Yearbook of Private International Law

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2012 / 2013

Founding Editors
Petar Šarčević † and Paul Volken

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Andrea Bonomi and Gian Paolo Romano

PUBLISHED IN ASSOCIATION WITH
Swiss Institute of Comparative Law

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FOREWORD

In line with its predecessors, this volume of the *Yearbook* strives to reflect and echo the pool of concerns and multiple levels of analysis that make contemporary private international law so complex and worthy of interest. Distinguished specialists and young authors offer once again a lively and thought-provoking picture of the field, reporting on the relentless work of law-framing agencies and bodies in Brussels, Luxembourg, the Hague and Strasburg, covering developments and trends around the world, from Turkey to India, from Israel to China. From national codifications to legal semiotics, from jurisdictional cooperation to enforcement of interim orders, from conflicting choice-of-law clauses to violation of human rights, from corporations to surrogacy, from discussions on the General Part of a prospective European Code on private international law to defamation and protection of personality rights… The multitude and spectrum of topics addressed are such that it would make little sense to cite them all here. Old ideas are being tested and new ideas are being framed, paying tribute to the past while looking to the future. This is what inspired the founding fathers of the *Yearbook*, whose primary aim was to foster debate and exchange of experiences thereby improving the cross-border life of individuals and ultimately serving human progress.

Following Publisher's suggestion, this volume is the first which straddles two years – not just to capture and pay heed to the traditional academic double term but to better reflect what has come over the years to be the actual rhythm of our editorial work, some authors submitting or updating their papers until well into the first quarter of the year.

May our contributors and collaborators find in these few lines the expression of our gratitude. May our readers find in this volume what the previous editions of the *Yearbook* entitled them to expect.

Andrea Bonomi Gian Paolo Romano

ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
ECR	European Court Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

DOCTRINE

THE SPATIAL SCOPE OF THE EU'S RULES ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS: FROM BILATERAL MODUS TO UNILATERAL UNIVERSALITY?

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I. Introduction

The increase of European acts on jurisdiction and enforcement of judgments and the issue of their application to proceedings connected with third States raise the question of the universal applicability of European private international law, a phenomenon which could eventually lead to the complete replacement of national rules, putting in place a true European code of private international law.

The question of the spatial scope of a rule determines its spatial application, not its normativity or its force as law, nor the question of its delimitation to the "territory" of the European Union. *Scope* or *application* in the strict sense refers to the use of a rule in a particular situation and thus focuses on persons and things implicated in this situation. *Normativity*, on the other hand, refers to the force of the rule for a public authority: such normativity respects territorial borders: a public authority only respects the norms produced by its own judicial system, territorially limited to the borders of the State.[1] When the EU produces rules to substitute those produced by the Member States, the question of normativity poses itself in a distinct but similar fashion: as an autonomous system, the EU possesses a legislator, a territory[2] and judges who have to apply the law (these are the judges of the national jurisdictions: they have to respect the normativity or the force of law of the rules produced by the EU legislator).[3]

Another question is whether all EU rules have force of law in all Member States, namely whether their authorities and judiciaries are bound by the particular EU rules in question. This is a pertinent question for the field of Private

[1] For an overview of these general notions of Private International Law, see F. RIGAUX/ M. FALLON, *Droit international privé*, Brussels 2005, para. 1.31 *et seq.*

[2] This territory is identified by Article 52 of the EU Treaty and Article 355 of the Treaty on the Functioning of the European Union (TFEU), both replacing Article 299 of the EC Treaty. These provisions do not determine the spatial application of the rules produced by the EU, but define a territory of reference every time the rule determines its application through territorial criterion. To be more precise, Article 52 usefully distinguishes between two elements. On the one hand, stating that "the Treaties apply to" different Member States (§ 1), it expresses the normative scope of EU rules (primary as well as secondary law). On the other hand, when referring to the "territorial scope" of the Treaties (§ 2), as "specified in Article 355", it identifies the territory of reference and also those territories that are excluded.

[3] The reasoning of the European Court of Justice in the *Owusu* judgment (ECJ, case C-281/02, *ECR* [2005] I-1383) confirms the distinction between normativity and applicability regarding the Brussels Convention: the Convention may be applied to a situation connected with a third State even if, because of its relative effect, the treaty "may not impose any obligation" on that State" (§ 30): giving jurisdiction to a tribunal of a Member State on the basis of the defendant's domicile in a case connected with a third State "does not impose an obligation on that State" (§ 31). Indeed, Article 5 of the Convention is "applicable" to proceedings linked with a third State, while it has no "normative" effect for this State.

International Law because of the protocols on the positions of Denmark,[4] Ireland and the United Kingdom.[5] However, it is not the focus of this article.

While the question of the spatial application of a rule on jurisdiction or recognition and enforcement does not arise in the case of national codification, it is pertinent for international instruments. National rules on these matters by their nature have a universal character, as this term is generally understood in Private International Law: the rule created by the national legislator is applicable to all international situations, irrespective of the particular persons or goods concerned. The mere fact that the situation is international, *i.e.* has a link to a foreign State in some manner, makes the choice-of-law rules relevant. Similarly, a national legislator, in fact, creates rules on all the situations in which its courts have jurisdiction or lack jurisdiction, and on all the situations in which a foreign judgment can or cannot be recognised.

Of course a national legislator can choose to give special treatment to situations linked to a specific other country, or to the judgments emanating from that other country. However, such special treatment is usually agreed upon in multilateral or bilateral conventions (what we have termed the *bilateral modus*). Conventions on the recognition and enforcement of judgments generally deal with judgments pronounced in one of the Contracting States. Conventions that contain rules on jurisdiction generally limit the rules to certain situations. For instance, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "Hague Child Protection Convention"), contains jurisdiction rules which apply to children that are habitually resident in one of the Contracting States. This was the same under the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. The 1996 Convention contains extensions for certain situations, such as for refugee children or children whose habitual residence cannot be established,[6] and provisional measures when property of the child is present in a Contracting State.[7] The Hague Convention of 30 June 2005 on Choice of Court Agreements applies when a court in a Contracting State is designated in a choice of forum agreement.

Often it is the jurisdiction rule itself that defines the spatial application (such as the habitual residence). This is because the jurisdiction rule offers no subsidiary rule; thus, if there is no jurisdiction under the first rule, the Convention simply offers no basis for its application. One would then have to fall back on domestic rules.

This logic seems to be a given in the law of conventions (in the *bilateral modus*). But does the same logic apply to jurisdiction rules adopted by the EU? A

[4] See Protocol 22 on the Position of Denmark.

[5] See Protocol 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice. On this matter, see also A. FIORINI, Qu'y a-t-il en un nom?, in M. FALLON/ P. LAGARDE/ S. PERUZZETTO (eds), *Quelle architecture pour un code européen de droit international privé?*, Francfort 2011, p. 27-48.

[6] Article 6 of the Hague Child Protection Convention.

[7] Article 11 of the Hague Child Protection Convention.

close examination shows a total copying at the outset, but one that is gradually fading away. This evolution calls for an investigation of the possibility of universal rules at the EU level. The evolution, dictated by the specific goals of the Union as opposed to those of conventions, goes hand in hand with an adaptation of the structure of jurisdiction rules. The adaptation is modelled on the methodology of both conventions (the *bilateral modus*) and national laws (*universality*).

Our analysis seeks to assess the link between codification and universal rules, more precisely to examine the hypothesis that codification in the strict sense of the word supposes rules of universal application or, conversely, that the creation of universal rules necessarily implies the creation of a code.

The analysis focuses on rules of jurisdiction and the recognition and enforcement of foreign judgments. Rules on applicable law, which have a different theoretical basis, will not be considered.

An analysis of the EU rules on jurisdiction and recognition and enforcement should start with a comparison with EU primary law, and the spatial application of the rules relating to the freedoms. This leads to the question of the nature of EU rules on jurisdiction and the recognition and enforcement of judgments, which today find themselves somewhere along the road between bilateral modus and unilateral universality. The creeping universality can be seen in the steps that the EU legislator takes, one step at a time, and in the interpretation of the existing rules by the European Court of Justice. Finally, as the rules are evolving into a new character, they have to be adapted to deal with different situations. Our analysis will end with a discussion of these necessary adaptations.

II. Rules on Jurisdiction and Recognition and Enforcement in Relation to Primary EU Law

Since the enactment of the Brussels I Regulation in 2000, rules on jurisdiction and the recognition and enforcement of foreign judgments in the EU are no longer of a convention/bilateral/multilateral nature. The Treaty of Amsterdam made the subject a Community (now Union) matter. On a constitutional level, one might say that this has opened the door for universal rules. It therefore seems appropriate to examine universal rules in relation to EU primary law.

A. General

The use of universal rules indeed has its foundation in primary EU law. Secondary law has to follow the goal of guaranteeing the four freedoms of primary law. These freedoms exist in the EU's area. The rules of secondary law on jurisdiction and the recognition and enforcement of foreign judgments are therefore gradually becoming more universal in nature, although the process has not yet been completed.

The question of the spatial application of the rules of primary EU law is not often posed explicitly. Of course the reach of primary law has received attention in

academic literature, and the acts of the European legislator must respect the terms of the normative framework conferred on it by primary law. The European Court of Justice has emphasised that the European legislator does not possess general normative competence, but only special competences[8] (Art. 4 and 5 TEU). The attribution of competences flows from the Union's objectives and thus from the domain of application of the treaties. In particular, measures of approximation of national laws in accordance with Article 114 TFEU must have as their object the establishment and functioning of the internal market. Instruments on judicial cooperation in civil matters according to Article 81 must affect the area of freedom, security and justice established by the Union (Art. 67) even though it is no longer required by the Lisbon Treaty that they are necessary for the functioning of the internal market. While Article 65 EC Treaty contained the requirement of necessity, Article 81.2 TFEU uses the words "*particularly* when necessary for the proper functioning of the internal market" (*emphasis added*).

It therefore seems relevant to recall the spatial limits of these areas construed by the Treaty on the Functioning of the EU, in order to assess whether the existing instruments respect the imposed limits.

B. Spatial Scope of the Rules of Primary EU Law

The pertinence of the question of the spatial applicability of the rules of primary EU law stretches further than the framework of competition law, a field of law which has solicited intensive debates on this topic: the question affects all the provisions of the TFEU on the various freedoms. This affirmation is linked to the notion at the basis of European constitutional law: the direct effect of EU norms. And if a norm is directly applicable it is of course necessary to define the contours of its application to individual cases, in particular its spatial application.

In fact, the various freedoms of movement established by the TFEU are in line with explicit rules relating to scope, as provided by the Treaty itself, even if the criteria for the different freedoms are not identical. These criteria can be grouped into two categories, depending on whether they concern economic goods (broadly speaking) or persons.

These "scope rules" must be distinguished from other provisions in the Treaty, which use a criterion of a spatial type to identify the holders of subjective rights, *i.e.* persons entitled to invoke the direct effect of a European norm.

1. Applicability of the Rules on the Free Movement of Goods, Services and Capital

Generally speaking, the regime on obstacles to the free movement of goods and services concerns all goods and services offered on the territory of an EU Member State.

[8] ECJ, case C-376/98, *Germany v. European Parliament and Council, "Tobacco advertising", ECR* [2000] I-8319.

More specifically, the regime on goods applies in the area where the goods have access to the market of a Member State. Member States are not permitted to introduce rules that would infringe, directly or indirectly, in fact or potentially, the "intra-community trade",[9] *i.e.* "trade between the Member States",[10] more precisely all measures which affect "access to the market" (of a Member State).[11]

The text of the Treaty determines, in analogous but distinct terms, to which goods the regime on obstacles applies, but this seems to serve more as a definition of who qualifies as a holder of subjective rights. The products concerned are those originating in Member States as well as third-country goods, which are in free circulation in the Member States (Art. 28(1) TFEU). Such free circulation depends on compliance with import formalities and the levying of customs duties (Art. 29 TFEU).

These criteria in fact do not determine the applicability of EU rules, but instead identify the goods which qualify for the benefits attributed by EU law's principles of free movement. The criterion of applicability is access to the EU market.

For services, the criterion of applicability seems to be the localisation of the offer in or toward a Member State or, according to the terminology used in the case law, the situation in which the service is provided within the EU.[12] The Treaty prohibits restrictions "within" the Union (Art. 56). This applies to persons pursuing their activities in a Member State. (Art. 57 TFEU). The text clearly distinguishes between applicability and the holders of rights: holders can only invoke the freedom of "providing services" if they are "nationals" of a Member State established in a Member State. It is significant that the Treaty permits an extension of the category of right-holders by a legislative act, to third country nationals, provided that they are at least established in the EU (Art. 56 TFEU). While it would not make sense that the European legislator could extend the domain of EU law from which it obtains its own existence, it is conceivable that the legislator is granted the ability to enlarge the category of right-holders within a pre-defined area.[13]

Turning to capital, the prohibition imposed by the regime of obstacles covers all movement "between the Member States" as well as "between Member States and third States" (Art. 56 TFEU) without any further precision on the status as right-holder: the extreme openness of the domain implies an availability to all holders of capital. Thus, as far as capital is concerned, one must come to the conclusion that the European regime of freedoms covers all obstacles to access the market, provided that the situation has a connection with the Union. This

[9] Term used in ECJ, case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville ECR* [1974] I-837.

[10] This expression is consistently used, notably in ECJ, case C-267/91 and C-268/91, *Keck & Mithouard*, *ECR* [1993] I-6097.

[11] Term used in the *Keck & Mithouard* case.

[12] ECJ, case C-290/04, *Scorpio*, *ECR* [2006] I-9461, para. 67.

[13] In the aforementioned *Scorpio* case, the European Court of Justice found that the regime of services was not applicable to a provider who was neither a national nor a resident of a Member State while no use has been made of the possibility to extend the regime. The judgment does not distinguish between applicability and ability to be a right-holder.

connection can lie in the movement of the capital from a Member State to a third State at the entry or at the exit of the Union. This extension does not imply an identical regime for European and external situations: the objective of the extension is not only to serve the internal market, but also to ensure the credibility of the single currency and to preserve the global financial centres in the Union.[14] Moreover, the possibility to impose restrictions on third States while such restrictions are forbidden between Member States is a consequence of the level of judicial integration that has been reached.

The comparison of the areas of services and capital deserves elaboration by way of an example. The *Fidium Finanz* case[15] provides such example: in this case the Court of Justice ruled that a bank established in a third State (in this case Switzerland), which offers services in the form of loans in a Member State (in this case Germany), could not invoke the regime of free movement of services: the situation enters into the spatial domain of this regime, but the bank was not a rights-holder. However, if the qualification of the case had put it in the domain of free movement of capital, the bank could have, as a rights-holder, invoked the prohibition on obstacles to the free movement of capital.

The comparison is equally useful for obstacles affecting external situations, in other words constituting a link with a third State. For services, a situation excluded from the spatial application of the regime of free movement could be addressed as part of the common commercial policy (Art. 207 TFEU), which certainly permits the inclusion of this problem in the domain of EU law, but in a different framework; it is no longer a question of applying rules of primary EU law which have direct effect, but only conferring the European legislator with the ability to act. However, the extension observed in the area of rights and obstacles to the free movement of capital does not leave room for questions of capital within the (material) scope of the common commercial policy (Art. 207 TFEU).

As for the area of free competition – with rules aimed to prohibit undertakings from engaging in certain types of behaviour that divide the national markets – the text of the Treaty covers both "trade between Member States" and the preservation of the free competition "within the internal market" or, in the case of a dominant position, the exploitation "within the internal market or in a substantial part of it" (Art. 101(1) and 102(1) TFEU). This terminology is time and again borrowed from that used for the free movement of goods ("between the Member States", Art. 34 TFEU) and for the free movement of services ("within the Union", Art. 56 TFEU). Certainly, the terms "affecting trade between the Member States" serves to define the area of application of the provision.[16]

The terms however remain insufficiently precise to allow for a concretisation by a criterion of applicability based on an element of localisation of the international situations envisaged. A process of interpretation has also been necessary and there has been much debate about the "extraterritorial" application of EU

[14] ECJ, case C-101/05, *Skatteverket v A, ECR* [2007] I-11531.

[15] ECJ, case C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanz dienstleistungsaufsicht, ECR* [2006] I-9521.

[16] For instance in ECJ, case 6/73, *Istituto Chimioterapico Italiano, ECR* [1974], 223.

rules.[17] In the *Gencor* case, the decisive element of localisation was that of the substantial operations. In this sense, a sale on the territory of the Member States can constitute substantial operations even if the parties are established in third States and they concluded their contract in a third State.[18] This criterion seeks to respond to the criticism of extraterritoriality, as the applicability of the European rule is based on the localisation of an activity or a fact such as a sales contract. At the same time, this solution was taken up in the precedent-setting *Wood Pulp* case,[19] emanating from the *Continental Can* case[20] in which the Court used the criterion of the localisation of the effects of acts on the European territory. The *Wood Pulp* case involved a contract concluded between companies of third States to set sales conditions for products to be sold in the territory of the Member States. The judgment rightly maintains the principle of territoriality, noting that such application does not violate any international rule or comity.

2. Applicability of the Rules on the Free Movement of Natural Persons

The regime on obstacles to the free movement of persons clearly distinguishes between "scope rules" relating to substantive rules and the determination of the status as a rights-holder.

The freedom of establishment by definition applies to establishment in a Member State.[21] On the other hand, the status as rights-holder is only available to nationals of a Member State (Art. 49 TFEU).

The free movement of workers is commonly seen as only covering workers with citizenship of an EU Member State, giving the impression that the nationality of the person involved constitutes the criterion of applicability.[22] In reality, the wording of the Treaty does not impose this requirement: it refers to movement "within the Union" and a prohibition of discrimination based on nationality

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[17] On the extraterritoriality of economic law, see for instance B. AUDIT, Extraterritorialilté et commerce international – L'affaire du gazoduc sibérien, *Rev. crit. dr. int. pr.* 1983, p. 401-434; J.G. CASTEL, The extraterritorial effect of antitrust laws, *Recueil des Cours* vol. 179 (1983), p. 9-144; P. DEMARET, L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?, *Revue trimestrielle de droit européen* 1985, p. 1-40; N. DIACAKIS, *Problèmes liés aux effets extraterritoriaux des normes communautaires*, Brussels 2000; D. GRISAY, Concurrence: le droit européen dans le contexte international, *Journal des tribunaux. Droit européen* 2000, p. 1-10; B. STERN, L'extraterritorialité revisitée – Où il est question des affaires Alvarez-Machain, Pâte de bois et de quelques autres..., *Annuaire français de droit international* 1992, p. 239-313.

[18] CFI, case T-102/96, *ECR* [1997] II-879.

[19] ECJ, case C-89/85, *ECR* [1993] I-1307.

[20] ECJ, case 6/72, *ECR* [1975], 495.

[21] ECJ, case C-31/11, *Scheunemann v Finanzamt Bremerhaven,* [2012], not yet published in *ECR,* available at <www.curia.eu>.

[22] ECJ, case 238/83, *Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade, ECR* [1984], 2631.

between workers "of" the Member States (Art. 45(1) and 45(2) TFEU).[23] The first expression can be seen as a criterion of applicability referring to localisation of the movement in the territory of the Member States. As for the second, only nationals of a Member State can become holders of rights.[24]

The movement of EU citizens indicates a division between applicability and status as a rights-holder. The criterion for the first is the movement and establishment "within the territory of the Member States", while the second imposes nationality as a condition (Art. 20 TFEU).[25]

In the *Garcia Avello* case,[26] the Court of Justice recognised the right of an EU citizen with two EU nationalities (Belgian and Spanish in this case) to invoke, in his or her State of residence (Belgium), the fact that, according to the law of his or her State of origin (Spain), a child can have a part of the father's surname and a part of the mother's surname. The law of the State of residence and nationality does not grant this possibility, but provides instead that only the surname of the father is given to the child. The case did not raise the distinction between applicability of a European rule (on the basis of residence) and the status as a rights-holder (on the basis of the nationality of a Member State). If the person had been a national of one or several third States, the European rule would certainly have been held applicable but the person would not have been able to benefit from the rule. In this sense, a Monaco company could not invoke Article 18 TFEU to contest, on the basis of the principle of non-discrimination, the imposition of a *cautio judicatum solvi* that is not required of nationals, even though it would be able to invoke Article 18 in the framework of the free movement of goods.[27] The reasoning of the court explains that the question affects the status as holder of rights rather than applicability.[28]

The *Garcia Avello* case shows how, when considering the impediment created by a national rule on the free movement of persons, the Court creates a European material rule of private law. Interestingly, in considering the

[23] It is interesting to note that the French version of the Treaty uses "nationalité" in this provision but "ressortissant" in Article 49 (on freedom of establishment) and in Article 56 (on services).

[24] See for example ECJ, cases 238/83, *Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade, ECR* [1984], 2631 and C-355/93, *Eroglu v Land Baden-Württemberg, ECR* [1994] I-5113. There has been some extension of the group of protected persons through the worker's right to family reunification, but it is significant to note that the right to family reunification has initially been viewed as a right belonging to the worker who is a national of a Member State while his or her family's right is based on derived rights: ECJ, case 40/76, *Kermaschek v Bundesanstalt für Arbeit, ECR* [1976], 1669.

[25] These general provisions have formed the basis for measures defining the intended situations in Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* L 30 of April 2004, p. 158.

[26] ECJ, case C-148/02, *Garcia Avello v the Belgian State, ECR* [2003] I-11613.

[27] ECJ, case C-291/09, *Francesco Guarnieri*, *ECR* [2011] I-2685.

[28] According to the judgment, the Monaco company could not claim the benefit attributed by the treaty provisions on the free movement of EU citizens. However, the precedent that the Court used, ECJ, case C-22/08, *Vatsouras, ECR* [2009] I-4585, rather deals with the "application" of the provision.

proportionality of the measure in question, the Court considered the merits of the Spanish rules on names.[29] It is thus not unthinkable that a European standard may develop in this field and that the application of such a standard would be dictated by rules on applicability and by the status as a rights-holder.

It makes sense that the spatial application of material rules instituting free movement of persons should be determined by a territorial criterion. This criterion has sometimes been extended to extraterritorial situations, but only if there is a sufficient connection with the territory of the Union. This has permitted an extension of the domain of primary law to activities that take place at multiple locations such as, for instance, the practice of high level sport,[30] the employment of persons on vessels,[31] or the performance of employment contracts in a Member State's embassy in a foreign State, with the effect that the contract was governed, according to the private international law of the forum, by the law of a Member State.[32]

The distinction between the concepts of "applicability" and "holder of rights" is useful with a view to explaining the broadening, with regard to persons and services, of the category of rights-holders to nationals of third States. Primary European law bestows this power on the European legislator. This is exactly what has been achieved in particular by Directive 2003/109 of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents[33] (Art. 63(3) and 63(4) EC Treaty and Art. 79 TFEU).

C. No Juxtaposition of the Domains of Secondary Law and Primary Law

However, it would seem that the determination of the spatial applicability of European private international law instruments took place in bilateral modus, rather than in the context of the different freedoms. This is ironic since the private international law rules are precisely aimed at facilitating the exercise by citizens, and undertakings of these freedoms. In the analysis which follows, we examine two possible explanations for the approach that has been taken.

First, the approach could be the result of a particular perception of the nature of EU law, namely that it is the product of an international treaty. According to this logic, European instruments are not that different from other international instruments. A second, and more probable explanation, linked to the first, is that of the circumstances: the approach comes from the legacy of the Brussels Convention, which became the Brussels I Regulation; and the Rome Convention, which became the Rome I Regulation.[34] It is this development that we will analyse in the next paragraphs.

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[29] Para. 42 of the *Garcia Avello* case.

[30] ECJ, case 36/74, *Walrave, ECR* [1974], 1405.

[31] ECJ, case C-9/88, *Lopes da Veiga*, *ECR* [1989], 2989.

[32] ECJ, case C-214/94, *Boukhalfa, ECR* [1996] I-2253. This case involved a Belgian employee working in the German embassy in Algiers.

[33] *OJ* L 16 of 23 January 2004, p. 44.

[34] While the GIULIANO and LAGARDE Report on the Rome Convention significantly refers to national models, Lord WILBERFORCE of the United Kingdom questioned the

III. A Move from International Agreements to European Area Instruments

The starting point of rules on jurisdiction and the recognition and enforcement of foreign judgments is in the Brussels Convention of 1968. At the time the convention was negotiated, the main goal was to ensure the recognition and enforcement of judgments in the Member States of the European Economic Community (as it then was). This goal had a clear and direct link with the functioning of the common market of the time. In light of the four freedoms, it was necessary to ensure that debtors did not (ab)use these freedoms (such as the free movement of goods or capital) to flee their creditors.

At the time, the Community did not have competence over matters of jurisdiction and recognition and enforcement in civil matters. The only way in which these matters could be regulated was by a negotiated convention. The Convention's legal basis must be seen in the particular institutional context, namely the former Article 220 EC Treaty (which became Art. 293 of the Treaty establishing the EC and which was repealed by the Lisbon Treaty). This Article provided that Member States shall enter into negotiations − only as necessary[35] − with a view to securing, among other things, the easy recognition and enforcement of judgments "for the benefit of their nationals".

Convention's application to contracts that were not linked to the European Community (parties established outside the Community and contracts to be performed outside the Community): R. PLENDER/ M. WILDERSPIN, *The European Private International law of Obligations*, London 2009, para. 4-016. The same discussion arose at the time of the negotiation of the Rome II Regulation, in an opinion of the Legal Service of the Council and by the British delegation (*ibid* para. 17-009). Arguing that the question should have been posed according to the strict terms of Article 65 EC Treaty having regard to the necessity of action for the functioning of the internal market, R. PLENDER and M. WILDERSPIN approve of the universal character of the rules. This does not only simplify matters, it also contributes to legal certainty. Moreover, any judgment issued in a Member State on the basis of the rules would be recognised and enforced in all other Member States on the basis of the Brussels I Regulation, including judgments involving contracting parties from third States. This argument does not seem to be decisive. On the one hand, the possible reason for refusal of recognition is not the law that the judge of origin had applied – such verification is excluded on the basis of the prohibition of the *révision au fond* - (compare, however, the link between the conflict of law rules and the recognition of judgments in Regulation 4/2009 on Maintenance Obligations, and the criticism by Ch. KOHLER, Elliptiques variations sur un thème connu: compétence judiciaire, conflits de lois et reconnaissance de décisions en matière alimentaire après le règlement (CE) No 4/2009 du Conseil, in K. BOELE-WOELKI/ T. EINHORN/ D. GIRSBERGER/ S. SYMEONIDES (eds), *Convergence and Divergence in Private International Law*, Zurich 2010, p. 277-290: only the verification of public policy is permitted as a ground for refusal of the judgment. On the other hand, even though the Brussels I Regulation is applicable on the recognition and enforcement of judgments against defendants domiciled in third States, the spatial domain of the instrument is the subject of criticism.

[35] And without creating a competence reserved for the State: ECJ, case C-208/00, *Überseering, ECR* [2002] I-9919.

The terms of the Convention doubly exceeded these limitations: the negotiators thought it sensible to include rules on jurisdiction in order to facilitate the recognition and enforcement of judgments. The thinking was that if all Member States could agree on the grounds for jurisdiction, it would be easier for them to accept each other's judgments knowing that the court that had granted the judgment had used the same grounds for jurisdiction. Therefore, in the first place, the Convention was extended to include rules on the jurisdiction of the courts as a condition for the good functioning of the system of recognition and enforcement. In the second place, the qualification of nationality was replaced by one of the domicile of the defendant, considered to facilitate the application and to favour foreigners established in a Member State with a view to their participation in the economic life of the Community.[36] It is the position of the defendant, rather than that of the plaintiff, which is advantaged in a text which originally, according to its interpretation by the case law,[37] aimed at protecting the defendant in international litigation. Note that at this stage no protective rules were yet included for consumers or employees.

This new method in convention law was praised for being innovative. There were even attempts to copy it on a global level.[38] Since it was quite innovative to include jurisdiction rules, it is not surprising that the rules were not all-embracing. The rules were constructed in such a way that their application required a link to the Community. Three categories were construed for three different scenarios.[39]

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[36] See the Report by JENARD, Chapter IV, A, 2. The Report also explains that Article 4's reference to national law for non-European defendants means that the exorbitant bases of jurisdiction can be applied to this group, while these bases are excluded for European defendants (see the commentary to Art. 4).

[37] ECJ, cases C-26/91, *Handte, ECR* [1992] I-3967 and C-129/92, *Owens bank, ECR* [1994] I-117 and C-269/95, *Benincasa, ECR* [1997] I-3767.

[38] The Member States of the Hague Conference on Private International Law negotiated from 1994 to 2002 with a view to creating such a Convention, but eventually the negotiations failed since the States could not reach an agreement on diverse issues. Experts from all over the world wrote prolifically on these attempts; see *i.a.* A.T. VON MEHREN, Recognition and Enforcement of Foreign Judgments: a new approach for the Hague Conference?, *Law and Contemporary Problems* 1994, p. 271-287; A.F. LOWENFELD, Thoughts about a Multinational Judgments Convention: A Reaction to the VON MEHREN Report, *Law and Contemporary Problems* 1994, p. 191-204; A. BUCHER, Vers une convention mondiale sur la compétence et les jugements étrangers, *La semaine juridique* 2001, p. 533-541; M. DOGAUCHI, The Hague Draft Convention from the Perspective of Japan' Seminar on the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Union International des Avocats, Edinburg, 20-21 April 2001; A.F. LOWENFELD/ L. SILBERMAN (eds), *The Hague Convention on Jurisdiction and Judgments*, 2001; L.J. SILBERMAN, Comparative Jurisdiction in the International Context: will the Proposed Hague Judgments Convention be Stalled?, *DePaul Law Review* 2002, p. 319-349; A. SCHULZ, International Organizations: The Global Playing Field for US-EU Cooperation in Private Law Instruments, in R.A. BRAND (ed.), *Private Law, Private International Law & Judicial Cooperation in the EU-US Relationship*, CILE Studies vol. 2 (2005), p. 237-262.

[39] For a more elaborate discussion of the categories and their scope, see P. GROLIMUND, *Drittstaatenproblematik des europäischen Zivilverfahrensrechts*, Tübingen 2000; T. KRUGER, *Civil Jurisdiction Rules of the EU and their impact on third States*,

There were specific scope rules for exclusive jurisdiction and for forum clauses, while the domicile[40] of the defendant in the EU remained as a general scope rule when there was neither exclusive jurisdiction nor a forum clause. Interestingly for our present study, the Convention did not contain an explicit rule dictating this scope of application formally, but the reader/practitioner had to deduce the scope from the formulation of the jurisdiction rules themselves. Thus, if there was an exclusive basis for jurisdiction that pointed to a Member State court, the Convention applied. If contracting parties, one of whom was domiciled in a Member State, concluded a forum clause by which they appointed a court in a Member State, the Convention applied. For all other cases, the Convention applied if the defendant had his or her domicile in a Member State. If a case fell outside of all of these scenarios, the Convention did not provide a basis of jurisdiction and the case therefore fell outside the spatial scope of the Convention. For these cases, courts in Member States had to fall back on their domestic jurisdiction rules, as provided by Article 4.

Interestingly, in its opinion on the new Lugano Convention, the European Court of Justice expressed the view that the Brussels I Regulation "contains a set of rules forming a unified system which apply not only to relations between different Member States, since they concern both proceedings pending before the courts of different Member States and judgments delivered by the courts of a Member State for the purposes of their recognition or enforcement in another Member State, but also to relations between a Member State and a non-member country"[41]. Thus, "[g]iven the uniform and coherent nature of the system of rules on conflict of jurisdiction established by Regulation No 44/2001, Article 4(1) thereof, which provides that «if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State», must be interpreted as meaning that it forms part of the system implemented by that regulation, since it resolves the situation envisaged by reference to the legislation of the Member State before whose court the matter is brought".[42]

In other words, for the Court of Justice, the Regulation contains a complete set of rules capable of governing all international situations, even where the defendant is domiciled in a third State: in this case, it contains a rule that allows the legislator of the forum to determine jurisdiction.

One must come to the conclusion that these criteria of applicability inherited from the Convention do not correspond to the needs of the European areas that the Regulation is supposed to serve, be it the internal market, or the area of freedom, security and justice.

Oxford 2008; A. NUYTS/ N. WATTÉ (eds), *International Civil Litigation in Europe and relations with Third States*, Brussels 2005.

[40] Domicile is used here in the civil law and not in the common law sense.

[41] § 144.

[42] § 148.

Moreover, the Brussels Convention was also severely criticised for its unfair effects. The criticism came from the United States in particular.[43] The basis for the criticism was to be found in the asymmetry of the Convention's jurisdiction rules and its rules on recognition and enforcement: the rules were not universal, but their bilateral nature was dissimilar. The result was particularly prejudicial to defendants domiciled in third States.

The perverse effect of the choices on scope made in the Brussels Convention (and carried to the 2000 version of the Regulation) is that the rules on jurisdiction are incapable of covering all cross-border litigation affecting the functioning of the internal market while they can extend to litigation that has no significant link with the European area. The first example is litigation concerning the performance of a contract located in the Union when the defendant is established in a third State: such a contract would normally involve goods circulating freely in the Union in accordance with Articles 28 and 29 TFEU and thus would benefit from the prohibition on quantitative restrictions of Article 34 *et seq.* TFEU. However, Article 4 provides that jurisdiction is to be determined according to the national rules. Conversely, in cases where the defendant is domiciled in the EU, the rules will directly determine jurisdiction even if the performance and all other elements of the contract are located in a third State, and even if the contract involves goods that did not originate in the EU within the terms of Article 28 TFEU, and did not make use of the free movement of goods. The European Court of Justice confirmed this state of the law in the *Josi* judgment.[44] In that case, the defendant was a reinsurer established in the EU. Apart from the defendant (established in Belgium) and the broker (established in France), all of the facts of the case arose outside of the EU: the insurer was established in Canada, the case involved reinsurance of home insurance policies covering homes in Canada. The Court found that the Brussels Convention applied based on the fact that the defendant was domiciled in the EU. The only relevant factor for the application of the Brussels I Regulation is the domicile of the defendant in the EU. An analogous question arose in a case where the place of performance was unknown or could not be determined because it involved an obligation to refrain from undertaking certain actions. The Court concluded that the special rule on jurisdiction cannot be used for this situation.[45] The conclusion is not that the Convention – today the Regulation – is inapplicable, but that jurisdiction can only be based on the domicile of the defendant and not on the specific rule in Article 5(1). If the place of performance of a contract is in a third State, the spatial application of the Brussels I Regulation is therefore untouched: the Regulation is applicable if one of the parties is domiciled in the EU and the parties had, by agreement, selected a forum in the EU for the settlement of disputes. Alternatively, in the absence of a forum agreement, the Regulation

[43] See *i.a.* K.H. NADELMANN, Jurisdictionally improper fora in treaties on recognition and enforcement of judgments. The Common Market draft, 1967 *Columbia Law Review*, 995-1023; A.T. VON MEHREN, Recognition and enforcement of sister-state judgments: reflection on general theory and current practice in the European Economic Community and the United States, 1981 *Columbia Law Review,* p. 1044-1060.

[44] ECJ, case C-412/98, *ECR* [2000] I-5925.

[45] ECJ, case C-256/00, *Besix SA v WABAG and Plafog, ECR* [2002] I-1699.

applies if the defendant is domiciled in the EU, irrespective of the domicile of the plaintiff and the place of performance. The *Owusu* case[46] illustrates a similar finding in a tort matter: the case involved services rendered in a third State, but the Brussels Convention applied based on the domicile of the defendant in the EU.

The configuration of the spatial domain of the Brussels I Regulation also contains other inconsistencies affecting the content of the rules and thus the integrity of the system. Certain inconsistencies could originate in the asymmetry between the spatial domains of the rules on jurisdiction and those on recognition and enforcement. The recognition and enforcement rules of the same Convention had a different scope: they applied to all judgments issued by a court of a Member State, regardless of the basis of jurisdiction used, and thus irrespective of the situation that had been relevant for determining the jurisdiction. The fact that the defendant was domiciled in a third State and that the jurisdiction had, therefore, been determined on the basis of domestic rules was not considered at the time of recognition and enforcement. On this point, authors from third States, especially from the US criticised the Convention: defendants from third States would still be subject to (often exorbitant) national rules of jurisdiction and the effect was enlarged because the resulting judgment would, without much further scrutiny, be recognised and enforced in all the other Member States. Because of the asymmetrical scope of application of the jurisdiction and enforcement rules, outsider defendants would be prejudiced.

Where a judgment is granted in a Member State while the defendant is domiciled in a third country, the judge granting enforcement has no assurance that the judge of origin had respected the rules on jurisdiction, even though this assurance is inherent in the system according to the European Court of Justice.[47] A converse example can be drawn from the application of the exclusive-jurisdiction rule of Article 22: when a third State court, which might have jurisdiction according to its own national law, violates this exclusivity, the recognition and enforcement of the resulting judgment would depend on the national law of the Member State in which recognition or enforcement is requested. The Regulation does not apply even though an aspect of the internal market is clearly at stake (*e.g.* where the matter involves immovable property situated in the EU or the validity of intellectual property rights in the EU). A judge in a Member State can only be bound by the principle of the effectiveness of EU law provided for by Article 4(3) TEU (former Art. 10 of the EC Treaty; the foundation of the general obligation of cooperation) to safeguard the exclusivity of the jurisdiction attributed to the courts of the EU.

The inconsistency is also apparent in the interpretation of the Regulation, which often insufficiently takes account of the correlation between the domain covered by the Regulation and that covered by primary law. Take for example the "provision of services" within the meaning of Article 5(1)b). In the *Falco Privatstiftung* case[48] the European Court of Justice found that the breach of a contract assigning intellectual property rights does not qualify as a service contract

[46] ECJ case C-281/02, *ECR* [2005] I-01383.

[47] ECJ, Opinion 1/03, *Lugano Opinion, ECR* [2006] I-1145, para. 163.

[48] ECJ, case C-533/07, *ECR* [2009] I-3327.

under the Regulation. The Court considered different interpretations in other segments of EU law, but preferred to focus its arguments on the Brussels I Regulation itself and on the logic of its system, namely that the specific bases of jurisdiction in Article 5 must be interpreted narrowly, and that the results must be foreseeable. Thus the Court chose not to use the meaning under primary EU law (Art. 57 TFEU), which constitutes a broad interpretation of "services" and which has the effect that all economic operations that do not fall under the provision on goods can be covered. Rather, the Court found that the rule under letter b) of Article 5(1) is a specific rule that should not be interpreted broadly: a broad interpretation might lead to the circumvention of the general rule for contracts contained in Article 5(1)a). The Court referred to the old structure of the rule in the Convention and its interpretation. Based on legal certainty and continuity, the old case law remained relevant. This is ironic, as the older case law, such as *Industrie Tessili Italiana Como*[49] caused much uncertainty and provoked a substantial amendment of the provision. The Court failed to consider the fact that the specific rule on services was only applicable to services provided in the EU while the general rule would remain applicable if the service were to be provided outside the EU while the defendant was domiciled in the EU. In this light, the danger that the general rule would be circumvented and never applied fades away to a certain extent.

IV. Creeping Universality in the Rules and their Interpretation

Imperceptibly, the nature of European private international law is changing, graduating from treaty law (bilateral modus) to unilateral universalism. This move is visible not only in the process of transformation of the Brussels and Rome Conventions to Regulations, but also in the adoption of new instruments in areas such as divorce, parental responsibility, maintenance and succession. In the area of parental responsibility and child abduction, the Brussels II*bis* Regulation brought a European dimension to the already existing Hague Conventions on the matters.

The sheer multiplication, within the last decade, of these instruments is, in itself, an indication that the adoption of legislation by the Union is easier and faster than the negotiation of international treaties.

According to the theory of the sources of EU law, these regulations are explicitly unilateral instruments, in contrast to treaties concluded by the Union, which constitute treaty law of the EU. The analogy with national law is useful: a State creates legislation of national application and concludes international conventions with other States. In the same way the Union creates internal "European" acts, of a unilateral nature, and can conclude conventions with third – thus "foreign" or external – States.

[49] ECJ, case 12/76, *ECR* [1876], 1473.

Like all unilateral acts, instruments of European private international law must respect the objectives of the Union. They have to safeguard the interests of the Union instead of purely formatting an international agreement into a European act. In this light, as long as national private international law rules unilaterally determine solutions for all international proceedings and, in so doing, enjoy universal applicability, European rules normally should be able to cover such proceedings that affect the functioning of the European area. At this stage the process towards universality is clearly ongoing, but it has not yet reached its natural end.

A. Jurisdiction Rules

1. The Brussels I Regulation

The Brussels I Regulation in its first version took over the structure of the Convention. Despite the new status of the instrument as EU legislation (primary law), the delimitation of the Regulation still followed the logic of the Convention. Thus the Regulation applies only to defendants domiciled in the EU, to forum clauses in favour of EU courts when at least one of the parties is domiciled in the EU, and to situations where there is an exclusive basis for jurisdiction in the EU. For defendants domiciled in third States, the domestic rules remain applicable.

In its interpretation of the Brussels Convention, the European Court of Justice has contributed to the process of increasing universality. In the *Owusu* case,[50] the Court accepted to "apply" the Convention to a situation connected with a third State and the Advocate General argued that this solution could be compared to the "universal applicability" of the Rome Convention on conflict-of-law rules.[51] Moreover, it found that the Brussels Convention is mandatory, in the sense that it contained a complete system of rules. Therefore, the English court could not use its own rules on *forum non conveniens* together with the Convention. The fact that the *forum non conveniens* rule had not been incorporated into the system meant that it had no place any more.

In the *Lugano* opinion[52] the European Court of Justice continued along the route taken in the *Owusu* case. The Court found that even though the Brussels I Regulation did not contain jurisdiction rules for defendants domiciled outside the EU, the reference to domestic law in these circumstances amounted to an incorporation of those domestic rules in the system of EU rules. Here again the European Court of Justice contributed to the gradual establishment of universality in the area of the EU's jurisdiction rules.

In another case, the European Court of Justice had to determine which jurisdiction rules were applicable (the Regulation or domestic rules) when the domicile of the defendant is unknown. This is of course problematic since the relevant criterion which determines the scope was unknown. The Court, in effect, introduced a presumption that the defendant is domiciled in the EU by stating that

[50] ECJ, case C-281/02, *ECR* [2005] I-1383.

[51] Opinion of Advocate General Léger, *ECR* [2005] I-1383, para. 185.

[52] Opinion 1/03, *ECR* [2006] I-1145.

the Regulation applies with respect to "a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not have firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union".[53] Here the Court confirmed that the Brussels I Regulation is clearly an instrument of the internal market, and even though its universality is not complete, it is certainly moving in that direction.

In the framework of the amendment of Brussels I, the discussion about the spatial delimitation of the instrument emerged once again. The question was whether the choices made in this regard in the 1960s should still be maintained or whether the Regulation's spatial scope should be extended. The HESS-PFEIFFER-SCHLOSSER report raised the matter and set out several possible changes, as did the GEDIP.[54] The Report notes that the current situation differentiates between various EU plaintiffs, depending on whether the defendant is domiciled in the EU or not. The Report then states that "[t]his situation is hardly according to the principle of establishing an area of freedom, justice and security as described by Art. 16 EC Treaty." We thus see, at the time of considering the legislation, a reference to the EU's goals.

The long process of the Regulation's amendment took many turns. In the European Commission's original proposal,[55] it extended the spatial application to all defendants under the heading "Improving the functioning of the Regulation in the international legal order". The European Commission justified its proposal with reference to the principle of access to justice.[56] Besides this justification, the European Commission also stated:

> "The harmonization of subsidiary jurisdiction ensures that citizens and companies have equal access to a court in the Union and that there is a level playing field for companies in the internal market in this respect."[57]

When considering the extension, the Commission thus took account of elements of justice, connected to the particular subject matter of the Brussels I Regulation, and of elements of the EU's area of security, justice and freedom.[58] It is interesting to note that the elements drawn from primary EU law were not decisive.

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[53] ECJ, case C-292/10, *G v Cornelius de Visser*, not yet published in *ECR*, available at <www.curia.eu>.

[54] See B. HESS/ T. PFEIFFER/ P. SCHLOSSER, *The Brussels I-Regulation (EC) No 44/2001,* Munich 2008, p. 45-47. On the GEDIP work, see the Bergen Meeting, 2008 (available at <www.gedip-egpil.eu>); M. FALLON/ Ch. KOHLER/ P. KINSCH (eds), *Building European Private International Law. Twenty Years' Work by GEDIP*, Cambridge 2011.

[55] See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF>.

[56] See p. 3 of the Proposal.

[57] See p. 8 of the Proposal.

[58] See A. DICKINSON, The Revision of the Brussels I Regulation, *YPIL* 2010, p. 247-310, esp. p. 272-283 and R. FENTIMAN, Brussels I and Third States: Future Imperfect?,

The European Parliament, in its assessment of the Commission's proposal, found that the time was not ripe for the extension of the Regulation to defendants domiciled outside the EU, and that more research was needed on the matter.[59]

However, the spatial scope of the Brussels I*bis* Regulation will not remain untouched as compared to the 2000 version. The three scope rules are complemented by two new ones: the bases of jurisdiction for consumer contracts and for employment contracts apply when either the consumer/employee or the counterparty/employer is domiciled in the EU[60] while until now these provisions only applied when the defendant was domiciled in the EU. There was only a presumption that the counter party/employer, a third State domiciliary with a branch in the EU, is domiciled at the place of the branch.[61] The same presumption applied to

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Cambridge Yearbook of European Legal Studies 2010-2011, p. 65-86, criticizing the European Commission's proposal and grounds for the extension. See also A. BORRÁS, Application of the Brussels I Regulation to External Situations: from Studies Carried out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation, *YPIL* 2010, p. 333-350, emphasising the EU concern for the extension.

[59] See European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0304+0+DOC+XML+V0//EN>, paras 15-18. See also A. LAYTON, The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness, in E. LEIN (ed.), *The Brussels I Review Procedure Uncovered*, London 2012, p. 75-81.

[60] See the final text adopted by the Council on 6 December 2012, *OJ* L 351 of 20 December 2012, p. 1.

For consumer contracts, see the new Article 18(1): "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, *regardless of the domicile of the other party,* in the courts for the place where the consumer is domiciled." (The words in italics are inserted by the amendment.)

For employment contracts, see the new Article 21:

"1. An employer *domiciled in a Member State* may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so, or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. *An employer not domiciled in a Member State may be sued in a court of a Member State according to point (b) of paragraph 1.*" (The words in italics are inserted by the amendment.)

These change are also reflected by Article 6 of the amended Regulation, which indicates that these provisions, along with those on exclusive jurisdiction and forum clauses, form an exception to the general rule that the Regulation only applies when the defendant is domiciled in a Member State.

[61] Articles 15(2) and 18(2). These provisions are retained.

insurance contracts.[62] These presumptions are retained in the amended Regulation. Furthermore, one of the old scope rules has also been expanded: the provision on jurisdiction clauses will be applicable once the clause designates the courts of a Member State while former Article 23 was limited to cases where at least one party was domiciled in a Member State.

It thus seems that the new Brussels I*bis* jurisdiction rules are taking another step towards universality. By now, for proceedings involving consumer and employment contracts, exclusive bases of jurisdiction (such as for immovable property) and forum choice, no place is left anymore for national jurisdiction rules. Other proceedings are covered by the Regulation only if the defendant is domiciled in the EU.

*2. The Brussels II*bis *Regulation*

The development of the Brussels II[63] and thereafter the Brussels II*bis*[64] Regulation took a different course. While the Brussels II Regulation was also based on a Convention, which had been negotiated but never entered into force,[65] the spatial scope was, from the outset, determined differently. With respect to divorce cases, the Regulation functions as a general point of departure: when instituting divorce proceedings anywhere in the EU, the basis of jurisdiction must first be sought in the Regulation. Only if the Regulation offers no such basis to the forum or to any other forum in the EU, may the court consider the national bases of jurisdiction.[66] Thus, when assessing the scope of the jurisdiction rules, the logic of the Brussels I Regulation that the domicile of the defendant is decisive, may not be followed. As was the case in *Sundelind Lopez*, even if the defendant has his or her domicile in a third country and is a third country national, jurisdiction may still be based on the Regulation, and more specifically on the basis that the last common habitual residence of the spouses was in an EU Member State.[67]

With this Regulation, the EU legislator thus struck a balance between creating universal rules (the Regulation *always* applies spatially) and leaving room for domestic rules (these rules can only be used in subsidiary order). Thus the Regulation introduced universality to a larger degree than the Brussels I Regulation: first, the point of departure for divorce jurisdiction in the EU is always the Regulation; second, the domestic rules apply to the same extent to all persons,

[62] Article 9(2). This provision is retained.

[63] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, *OJ* L 160 of 30 June 2000, p. 19.

[64] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338 of 23 December 2003, p. 1.

[65] Brussels II Convention of 28 May 1998, *OJ* C 221 of 16 July1998.

[66] ECJ, case C-68/07, *Sundelind Lopez*, *ECR* [2007] I-10403.

[67] Article 3(1)a) Brussels II*bis* Regulation.

i.e. their sphere of application is not determined by the particular characteristics of the defendant, but by the Regulation's jurisdiction rules themselves.

The spatial scope of the Regulation is determined differently for proceedings concerning the parental responsibility for children. For these cases, the relevant factor for determining the spatial scope is the habitual residence of the child.[68] Therefore, if the child is habitually resident in the EU, the Regulation applies. The spatial application is extended by two other rules. The first is jurisdiction on the basis of the child's substantial connection to the Member State while the parties agree to such jurisdiction and the jurisdiction is in the best interests of the child.[69] This basis of jurisdiction can be used irrespective of whether the child's habitual residence is in another Member State or in a third State. The second extension is jurisdiction in the State where the child is present if the habitual residence of the child cannot be established.[70] Only if none of these bases for jurisdiction is present, can a court revert to the domestic rules, which therefore have a subsidiary nature.[71]

3. The Maintenance and Succession Regulations

The more recent Maintenance[72] and Succession[73] Regulations took this logic further. They perfected the universal application. These Regulations always apply spatially. As soon as the temporal and material application requirements are met, Member State[74] courts have to apply their rules. The Regulations contain their own subsidiary rules,[75] so that it is never necessary to fall back on those provided by the respective domestic rules of the Member States. The domestic rules have thus lost all significance and have been superseded by Union law. Here we can speak of completely unilateral and universal instruments.

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[68] Article 8 Brussels II*bis* Regulation.

[69] Article 12(3) Brussels II*bis* Regulation. Note that in such a situation the jurisdiction is deemed to be in the child's interests if the child lives in a State that is not party to the 1996 Hague Child Protection Convention.

[70] Article 13 Brussels II*bis* Regulation.

[71] Article 14 Brussels II*bis* Regulation.

[72] Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7 of 10 January 2009, p. 1.

[73] Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ* L 201 of 27 July 2012, p. 107. This Regulation will be fully applicable as of 17 August 2015.

[74] Note that the Succession Regulation does not apply in Denmark, Ireland and the United Kingdom, so that "Member State" must be understood here to exclude those States.

[75] Articles 6 (Subsidiary Jurisdiction) and 7 (*Forum necessitatis*) of the Maintenance Regulation; Articles 10 (Subsidiary Jurisdiction) and 11 (*Forum necessitatis*) of the Succession Regulation.

B. Universality in Rules on Recognition and Enforcement?

The advent of universality as the general rule for jurisdiction has however not yet found its counterpart in the rules on recognition and enforcement of judgments: all the instruments are concerned only with judgments emanating from EU Member States. The European Court of Justice has confirmed this. Firstly, in the *Owens Bank* case,[76] the Court confirmed that judgments from third States fell entirely outside the scope of the Brussels Convention: the provisions on *lis pendens* do not apply when the same third country judgment's enforcement is at stake in two different Member States. In a more recent case, *Wolf Naturprodukte*,[77] the Court found that the easy recognition and enforcement could only apply if the Member State where the judgment was rendered and the Member State where enforcement is sought were both Members of the EU at the time that the judgment was delivered. In these judgments the Court emphasises the relationship between the jurisdiction rules and the easy enforcement. In the *Wolf Naturprodukte* case, the Court states that: "[t]he rules on jurisdiction and the rules on the recognition and enforcement of judgments in Regulation No 44/2001 do not constitute distinct and autonomous systems but are closely linked."[78] Thus, in a situation where the defendant was domiciled in a State that was not yet a Member State of the EU at the time that the judgment was delivered (the Czech Republic in this case), the plaintiff cannot benefit from the easy recognition and enforcement since the defendant was not treated as an EU-defendant, but as a defendant from a third State, and national rules of jurisdiction were applied to it. However, as has been pointed out, since the jurisdiction rules are not entirely universal, the legal reasoning is incomplete. If the defendant were domiciled in a third State that remained a third State while the judgment was granted in a Member State, the judgment would still be able to be recognised and enforced under the Regulation's rules.

With regard to the revision of the Brussels I Regulation, the European Parliament has taken the same position on judgments from third States as it has with respect to the so-called reflexive effect: it stated that more research was needed on the matter.[79] It thought that a proposal to extend the recognition and enforcement rules to third States should be the subject of a separate review. Moreover, in a resolution of 23 November 2010, the Parliament:[80]

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[76] ECJ, case C-129/92, *ECR* [1994], 117.

[77] ECJ, case C-514/10, not yet published in *ECR*, available at <www.curia.eu>.

[78] Para. 25.

[79] See the European Parliament's resolution of 7 September 2010, above (note 59). See also S.M. CARBONE, What about the recognition of third States' foreign judgments?, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Milan 2012, p. 299-309, arguing in favour of EU rules on the matter, but stating that as the time is not yet ripe according to some, the EU legislator should establish basic principles on the recognition of judgments from third States.

[80] European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme, para. 35.

> "[u]rges the Commission to use its best endeavours at the Hague Conference to revive the project for an international judgments convention; considers that the Commission could make a start with wide-ranging consultations, while informing and involving Parliament, on whether the rules of Regulation (EC) No 44/2001 should be given reflexive effect in order to incentivize other countries, particularly the United States, to resume negotiations; takes the view that it would be premature and ill-advised to contemplate giving the rules of that regulation reflexive effect until it is sufficiently clear that the attempts to restart the negotiations in the Hague have failed and it appears from the consultations and studies carried out that this move would have positive benefits and advantages for citizens, business and practitioners in the EU."

This argumentation clearly but subtly gives preference to the convention route and the efficacy of the Union's actions in its relations with third States. In one way or another it expresses the concern of efficacy in the Union's politics, saving the possibility of unilateral action for the case of failure of the convention approach. In doing so, the Parliament calculates the risk to which the Union would expose itself by adopting rules in favour of the recognition of decisions rendered in third States: this would impede putting pressure on third States to achieve a reciprocal treatment for judgments rendered by courts in EU Member States. It is in any event interesting to note that the position taken by the European Parliament does not deny the possibility of European rules on the effect of third State judgments. In the current state of affairs, the concern is not only to harmonise the laws of the Member States, but also to undertake the most efficient action with regard to the unilateral interests of the EU. The dilemma which the Union faces in this regard is not different from that known to all States in their international relations.

Whether the wait-and-see politics are good, remains to be seen. In the case of a State, such attitude would result in a failure to adopt any rules on recognition. Yet, comparative law demonstrates that most of the EU Member States have a regime on recognition, some very restricted, others more open. Also, independent of the dysfunctioning of the European area that can result from disparities between national legislations that obstruct trade,[81] it is not certain that the current situation serves the interests of the Union in the conducting of its external relations. From the perspective of a third State, the liberal regimes of some Member States with which businesses have commercial contracts can suffice to not enter into negotiations with the Union. From the perspective of the Union, the existence and extent of these disparities can weaken its persuasive force, because it lacks a clear mandate to negotiate.[82] More generally, an extension of the EU's rules to external

[81] It suffices at this point to take the example of the emblematic question of the recognition of Islamic repudiations. The disparity of the recognition regimes in the European Member States may discourage the mobility of persons in the Union, whether as employees or family members, or as citizens, for example when applying for an allowance for which the qualification as spouse is required.

[82] See in this regard S.M. CARBONE, What about the recognition of third States' foreign judgments?, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*,

situations does not necessarily mean that the Union "would unilaterally open up the Community market to third countries without retaining the means of negotiation necessary to achieve such liberalization on the part of those countries", since EU law enables the enactment of provisions specifically taking account of the fact that the situations "take place in a different legal context from that which occurs within the [Union]".[83]

Of course the adoption of European unilateral rules does not necessarily mean that they are aligned with the regime for decisions rendered in EU Member States. In particular, the extension of the regime of the European Enforcement Order[84] to any decision irrespective of its origin, would be problematic both in law and in fact. This realisation does not in itself exclude the adoption of a common regime that would exist side by side with that for EU judgments. In other words, the adoption of universal rules generally goes hand-in-hand with an adaptation to external situations.

V. Adaptation of the European Rules to their Universal Nature

Creating universally applicable rules in the European context supposes that a two-fold condition is met. First, it must be shown that the internal market and/or the area of liberty, security and justice need such rules (a). Second, such a system has to contain a complete spectrum of provisions capable of regulating all international situations in the domain covered (b).

A. The Establishment of Rules of a Universal Character

Adopting European rules of a universal nature would entail the establishment of a complete collection of norms in the particular domain, replacing in fact all national

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Milan 2012, p. 299-309 stating at 301 that "common European rules on recognition and enforcement of third States' judgments would foster the cooperation between the European Union and third States, providing also the EU with guidance criteria on where to start negotiating and concluding bilateral and multilateral treaties dealing with such matters."

[83] ECJ, case C-101/05, *A*, *ECR* [2007] I-11531, paras 36 and 38 with respect to a fiscal measure affecting the movement of capital: even if "the concept of restrictions... were interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States", the situation of "economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries" to the effect that a State could invoke justifications for the latter type of situation that would be invalid for the former type (para. 37) .

[84] Introduced by Regulation 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* L 143 of 30 April 2004, p. 15.

provisions in that domain without leaving any residual space for those provisions. Yet, a rule of universal character aims to configure the common law in the domain concerned because it can cover any international situations in the relevant legal category.

A precision of the notion of universality of private international law rules is necessary in the European context. It is not impossible to think of a rule with a universal character within the classic meaning of the term, but which does not cover all international situations in the matter concerned.[85] In the context of choice of law rules for example, a universal rule is one that applies irrespective of whether the designated law is that of the EU or that of a third State. However, it is not impossible to construct a system of such universally applicable rules that nevertheless involve only situations that have a specific link with the EU. This link could correspond to the one defining the spatial scope of primary law rules on free movement of goods, persons or services.[86] For jurisdiction rules, the question of universally applicable rules could not refer to situations where the rule designates a foreign court. Rather, it covers a complete set of rules which designate the courts of EU Member States for all international situations. Here also, a distinction could be made, depending on a specific link with one of the European spaces. For rules on recognition and enforcement, universal rules would mean including rules concerning judgments emanating from third States, possibly limited to European situations.

Only universally applicable rules covering every international situation are capable of replacing wholly corresponding national rules on jurisdiction or on the enforcement of judgments. Yet, European institutional law raises another issue: the legislative power of the Union exists only by attribution. European acts may only be adopted within the limits of the powers granted by the Treaty on the functioning of the Union.

The problem can clearly be illustrated by the *Tabacco 2* case.[87] The case involved an action for annulment of a directive establishing norms of composition and of presentation of tobacco products, including products that would be exported to third countries. The legal basis of the instrument was the functioning of the internal market (Art. 95 EC Treaty, currently Art. 114 TEU). According to the Court, the inclusion of products of exportation is only permitted in order to prevent

[85] Compare in this respect the imprecise affirmation according to which "the adoption of universal rules" would exceed the terms of the functioning of the internal market, as provided in the old Art. 65 EC Treaty, since "ne doivent être visés que les rapports transfrontières à caractère intracommunautaire" while this limitation would have been abolished by the Lisbon Treaty, which no longer requires that measures be "necessary" for the proper functioning of the internal market (see V. HEUZÉ, D'Amsterdam à Lisbonne, l'Etat de droit à l'épreuve des compétences communautaires en matière de conflits de lois, *La semaine juridique* I 2008, p. 166.) It is of course true, according to the elements of this analysis, that this requirement limits actions to "Community" situations – understood as those that respond to the criteria of applicability relevant for primary law – but this does not prevent the adoption of universal rules, in the traditional sense of the terminology - designating the law of any State.

[86] See above (note 2).

[87] ECJ, case C-491/01, *British American Tobacco, ECR* [2002] I-11453.

circumvention of the rule by illegal re-importation, a particular problem in a market such as that of cigarette sales.[88] Moreover, while the instrument did not specify that it applied to export products, because it was aimed at the functioning of the internal market, it "must be considered in principle to concern only tobacco products which are to enter the internal market".[89] Therefore, if the instrument is adopted in the name of the European area (internal market in this case), it cannot include applicability criteria reaching beyond the spatial domain of the regime envisaged by primary law.

This does not, however, mean that the EU has no normative power over goods destined for or coming from third countries: an EU instrument can cover external situations, but this requires a specific legal basis, and the instrument must aim to achieve the particular goals envisaged. It can be different if the internal and external aspects of the policy cannot be split up.[90] For private international law, this issue arises where a situation has links with only one Member State and with a third State. On first sight, it seems that the situation itself does not have any relevance for the EU. This situation can be compared to other purely internal matters, such as the one that arose in the *Tabacco 4* case,[91] in which the Court found that even internal trade can, in exceptional cases, lead to a sale in a different State. The Court recalls that it is not required that every situation have an actual connection to free movement between the Member States.[92] The Court referred to the precedent established in *Österreichischer Rundfunk,*[93] concerning the application of a directive to internal situations. In that case, the Court explained that it is not required that the specific situation at hand has a sufficient link with the EU freedoms, as long as the act was aimed at improving the conditions for the establishment and functioning of the internal market. The Court added that a "contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain".[94] Moreover, the Directive could apply to

[88] Para. 82.

[89] Para. 212.

[90] This is the case when the exercise of external competence is required for the exercise of internal competence (ECJ, Opinion 1/76, *European laying-up fund for inland waterway vessels, ECR* [1977], 741), or when it is simply useful (see ECJ, Opinion 1/94, *WTO Agreement, ECR* [1994], 5267, on the adoption of external provisions in instruments on the internal market). On agricultural matters, see ECJ, case C-280/93, *Germany v. the Council, ECR* [1994], 4973 (on the market for bananas). Compare the terms used to define power of the Union to conclude international agreements, Art. 216 TFEU, naming as hypotheses, other than explicit power, when the conclusion of the agreement is "necessary" to achieve one of the EU's objectives, when the competence is provided for in a legally binding Union act, or when the agreement is likely to affect common rules or alter their scope. This last hypothesis corresponds to the criteria established in ECJ, Opinion 1/03 on the conclusion of the new Lugano Convention, *ECR* [2006] I-1145.

[91] ECJ, case C-380/03, *Germany v The European Parliament and the Council "The Directive on Tobacco Advertising", ECR* [2006] I-11573.

[92] Para. 80.

[93] ECJ, joined cases C-465/00, C-138/01 and C-139/01, *ECR* [2003] I-04989.

[94] Para. 42.

"situations where there is no direct link with the exercise of the fundamental freedoms of movement".[95]

Returning to Private International Law, the argumentation in the *Owusu*[96] case (citing *Österreichischer Rundfunk*) and *Lugano* opinion[97] (citing *Owusu*) is similar. The Court observed that "the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States" and that the Brussels Convention was "without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject."[98]

B. The Adaptation of the Rules on Jurisdiction

Since European rules that use the model of universal rules constitute common law, it is important both to reach the goals that are inherent in the system of jurisdiction, and to put in place a system without gaps. If necessary, the rules have to be adapted for situations that have connections with third States. In light of reaching the goals, the question arises about the added value of provisions aimed specifically at situations with connections to third States.

1. Adaptation of European Rules for External Proceedings

When a particular instrument contains universal rules, in other words rules to grant jurisdiction in all possible situations falling within the material scope of the Regulation, one must examine the necessity of rules on *lis pendens*. Such rules are absent from the Maintenance Regulation, despite the Regulation's universal scope. This would mean that although many situations with connections to third States can be brought to the courts of Member States, these courts can never take account of the (valid) jurisdiction claims of third State courts. The Regulation's Articles 12 (*lis pendens*) and 13 (related actions) deal only with situations where cases are pending "in the courts of different Member States", and thus exclude cases pending before third State courts. This omission should not necessarily be seen as a gap; it might indicate the unilateral nature of the regime: taking the example from a national legislator, the European legislator could have decided not to foresee the possibility of granting a stay in favour of a third State court. This simply means that a court in a Member State cannot employ the exception of "international" *lis pendens* contained in the law of the *forum.*

[95] Para. 43.

[96] ECJ, case C-281/02, *ECR* [2002] I-01383.

[97] ECJ, Opinion 1/03, *ECR* [2006] I-1145.

[98] Para. 34 of the *Owusu* case.

The Brussels I*bis* Regulation[99] has tackled this question, which had also been raised by the GEDIP.[100]

The new Article 33 reads:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:
>
> (a) the proceedings in the court of the third State are themselves stayed or discontinued;
>
> (b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> (c) the continuation of the proceedings is required for the proper administration of justice.
>
> 3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."

The provision differs from that of *lis pendens* between Member State courts in various ways: it contains a possibility, not a requirement, and the Member State court using the provision thus has a margin of appreciation; the recognition of the foreign judgment is a condition, as is the proper administration of justice. It is also interesting to note that the question of whether the court can apply this provision of its own motion, depends on its national law. We thus once again see the incomplete

[99] COM(2010) 748.

[100] Bergen Meeting, 2008 (available at <www.gedip-egpil.eu>); M. FALLON/ Ch. KOHLER/ P. KINSCH (eds), *Building European Private International Law. Twenty Years' Work by GEDIP*, Cambridge 2011.

universality: a universal rule seems to be introduced, but to a certain extent it still relies on the residual national rules.

The final version of Brussels I*bis* also includes a provision on related actions pending in third State courts (Art. 34):

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:
>
> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
>
> (b) the proceedings in the court of the third State are themselves stayed or discontinued;
>
> (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> (d) the continuation of the proceedings is required for the proper administration of justice.
>
> 3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."

This provision also contains important differences with respect to the rule on related actions in Member State courts: account is also taken of the possibility of recognition of the third State judgment and of the proper administration of justice. As is the case for the *lis pendens* rule, a court can only apply this rule of its own motion if permitted by its national law.

2. Adding Subsidiary Rules

There is a clear tendency to add separate provisions for the situations connected to third States. The Maintenance and Succession Regulations provide the clearest examples: they contain rules entitled "Subsidiary Jurisdiction" (Art. 6 and 10 respectively) and "*forum necessitatis*" (Art. 7 and 11 respectively), which only apply if no EU court has jurisdiction on the basis of the other provisions. These rules will only apply to defendants with their habitual residence outside the EU, as those with their habitual residence in the EU would fall under the general rules.[101] The preamble of the Maintenance Regulation explicitly links the Article 6 and 7 bases for jurisdiction to defendants from outside the EU.[102] It also states that the application of the Regulation should not be limited to defendants habitually resident in the EU. Therefore there is no space left for national rules on jurisdiction.

The European Commission wanted to follow the same approach in the recast of the Brussels I Regulation. It therefore proposed to extend the existing rules on jurisdiction to situations where the defendant is domiciled outside the EU. This proposal was in line with the conclusions formulated by the GEDIP.[103] However, the proposal was not accepted by the Parliament and the Council.

3. Adding Mirror Rules

Substituting common law rules by European universal rules calls for the use of the technique of the mirror rule, without which the system would be incomplete.

The Maintenance Regulation and Brussels I*bis* illustrate the problem. Both instruments allow parties to choose the forum that would hear their dispute (although the possibility under the Maintenance Regulation is limited).[104] The rules only apply to situations in which the parties choose a court in the EU and no rule has been inserted for the situation in which the parties choose a third State court. The same problem exists for the exclusive bases of jurisdiction under Brussels I.[105] In these situations, the other bases of jurisdiction of the Regulations would apply, despite possible exclusive jurisdiction of a third State and despite a forum choice for a court in a third State. Even under the Brussels I Regulation where reference might be made to national bases of jurisdiction because the defendant is domiciled

[101] In the case of the Maintenance Regulation, the rules will also yield to the Lugano Convention. In this sense, Article 6 explicitly provides that its subsidiary bases of jurisdiction can only be used if no court in the EU has jurisdiction nor any court in a Lugano Contracting State on the basis of that Convention.

[102] Recital 15.

[103] Bergen Meeting, 2008 (available at <www.gedip-egpil.eu>); M. FALLON/ Ch. KOHLER/ P. KINSCH (eds), *Building European Private International Law. Twenty Years' Work by GEDIP*, Cambridge 2011. In the Recast, see Arts 25 and 26.

[104] Art. 4 of the Maintenance Regulation; Art. 25 of Brussels I*bis* (Art. 23 of Brussels I).

[105] Art. 24 of Brussels I*bis* (Art. 22 of Brussels I).

outside the EU, the result of the European Court of Justice's case law is that those national rules are part of the system.[106]

The GEDIP has reacted to this anomaly of the Court's Opinion 1/03 and proposed the extension of the rules on exclusive jurisdiction and forum clauses in the following way.

Proposed Article 22bis:

> "1. Where no court of a Member State has jurisdiction under Article 22, a court of a Member State before which proceedings are brought concerning a matter to which that Article applies and which has jurisdiction under another provision of this Regulation shall stay its proceedings if it is established that the courts of a non-Member State have exclusive jurisdiction under the law of that State on the basis of provisions analogous to those in Article 22 other than those concerning tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, and those concerning the enforcement of judgments.
>
> It shall decline jurisdiction once the court of the non-Member State has given a judgment that is entitled to recognition under the law of the Member State of the court seised. It may hear the proceedings before it, if it appears that the court of the non-Member State will not give judgment within a reasonable time.
>
> 2. By way of exception to paragraph 1, when the validity of the rights referred to in paragraph 4 of Article 22 is raised as an incidental question in proceedings brought before the courts of a Member State, those courts shall have jurisdiction to decide that question even if, according to the law of a non-Member State, it falls within the exclusive jurisdiction of the courts of that State. Such a decision shall have no effect with regard to the rights of third parties."

Proposed Article 23bis:

> "1. A court of a Member State seised of proceedings over which it has jurisdiction under this Regulation, and with regard to which the parties have given exclusive jurisdiction to a court or the courts of a

[106] ECJ, Opinion 1/03, New *Lugano Convention Opinion, ECR* [2006] I-1145. Furthermore, when considering the impact of the Lugano Convention on the functioning of Articles 22 and 23 of the Regulation, the Court's opinion is that "where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country" (§ 153). This means that when the good is located outside the EU or when the jurisdiction clause designates a third State court, national rules on jurisdiction are excluded and the general provisions of the Regulation apply, provided that the defendant's domicile is in the EU.

> non-Member State under an agreement complying with the conditions laid down by Article 23, shall not hear the proceedings unless and until the chosen court has declined jurisdiction.
>
> It shall stay the proceedings as long as the chosen court has not been seised or, if it has been seised, has not declined jurisdiction. It shall decline jurisdiction once the chosen court has given a judgment entitled to recognition under the law of the State of the court seised.
>
> Nevertheless, it may hear the proceedings if it appears that:
>
> (a) the chosen court will not give judgment within a reasonable time;
>
> (b) the chosen court will give a judgment which will not be entitled to recognition under the law of the State of the court seised.
>
> [2. The choice by the parties of a court of a non-Member State shall have no effect if all other elements relevant to the situation at the time of the choice are located in the same Member State.]"

These proposals are based on the theory of the reflexive effect, which has been recognised in the literature since quite some time already.[107] It can also be seen as producing a mirror rule, reflecting something that is in the Regulations for intra-EU situations. As for situations outside the EU, the rule aims to set aside the application of other rules because of the exclusive nature of certain rules. However, the rule, as is typical of a mirror image, contains an element of inversion: when applied to third States, it is not a rule granting jurisdiction, but a derogation rule, merely excluding jurisdiction to a Member State's court. The model has already been used in the Belgian Code on Private International Law.[108] Of course, a unilateral rule of the EU cannot grant jurisdiction to a third State court. In the case of a convention (such as the 2005 Hague Choice of Court Convention), the rule can grant jurisdiction to a court and at the same time derogate from courts in other Contracting States. A unilateral rule is relevant for the court from which jurisdiction is derogated because it sets the conditions (substantive and procedural) for such derogation.

Neither the Commission's proposal for the recast of the Brussels I Regulation, nor the European Parliament in its legislative resolution of 20 November 2012 accepted to include mirror rules. Therefore, the final version of the Brussels I*bis* Regulation contains the same gap as its predecessor.

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[107] See G. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris 1972, para. 165; A. NUYTS, La théorie de l'effet réflexe, in G. DE LEVAL/ M. STORME (eds), *Le droit processuel & judiciaire européen*, Brussels 2003, p. 73-90. See also the more recent analyses in M. FALLON, L'applicabilité du règlement "Bruxelles I" aux situations externes après l'avis 1/03, in *Mélanges H. Gaudement-Tallon*, Paris 2008, p. 241-264 and T. KRUGER, *Civil Jurisdiction Rules of the EU and their impact on third States*, Oxford 2008, p. 188-192 and 241.

[108] Article 7.

4. Adapting the Rules on Recognition and Enforcement of Judgments

If envisaged by the European legislator, the adoption of rules on the recognition and enforcement of judgments of third States would necessarily bring about their own particular rules. It seems to be a political condition that the rules for third State judgments must be less favourable than those operating within the Union.

The special regime could reproduce the classical regime of the Brussels and Lugano Conventions. Of course copying the Brussels regime entirely is not possible because of the unilateral nature that the act would have, *i.e.* an EU instrument permitting the recognition and enforcement of third State judgments. The GEDIP has worked out a proposal inspired by the Brussels Convention, allowing as open as possible a regime for third State judgments, and permitting recognition without any form of procedure while exequatur proceedings would still be required for enforcement.[109] Necessary adaptations include making some of the grounds for refusal stricter, and clarifying others. The document of the GEDIP contains reference to (indirect) jurisdiction rules in order to demand respect for exclusive jurisdiction and forum choices for EU courts and in order to prohibit exorbitant jurisdiction.[110] Mandatory provisions of the requested Member State and of the Union are safeguarded, as follows:

> *Article 56-5:*
>
> "A judgment shall not be recognised to the extent that:
>
> (a) it was granted in contravention:
>
> – of a mandatory provision respect for which is regarded as crucial by the State addressed to such an extent that it is applicable to any situation falling within its scope, irrespective of the law otherwise applicable to the legal relationship; or
>
> – a mandatory rule of European Union law respect for which is regarded as crucial by the Union to such an extent that it is applicable to any situation falling within its scope, irrespective of the law otherwise applicable to the legal relationship; or
>
> (b) it awards excessive non-compensatory damages, including exemplary or punitive damages."

Formal as well as substantive public policy gained a place in the rules as follows:

[109] At its Copenhagen meeting 2010, see M. FALLON/ Ch. KOHLER/ P. KINSCH, *Building European Private International Law. Twenty Years' Work by GEDIP*, Cambridge 2011.

[110] For instance excluding recognition and enforcement when jurisdiction had been based solely on the nationality of one of the parties; the fact that the defendant was served with proceedings in the State of the court; the presence in the State of the court of assets belonging to the defendant; the exercise by the defendant of commercial activities in the State when those activities have no connection to the dispute.

Article 56-6:

> "A judgment shall not be recognized if such recognition is manifestly contrary to the substantive or procedural public policy ("ordre public") of the State addressed or of the European Union, in particular if the judgment is the result of an infringement of the principles governing the right to a fair trial or of fraud regarding a matter of procedure."

The Group renounced a proposal according to which in case of a grave miscarriage of justice or an imminent risk of such grave miscarriage of justice, the Commission would be able to temporarily suspend the application of the chapter on the recognition to judgments from a particular third State. The objections to the proposal were aimed not at the concept of sanctions, but at the use of this instrument for such sanctions. In any event, the exercise has shown that adopting rules for judgments rendered in third States outside the mechanism of bi- or multilateral conventions must be accompanied by certain safeguards in order to permit the Union to influence the policies in third States.

Moreover, a certain margin is left for the negotiation of conventions with third States with a view to facilitate the movement of judgments in a context of reciprocity. Such conventions could contain a more favourable regime than the one introduced in EU law.

VI. Conclusion

An analysis of the spatial scope of the EU's rules on jurisdiction and the recognition and enforcement of judgments shows an emergence towards universal rules – universal in their applicability, not in their normative force. While this character is inherent to national rules of Private International Law, the same cannot be said of international rules, especially in the context of international conventions, which operate in a bilateral modus. European private international law of the first generation followed mainly this conventional logic. However, in the domain of jurisdiction, we see an increasing tendency towards the use of rules of a universal character, despite the standstill – or the complete stop? – that we observe in the Brussels I*bis* Regulation. The same cannot – yet? – be said for rules on the recognition and enforcement of judgments.

The graduation of EU rules in these fields from bilateral-modus rules to universal ones goes hand in hand with an increasing unilateral nature of EU rules: if the EU enacts universal rules, it is doing so in a unilateral way, in the same manner as national legislators have to operate when they introduce rules in these fields.

At the moment, European private international law is still being constructed. We have indicated how its origins have affected the nature of the adopted rules. However, this nature is slowly but surely changing, certainly for jurisdiction. This change brings along an adaptation in the formulation of the rules themselves. We see the introduction of rules on subsidiary jurisdiction and on *forum necessitatis*, while these types of rules have previously been the exclusive domain of national

law. When universality also comes in the field of recognition and enforcement, those rules will have to be adapted as well. In this sense, Private International Law can learn from primary and secondary EU law, which have long since had to find the correct applicability, as opposed to the normative force of the rules.

CONFLICTING DECISIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

Pierre MAYER*

I. Introduction

1. As a specialist of private international law, which I was even before I developed an interest in arbitration, I am naturally very sensitive to the problem of conflicting decisions. One of the main objectives of private international law, *the* main objective according to SAVIGNY, is international harmony of solutions; which means that a given private law situation, having connections with two or more States, must be assessed in the same way in all those States.

Two conflicting judgments, for instance, one holding a marriage to be valid and the other holding it to be void, is the very opposite of international harmony.

2. There are specific procedural tools, in private international law, to prevent the occurrence of such a conflict.

The first is the *res judicata* effect of a judgment previously rendered in a foreign country. That effect can be negative, preventing the introduction of the same claims before a second court. It can also be positive, obliging the second court to take as the expression of truth what has already been decided in the first judgment.

A second tool is the stay of proceedings by a court when a foreign court has previously been seized but has not yet rendered its judgment. In civil law countries

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(and in French legal terms), the stay can be based either on an "exception de litispendance" or an "exception de connexité", depending on whether the new claim is identical, or only closely related to, the claim presented in the pre-existing proceedings.

In common law countries, the fact that a foreign court is seized of a related or identical claim is one element which will play a role in deciding whether the court will declare itself *forum non conveniens*.

3. Can a parallel be drawn in that regard between private international law and arbitration law? To some extent the answer is positive.

In the place of a problem of conflicting judgments we may have a problem of conflicting awards, which can be avoided by using the same instruments. An arbitral tribunal can recognise the *res judicata* effect of an award already made. An arbitral tribunal can also stay the proceedings (or decline jurisdiction, see *infra* para. 30), because another arbitral tribunal has been seized of the same dispute, but has not yet rendered an award.

On the other hand, there is no room for an "exception de connexité" in arbitration, which already makes a difference.

4. However, what makes things more complex is that, apart from the parallel that one can draw between conflicting judgments and conflicting awards, one must also consider combinations of State judgments and arbitral awards. State judgments come into play because State courts may be requested to allow an arbitration to take place, or on the contrary to enjoin the claimant from pursuing it; to declare an award valid, or to declare it void; to recognize an award; to enforce it.

Conflicts may therefore involve both awards and State judgments.

The combinations may be of two kinds:

– an award and a judgment may conflict;
– there may be a conflict between two judgments, concerning:
– the validity or applicability of an arbitration agreement, or
– concerning the validity, the recognition or the enforcement of an award.

5. All these conflicts have to be considered. However, before examining them in turn, it is necessary to clarify exactly what is meant by the expression "conflicting decisions".

6. As to the degree of seriousness of the conflict, a distinction must be made between three kinds of conflicts.

First there is what can be called an absolute conflict, meaning that the decisions cannot both be enforced: the enforcement of one of them makes it impossible to enforce the other one – physically impossible. For instance, an award orders the respondent to adopt certain behaviour, whilst another award enjoins the same respondent from adopting the same behaviour.

It is to be noted that there can be no absolute conflict between two monetary decisions. If an award orders the Respondent to pay 500 as damages to the Claimant, and another award orders the same Respondent to pay 1000 to the same Claimant for the same cause, it is not impossible to enforce both awards. It could even be said that by enforcing the one for the higher amount one is also enforcing the one for the lower amount. Most disputes subject to arbitration being monetary disputes, absolute conflicts are extremely rare.

7. However, in this example there is still a conflict, of a second kind, in that the operative parts of the decisions, the "orders" in the strict sense ("le dispositif"), are incompatible, materially incompatible: to enforce one is necessarily to ignore the other one, to deprive it of its object. For instance, to enforce the award ordering to pay 1000 as damages, renders the award that ordered to pay only 500 meaningless. I will call that kind of conflict a material conflict. It corresponds to the definition of conflicting judgments in the European Union, pursuant to the *Hoffmann* decision of the European Court of Justice (4 February 1988, Case No. 145/86): "Judgments that entail mutually exclusive legal consequences."[1]

8. The third kind of conflict, by contrast, is purely intellectual. An intellectual conflict consists in the existence of two logically incompatible statements in the decisions (either in the dispositive part or in the reasoning). For instance, one decision is based on a certain interpretation of a contract, adopted in the reasoning of the decision, and the other decision is based on a different, logically incompatible, interpretation of the same contract.

Of course, where there is a material conflict there is, necessarily, also an intellectual conflict, but the reverse is not true: two decisions can be intellectually conflicting in some of their reasons, or between the reasons of one and the "dispositif" of the other, without being materially conflicting.

9. Apart from this tri-partite distinction related to the more or less serious nature of the conflict, another distinction must be mentioned, which concerns the dimension of the conflict: it can exist either within the framework of one legal order, or only where two or more legal orders are involved.

A conflict may exist within the legal order of one State. That would be the case, for instance, if in Switzerland two awards were considered binding, although they contained logically incompatible statements.

However, a conflict sometimes exists only because two different legal orders have different views: one considers, for instance, that a certain award is binding, while in another legal order it is another award, which is intellectually or materially conflicting, that is considered binding.

The first type of conflict may be called an internal conflict, the second one an international conflict.

10. International commercial arbitration can give rise to both internal and international conflicts, but since internal conflicts arise in the same manner in domestic arbitration, I will focus more on international conflicts, which are specific to international commercial arbitration.[2]

Unfortunately, once two internationally conflicting decisions have been rendered, it is generally impossible to resolve the conflict: the two conflicting decisions will remain; each in its legal order. The only objective the jurists may try to reach is to limit, as much as possible, the risk of conflicts. The dual question I will

[1] ECJ, 4 February 1988, case 145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, at para. 22; *Rev. crit. dr. int. pr.* 1988, p. 598, with comments by H. GAUDEMET-TALLON; *JDI* 1989, p. 449, with comments by A. HUET.

[2] On the subject of conflicting decisions in international arbitration I must mention the excellent doctoral thesis of C. DEBOURG, *Les contrariétés de décisions dans l'arbitrage international*, Paris 2012.

ask myself in this conference is therefore not: how to resolve an international conflict when it exists – since that is impossible, but instead: 1) what are the causes of the risk of conflicting decisions, and 2) to what extent can such risk be eliminated or, at least, limited?

For this I will distinguish three kinds of conflicts: conflicts between two State judgments concerning one award (II), conflicts between a judgment and an award (III), and finally, conflicts between two awards (IV).

II. Conflicts between Two State Judgments Concerning One Award

11. Such a conflict is by definition an international conflict. Typically it will be present where a given award is recognized in a certain country and refused recognition in another. It is not a material conflict: both State judgments can be given full effect, the effect of each being limited to its own territorial sphere. Of course, intellectually they do conflict.

12. The New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards tends to prevent conflicts by limiting the grounds for refusing recognition and by harmonizing them between the numerous States that are parties to the Convention. Nonetheless, the harmonization is not complete: the Convention lists the grounds that may be opposed to recognition,[3] but it does not oblige States to accept all these grounds in their national legislation. The legislation of a State may be more liberal than the New York Convention.[4] As we will see, that is the case for French law. In addition, two courts may arrive at different conclusions even when they apply the same provision, either because they adopt different interpretations of that provision, or because they have a different assessment of the facts of the case, or because the provision refers to a State law, which they do not understand in the same manner.

13. Even when the courts make serious efforts to take into account the position of another State, the law of which is applicable, conflicts are not always avoided. The recent *Dallah* case is a good example of this.

In that case, the Government of Pakistan had wished to conclude a contract with Dallah, a Saudi Arabian contractor, for the building of accommodation suitable for pilgrims travelling from Pakistan to Mecca. Negotiations had taken place. Just before the contract was entered into, Pakistan created a special vehicle: the Awami Hajj Trust, which signed the contract. A few months after the execution of the contract, the Secretary of the Ministry of Religious Affairs of Pakistan, on his own letterhead, terminated the contract, alleging that Dallah had committed fundamental breaches.

[3] Article V.

[4] Article VII.

In fact, one month before that letter was sent, the Trust had ceased to exist, because the Decree creating it had only a six-month validity and had not been renewed.

14. Relying on the ICC arbitration clause contained in the contract, Dallah filed a request against the Government of Pakistan for damages. The arbitration took place in Paris.

Of course, the Government challenged the jurisdiction of the tribunal, since it was not a party to the contract. However, the tribunal assumed jurisdiction, noting, among other considerations, that the Government had been "involved in the negotiation and the performance of the Contract." Those words reflect the position of French case law relating to the extension of arbitration to non-signatories.

On the merits, the arbitral tribunal found that the Government owed Dallah twenty million pounds in damages.

The Government appealed before the Paris Court of Appeal; in parallel, Dallah requested leave to enforce the award from the English Courts.

15. How did the English courts reason? At every level of the judicature: High Court, Court of Appeal and Supreme Court, they reasoned in the same way. They found, first, that they had to apply French law as the law of the seat, that resulted from Section 103 of the 1996 Arbitration Act, which replicates Article V of the New York Convention. They then mentioned that, under French law, the involvement in the negotiation and/or the performance of the contract was to be considered, but only in so far as it would reveal the intention of the non-signatory to become a party to the contract. And they concluded that, in spite of its involvement, the Government did not have any intention to become a party to the contract. In the words of Lord Justice MOORE-BICK (who wrote the lead opinion in the judgment of the Court of Appeal): "If it had been the parties' common intention the Government would surely have been named as a party to the Agreement, or would at least have added its signature in a way that reflected that fact."[5]

Moreover, the termination of the contract by the Secretary of the Ministry was found to be ambiguous since that person happened also to be the chairman of the Board of Directors of the Trust.

The Supreme Court confirmed the position of the Court of Appeal on 3 November 2010.[6] As a consequence, leave to enforce the award is definitively denied in England.

16. Only a few months later, on 17 February 2011,[7] the Court of Appeal of Paris, seized of an appeal to set aside the award on the ground of lack of jurisdic-

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[5] *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, Court of Appeal, [2009] EWCA Civ. 755 (20 July 2009), at para. 32.

[6] *Dallah Estate and Tourism Holding Company v. the Ministry of Religious Affairs, Government of Pakistan*, UK Supreme Court, [2010] UKSC 46 (3 November 2010).

[7] Paris, 17 February 2011, RG 09/28533, *Gouvernement du Pakistan, Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company*, *JDI* 2011, p. 395, with comments by I. MICHOU; *Cah. arb.* 2011, p. 433, with comments by G. CUNIBERTI; *LPA* 2011, No. 225, p. 5, with comments by L.-C. DELANOY; *JCP* 2011, p. 1432, at para. 2, with comments by C. SERAGLINI; *Rev. arb.* 2012, p. 374, with comments by F.-X. TRAIN.

tion of the arbitral tribunal over the Government of Pakistan, dismissed the appeal (which entails that the award is enforceable in France).

The main reasons for the judgment of the Court of Appeal are the following.

First, the negotiations which led to the execution of the contract took place exclusively between Dallah and the Ministry of Religious Affairs and not the Trust, until the day preceding the execution of the contract. Secondly, the Ministry had sent two letters to Dallah during the period of performance of the contract (a fact that was mentioned in the judgment of the Supreme Court, only by Lord MANCE, who found it irrelevant). Thirdly, although the person who had signed the letter purporting to terminate the contract had done so on the headed paper of the Ministry and was also the chairman of the board of the Trust, there was no ambiguity about the fact that he had acted in his capacity as Secretary of the Ministry, since the Trust had ceased to exist one month earlier for lack of a new presidential decree prolonging its existence. The Court added that the creation of the Trust was purely formal, and that the Government had behaved as the actual Pakistani party during the economic operation, in particular when it notified the termination of the contract to Dallah.[8]

17. The case shows that although the English courts honestly tried to follow the French approach, it is so alien to British minds that they simply could not, or at least, did not, succeed. We now have two conflicting decisions, one in England and one in France. That is not the consequence of a difference in the applicable rules, but of an irreconcilable difference in the legal cultures of the judges.

In that case the courts of the seat, which were French, held the award to be valid, while the other courts, which were English, refused to recognise and enforce it. The opposite situation also exists, although it is most often avoided: the court of the seat annuls the award, nevertheless it is recognised in another country. I will deal with that situation in the third part of this article, because it leads to another kind of conflict: there is a conflict not only between two State judgments, but also between two awards, and that conflict is a material conflict.

[8] Is the French position shocking? At first sight it is, since the consent of the parties to arbitrate is the cornerstone of arbitration, and the Government of Pakistan had made clear its intention *not to be* party to the contract containing the arbitration clause. However, the refusal to recognise the award would have meant a denial of justice, since the Trust had disappeared and there was no defendant against which Dallah could have acted other than the Government. In addition, it is the Government's inaction that caused the Trust to cease to exist. The Government was under a duty of good faith to keep the Trust alive. Having failed to do so, it is justified that it had to bear the consequences. One could object that a lack of good faith does not constitute in itself a valid ground to bind a person to a contract to which it never consented to be a party. A more specific theory is needed. One could suggest the following analysis. By not renewing the decree creating the Trust, the Government deprived Dallah of the possibility of performing the contract and/or of claiming damages. This constituted a tort for which the Government was liable *vis-à-vis* Dallah. The only adequate remedy was to decide that proceedings could be brought against it and that it should (as a consequence) be exposed to an order for the payment of damages.

III. Conflicts between a Judgment and an Award

18. We have to distinguish here between a purely intellectual conflict and a material conflict. A purely intellectual conflict may easily occur each time claims are closely related, and only some of them fall within the scope of the arbitration agreement. The same issue, relevant to several claims may be decided differently by the arbitral tribunal with jurisdiction over certain claims, than a State court with jurisdiction over other claims (or over the same claims brought by or against other parties). But I won't insist on that situation because it is not specific to international arbitration.

19. What about a material conflict, between a judgment and an award deciding the merits of the same case? That may occur in the following circumstances: an arbitral tribunal, having its seat in country A, considers that it has jurisdiction over a dispute, and renders an award, although one party, in parallel, has seized a court in country B (in the domicile of the other party, for instance) and that court, considering that it has jurisdiction, renders a judgment which is incompatible with the award; it is a material conflict, which is the result of a different assessment of which of them, the court or the arbitral tribunal, has jurisdiction.[9]

Are there ways to prevent such a conflict? Various solutions have been proffered; I will mention four of them.

A. *Lis pendens*

20. Applying the doctrine of *lis pendens* is the solution that the Swiss Federal Court adopted in the famous *Fomento* decision in 2001.[10]

[9] There can also arise a situation in which, exceptionally, the materially conflicting decisions are rendered, respectively, by a court and by an arbitral tribunal, which both have jurisdiction, contrary to the usual situation, examined in the text, in which if the arbitration clause is valid and applicable it both creates arbitral jurisdiction and excludes the jurisdiction of State courts. That seems to have been the case of a conflict between a judgment rendered between two shareholders by the Court of Appeal of Ouagadougou, based on the articles of incorporation of a Burkinabe company and an award made in France between the same parties, based on a Memorandum of Understanding which contained an arbitration clause. The judgment had ordered one of the shareholders to transfer all its shares to another shareholder, which would hold 95% of the shares. The tribunal then decided that pursuant to the Memorandum that another shareholder should only hold 32% of the shares. The Court of Appeal of Paris set aside the award on the ground of a violation of international public policy, because it was irreconcilable with a foreign judgment that had been recognised in France *de plano,* on the basis of a bilateral treaty between France and Burkina-Faso (Paris, 17 January 2012, *Planor Afrique SA v. Etisalat*, *Rev. arb.* 2012, p. 569, with comments by M.-L. NIBOYET).

[10] Tribunal Fédéral suisse, 14 May 2001, *Fomento de Construcciones y Contratas SA v. Colon Container Terminal SA*, ATF 127 III 279; *Bull. ASA* 2001, p. 544, with comments by J.-M. VUILLEMIN, p. 439 and by M. SCHERER, p. 451; *Rev. arb.* 2001, p. 835, with comments by J.-F. POUDRET; *Arb. Int.* 2002, vol. 18, No. 1, p. 137, with comments by C. OETIKER.

One party, Fomento, a Spanish company, seized a court in Panama. The other party, Colon Container, of Panama, objected the contract contained an arbitration clause. However, the Panamanian courts considered that this exception had not been raised in due time. Colon Container then filed a request for arbitration, the seat being in Switzerland, according to the arbitration clause. The arbitral tribunal considered that it had jurisdiction and refused to stay the proceedings, in spite of the "exception de litispendance" raised by Fomento.

The *Tribunal Fédéral* annulled the award. It considered that the arbitral tribunal should have stayed the proceedings because there was a case of international *lis pendens*. Article 9 of the Federal Act on Private International Law (*Loi Fédérale de droit international privé*, LDIP) obliges a Swiss court to stay proceedings when a foreign court has already been seized of the same claims between the same parties. The provision applies, *per se*, to a Swiss court, not to an arbitral tribunal sitting in Switzerland. However, the *Tribunal Fédéral* considered that the objective of the rule is to avoid conflicting decisions, which is an objective of public policy and that, therefore, the rule should also apply to an arbitral tribunal.

21. The *Fomento* decision has been generally, although not unanimously, criticized. I venture, with caution, the following view: what was wrong with the judgment of the *Tribunal Fédéral* was that it did not take into account the specific nature of the issue pending before both the arbitral tribunal and the foreign court, namely the applicability of the arbitration clause. If one does take it into consideration, it appears, first, that the controlling point of view when the award is rendered, is not that of the foreign court, but that of the court of the seat, in this case the Swiss court, which has jurisdiction to decide whether the award is valid or not; including whether it was rendered by a tribunal having jurisdiction. Second, why should the *Tribunal Fédéral*, when exercising its control over the award, defer to the view of a foreign court? From the perspective of the court of the seat, whether the arbitral tribunal has jurisdiction over the dispute depends exclusively on the views of that court; the position of a Panamanian court is simply not relevant.

22. The criticism against the *Fomento* judgment convinced the Swiss legislator, which in 2007 introduced a new paragraph in Article 186 of the LDIP. The new provision allows the arbitral tribunal to rule on its jurisdiction regardless of whether the same cause is already pending before a Court or an arbitral tribunal.

Inasmuch as it applies to the case of an action pending before a foreign court, it re-introduces the risk of conflicting decisions, to the extent the foreign court does not itself consider that it has to stay its decision on its own jurisdiction until the arbitral tribunal has been seized and has ruled upon the validity or applicability of the arbitration clause.

B. Negative Effect of Competence-Competence

23. The second means to prevent a conflict is for the court seized of the merits of the case, before which the respondent objects that an arbitration clause exists, –

the Panamanian court in the *Fomento* case –, to decline jurisdiction, leaving it to the arbitral tribunal to decide first whether the clause is valid and applicable.[11]

Such a position, called the negative effect of competence–competence, is inscribed in French law. Pursuant to Article 1448 of the *Code de Procédure Civile*, "when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable." If the arbitral tribunal then assumes jurisdiction and decides on the merits, and the court of the seat confirms the jurisdiction, it is likely – although not certain – that the court initially seized will not take a different position, and will recognise the award.

C. Anti-Suit Injunctions

24. The third means to prevent a conflict, which is used by the English courts, is the anti-suit injunction.

When the seat of arbitration, agreed upon by the parties, is in England, and nevertheless a party seizes a foreign court, an English court may enjoin that party from pursuing its action before the foreign court, under the penalties of contempt of court.

Compared with *Fomento*, this is in a way the opposite means to solve the same problem: priority is given, even somewhat brutally, to the arbitral tribunal. However, contrary also to the solution based on the negative effect of competence-competence, that priority results, not from the fact that the court seized of the merits accepts it, but from the fact that the court of the seat of the tribunal imposes it. There will be no conflict because there will be no foreign judgment, if the claimant abides by the injunction.

25. This works when the foreign court belongs to a State that is not a member of the European Union (and perhaps one must add: a State that is not a party to the Lugano Convention). However, can an anti-suit injunction be addressed to a party that has seized a court of a member State of the European Union?

In a case called *West Tankers* the House of Lords hesitated and chose to refer the question to the Court of Justice of the European Union.[12] The contract in dispute contained a clause providing for arbitration in London. Nevertheless, the claimants, two insurance companies, sued West Tankers before the *Tribunale di Siracusa*, being the court of the place of the damage. Italian courts sometimes take a long time before declining their jurisdiction, hence the desire to make things go faster by issuing an injunction.

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[11] This option was probably not open in the situation of *Fomento* (independently of the contents of the Panamanian rules on arbitration), because the issue was not whether the arbitration clause was valid and applicable. The problem arose because the jurisdictional objection based on the arbitration clause was raised too late; and that is a purely procedural issue, which necessarily rested with the court seized.

[12] *West Tankers Inc v. Ras Riunione Adriatica di Sicurta*, "the Front Comor", House of Lords, [2007] 1 Lloyd's Rep. 391 (21 February 2007); *Rev. crit. dr. int. pr.* 2007, p. 434, with comments by L. USUNIER; *Rev. arb.* 2007, p. 223, with comments by S. BOLLEE.

26. The right answer was not easy to find. On the one hand, the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments excludes arbitration from its scope of application (article 1, §2 d), and, therefore, it could be argued that the Regulation could not constitute a bar to an English court protecting an arbitration on its territory. On the other hand, the Italian court had been validly seized and had, pursuant to the Regulation, the power to decide, itself, on its jurisdiction, which would include the power to decide whether the arbitration clause constituted a valid bar to its jurisdiction. The Court of Justice, which is generally hostile to anti-suit injunctions, decided that an anti-suit injunction in those circumstances was not acceptable (Judgment of 10 February 2009).[13]

27. The consequence is that a conflict may well arise in similar circumstances: if the court seized considers the arbitration clause to be null and void, while the arbitral tribunal, approved by the court of the seat, considers it valid, there will be two decisions on the merits – possibly two materially conflicting decisions.

An additional issue is whether in such a case the court of the seat of the tribunal is obliged to recognise the foreign judgment, even if it considers that the arbitration clause was valid and applicable. The answer seems to be in the affirmative, since the Brussels I Regulation does not provide for control over the jurisdiction of the foreign court, except in specific circumstances. It is, therefore, the award that will be sacrificed.

D. Exclusive Jurisdiction of the Court of the Seat to Decide on the Existence, Validity and Effects of an Arbitration Agreement

28. Precisely in order to avoid the conflict which the *West Tankers* judgment makes possible, a revision of the Regulation, which was recently under consideration would have included the deletion of the provision excluding arbitration from the scope of the Regulation.

What the Brussels Commission was contemplating was to give priority jurisdiction to the court of the seat of arbitration to decide on the existence, validity and effects of an arbitration agreement. The court of another European State, seized of the merits of a case, and before which the existence, validity or effects of an arbitration clause would be disputed, would have had to stay the proceedings until the courts of the seat – if seized by either party – decided the issue. Conflicts would thereby have been avoided within the European Union: the point of view of the courts of the seat on whether an arbitration could take place would have been imposed on all European countries.

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[13] ECJ, 10 February 2009, C-185/07, *Allianz SpA et Generali Assicurazioni General SpA v. West Tankers Inc.*, *LPA*, 16 March 2009, No. 53, p. 3, with comments by S. CLAVEL; *Procédures*, April 2009, No. 4, comm. 114, with comments by C. NOURISSAT; *Rev. arb.* 2009, p. 407, with comments by S. BOLLÉE; *Gaz. Pal.*, 18 July 2009, No. 199, p. 20, with comments by A. MOURRE/ A. VAGENHEIM; *D.* 2009, p. 981, with comments by C. KESSEDJIAN; *RTD civ.* 2009, p. 357, with comments by P. THÉRY; *Rev. crit. dr. int. pr.* 2009, p. 373, with comments by H. MUIR WATT; *JCP* G., 7 September 2009, No. 37, p. 49, with comments by P. CALLÉ; *JDI* 2009, p. 1281, with comments by B. AUDIT; *RTD com.* 2010, p. 529, with comments by E. LOQUIN.

This was of course criticised by authors who are in favour of the negative effect of competence–competence. Finally, the exclusion of arbitration from the scope of the Brussels I Regulation was maintained in the revised version of the Regulation, adopted on 12 December 2012.[14]

IV. Conflicts between Two Awards

29. Can there be conflicts between two awards? One must distinguish again between conflicts of a purely intellectual nature and material conflicts.

Intellectually conflicting awards can exist each time it has not been possible to bring closely related claims before a single arbitral tribunal. Two tribunals may have different views on the same facts involved in both procedures.

The remedy lies in a liberal attitude regarding the introduction, in a single procedure, of claims arising from different contracts, even between several parties, provided all the claims are connected and are covered by compatible arbitration agreements. This is a trend than can be observed in recent arbitration rules, although they remain rather timid.

Intellectually conflicting awards can also be rendered by one arbitral tribunal in a single case, because the tribunal has chosen to bifurcate the proceedings, and has realised, after rendering the first award (on the principle of liability, for instance), that it has made a mistake in the assessment of some facts. That is the main danger of bifurcation. Claude REYMOND, in a famous award, explained that the arbitral tribunal has the duty not to contradict itself. It cannot, therefore, correct the mistake.[15]

30. All this, however, is not specific to international commercial arbitration: what about material conflicts?

A material conflict can only exist when the awards concern the same parties, and the claims are either identical, or mutually exclusive. Normally that should not happen, because the tribunal which is seized of the second request should refuse to adjudicate the dispute.

The legal basis for the refusal is in my opinion lack of jurisdiction: the arbitration agreement is strong enough to give jurisdiction over a given dispute to one tribunal, but not to two tribunals. After one tribunal has been constituted, the effect of the arbitration agreement regarding the dispute is exhausted, it cannot be relied upon a second time. For that reason, if the second arbitral tribunal nevertheless accepted to adjudicate the dispute, its award should be set aside for lack of jurisdiction, even if it was rendered before the first tribunal had rendered its award. Any conflict between the two awards would thus be resolved. That analysis applies both

[14] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351 of 20 December 2012, p. 1.

[15] ICC award, case No. 3267 (1984), XII *Yearbook Com. Arb.*, p. 87 (1987), *Collection of ICC Arbitral Awards*, vol. II, p. 43.

to domestic and to international arbitration and it does not matter whether the tribunals have their seat in the same country or in two different countries.

31. There is, however, one situation in which it is normal that a second award be rendered and that is when the first award has been set aside by a court of the seat of arbitration: the claimant starts new arbitral proceedings.

Within the legal order of the seat there is no conflict: only the second award exists. Nor should there be an international conflict, because only the second award should be recognised in other countries. Article V(1)(e) of the New York Convention provides that recognition of an award may be refused if the award was set aside in its country of origin.

That is the rule in most countries; but it is not the rule in France. In a series of famous decisions – *Norsolor*,[16] *Hilmarton*,[17] *Putrabali*[18] – the French *Cour de cassation* decided that the fact that an award had been set aside in its country of origin is not a bar to its being recognised in France.

32. I take the *Putrabali* case as an example. Putrabali, an Indonesian company, sold a quantity of white pepper to the French company Rena. The pepper was lost in a shipwreck and Rena refused to pay the purchase price. Pursuant to the arbitration clause contained in the sales contract, Putrabali claimed the payment of the purchase price before an arbitral tribunal sitting in London, under the auspices of the International General Produce Association.

The arbitral tribunal decided that Rena was not under an obligation to pay the purchase price. However, under the English Arbitration Act a party can criticise the way English law was construed by an arbitral tribunal by seizing the High Court of Justice.

Putrabali did exactly that and the High Court decided that English law had been wrongly construed. As a consequence, a second award was rendered, correctly applying English law and deciding that Rena must pay. That second award was substituted for the first one.

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[16] Cass. civ. 1re, 9 October 1984, *Rev. arb.* 1985, p. 431, with comments by B. GOLDMAN; *JDI* 1985, p. 679, with comments by P. KAHN; *D.* 1985, jur., p. 101, with comments by J. ROBERT; *Rev. crit. dr. int. pr.* 1985, p. 551, 2nd case, with comments by B. DUTOIT.

[17] Cass. civ. 1re, 23 March 1994, *Hilmarton v. OTV*, *Bull. civ.* I, n° 104; *Rev. crit. dr. int. pr.* 1995, 356, with comments by B. OPPETIT; *JDI* 1994, p. 701, with comments by E. GAILLARD; *RTD com.* 1994, p. 702, with comments by E. LOQUIN; *Rev. arb.* 1994, p. 327, with comments by C. JARROSSON; *YCA*, vol. XX, 1995, p. 663.

[18] Cass. civ. 1re, 29 June 2007, *Putrabali* (2 decisions, No. 05-18053 and No. 06-13293), *Bull. civ.* I, Nos 250 and 252; with comments by J.-P. ANCEL, L'arbitrage : une juridiction internationale autonome, *RJDA* 10/07, p. 883 and *Rev. arb.* 2007, p. 507; M. de BOISSÉSON, *LPA* 2007, No. 192, p. 20; X. DELPECH, Admission de l'exequatur en France d'une sentence arbitrale étrangère annulée, *D.* 2007, p. 1969; E. GAILLARD, *Rev. arb.* 2007, p. 507; P.-Y. GUNTER, *Bull. ASA* 2007, No. 4, p. 826; P. PINSOLLE *Gaz. Pal.*, 22 November 2007, No. 326, p. 14; C. DEBOURG, *Gaz. Pal.*, 22 March 2008, Nos 82, 23, L. DEGOS, La consécration de l'arbitrage en tant que justice internationale autonome, *D.* 2008, p. 1429; L. WEILLER, *Rev. bras. arb.* 2008, No. 18, p. 114; P. PINSOLLE, The Status of vacated Awards in France: the Cour de Cassation Decision in Putrabali, *Arb. Int.* 2008, vol. 24, No. 2, p. 277.

33. Nevertheless, Rena sought *exequatur* for the first award in France, and obtained it. An appeal from the *exequatur* order was dismissed by the Court of Appeal of Paris. A *pourvoi en cassation* against the judgment of the court was also dismissed by the *Cour de cassation* (Civ. 1ere, 29 June 2007).

In the meantime, Putrabali had obtained *exequatur* of the second award. On appeal, however, the Court of Appeal quashed the decision granting *exequatur*: since *exequatur* of the first award had been obtained first, it was impossible to grant *exequatur* to the second award, both awards being irreconcilable. That result was approved by the *Cour de cassation* in a second decision of 29 June 2007.

The result remains nevertheless surprising: the second award that had, according to English judges, correctly applied English law, was denied enforcement, although the parties had chosen England as the seat of the arbitration and English law as the applicable law, and the first award, which had wrongly construed English law and had been set aside in England, was declared enforceable in France.

In the rest of the world it is the second award that is recognised.

34. The justification for the French position was expressed in the *Putrabali* decision in the following terms: "An international award, which is not integrated in the legal system of any State, is a decision of international justice, which must be reviewed pursuant to the rules in force in the country where recognition or enforcement is sought."

It is the idea of delocalisation, or even, maybe (the formula is somewhat ambiguous), the idea of integration in an international legal order. That international legal order had been analysed by Berthold GOLDMAN as the *lex mercatoria*, the law of the *societas mercatorum*.[19] More recently Emmanuel GAILLARD has developed the slightly different concept of an "ordre juridique arbitral".[20]

Whether one finds this doctrinal foundation of the solution convincing – and I personally do not – it is clear that the practical result is disastrous. However, there are situations in which the French solution has its merits. I can quote here two other cases, in which the Court of Appeal of Paris also accepted to recognise awards that had been annulled abroad: the *Chromalloy* case[21] and the *Bechtel* case.[22] In the first case the seat was in Egypt, in the second it was in Dubai. In both cases a foreign party obtained a favourable award against an instrumentality of the

[19] B. GOLDMAN, La lex mercatoria dans les contrats et l'arbitrage internationaux : réalité et perspective, *JDI* 1979, p. 475.

[20] E. GAILLARD, Aspects philosophiques du droit de l'arbitrage international, *Recueil des Cours* vol. 309 (2008), p. 49; rev. ed. Leiden/ Boston 2008.

[21] Paris, 14 January 1997, *Chromalloy*, *Rev. arb.* 1997, p. 395, with comments by P. FOUCHARD, p. 329; *JDI* 1998, p. 750, with comments by E. GAILLARD; *Bull. CCI*, vol. 9, No. 2, 1998, p. 15, with comments by J. VAN DEN BERG; *YCA*, vol. XXII, 1997, p. 691; *Mealey's Int. Arb. Rep.*, April 1997, vol. 12, B1 and B4.

[22] Paris, 29 September 2005, *Direction générale de l'aviation civile de l'émirat de Dubaï v. Société internationale Bechtel*, *Rev. arb.* 2006, p. 695, with comments by H. MUIR WATT; *Rev. crit. dr. int. pr.* 2006, p. 387, with comments by A. SZEKELY; *D.* 2005, pan., p. 3050, with comments by T. CLAY; *JCP* G. 2006, I, p. 148, No. 7, with comments by C. SERAGLINI; *Stockholm Int. Arb. Rev.* 2005, No. 3, p. 151, with comments by P. PINSOLLE, p. 159 and A. MOURRE, p. 172.

State of the seat. In both cases it was set aside by the local courts, for reasons which were clearly unconvincing: those courts were obviously partial. The French solution makes it possible to enforce in France a perfectly well-reasoned award, in spite of the fact that it has been annulled by a partial local court. Of course, it is imprudent for the foreign party to accept that the seat be fixed in a country which may easily become hostile, but often the party, when contracting, is not given a choice.

The real problem with the French position is that it does not distinguish between *Putrabali* type awards and *Chromalloy* type awards.

V. Conclusion

35. It is clear that decisional harmony is not always achieved and that conflicting decisions do exist. Could the situation be improved?

Concerning purely intellectual conflicts, one improvement would consist in adopting a less shy attitude regarding the admissibility of closely related claims in the same arbitral proceedings. As an example, the joinder of a third party is not accepted in ICC arbitration after an arbitrator has been appointed.[23] The result is that a second arbitration, involving the third party must be commenced and that leads to a risk of conflicting decisions. The Swiss Rules are more flexible (Article 4(2) of the Rules).

The adoption of flexible rules in case of multi-contract situations is also an improvement; fortunately, it is the new trend.

36. *As to material conflicts*, which are more embarrassing, their main source is the divergence of views between two States regarding either an arbitration agreement or an arbitral award.

Such a divergence cannot be totally eliminated: in various circumstances a State makes its own views legitimately prevail over the views of another State.

However, what seems to me to be a paradox is that sometimes the aspiration of a universal vision of international arbitration actually leads in fact to increased conflicts. I am thinking here of the *lex mercatoria*, or the more recent invention of an "ordre juridique arbitral". By advocating the notion that international arbitration is a legal order in itself, or is the judicial system of the *societas mercatorum*, one invites the courts of the country in which the recognition of an award is sought to consider the award in itself, as a product of the allegedly universal legal order and to disregard the views of the State in which the award was made; and that leads to the results that we have seen in the third part of this article, which I regard as harmful.

My final conclusion would therefore be: that the law of international arbitration is not completely separate from private international law; that the main objectives of private international law are relevant in the field of international commercial arbitration; and that among them, decisional harmony should not be forgotten.

[23] Art. 7(1), ICC Rules of Arbitration.

A SEMIOTICS OF PRIVATE INTERNATIONAL LEGAL ARGUMENT

Horatia MUIR WATT*

I. Introduction

1. The pool of concerns which, over time, have provided the foundations of private international law, appears not only limited but remarkably repetitive – and such repetition is generally claimed to be a sign of the field's peculiar jurisprudential robustness, setting it apart from the random trajectories of domestic, substantive law.[1] Indeed, the historiographical narrative is one of successive decline and revival;[2] oscillation between "revolution and evolution",[3] and migration and cross-fertilization of legal doctrines.[4] This narrative is based in turn on what is perceived to be a characteristic intertwining of axiology and methodology, whose patterns evolve – in kaleidoscopic fashion – as between binary poles.[5] However the pairs assemble and reassemble, local goals are pitted against the common good; private interests are opposed to public policy; international harmony prevails over, or bows, to internal coherence; sovereignty waxes and wanes as a guiding principle;

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[1] B. OPPETIT, Le *droit international privé, droit savant, Recueil des Cours* vol. 234 (1992), p. 331-434.

[2] P. GOTHOT, Le renouveau de la tendance unilatéraliste, *Rev. crit. dr. int. pr.* 1971, p. 1 *et seq.*

[3] S. SYMEONIDES, The American Choice-of-Law Revolution in the Courts: Today and Tomorrow, *Recueil des Cours* vol. 298 (2002) 9, at 66.

[4] For a transatlantic historiography, see D. BUREAU/ H. MUIR WATT, *Droit international privé,* 2nd ed., vol. 1, § 336 *et seq.*

[5] The most convincing account of the binary structure of private international law can be found in the "diptique" set out by D. BODEN, *L'ordre public: limite et condition de la tolérance. Recherches sur le pluralisme juridique,* doctoral thesis, Univ. Paris I, 2002.

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and territoriality loses and regains ground from the extraterritorial ambit of the law. These form the common professional vocabulary, welding together the "interpretative community" of private international (or "conflicts") lawyers, historically and geographically.[6]

2. For instance, in a given time and context (medieval post-glose, then mid-twentieth century American functionalism), policy analysis might be seen to mandate "unilateralist" methodology in one form or another, whereas a sense of transcendent values might be associated with multilateralism. Then patterns change, and, in another combination, human rights dictate their own scope of application and call for universalism, while multilateral conflict rules are perceived as a closed and somewhat parochial system. Natural law conceptions are swept away by legal positivism, only to be reinstated through fundamental rights; the virtues of convergence are reconsidered after decades of parochialism and *lexforism*; grand ideas on the global good supersede, before being reduced to, the interests at stake in commercial litigation, and so on. This does not prevent each consecutive stage of thinking from claiming to have achieved a final enlightenment, on a path of groping progression.[7] But then, the familiar pendulum swings between functionalism or policy analysis to "post-critical" rediscovery of the virtues of legal technique;[8] or back and forth from the public, supra-national function of conflict rules to a resolutely private perception of the interests involved.[9]

3. The most popular (Continental European) explanation for this legendary circularity of schools of thought in private international law lies in the "learned" nature of knowledge in this field, in which positive law is supposedly indebted to doctrinal constructions rather than the reverse.[10] However, whether or not scholastic modes of thought have a greater tendency to shift back and forth between received poles of wisdom than the more chaotic state of the art generated through

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[6] On the community of international lawyers as those who share as a *professional* practice of arguing, see M. KOSKIENNEMI, *From Apology to Utopia; The Structure of International Legal Argument* (first published 1989).

[7] See P. GOTHOT's excellent account of the "saga" of the conflict of laws, Simples réflexions à propos de la saga du conflit des lois, in *Mélanges Paul Lagarde*, Dalloz 2005, p. 343.

[8] R. MICHAELS, *Post-critical Conflict of Laws. From Politics to Technique*, Sciences-Po PILAGG seminar, forthcoming 2013; comp. similarly, K. KNOP/ R. MICHAELS/ A. RILES, From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style, *Stanford Law Review* 2012, vol. 64, No. 3.

[9] Similar tensions between divergent approaches appear *within* each of these methods, so that within multilateralism, characterization can take place *lege causae* or *lege fori*, *renvoi* can be allowed or not (and functionalism can crave or reject predictability as a value…). Identical poles, with analogous gravitational pull, can also be found within particular concepts. For instance, public policy may take the form of an exception of the general good within an essentially private-interest methodology, or may serve as the core of a public law, functional analysis. Rights may be private and territorially vested, or fundamental and of supranational source, and so on.

[10] See again, B. OPPETIT (note 1), (on private international law as "droit savant"), whose essentially methodological content is purported to set it apart and above the merely political.

the practice of litigation, it is also clear that this conviction is itself subject to the very circularity it seeks to explain. Emerging in the context of early twentieth century belief in the neutrality of the tools of the conflict of laws, supposedly removed by their function from political concerns, and embedded moreover in a resolutely "particularistic" conception of their goals, it rests on an increasingly out-dated description of a discipline which is now overwhelmingly codified throughout the world,[11] and which entertains complex relationships with the political objectives and strategies at work in federal arrangements, economic constitutionalism, globalization of the law, and human rights. There is surely room, therefore, for an alternative analysis. This could of course be achieved from various critical stances; indeed, the whole field could benefit from the insights gleaned from interdisciplinarity.[12] One possible avenue, explored in this contribution, might be to use the resources offered by a positive sociology of legal knowledge.

4. In "A Semiotics of Legal Argument",[13] Duncan KENNEDY proposes to lay the foundations of such sociology,[14] borrowing from language theory (in particular, the structuralism of SAUSSURE, LEVI-STRAUSS and PIAGET) to further the analysis of legal argument. His essay focuses on the practice of policy arguments,[15] in the context of private law adjudication, in cases where the law is affected by gaps, vagueness or contradiction, so that the legal issue cannot therefore (even arguably) be solved through formal or deductive processes of legal reasoning. His essential points are that, in such a context, legal arguments tend to be stereotyped, to come in conventional sets or clusters, and to operate through conventional modes of argument and counter-argument. Ultimately, the analysis shows the way in which such practice succeeds in generating the "experience of necessity" through which an apparently rational solution can be justified despite the inadequacy of available tools.[16]

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[11] S. SYMEONIDES, Codification and Flexibility in Private International Law (October 18, 2011), in K.B. BROWN/ D.V. SNYDER (eds), *General Reports of the xviiith Congress of the International Academy Of Comparative Law*, available at <http://ssrn.com/abstract=1945924>.

[12] See K. KNOP/ R. MICHAELS/ A. RILES (note 8).

[13] D. KENNEDY, A Semiotics of Legal Argument, in ACADEMY OF EUROPEAN LAW (ed.), *Collected Courses of the Academy of European Law*, vol. Ill. Book 2, p. 309-365, the Netherlands 1994. This piece, less the "European Introduction", was first published in 42 *Syracuse Law Review* 75 (1991). One of the aims of the present contribution is to generate debate – long overdue - on this piece of work in Continental European circles.

[14] The intellectual genealogy of this sociology is appended to D. KENNEDY's article in an instructive annex, p. 352-357.

[15] Policy arguments are defined as meaning arguments from principles and rights as well as instrumental or consequentialist arguments, as opposed to the deductive process of rule application.

[16] D. KENNEDY (note 13), at 324: "The objective, or more broadly the merely rational character of adjudication, its capacity to generate the effect of necessity, is an important building block in the construction of Western culture. Legal necessity is a model for necessity in general. With what tools do legal arguers generate the experience of necessity in cases that appear to require something more than the deductive application of rule to facts

5. For reasons which will be expanded below, this highly stimulating research into the semiotics of legal argument may have particular resonance in respect of the current state of European thinking in private international law. The question that underlies this article, then, concerns the various argumentative processes which work, consciously or not, to restrict the pool of concerns which constitute the identity of this field. It may well be that such processes account for the distinctive tendency of legal arguers to focus exclusively on the refinement of legal technique at the expense of theory, political economy, and all those issues with significant governance implications which should arguably constitute the crux of the discipline.[17] Indeed, perhaps it is the conventional pendulum metaphor itself which prevents any search beyond the stale stock of arguments about internal v. international harmony, flexibility v. predictability, formalism v functionalism, rules v policy, which provide the staple values in private international law argumentative practice and doctrinal discussion. Whatever the limitations of the pendulum metaphor, KENNEDY's analysis of patterns of legal argument immediately appears to fit the private international law context like a glove. A discussion for the reasons for which the linguistic analogy appears to be of particular relevance in private international law (II) sets the scene for a more detailed exploration of the analysis proposed by Duncan KENNEDY (III), which will then in turn prepare the way for some conclusions (IV).

II. The Relevance of a Legal Semiotics for (European) Private International Law

6. Undoubtedly, patterns of legal argument in the field of private international law correspond closely, even perhaps emblematically, to the linguistic model highlighted by Duncan KENNEDY. Firstly, as he explains, "it is crucial to understanding the article that it is about the choice between two definitions of an ambiguous rule, or between two possible solutions to a gap between rules, or between two conflicting rules. It is not about the application of rules to facts". The fit is perfect here because the issues discussed in the private international law context are indeed rarely the "application of rules to facts". The methodology in this area operates solely on issues of governing law or jurisdiction; having indicated the relevant legal regime, it leaves the scene to domestic substantive law, which will then implement its own, specific, "experience of necessity". This is true even in cases where deductive choice of law rules have been swept away by functionalism (or, transposed into European terminology, *lois de police*): although the facts may appear to be directly relevant in the latter context, they are only so to the extent that they provide information on the strength of the respective interests of the vari-

for their resolution? Necessity means that there is a non-deductive «correct», «objectively required», legal outcome to the problem of rule- definition."

[17] See our article, International Law Beyond the Schism, 2(3) *Transnational Legal Theory* (2011), p. 347–427.

ous States involved (and as such, fulfil a function entirely similar to that of predetermined connecting factors).

7. Secondly, explaining the possible ambit of an analysis of legal semiotics, Kennedy observes that "a large proportion of moral and political-philosophical discourse seems to be a somewhat elaborated version of the legal argument-bites"[18] […] "The attempt to plumb the normative «behind» has been consistently distorted by reliance on particular understandings of the «surface» or illusory present of legal argument." This description is particularly apt in the case of attempts by private international lawyers to identify the normative underpinnings of their discipline. As seen above, appeals to the values pursued through the international legal ordering of the private sphere are closely intermingled with issues of method; it is quite frequent to read, say, that the quest for "conflicts justice" – in which the pursuit of predictability, or "international legal harmony" overrides preference for particular substantive outcomes – commands recourse to multilateralism. Here, the "surface of legal argument" (the need for legal certainty), stems from a commitment to legal determinacy, or a certain conception of the "nature of law"), which it validates in turn.[19] Nowhere is this clearer than in the way in which twentieth century European legal doctrine has interpreted the works of SAVIGNY.[20] The (highly contested) "nature of legal relationships" supposedly validates (equally contested) perceptions of appropriate international legal ordering, while the tools thus chosen legitimate, in turn, the pursuit of further liberal concerns (security, freedom of choice).

8. Thirdly, the field of private international law has retained a distinctly "private law" flavour – or at least a particular attachment to the epistemological premises of the public/private divide, – blind to the upheavals affecting such premises in other areas of substantive law. Moreover, through its exclusive focus on method, the discipline is traditionally associated with "the jurisprudence of rules" – meaning its characteristic concern for the respective virtues of formal principle and open standards – and a conventional commitment to issues of process rather than substance. In all these respects, it embodies, quintessentially, the comparative American-European debate about the nature of adjudication, which in turn determines the ability and willingness of courts to substitute policy analysis for more formal components of deductive legal reasoning. It might then be asked, from the outset, why such an analysis should be relevant in the latter, more dogmatic context. KENNEDY himself supplies the answer, in addressing this potential objection in his "European Introduction". Among the reasons given, the most convincing in the field of private international law is linked to impact of policy-driven EU law, which in muddling the public/private divide also introduces policy analysis and proportionality into private law adjudication.

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[18] This and the following passages are taken from p. 11 *et seq.*

[19] "The analysis derives in a circular fashion "the surface of legal argument" from "the very «meta» commitments (to conceptions of the «nature» of law or legal determinacy) that the descriptions supposedly validate."

[20] See P. GOTHOT's analysis of the "saga" of the conflict of laws (note 7), showing how SAVIGNY's legal doctrine has become the crux of a largely fantasized account of progress towards methodological enlightenment.

9. Yet although now equipped with an explanatory introduction for the use of European lawyers, and despite its self-conscious use of "French theory", the work has had little echo among either scholars or advocates.[21] The "French paradox", according to which some of the most influential critique in French non-legal scholarship is all but ignored in the French-speaking legal world, is no doubt at work here. It is entirely true that even while policy argument has expanded over this side of the Atlantic, as predicted, so as to lend the law to more novel forms of legal critique, there is still very little European critical legal theory,[22] and private international law is certainly no exception.[23] The reasons for this inhibition provide a fascinating source of speculation: linguistics? Legal education? A form of collective espousal of the norm? Whether the preferred explanation is mere cultural path dependency, or, more radically, a split social subconscious, one suspects, as Kennedy suggests, that "exclusion from influence on European legal scholarship of the most advanced European critical thinkers in the structuralist and post-modern traditions may be more than an accident. It may be one of the mechanisms through which the undeveloped reconstitutes itself as the merely conservative".[24] This, surely, is sufficient reason to look further into the content of the linguistic analogy.

III. The Components of a Positive Sociology of Legal Argument

10. What, then, are the elements of the linguistic analogy helpful to understanding the patterns of argument – both at the surface, and, as seen above, in respect to its normative underpinnings – in private international law? Kennedy presents the

[21] In France, in particular, the attempt to introduce critique in the field of private law has met with fierce opposition: see, for the attempt, Ch. JAMIN, L'oubli et la science, regard partiel sur l'évolution de la doctrine privatiste à la charnière des XIX^{e} et XX^{e} siècles", *Revue trimestrielle de droit civil* 1994, p. 815 *et seq.*; and La rupture de l'Ecole et du Palais dans le mouvement des idées, in *Mélanges Moury*, 1998, vol.1, p. 69 *et seq.*; Ph. JESTAZ/ Ch. JAMIN, L'entité doctrinale française, *Dalloz* 1997, chronique, p. 167 *et seq.*; *contra*: L. AYNÈS/ P.-Y. GAUTIER/ F. TERRÉ, Antithèse de l'entité: à propos d'une opinion sur la doctrine, *Dalloz* 1997, *chronique*, p. 229 *et seq*.

[22] Quite the reverse, in fact. Much doctrinal activity is devoted to celebrating the *status quo*, or indeed its imagined past: see P. RÉMY, Eloge de l'Exégèse, *Droits* 1985/1, p. 115 *et seq*.

[23] For a (modest) attempt, see our article, International Law Beyond the Schism, (note 17).

[24] D. KENNEDY (note 13), at 14. The paradox described is well known. Theoretical texts about law written "from the outside" (by writers who are not professional lawyers), such as Derrida's "The Mystical Foundation of Authority", are ignored (in the sense of both missed and dismissed) in the teaching and publications of French lawyers, in favour of a body of insider professional knowledge composed of technique and dogmatics, known as "la doctrine". See our reflection, The epistemologial function of "la doctrine", in M. VAN HOEKE, *Methodologies of Legal Research*, 2011, p. 123.

"three basic elements to the proposed semiotics of legal argument" as follows. These are:

> "(1) the idea of reducing the «parole» of legal argument to a «langue» composed of argument-bites,
>
> (2) the idea of relating the bites to one another through «operations», and
>
> (3) the idea of «nesting», or the reproduction, in the application of a doctrinal formula, of the confrontation between argument-bites that the formula purported to resolve."

A. Pairing of Various Categories of Argument Bites

11. KENNEDY divides conventional policy arguments in domestic substantive law into various types, distributed between the substantive (morality, rights, expectations) and the systemic (institutional competence, administrability).[25] For instance, arguments relating to good faith will be about rights, morality or expectations, and are substantive; by contrast, arguments relating to the proper role of the courts in implementing principles (or the propriety of judicial law-making) are about institutional competence and are systemic; and so on. The categories KENNEDY proposes, largely evolved from a study of contract law, are neither exhaustive nor immune from change. He observes, for instance, that efficiency arguments, based on economic analysis, are a new arrival on the scene. In Continental European practice, a newcomer category is fundamental rights (either of European or national constitutional origin), which by virtue of the doctrine of horizontal effect are now routinely invoked in the course of private law litigation. The recent emergence of human rights arguments holds true too for private international law. But because the field stands (or claims to stand) aloof from the ordinary run of substantive domestic law concerns, policy arguments relating to the appropriate solution to a conflict of laws issue tend to fall into a slightly different scheme from the one KENNEDY proposes. In addition to the fundamental rights arguments – which may well be in the process of dismantling this more traditional scheme – they are typically (if not exhaustively) articulated around:

- *private law values* relating to individuals at risk from plural legal regimes (differentiating is fairness v. differentiating is discriminatory); expectation

[25] There is much more on argument-bites in D. KENNEDY's article, of which the content is far too rich to be reproduced here. In particular, "Argument-bites acquire meaning not only through their oppositional relationship to bites we generate through operations, and not only from their relationship to bites they support and are supported by, but also from the other members of the cluster. A cluster is a set of arguments that are customarily invoked together, when the arguer identifies his raw facts as susceptible of posing a particular kind of legal issue."

arguments are of course particularly frequent here (expectations are best protected by simple hard-and-fast rules v. expectations are best protected by a context-specific, case-by-case approach); or,

- *public law values* at stake in a culturally and politically pluralistic community (respect for alterity mandates recognition of, or deference to, foreign perspectives v. democracy requires giving primacy to overriding local interests); these may also include consequentialist arguments relating to the social or economic effects of a rule across the board (what are the requirements for the global governance of class actions, financial markets, *etc.*); or,

- *the nature of transnational legal ordering* (the legal world beyond the state should aim to ensure harmony – avoiding different outcomes as between different fora v. dissonance is the price of the coexistence of multiple regimes); these may of course include *administrability* arguments (applying a given connecting factor would be to risk generating contradictory legal outcomes for similarly situated claimants v. in a heterogeneous legal environment, *dépeçage* or issue by issue treatment is naturally the hallmark); or,

- *legal form*[26] (law should provide certainty v. rules should be flexible above all in order to respond to the complex interests at stake at the transnational level).

12. All these concerns may equally well be framed as argument-bites or as "support systems" (or secondary arguments). Moreover, categories are clearly porous: concerns about form (rules v standards) can be reframed as private law values (predictability v. flexibility); administrability concerns often involve a certain conception of transnational legal ordering, *etc*. It is as well, too, to bear in mind KENNEDY's caveat, which is to beware of the siren calls of "legal logic". Thus, "the play of bite and counter-bite settles nothing (except the case at hand). As between the bites themselves, every fight is a draw, and all combatants live to fight another day, neither discredited by association with the losing side nor established as correct by association with a winner. There are no killer arguments outside a particular context."

13. In the (highly simplified) example below, various arguments will be brought to bear under the above headings on the question of how best to deal with financial torts,[27] on which EC Regulation Rome II on the law applicable to non-contractual obligations is silent (without however having endorsed the British proposal to exclude them explicitly and altogether). Various options are open: apply the general rule in article 4 – 1 (law of the place of the harm); attempt to use the "escape clause" in article 4 – 3 (as the court thinks best); reason by analogy

[26] On the meaning of "legal form", see D. KENNEDY, Form And Substance In Private Law Adjudication, 89 *Harv. L. Rev*. 1685 (1976), p. 1687: "The jurisprudence of rules is the body of legal thought that deals explicitly with the question of legal form. It is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analysed in isolation from the substantive issues that the rules or standards respond to."

[27] See M. LEHMANN, Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers, *Rev crit. dr. int. pr.* 2012, p. 485.

with article 10-12 on quasi-contracts (law governing the underlying relationship); consider the issue to be excluded from the scope of the instrument and go back to common national rules; invent a new common rule, in line with the trend apparent in cases of other economic torts, in favour of the law of the affected market. The stereotyped argument pairs examined below will be restricted to the issue of whether financial torts should remain within the ambit of article 4 (law of the place of the harm). This is what they will tend to look like:

1. Expectations

PRO: This simple default rule is predictable for the claimants, who need to know where they stand, particularly when they are small investors acting against a stronger corporate party.

CON: This rule does not provide any certainty to issuers of securities, who are at particular risk of abuse and harassment by numerous, dispersed investors.

2. Administrability

PRO: This rule is easy to apply.

CON: This rule will lead to multiple simultaneously applicable laws to different claimants.

CON: It is highly problematic to determine the place of the harm in cases of electronic operations entailing financial losses with no specific geography.

3. Public Interests

PRO: It is in the strong public interest of the home state of the buyers to ensure that they are sufficiently protected.

CON: The state of conduct cannot ensure that its rules of conduct are properly sanctioned, so that the private attorney general function of such rules is frustrated.

4. International Legal Ordering

PRO: Any court with sufficient links has a title to regulate, so variable outcomes are a risk inherent in a pluralistic society/federalism. Parties who enter into cross-border transactions are aware of the risk of variation and adapt accordingly.

CON: The global governance of civil procedure requires thinking out a legal regime which is not biased against the use of class actions in the area of financial torts. If the final result depends upon the court seized, justice is random. This runs against a commitment to the rule of law.

B. Operations

14. The characteristic pairing of legal arguments takes the form of the formulation of maxim and countermaxim. "A competent legal arguer can, in many (most? all?) cases, generate for a given argument-bite at least one counter argument-bite that has an equal status as valid utterance within the discourse. While responding to an argument-bite with one of its stereotypical counter-bites may be wholly unpersuasive to the audience, it is never incorrect, at least not in the sense in which it would be incorrect to answer an argument-bite with an attack on the speaker's character or with a description of the weather".[28] The articulation of counter-arguments may take the form of various "operations" (denial of the initial premise; symmetrical opposition; "flipping", refocusing…).[29] These operations correspond to the various types of counter-argument conventionally perceived to be mandated by "legal logic".[30] The private international law example below concerns the recognition of foreign surrogacy agreements, and hence the status, in the forum State, of the children born of them. In such a case, which is the topic of considerable debate within and without a federal (or free movement) context, it is often asserted (under the heading of private law concerns) that, "it is immoral to go abroad in order to benefit from a surrogacy agreement that is prohibited at home. Therefore, no legal recognition should be given to the resulting relationship between the child and the biological gamete-provider".[31] The counter-arguer might then "flip" the argument, meaning that she would claim that concerns of morality leads to just the opposite result.
Thus, she might say:

> "No, it is immoral to penalize the children for acts of their parents, by refusing to recognize the parent-child relationship to which the surrogacy arrangement was intended to give rise."

She might, too, deny the assertion, by arguing on the same terrain that the opponent has "got it wrong", that there is nothing immoral about availing oneself of the opportunities, which are legally, provided elsewhere, particularly when the law protects the fundamental right to free movement[32]. Or she might counter-attack, without addressing the morality claim, by focusing in the potential effects of any

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[28] D. KENNEDY (note 13), at 336: "It is easy to fall into the error of believing that what I have been calling operations are a true «logic of legal discourse»."

[29] In more detail, the operations identified by D. KENNEDY are: 1. Denial of a (Factual or Normative) Premise; 2. Symmetrical Opposition; 3. Counter-Theory; 4. Mediation; 5. Refocusing on Opponent's Conduct (Proposing an Exception); 6. Flipping; 7. Level Shifting.

[30] *Ibid*, p. 336: "It is easy to fall into the error of believing that what I have been calling operations are a true «logic of legal discourse»".

[31] See the penultimate stage of the *Mennesson* saga in French private international law, before the forthcoming decision of the European Court of Human Rights: Cass civ 1re, 6 April 2011, *Rev crit. dr. int. pr.* 2011, p. 722, P. HAMMJE.

[32] See the *Blood* case, before the UK Court of Appeal: (*R. v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687.

refusal to recognize the child's status and invoking the primacy of the child's interests. In all these cases, a denial, flip or exception properly conducted according to the conventions governing the articulation of counter-argument provides legitimacy for an outcome that runs counter to an initial assertion.

15. Below, in tabular form is what various operations might look like. The question before the court is whether couples (or individuals) who have had recourse to a surrogacy arrangements abroad, be allowed to establish the parent-child relationship on their return home, when their home country prohibits surrogacy?

1. Private Law Arguments

- NO: This is immoral behaviour, typically a case of *fraude à la loi* (remember Reno divorces, or Princess de Bauffremont's miraculous change of nationality in order to obtain divorce). Public policy, as a moral order composed of foundational values of the forum, opposes this.

- YES (*Flipping*): Well, it would be far more immoral to penalize the children, whose status will be either incomplete or ineffective, for the acts of their parents. The child's overriding best interests shall prevail.

2. Public Law Arguments

- NO: Public policy, reflecting the democratic choices of the home community, opposes recognition. The prohibition, reflecting strong convictions of the community, would be rendered meaningless if people may circumvent it by law shopping/forum tourism.

- YES (*Counter-theory*):
Recognition of foreign-created family relationships is mandated by free movement in a federal context. Value concerns hide protectionist barriers which must yield.

- YES (*Counter-theory bis*):
Recognition of foreign-created family relationships is mandated by article 8 of the European Convention on Human Rights (see *Wagner*).

- YES (*Re-focusing and formulating an exception*): True, law shopping is not to be encouraged. However, once the child is born, it would be discriminatory not to recognize its status. After all, in the case of adopted children, the recognizing forum does not hesitate to override a prohibition in the law of the child's country of origin (the child's personal status.

16. All these counter-arguments potentially open space for pursuing the debate with a new, sub-set, of arguments (on what the child's best interests really are, or what exactly is mandated by free movement, the right to a family life, or equal treatment *etc.*).

It may be that the court will, in a first stage of the argument, condemn the parent's action for reasons of public policy (seen as democracy, morality, *etc.*), then in a second stage, nevertheless allow the relationship to be established, equally for reasons of public policy (seen as the supreme interests of the child). Indeed, because conflicts of laws connect legal systems with inevitably divergent techniques and political values, any solution is necessarily going to involve a choice between, on the one hand, imposing the forum's own values and assuming parochialism (or universalism), or, on the other hand, making a concession to cooperation and showing deference to the foreign, at the expense of internal coherence and perhaps even of subverting domestic policy. In other words, because private international law adheres simultaneously to two contradictory ideals – "international harmony", which pulls towards alignment on foreign outcomes, and "internal harmony", which pulls back towards local consistency, – pairs of argument-bites composed of an assertion of principle, then counter-argument through exception, are of particular frequency and significance. As seen above, the exception will very often take the form of an *ordre public* or public policy argument (which resurfaces now in the European context in motives of general interest). This in turn explains the frequent occurrence of the third element of D. KENNEDY's linguistic analogy, "nesting".

C. Nesting

17. The "nesting" phenomenon[33] corresponds to the re-appearance, at a later stage of the argument, of the initial conflict, which the arguer may well then deal with in entirely different terms, without feeling committed to initial stance. "«Nesting» is my name for the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle."[34] In such a case, it appears that "argument and counter-argument are presented as simply «correct» as applied to the general question, without this presentation binding the arguer in any way on the nested subquestion." For example, in a given (contract law) case, the

[33] See J. BALKIN, The Crystalline Structure of Legal Thought, 39 *Rutgers Law Review* (1986) 1.; J. BALKIN, Nested Oppositions, 99 *Yale Law Journal* (1990).

[34] D. Kennedy (note 13), at 344: "Nesting occurs as follows. Let us suppose that the court accepts an argument in favour of a defence of mistake which makes it look as though the defendant has won. But now suppose the plaintiff argues that the defendant's mistake was «unreasonable», meaning that a person of ordinary intelligence and caution would not have shot, under the circumstances, without more indication that he was in danger. «Nesting» is the reappearance of the inventory when we have to resolve gaps, conflicts or ambiguities that emerge when we try to put our initial solution to a doctrinal problem into practice. In this case, we first deploy the pro and con argument-bites in deciding whether or not to permit a defence of mistake. We then redeploy them in order to decide whether to require that the mistake be reasonable."

courts might in practice have chosen to honour pro-defendant arguments in creating a defence (mistake), but then to honour the pro-plaintiff (reasonableness) arguments in defining its contours. In other words, the judge might assert, in a first stage of the argument, that "«equitable flexibility is so important that it requires us to accept a defence of mistake here», and then turn around and state that certainty is so important that we are obliged to reject a «good faith» test in favour of reasonableness."

18. Taking this idea over into the field of the conflict of laws, it is quite apparent that nesting is a frequent occurrence in the interplay of principle and exception, which constitutes a staple of legal reasoning in this field. Public policy or escape clauses are two notable cases in which a powerful convention of legal argument allows the arguer to assert, first, a principle which appears to be rooted in the most elementary values, say, of private law (fair balance as between the parties), then to turn around and, in the name of those same values, assert exactly the contrary (under an exception of *ordre public*, or a judicial discretion conceded by the legislator) Take, for instance, the justifications given in the recitals of Regulation Rome II on the appropriate connecting factor in tort cases. The initial debate about the appropriate treatment of multistate torts opposes the place of harm and the place of conduct. The first wins the day, as against the more traditional attachment to the place of conduct, under article 4-1:

> "the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

This is because (Recital 16)

> "A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability."

However, in the next breath, it is perfectly acceptable to assert (Recital 34) in the name of the very same need " to strike a reasonable balance between the parties", that account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed. Hence article 17:

> "In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."

In the end, the court is practically free either to apply either the place of harm or the place of conduct.[35] The conflict which article 4 was designed to settle, reappears in identical terms.

19. Typically, nesting has also become apparent in cases of conflicts of laws involving fundamental rights, particularly in cases governed by EU law.[36] In addition, here, the proportionality test adds on a further level at which sub-nesting occurs, because of the division of labour as between the ECJ and national courts. The following example, taken from the ECJ's *Laval* case.[37] Here a Swedish trade union created a blockade at a building site to which Latvian workers had been posted by a Latvian firm, in order to pressure the Latvian employer into negotiations on the rates of pay for posted workers. Under Regulation Rome I, Latvian law was applicable to the employment contracts of the Latvian posted workers, including the level of wages.[38] But a conflict of laws reasoning was inadequate to solve the problem here, since it was overlain by a conflict of fundamental rights. Whereas the posting of workers took place under the aegis of the (Latvian) employer's foundational economic freedom to provide cross-border services, such a right was pitted against the (Swedish) workers' fundamental right to take industrial action in order to induce an alignment of the foreign workers' wages on the higher local standard. The legal issue is framed thus: is industrial action (designed to induce an undertaking to enter into a collective work agreement with a trade union and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State), a restriction of freedom to provide services under article 43?

20. The Court starts by asserting (§ 91) the fundamental right to take collective action as an integral part of the general principles of Community law. As it might be expected, however, "the exercise of that right may none the less be subject to certain restrictions". This might have led to a determination as to whether the right to provide cross-border services through the posting of lower-paid workers constituted or not a justified restriction. However, the reasoning does not take this road,

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[35] See (on the ambit of the category "rules of safety and conduct"), our contribution Rome II et les "intérêts gouvernementaux": pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle, in *Le Règlement Communautaire "Rome II" sur la loi applicable aux obligations non conractuelles*, CRIDON, 2008, p. 129.

[36] For another, recent, example see *conflictoflaws.net* (debate opened by G. CUNIBERTI) on the publication in the French/Italian press of Kate MIDDLETON's unauthorized topless pictures. In such a case, whichever way the conflict of laws is solved (French v. English law) and before whichever forum (French v. English court), it will not prevent the re-emergence of the initial conflict of rights (freedom of expression v. privacy). Whichever forum decides, it will no doubt give the greater weight to the value which weighs more heavily in its own view. Subsequent nesting will show up in the proportionality test.

[37] ECJ, 18 December 2007, C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others.* There is an enormous amount of Europe-wide commentary on this and its sister case, *Viking*. For our own attempt at a conflict of law analysis of these cases, see *Rev crit. dr. int. pr.* 2008, p. 356.

[38] The difficulty here is that the *Posted Workers' Directive* 1996 did not allow, as it was designed to do, an alignment of the posted workers' wages on local wages, due to unforeseen differences with the Swedish social model.

since the point of departure is reversed. Indeed, the fundamental right to take collective action is "as is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, […] to be protected in accordance with Community law and national law and practices". This leads, then, to consider the fundamental principles of Community law, which contains the freedom to provide services. Now, any "restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it". It is then up to the national court to decide if this condition is satisfied in the circumstances, in respect of the litigious industrial action taken in Sweden.

21. Thus, the nesting takes place as follows:

- In stage one, the terms of the conflict are set out (applicability of article 43 Treaty) and it is determined that industrial action is potentially a restriction to free provision of cross-border services.
- In stage two, it is accepted that such a restriction can nevertheless be justified, if in the public interest.
- In stage three, the national court must carry out the proportionality test, which conditions the legality of the restriction.

Each stage is separate from the preceding one and ultimately, the national court carrying out the proportionality test is free to judge – within that framework – that the restriction constituted by industrial action is reasonable.

STAGE ONE: Industrial action is a restriction to freedom to provide cross-border services within the meaning of article 43?

NO: Such action is a fundamental collective right guaranteed by the EU Charter and various other international instruments, and cannot be limited by competing economic considerations /*alternatively:* does not therefore come within the scope of Community law.	YES: Even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law. Article 43 EC is to be interpreted to the effect that collective action (such as that at issue in the main proceedings), constitutes a restriction within the meaning of that article (*Laval* § 90).

STAGE TWO: But such a restriction may be justified?

YES: Such a restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers.	NO: But only provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go

> beyond what is necessary to achieve that objective (proportionality test).

STAGE THREE: The national court must assess, afresh, whether other adequately efficient means were available to express workers right to put pressure on the employer.

IV. Ideas to Be Drawn from All This?

22. The first idea to be drawn from this avenue of reflection is that the mediation between polar opposites which plays out in the endless exchange of stereotyped argument-bites, is inherent in liberal legal thought. D. KENNEDY has shown, in other works, how the liberal paradigm leads to denial and apology, or attempts at conciliation and final non-choice.[39] Private international legal argument is no exception; indeed, the current tendencies in EU and fundamental rights law tend to accentuate, through the proportionality test, the balancing process in legal reasoning. Clearly, in the *Laval* example above, the double-staged nesting process results first from the emergence of fundamental rights discourse in private law adjudication, and the risk of collision among such rights (stage one), and then of the impact of the accompanying proportionality test (stage two), which ultimately pushes the conflict down-river (here, to the national court: stage three). However, a similar situation (less the multi-level jurisdictional dimension) occurs under more traditional methodology, when an asserted principle which wins the day (whether through its primacy within a constitutional hierarchy or through the ordinary operation of a choice of law rule) then in a second stage gives way to its contrary, in the name of the exception of public policy. Public policy (*ordre public*), which epitomizes "nesting" in the context of deductive reasoning, has always laid bare the conciliatory, back and forth mechanics of legal argument. D. KENNEDY emphasizes the equivalence between these two modes of legal argument (principle/exception and balancing), in respect of the nesting process:

> "Of course, it may be true that what the judge is «really» doing is «balancing» the conflicting policy vectors to determine just that spot

[39] The Structure of Blackstone's Commentaries, 28 *Buff. L. Rev*. 205 (1978-1979). In this article (at 210), D. KENNEDY takes as a premise about legal thinking that "the activity of categorizing, analysing, and explaining legal rules is an attempt to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world". As an instrument of "denial and apology", it is "an attempt to mystify both dominators and dominated by convincing them of the "naturalness", the "freedom" and the "rationality" of a condition of bondage". We… "need to account for the obvious fact that it has either not been experienced at all, or not acknowledged, by *any* of the succeeding generations of Western legal thinkers between the time of the sophists and the very recent past. Let us suppose that the reason for this has been that during that whole period there have existed processes of mediation, or denial, that have functioned to hide or disguise it from those engaged in the enterprise of legal thought."

> on the continuum" where the benefits of freedom to strike balance out the costs in terms of restriction to economic freedoms. However, if traditional lawyers will still prefer a principle and exception dichotomy, and remain unperturbed by the apparent irrationality of the nesting process, the explanation may simply be that "the nesting presentation is associated with «objectivity». Judges prefer it because it harmonizes with the stereotypically judicial pole in the judge/legislator dichotomy".[40]

In either case, the (liberal) attempt at conciliation reproduces the very conflict it is designed to pacify.

23. The second idea concerns the relationship between the claims of rationality and the conventions of legal argument. Private international law is traditionally perceived in continental Europe as a more noble discipline then its domestic (private law) counterpart, since it remains once-removed from the facts. As pure doctrine, it supposedly entertains more intimate links with legal logic. However, structural analysis suggests that such hyper-rationality must be seen for what it is, a social convention. In an instructive note, KENNEDY explains that

> "the source in structuralism of the idea of reducing legal argument to bites was Levi-Strauss's discussion of «bricolage» in the first chapter of The Savage Mind. Levi-Strauss relativizes the distinction between rationality or technical reasoning and the activity of myth-making. In spite of its pretensions to fit precisely whatever phenomenon it addresses, technical reasoning is inevitably the «jerry-building» (*bricolage*) of an edifice out of elements borrowed from here and there, elements initially meant for other purposes (and themselves therefore jerry-built of yet other, earlier bits and pieces). Legal argument, understood as the deployment of stereotyped pro and con argument fragments, seems a particularly good example of *bricolage* masquerading as hyper-rationality."

24. The third idea follows on KENNEDY's suggestion that the loan from structural analysis is designed to provide insights into the way in which law legitimates "passivity in response to the «crises of our time»".[41] In private international law, the available tools clearly fail in respect to crucial issues relating to the governance of private power in the international arena. Therefore, an inquiry into the practice of private international legal argument may be promising insofar that it serves both to highlight and explain the way in which a narrow set of circular, stereotyped concerns serves to legitimate private international law's passivity before the very difficulties which – either as a matter of highly practical import in the context of global societal, financial or ecological crises, or through significant contemporary challenges for legal theory – would seem to lie at its very heart.[42] In other words, a close scrutiny of the practice of legal argument may help understand the extent to

[40] D. KENNEDY (note 13), at 348.

[41] *Ibid*, p. 359.

[42] See "International Law Beyond the Schism" (note 17).

which certain concerns are prevented from surfacing. In continental Europe, policy analysis is often mistakenly thought to signify an open- ended pool of argument – anything goes. Not so, however! Argument-bites put forward in the name of policy are as stereotyped as their circle is restricted. This means, clearly, that the patterns of legal argument are such that they exclude more than they allow in novel concepts or ideas. Of course, this does not prevent the appearance of new argument-bites, from time to time. KENNEDY discusses the appearance of the efficiency argument in US policy discourse. Sufficient repetition introduces it into the conventional pool of available legal tools, perhaps as a "support argument" before it accedes to the status of maxim.

25. Take, then, as a thought experiment, an area in which existing legal tools are clearly inadequate to respond to the issues which arise. Which arguments are part of the conventional pool? Which are absent, or perceived as irrelevant to "legal logic"? One of the best known relates to the responsibility of multi-national corporations for misconduct on foreign territory. Thus, the current debate asks whether these corporate actors should be held accountable before the courts of the home state for human rights violations committed abroad.[43] Arguments now focus overwhelmingly on the legal technical issue of "extra-territoriality" (whether of jurisdiction for human rights violations, as in the US; or of (ECHR) human rights as applicable law, as in the EU). The pool of available arguments in this respect, when the question before the court is: "Should the home country provide a forum for corporate misconduct abroad?", is mainly composed of considerations about international legal ordering:

> - "In the absence of contrary Congressional intent, statutes such as the Alien Tort Statute, are presumed to be territorial in scope (see *Morrison*)"
>
> *Counter-argument* (by denial of premise): But the ATS raises a jurisdictional issue, and does not provide a cause of action (see also *Morrison*)
>
> *Counter-argument* (by counter-theory): There is nothing exorbitant about the courts of the domicile/seat extending their jurisdiction over corporations whose activities abroad generate fiscal revenues at home.
>
> - "Chaos would ensue if each country decides to exercise extraterritorial jurisdiction"
>
> *Counter-argument* (by flipping): Chaos ensues, rather, when nobody does, since this means that private transnational actors can get away with murder (see the chaos-flip arguments advanced by the dissent in CIJ *Germany v Italy, Greece intervening*)

[43] Under the *Alien Tort Statute* in the US; under Regulation Brussels I in the EU (where the problem lies less in the grounds for international jurisdiction than in respect of the "extraterritoriality" of European human rights).

- "Local remedies must first be exhausted" (or similar *forum non conveniens* argument)

Counter-argument (by denial in fact): But there are no effective local remedies (alternative forum) available here, since local courts are corrupt, or grossly underfunded, so that there is clear risk of denial of justice

And so on.

26. What, then, are the intruders, the arguments which are not used, or judged irrelevant? Here, there has been no reference to the way in which this debate on extraterritorial jurisdiction fits with other areas of international governance, particularly the framework for international investment. Curiously, while corporate misconduct has been closely linked to a human rights framework, it has not been connected to the investment framework, where it has its obvious place. One might imagine, however, the following exchange, in which a "systemic linkage" argument is invoked in the form of a counter theory:

NO: In international law, there is no state responsibility for the conduct of its *private* undertakings on foreign soil - and therefore no derivative or horizontal effect of similar obligations in the relationship between private entities	*Counter-argument* (by counter-theory): Whenever there is an investment treaty between the home and host countries, the home state is considered to have encouraged or endorsed the activities of its corporate undertakings which generate fiscal revenues, so that state responsibility in cases of corporate misconduct can be established exactly as in respect of public agents.

And so on. One wonders what prevents what might be called "systemic linkage" arguments, from surfacing in the pool? Perhaps assumptions about the public international/private international divide are still sufficiently powerful within the conventions of legal argument to prevent any interaction between the public international regime of investment law and the private transnational tort framework, or indeed between public international conceptions of the reach of State responsibility beyond national territory, and private international definitions of the extraterritorial reach of rights.[44]

[44] J. BOMHOFF, The Reach of Rights: "The Foreign" and "The Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements, 71 *Law & Contemp. Probs.* 39 (2008).

27. One could easily add other examples.[45] The only point made here is that a critical scrutiny of patterns of legal argument can open up new avenues of reflection, highlighting the potential role of academic discussion of novel legal tools as a way of broadening the pool of acceptable argument-bites before the courts. Such discussion is often sorely missing in European legal doctrine in private international law, which still tends to devote its energy to a largely descriptive if not dogmatic commentaries of codified texts or judicial cases. More broadly, the object of this contribution is to make better known Duncan KENNEDY's text, which, despite its European introduction, is still insufficiently considered in European legal theoretical debate. Private international law seems to be a good place to start. After all, neither the underdeveloped, nor indeed the "merely conservative" under which it may masquerade,[46] is inevitable!

[45] For another example, take the content of the ICJ's recent *Germany v Italy* decision, relating to the conflict between sovereign immunity and individual access to justice for human rights violations. The way in which the conflict is solved in favour of sovereign immunity is an extreme example of the operation of "legal logic" (see our critique, Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles: A propos de l'arrêt de la Cour internationale de justice, *Immunités Juridictionnelles de l'Etat (Allemagne c. Italie; Grèce (Intervenant)*, du 3 février 2012, *Rev. crit. dr. int. priv.* 2012, p. 539).

[46] See D. KENNEDY (note 13), at 324: "the exclusion from influence on European legal scholarship of the most advanced European critical thinkers in the structuralist and post-modern traditions may be more than an accident. It may be one of the mechanisms through which the undeveloped reconstitutes itself as the merely conservative."

SOLVING THE RIDDLE OF CONFLICTING CHOICE OF LAW CLAUSES IN BATTLE OF FORMS SITUATIONS: THE HAGUE SOLUTION

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"The battle of the forms that resulted from the exchange of standard form contracts has gone on for over one hundred years. Yet every attempt to end the battle has proven only to inflame it."[1]

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[1] C.A. STEPHENS, Escape from the Battle of the Forms: Keep it Simple, Stupid, [2007] *Lewis & Clark L. Rev.* 233. See also M.J. SHARIFF/ K. MARECHAL DE CARTERET, Revisiting the Battle of the Forms: a Case Study Approach to Legal Strategy Development, [2009] *Asper Rev. Int'l Bus. & Trade L.* 21: "The area of contract law described as the battle of forms is a perfect example of an area of law where the legal rules and their application are complex, contradictory, and/or inconsistently applied. Indeed, the battle of forms problem has been recognized as among the most «difficult problems for contract doctrine to resolve» and in some jurisdictions, has been described as «chaos» […]".

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I. Introduction

During contract formation parties frequently try at some stage of the negotiations to include their own standard terms in the contract. When the contract is transnational, these standard terms often contain choice of law clauses.[2] More often

[2] According to L. MISTELIS, "[m]ore than 80% of international contracts will normally contain choice of law clauses", in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS

than not, the standard forms will designate different laws: for example, one party having its place of business in Denmark provides for the application of Danish law to the contract in his standard forms; the other party, established in New York, respectively provides for the application of the law of New York. The question then is: Which law governs the contract? And, first of all, which law is applicable to the question of whether an agreement on the applicable law has been reached? Given that both parties preferred choosing the applicable law rather than leaving its determination to the application of objective connecting factors, should at least one of the choice of law clauses be respected, and if so, which one? Which law applies to decide the conflict of the choice of law clauses?

The issue of conflicting standard terms is widely discussed under the succinct expression *battle of forms*. At the substantive law level, different contract law systems give different answers to the question as to which party wins the battle. The outcome of the battle of forms will thus depend on the applicable law. The following contribution first provides a short overview of the solutions to battle of forms situations in a number of national legal systems, the CISG, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the Principles of European Contract Law (PECL), and the European Commission's Proposal of a Common European Sales Law (CESL) (II). In a second step, the proposals to solve the battle of forms issue at the Private International Law level, to be found in legal doctrine and national case-laws, will be set out (III). In November 2012, the Hague Conference on Private International Law proposed, in its *Hague Principles on Choice of Law for International Contracts*, a solution to the problem of conflicting choice of law clauses in standard terms in transnational situations.[3] The Hague solution will be presented, then illustrated using a series of transnational case scenarios involving battle of forms situations, and finally evaluated in comparison with the alternative solutions suggested in legal doctrine (IV). The contribution then addresses the further situation in which the conflicting choice of law is between domestic law regimes and the CISG (V) before drawing conclusions (VI).

(eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, München 2011, Art. 6, para. 12.

[3] Hague Principles on Choice of Law for International Contracts, Art. 6, available at <www.hcch.net>.

II. The Battle of Forms: A Short Survey of the Solutions under Different National Legal Systems, the CISG, the UNIDROIT Principles, PECL and CESL

In domestic laws, there are basically four[4] fundamentally different solutions for dealing with battle of forms situations.[5] In most countries, these solutions are judge-made. Code provisions or other statutory rules on the battle of forms are still rare, but examples are to be found in the Dutch Civil Code of 1992, the Polish Civil Code, the recent codifications of two of the three Baltic States[6] as well as in the Uniform Commercial Code (UCC). The UNIDROIT Principles, the PECL and the CESL also provide for explicit rules on the battle of forms.

[4] One could consider adding yet another solution according to which there is no agreement and consequently no contract if the standard forms differ, see G. DANNEMANN, The "Battle of Forms" and the Conflict of Laws, in F.R. ROSE (ed.), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, London 2000, p. 200 *et seq*. with reference to a German case. However, once the parties have started executing the contract, this solution seems to be no option anymore and recourse to the law of restitution is in practice extremely rare in these situations, see also G. DANNEMANN, *op. cit*., at 201 and fn. 6; E.A. FARNSWORTH, *Contracts* (4th ed.), New York 2004, para. 3.21: "Performance by both parties makes it clear that there is a contract"; C. KEATING, Exploring the Battle of the Forms in Action, [2000] 98 *Mich. L. Rev.* 2678, 2683: once both parties have started executing the contract, "[o]n the formation question, almost anyone would agree that there was a valid contract at some time"; A.D.M. FORTE, The Battle of Forms, in H.L. MACQUEEN/ R. ZIMMERMANN (eds), *European Contract Law: Scots and South African Perspectives*, Edinburgh 2006, 98 at 102: "the risk that no contract may be found to exist [is] a risk that a court faced with a dispute between two commercial parties might be reluctant to run".

[5] For comparative overviews, see L. MÖLL, *Kollidierende Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen im internationalen Vertragsrecht*, Frankfurt 2012, p. 87-152; E.A. KRAMER, "Battle of the Forms" – Eine rechtsvergleichende Skizze mit Blick auf das schweizerische Recht, in *Gauchs Welt – Recht, Vertragsrecht und Baurecht, Festschrift für Peter Gauch zum 65. Geburtstag*, Zürich 2004, p. 493; G. RÜHL, The Battle of the Forms: Comparative and Economic Observations, [2003] 24 *U. Penn. J. Int. Econ. L.* 189; G. DANNEMANN (note 4), at 200-206; E.H. HONDIUS/ Ch. MAHÉ, The Battle of Forms: Towards a Uniform Solution, [1998] 12 *Journal of Contract Law* 268; A. BOGGIANO, *International Standard Contracts – The Price of Fairness*, Dordrecht 1991, p. 67-70; A.T. VON MEHREN, The Battle of the Forms: A Comparative View, [1990] *Am. J. Comp. L.* 265; E.J. JACOBS, The Battle of the Forms: Standard term contracts in comparative perspective, [1985] 34 *I.C.L.Q.* 297.

[6] See *infra*, II.C. No such explicit rules exist in the Civil Code of Latvia or the Russian Civil Code of 1994.

A. Last-Shot Rules

In two leading cases, the English courts have solved battle of forms situations by applying the rule of general contract law according to which offer and acceptance must match (and the acceptance is required to be the "mirror image" of the offer).[7] If a declaration purported to be an acceptance refers to standard terms differing from those of the offer, it constitutes a new offer which is regarded as being accepted at the latest when the party receiving it starts performing the contract. It is thus, in principle, the last set of forms which prevails and which becomes part of the contract (*last-shot rule*).[8] The last-shot rule can also be found in a leading Scottish court decision.[9] Decisions in Australia have referred to the English precedents when discussing battle of forms issues and in Australian legal doctrine it is assumed that the courts might be willing to apply the last-shot rule.[10] It seems that the courts in South Africa also tend to apply a last-shot rule to battle of forms scenarios.[11] The Chinese Contract Act 1999 arguably provides a last-shot rule.[12]

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[7] *British Road Services Ltd* v. *Arthur V. Crutchley & Co. Ltd,* [1968] 1 All ER 811, (Court of Appeal, 5.12.1967); *The Butler Machine Tool Company Ltd* v. *Ex-Cell-O Corp. (England) Ltd,* [1977] EWCA Civ 9 (Court of Appeal, 25.4.1977).

[8] See *e.g.* G. TREITEL, *The Law of Contracts* (12th ed.), London 2007, paras 2-019 *et seq*.; E. PEEL, *The Law of Contract* (12th ed.), London 2007, paras 2-019 *et seq*.; see also A.D.M. FORTE (note 4), at 100 *et seq*.; J. POOLE, *Textbook on Contract Law* (10th ed.), Oxford, 2010, p. 60 *et seq*.; *Chitty on Contracts, Vol. I: General Principles* (13th ed.), London 2008, paras 2-034 *et seq*., and *Chitty on Contracts, Third Cumulative Supplement*, London 2011, para. 2-037; with further references to more recent cases.

[9] *Uniroyal Ltd* v. *Miller & Co Ltd*, 1985 SLT 101 (Outer House), according to M. HOGG and G. LUBBE the "classic Scots authority" on battle of forms situations, in R. ZIMMERMANN/ D. VISSER/ K. REID (eds), *Mixed Legal Systems in Comparative Perspective*, Oxford 2004, p. 58, para. 159. See however A.D.M. FORTE (note 4), with reference to a second Scottish case, *Roofcare Ltd* v. *Gillies*, 1984 SLT 8 (Sh Ct) (applying a first-shot rule), and with the conclusion: "the best that can be said is that it is presently unclear in Scots law which party's form, first or last, will win that battle", at 106 *et seq*.

[10] N.C. SEDDON/ M.P. ELLINGHAUS, *Cheshire and Fifoot's Law of Contracts* (8th Australian ed.), LexisNexis Butterworths Australia, 2002, para. 3.28: "Australian courts will probably follow the more traditional «matching» approach [*i.e*. require, like English courts, «the precise matching of acceptance to offer»] which has the merit of ease of application"; see also J. GOOLEY/ P. RADAN, *Principles of Australian Contract Law*, LexisNexis Butterworths Australia, 2006, paras 4.87 *et seq*., 4.89, 4.91 (leaving the answer open).

[11] *Ideal Fastener Corporation CC* v. *Book Vision (Pty) Ltd t/a Coulour Graphic* 2001 (3) SA 1028 (D), cited according to R. SHARROCK, *Business Transactions Law* (7th ed.), Cape Town 2007, p. 64. See however L.F. VAN HUYSSTEEN/ S.W.J. VAN DER MERWE/ C.J. MAXWELL, *Contract Law in South Africa* (2nd ed.), Alphen aan den Rijn 2012, para. 147: "The practical problem that arises when parties accept that there is a contract despite the absence of a final agreement as to incidental terms (*e.g.*, in the so-called battle-of-forms situation) has not received much attention in South African law"; in the same sense A.D.M. FORTE (note 4), at 107: "The South African law of contract seems to have tended to ignore the battle of forms debate"; M. HOGG/ G. LUBBE (note 9), at 58-59.

[12] See its Art. 30 and 31 and BING LING, *Contract Law in China*, Hong Kong et *al*. 2002, para. 3.039.

Last but not least, Art. 19 of the CISG is understood as a last-shot rule in some court decisions as well as by many commentators, notably, but not exclusively, in Common Law jurisdictions.[13]

If the standard terms that were last referred to contain different or additional terms that *do not materially alter* the terms of the offer when compared to the terms first employed, in a certain number of yet other contract law systems the contract is also concluded with the modifications of the terms last referred to (*i.e.* a last-shot rule is then applied).[14] However, in practice very few standard terms will contain only non-material modifications when compared to the terms used by the other party. In most, if not almost all situations the standard terms will differ with respect to substantial issues (such as, *e.g.*, the law applicable to a transnational contract).[15]

Under last-shot rules, the forms that were last referred to prevail *in total* over any other forms that were previously referred to. Previous references to other standard terms are without effect and to be disregarded.

B. First-Shot Rules

According to another approach, it is in principle the first set of standard forms used during the contract negotiations that will prevail. The main representative in Europe for a *first-shot rule* is Art. 6:225(3) of the Dutch Civil Code. According to this provision, if both the offer and the acceptance refer to different standard terms, the second set of standard terms are to be disregarded except if the party submitting the second set of terms expressly rejects the terms of the offer. According to the

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[13] See *e.g.* US District Court of Illinois 7.12.199, 99 C 5153, available at <www.unilex.info/case.cfm?id=423>; OLG Linz 23.3.2005, CISG-online 1376. E.A. FARNSWORTH (note 4), at para. 3.21; A.D.M. FORTE (note 4), at 115; F. FERRARI, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (eds) (note 2), Art. 19, paras 15 *et seq*.; L. MÖLL (note 5), at 115 *et seq*. with numerous references in fn. 481, p. 123, and p. 184; for numerous further references, see U. SCHROETER, in P. SCHLECHTRIEM/ I. SCHWENZER (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed., by I. SCHWENZER), Oxford 2010, Art. 19, para. 35 and fn. 118-119.

[14] Art. 2.1.11(2) UNIDROIT Principles, Art. 2:208(2) PECL, § 2-207(2)(b) UCC, Art. 6:225(2) of the Dutch Civil Code, Art. 6:178(2) of the Lithuanian Civil Code. See also Art. 19(2) CISG, Art. 31 of the Chinese Contract Act. – Art. 39 of the CESL, on the other hand, does not distinguish between terms materially altering the terms of the contract and terms concerning issues of minor importance. The CESL thus avoids the difficult task of drawing a line between the two categories of terms, which is certainly a good idea. For the "vast amount of litigation [in the USA] devoted to determining whether particular terms result in such «surprise or hardship» as to materially alter the contract", see E.A. FARNSWORTH (note 4), at para. 3.21.

[15] See for the CISG *e.g.*: W.A. STOFFEL, La formation du contrat, in *The 1980 Vienna Convention on the International Sale of Goods, Lausanne Colloquium of November 19-20 1984,* Zürich 1985, p. 73: "des conditions générales qui ne concernent pas au moins un ou plusieurs, sinon tous les points, énumérés dans l'art. 19 al. 3 n'existent guère en pratique"; E.A. FARNSWORTH (note 4), at para. 3.21; for the UCC *e.g.* C.A. STEPHENS (note 1), at 246; for Chinese law: BING LING (note 12), at para. 3.037.

dominant opinion in the Netherlands, the requirement in Art. 6:225(3) of the Dutch Civil Code that the refusal be "express" excludes that it is made only in standard terms.[16] Ideally, this rule shall lead to an explicit exchange between the parties as to which standard terms will eventually prevail.

In the USA, under certain circumstances the UCC can also lead to the integration of the first standard forms employed.[17]

Under first-shot rules, the forms that were first referred to prevail *in total* over the forms that were subsequently referred to. Later references to other standard terms are in principle to be disregarded. Art. 6:225(3) of the Dutch Civil Code, *i.e.* the main representative of this solution in European private law, explicitly confirms this result by stating: "Where offer and acceptance refer to different general conditions, the second reference is without effect […]."

C. **Knock-Out Rules**

According to a third approach, conflicting standard terms knock each other out and standard terms are to be disregarded when, and as far as, they contradict each other. *Knock-out rules* are applied by the French *Cour de cassation,*[18] the German Federal Court,[19] and the Supreme Court of Austria.[20] The largely dominant opinion in Swiss legal doctrine also advances the proposal of a mutual knock-out of

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[16] See *e.g.* C.B.P. MAHÉ, in D. BUSCH et *al.* (eds), *The Principles of European Contract Law and Dutch Law: A Commentary*, Nijmegen/ The Hague 2002, p. 123-124, paras 2 and 3.

[17] See § 2-207(1) in conjunction with Sect. (2)(a), (b) or (c) of the UCC and under the further condition that the acceptance is not "expressly made conditional on assent to the additional or different terms", Sect. (1) *in fine*.

[18] Cour de cass. (comm.) 20.11.1984 *(Société des constructions navales et industrielles de la Méditerranée c. Société Freudenberg)*, Bull. 1984 IV No. 313; see also F. TERRÉ/ Ph. SIMLER/ Y. LEQUETTE, *Droit civil, Les obligations* (9th ed.), Paris 2009, para. 122: "En cas de contradiction entre les clauses contenues dans les conditions générales de chacune des parties - par exemple entre les conditions générales de vente et les conditions générales d'achat - les deux stipulations s'annulent".

[19] Bundesgerichtshof (BGH) 26.9.1973, *BGHZ* 61, 282, 286 *et seq*. = *NJW* 1973, 2106, 2107; Oberlandesgericht (OLG) Köln 19.3.1980, *Betriebs-Berater* 1980, 1237; BGH 20.3.1985, *NJW* 1985, 1838, 1839 *et seq*. (English translations of the 1980 and 1985 decisions in B. MARKESINIS/ W. LORENZ/ G. DANNEMANN, *The German Law of Obligations, Vol. I: The Law of Contracts and Restitution*, p. 61-63, case 13 and case 16); BGH 23.1.1991, *NJW* 1991, 1604, 1606; BGH 24.10.2000, *NJW-RR* 2001, 484; see also J. BASEDOW, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2, Schuldrecht – Allgemeiner Teil - §§ 241-432* (6th ed.), München 2012, § 305, para. 105; J. BECKER, in H.G. BAMBERGER/ H. ROTH (eds), *Kommentar zum Bürgerlichen Gesetzbuch*, *Bd. 1* (3rd ed.), München 2012, § 305, paras 81 *et seq.*; C. GRÜNEBERG, in *Palandt, Bürgerliches Gesetzbuch, Kommentar* (71st ed.), München 2012, § 305, paras 54 *et seq*.

[20] Oberster Gerichtshof (OGH) 7.6.1990, *Juristische Blätter* 1991, 120 = *IPRax* 1991, 419. See also P. RUMMEL (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, 1. Band, Wien 2000, § 864a, para. 3.

contradicting standard terms.[21] The new Estonian Code of Obligations[22] as well as the new Civil Code of Lithuania[23] both explicitly adopt knock-out rules for battle of forms scenarios, as well as, since the year 2000, the Polish Civil Code (for contracts concluded between companies).[24] The UCC uses a knock-out rule as a fall-back solution.[25] The UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the proposed Common European Sales Law all solve battle of forms situations using knock-out rules.[26] Last but not least, many authors on the European continent, but also in other parts of the world, suggest applying a knock-out rule under the CISG.[27] The Draft

[21] E.A. KRAMER, in E.A. KRAMER/ B. SCHMIDLIN (eds), *Schweizerisches Zivilgesetzbuch, Band VI, 1. Abteilung, 1. Teilband*, Bern 1986, Art. 1, para. 160; *idem* (note 5), at 493 *et seq*.; A. KUT, in A. FURRER/ A.K. SCHNYDER (eds), *Handkommentar zum Schweizer Privatrecht, Obligationenrecht, Allgemeine Bestimmungen* (2nd ed.), Zürich 2012, Art. 1, para. 58; I. SCHWENZER, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (6th ed.), Bern 2012, para. 45.15; Th. PROBST, in P. JUNG/ Ph. SPITZ (eds), *Bundesgesetz gegen den unlauteren Wettbewerb (UWG),* Bern 2010, Art. 8, para. 9 *et seq.*; A. MORIN, in *Commentaire Romand, Code des obligations, Vol. I* (2nd ed.), Bâle 2012, Art. 1, para. 172; distinguishing different scenarios: E. BUCHER, in *Basler Kommentar, Obligationenrecht I, Art. 1-529* (5th ed.), Basel 2011, Art. 1, paras 66-69.

[22] § 40 (Conflicting standard terms) of the Estonian Code of Obligations provides (in English translation): "(1) If, upon entering into a contract, the parties each refer to their own standard terms, the contract is deemed to have been entered into under the terms which are not in conflict with each other. The provisions of law concerning the type of contract concerned apply in lieu of any conflicting terms. (2) In the case of conflicting standard terms, the contract is not deemed to have been entered into if one party has explicitly indicated before the contract is entered into or without delay thereafter and not by way of the standard terms that the party does not deem the contract to have been entered into. A party does not have this right if the party has performed the contract in part or in full or has accepted performance by the other party".

[23] Art. 6.179 of the Civil Code of Lithuania (in English translation): "Conflict of standard conditions. Where a contract is concluded by an exchange of standard conditions between both parties, it shall be considered that the contract is concluded on the basis of the standard conditions which are common in substance unless one party clearly indicates in advance a disagreement with the standard conditions proposed by the other party, or informs the other party without delay that it is opposed to the other party's standard conditions." On this provision V. MIKELĖNAS et *al., Lietuvos Respublikos civilinio kodekso komentaras. 6 knyga. Prievolių teisė. I dalis*, Vilnius 2003 (V. MIKELĖNAS et *al., The Commentary of the Civil Code of the Republic Lithuania. Book 6. Law of Obligations. Part I, Vilnius*), Art. 6.179, paras 1-3.

[24] § 385 of the Polish Civil Code.

[25] § 2-207(3) of the UCC.

[26] Art. 2.1.22 UNIDROIT Principles, Art. 2:209 PECL, Art. 39 CESL.

[27] See *e.g.* U. SCHROETER, in P. SCHLECHTRIEM/ I. SCHWENZER (eds) (note 13), Art. 19, para. 38 with numerous references in para. 36 and fn. 121-124; U. MAGNUS, Last Shot vs. Knock Out – Still Battle over the Battle of Forms Under the CISG, in R. CRANSTON/ J. RAMBERG/ J. ZIEGEL (eds), *Commercial Law Challenges in the 21st Century. Jan Hellner in memoriam*, Stockholm Centre for Commercial Law Juridiska institutionen 2007, p. 200 (*in fine*); J. BECKER, in H.G. BAMBERGER/ H. ROTH (eds) (note 19), § 305, para. 83; W.A. STOFFEL (note 15), at 75; *CISG Advisory Council Opinion Number*

Chinese Civil Code also contains a knock-out rule[28] (instead of the last-shot rule in Art. 30 and 31 of the Contract Act 1999 which is currently in force).

Under knock-out rules, the standard terms of neither party prevail. The existing black letter rules establishing knock-out rules thus provide that "the contract is deemed to have been entered into under the terms which are *not in conflict with each other*"[29] or "that the contract is concluded on the basis of the standard conditions which are *common in substance*"[30] or that "the contract may be concluded according to the agreed clauses of contract and those *standard-form clauses with substantially similar content*".[31] Under knock-out rules "[t]he general conditions form part of the contract *to the extent that they are common in substance*".[32]

D. Hybrid Solutions

§ 2-207 of the UCC combines elements of first-shot, last-shot and knock-out rules, the precise solution depending on the circumstances of the case.[33] In other jurisdictions, the above-mentioned general rules may be displaced by different solutions under certain circumstances. In Dutch law, for example, if a party *expressly rejects* the application of the standard forms to which the first reference

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13: Inclusion of Standard Terms under the CISG, Rule 10. – The question was left open by the German Federal Court in BGH 9.1.2002, *NJW* 2002, 1651, 1652.

[28] Art. 867 (Conflict of standard clauses), see LIANG HUIXING, *The Draft Civil Code of the People's Republic of China*, English Translation, Leiden/ Boston 2010.

[29] § 40(1) of the Code of Obligations of Estonia.

[30] Art. 6.179 of the Lithuanian Civil Code, see also Art. 385 § 1 of the Polish Civil Code.

[31] Art. 867 of the Draft Civil Code of the People's Republic of China, see also Art. 2.1.22 of the UNIDROIT Principles.

[32] Art. 2:209(1)2 PECL, Art. 39(1) CESL (emphasis added).

[33] § 2-207(1) abandons, in principle, the last-shot rule and "marked the end to the common law's mirror image rule", see *e.g.* C. KEATING (note 4), at 2684. However, a *last-shot rule* still applies if "acceptance is expressly made conditional on assent to the additional or different terms", Sect. (1) *in fine,* and under the further conditions that the offer does not "expressly limit acceptance to the terms of the offer", Sect. (2)(a), that the terms of the acceptance do not "materially alter" those of the offer, Sect. (2)(b), or that no notification of objection to the terms of the acceptance is given in due time, Sect. (2)(c). On the other hand a *first-shot rule* applies under Sect. (1) in conjunction with Sect. (2)(a) if "the offer expressly limits acceptance to the terms of the offer", or (b) the terms of the acceptance "materially alter" those of the offer or (c) "notification of objection to them" is given, unless the "acceptance is expressly made conditional on assent to the additional or different terms", Sect. (1) *in fine*. Finally, a *knock-out rule* applies if the contract is not formed under Sect. (1) or (2) but conduct of both parties "recognizes the existence of a contract", in particular if they start executing the contract; see *e.g.* E.A. FARNSWORTH (note 4), at para. 3.21; C.A. STEPHENS (note 1), at 237 (for the "Pre-Code-Situation"), 246, 250 (for the use of "the old last-shot rule), and 251 (for the knock-out rule in Sect.(3)). For § 2-207 of the UCC in practice, see C. KEATING (note 4).

was made and if the standard terms differ with respect to major points of the contract, a knock-out rule will apply instead of the first-shot rule; if there is an express refusal and if the alterations in the second set of standard terms are of minor importance, a last-shot rule applies instead of the first-shot rule.[34]

Under hybrid solutions, but also in some jurisdictions providing first-shot or last-shot rules, the rule that eventually applies may thus very much depend on the circumstances of the case.[35]

III. The Battle of Forms in Private International Law: Diversity of Opinions and Much Legal Uncertainty

A. Introduction

If a transnational contract contains a choice of law clause, the first question is whether the choice of law is permitted and whether it needs to meet special requirements at the Private International Law level (for example that "[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case"[36]). These questions are to be decided according to the PIL of the forum.

The second question is whether the parties have *actually agreed* on the applicable law. Nowadays, it is well established that an agreement on the applicable law constitutes a second contract, to be analysed separately from the main (for example construction or sales) contract.[37] The question then is: if the law

[34] C.B.P. MAHÉ (note 16), at 123-124, paras 2 and 3.

[35] Further complications may arise if one or both of the parties explicitly state in their standard forms that they refuse to accept standard terms differing from their own terms (so-called *Abwehrklauseln*, "rejection clauses"). Some contract law systems, such as the PECL and the CESL regard such declarations as relevant only when made explicitly and not by way of standard terms, Art. 2:209(2)(a) PECL, Art. 39(2)(a) CESL; see for German law BGH 20.3.1985, *NJW* 1985, 1838, 1839 *et seq*. and BGH 23.1.1991, *NJW* 1991, 1604, 1606: applying the knock-out rule if there are rejection clauses in standard terms. See for English law *e.g.* E. PEEL (note 8), 2-021: "The most that the draftsmen can be certain of achieving is the stalemate situation in which there is no contract at all. Such a situation will often be inconvenient […]". – For a "Canadian *battle of the forms* case-law summary", see M.J. SHARIFF/ K. MARECHAL DE CARTERET (note 1), at 30 *et seq*. It seems that the courts in Canada are reluctant to follow any of the theories vigorously and are sceptical in particular with regard to strict first- or last-shot rules.

[36] See, *e.g.*, Art. 3(1) 2nd sent. of the Rome I Regulation; Art. 2 of the 1955 Hague Convention; Art. 4(1) of the Hague Principles, etc.

[37] See *e.g.* Art. 3(5) of the Rome I Regulation; R. FREITAG, in Th. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht –EuZPR/EuIPR, Kommentar*, Bearbeitung 2011: Rom I-VO, Rom II-VO, München 2011, Art. 3 Rom I-VO, para. 9; F. FERRARI, in F. FERRARI/ E.-M. KIENINGER/P. MANKOWSKI/K. OTTE/ I. SAENGER/ R. SCHULZE/ A. STAUDINGER (eds), *Internationales Vertragsrecht, Kommentar* (2nd ed.), München 2012, Rom I-VO, Art. 10, para. 4; F. VISCHER/ L. HUBER/ D. OSER, *Internationales Vertragsrecht*

applicable to the main contract was purportedly designated during the contract negotiations, which law applies to the question of whether an agreement on the applicable law has actually been formed and whether this agreement is valid?

If, during the contract negotiations, only *one law* was purportedly designated as the law applicable to the contract, it is recognized in international choice of law instruments that "consent is to be determined by reference to the law that would apply if such consent existed".[38] In other words the putatively chosen law applies in order to determine whether the parties agreed on the applicable law and whether the agreement is valid.[39] For example Art. 10(1) of the Rome I Regulation (on "Consent and material validity") states that "[t]he 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 Regulation if the contract or term were valid." Art. 2(3) of the 1955 Hague Convention on the Law Applicable to International Sales of Goods reads: "Les conditions, relatives au consentement des parties quant à la loi déclarée applicable, sont déterminées par cette loi."[40] Similar rules are to be found in national statutes on PIL.[41]

The issue is much more complicated and controversial when the parties designate in their respective standard forms not one but *different laws* to govern the contract, which is frequently the case when both parties use standard terms in transnational contracts.[42] If both parties to a transnational contract[43] use standard

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(2nd ed.), Bern 2000, para. 139; J. KROPHOLLER, *Internationales Privatrecht* (6th ed.), Tübingen 2006, § 52 II 2. For a critical view, see H. STOLL, Das Statut der Rechtswahlvereinbarung – eine irreführende Konstruktion, in *Rechtskollisionen, Festschrift für Anton Heini zum 65. Geburtstag*, Zürich 1995, p. 429.

[38] Compare: Hague Conference on Private International Law, Choice of Law in International Contracts, Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contract, Prel. Doc. No 1, October 2012, para. 65.

[39] Some authors call it a"bootstrap-rule", *Benjamin's Sale of Goods* (7th ed.), London 2006, para. 25-034; *Chitty on Contracts* (note 8), at para. 30-059.

[40] The Convention was drawn up in French only. See also Art. 10 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (not in force): "(1) Issues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law are determined, where the choice satisfies the requirements of Article 7, by the law chosen. If under that law the choice is invalid, the law governing the contract is determined under Article 8."

[41] See in particular Art. 116(2) of the Swiss Act on PIL: "L'élection de droit […] est régie par le droit choisi"; "Die Rechtswahl […] untersteht […] dem gewählten Recht".

[42] See *e.g.* the Austrian case OGH 7.6.1990, *IPRax* 1991, 419 (Austrian and German choice of law clauses); the German case Amtsgericht (AG) Kehl 6.10.1995, *NJW-RR* 1996, 565 (Italian and German choice of law clauses); or the English case *O.T.M. Ltd.* v. *Hydranautics* 2 Lloyd's Rep. 211 (Q.B. Com.: Parker, J.) cited according to G. DANNEMANN (note 4), at 206.

[43] For the question as to when a contract is to be regarded as "international", see *e.g.* Art. 1(1) and (2) of the Hague Principles: "1. These Principles apply to choice of law in international contracts […]". 2. For the purposes of these Principles, a contract is international unless the parties have their establishments in the same State and the

forms, and if these standard terms designate different laws to govern the contract, which law then applies to decide the battle of forms and, consequently, which law applies to the choice of law agreement and – if this agreement is valid – to the main contract?[44]

This issue has so far never been explicitly addressed in a black letter rule, neither in the Rome I Regulation[45] nor the 1955 Hague Sales Conventions nor the 1986 Hague Convention on the Law applicable to Contracts for the International Sale of Goods,[46] nor in any national PIL statute. Given the complexity of the issue, the courts have so far often tried to avoid or circumvent the issue of the law applicable to the choice of law agreement or they simply applied the *lex fori*.

B. Proposals for a Solution

1. Applying the lex fori

A first solution could be found in solving the battle of conflicting choice of law clauses in standard forms according to the *lex fori*. This approach was eventually applied by some courts confronted with complex issues of choice of law in diverging standard forms,[47] and it has also been suggested by a minority opinion in the UK and Switzerland.[48]

In order to support this solution, it has been argued that both parties preferred to choose the applicable law rather than have it determined through

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relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State".

[44] See on this issue: G. DANNEMANN (note 4), at 206 *et seq*.; A. DUTTA, Kollidierende Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen, *ZVglRWiss* 2005, 461; L. MÖLL (note 5), at 153 *et seq*., 188 *et seq.*; S. MAIRE, *Die Quelle der Parteiautonomie und das Statut der Rechtswahlvereinbarung im internationalen Vertragsrecht*, Basel 2011, p. 151 *et seq.* For an overview of the case-law, see *e.g.* L. MÖLL (note 5), at 201 *et seq.*

[45] *Dicey, Morris and Collins on the Conflict of Laws*, *Vol. 2* (15th ed.), London 2012, para. 32-165: "if both sets of standard terms contain choice of law clauses, but choose different laws, then the Rome [Regulation] provides no solution".

[46] The 1986 Hague Convention is not yet in force.

[47] However, the *lex fori* was often applied without stating this explicitly, for references see L. MÖLL (note 5), at 203 and n. 777; see also the court decisions presented by M.J. SHARIFF/ K. MARECHAL DE CARTERET (note 1).

[48] J. FAWCETT/ J. HARRIS/ M. BRIDGE, *International Sale of Goods in the Conflict of Laws*, Oxford 2005, paras 13.60-13.61with references; the application of the *lex fori* is also considered in *Dicey, Morris and Collins on the Conflict of Laws* (note 45), at para. 32-103: "In these circumstances the only laws which could provide an answer are the *lex fori* or the law which would govern the contract in the absence of an express choice of law", see also para. 32-165; *ibid*, at para. 32-164: "English and Australian courts have tended to apply the *lex fori* to determine what the terms of the contract were"; M. KELLER/ J. KREN KOSTKIEWICZ, in *Zürcher Kommentar zum IPRG* (2nd ed.), Zürich 2004, Art. 116, para. 43; see also the references in A. DUTTA (note 44), at 464.

objective connecting factors. Instead of ignoring the choices altogether,[49] the law of the forum may play "a residual and mediating role".[50]

Applying the *lex fori* is however an "imperfect solution" even in the eyes of its proponents, "and reliance on the law of the forum raises an obvious forum shopping objection"[51] (in the same case, depending on the forum chosen by the claimant, English courts would, for example, apply a last-shot rule, whereas French, German or Swiss courts, for example, a knock-out rule.) The forum is often chosen for procedural reasons and there is not necessarily a link between the contract and the *lex fori*.[52] What is more, since the *lex fori* is unknown when the contract is formed, this approach results in considerable uncertainty until a case is eventually brought before the courts.[53] Last but not least, modern PIL instruments very much suppress the role of the forum in determining the consent to a choice of law, and rightly so. For example, under Art. 3(5) and 10(1) of the Rome I Regulation "invoking the *lex fori* is no longer an option".[54]

2. Knock-Out Rule at the PIL Level. Using Objective Connecting Factors Instead

According to a second opinion dominant in English legal doctrine and, in the past, also in Germany, if the parties use conflicting choice of law clauses in their standard terms the choice will be ineffective and the applicable law be determined according to objective connecting factors.[55]

In support of this solution, it has been argued that there is no agreement on the applicable law, and not even the appearance of an agreement, if both parties

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[49] See the second proposal, *infra* 2.

[50] J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 48), at para. 13.61 (p. 675).

[51] J. FAWCETT/J. HARRIS/ M. BRIDGE (note 48), at para. 13.61 (p. 675).

[52] S. MAIRE (note 44), at 155.

[53] D. MARTINY, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10, IPR* (5th ed.), München 2010, Art. 3 Rom I-VO, para. 106; M. AMSTUTZ/ N.P. VOGT/ M. WANG, in *Basler Kommentar, Internationales Privatrecht* (2nd ed.), Basel 2007, Art. 116, para. 47; R. HAUSMANN, in *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch, EGBGB/IPR*, Berlin 2011, Art. 10 Rom I-VO, paras 35-36.

[54] G. DANNEMANN (note 4), at 210; see also A. DUTTA, (note 44), at 464; L. MÖLL (note 5), at 207; D. MARTINY, in *Münchener Kommentar, Band 10* (note 53), Art. 3 Rom I-VO, para. 13.

[55] L. COLLINS (gen. ed.), *Dicey, Morris and Collins on the Conflict of Laws* (note 45), at para. 32-103; C.M.V. CLARKSON/ J. HILL, *The Conflict of Laws* (3rd ed.), Oxford 2006, p. 184; *Benjamin's Sale of Goods* (note 39), at para. 25-034 *in fine*; less determined: *Chitty on Contracts* (note 8), at para. 30-059: the above solution "has been suggested"; J. VON HEIN, in Th. RAUSCHER (ed.) (note 37), Art. 3 Rom I-VO, para. 43; R. HAUSMANN (note 53), Art. 10 Rom I-VO, para. 36; Ch. VON BAR, *Internationales Privatrecht*, *Zweiter Band*, München 1991, para 475. – See also the German case AG Kehl 6.10.1995, *NJW-RR* 1996, 565 = CISG-online 162.

want to have different laws applied. This solution also has the advantage of being simple, clear and its results are easily foreseeable for the parties.[56]

However, if one party designates the law of A to govern the contract and the other the law of B, "rejecting both choices may defeat the expectation of both parties, and any third parties relying upon the contract. In other words, the fact that both parties cannot have their preferences respected is not obviously a sound reason for saying that we should respect neither."[57]

3. Use of the Law Applicable in the Absence of a Choice to Determine the Prevailing Choice of Law Clause

According to a third approach, the battle of forms shall be decided under the law that would be applicable in the absence of choice. This law then decides whether any standard forms prevail, or whether the conflicting choice-of-law clauses knock each other out. If one set of standard forms prevails, the law chosen in these terms shall then apply to the choice-of-law agreement[58] (and – if the choice is valid under this law – eventually also to the main contract).

This approach has been criticized for splitting the applicable law between a first law applicable to the battle of forms in general (first step) and a second law, determined in the first step, and then applicable to analysing the existence of an agreement on the applicable law (second step);[59] the battle of forms is then decided (in the first step) by a law that may eventually not be applicable since, in the end, a choice of the applicable law may be accepted and this law applied (in the second step).[60]

4. Analysing the Choice of Law under the Laws Chosen Respectively. Solving Potential Conflicts by Way of a Knock-Out Rule

Following a fourth opinion, the inclusion of each respective set of standard terms (including the choice of law clause) shall be analysed separately under the law designated in those terms. If neither of the terms passes this test, objective connecting factors apply. If one of the terms passes it, the law chosen in these

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[56] See also L. MÖLL (note 5), at 207.

[57] J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 48), at para. 13.61 (p. 675); for further arguments against this approach, see A. DUTTA (note 44), at 465 *et seq*.

[58] O. LANDO, *Int. Enc. Comp. L., Vol. III: Private International Law*, Ch. 24: Contracts, Sect. 84; W.-H. ROTH, *Internationales Versicherungsvertragsrecht*, Tübingen 1985, p. 578; following a comprehensive analysis, this solution has recently again been suggested by L. MÖLL (note 5), at 219 *et seq*., 232 *et seq.* with a well-argued proposal. This approach is also partially used under the solution suggested by A. DUTTA (note 44).

[59] M. AMSTUTZ/ N.P. VOGT/ M. WANG, in *Basler Kommentar IPR* (note 53), Art. 116, para. 47.

[60] D. MARTINY, in *Münchener Kommentar, Band 10* (note 53), Art. 3 Rom I-VO, para. 106; R. HAUSMANN (note 53), Art. 10 Rom I-VO, para. 36.

terms shall apply to the choice of law agreement. Should, on the other hand, both designated laws reach the conclusion that the respective terms were included in the contract (and the respective laws validly chosen), the choice of law clauses will knock each other out, or the conflict could be solved by taking inspiration from the rule governing the battle of forms under the *lex fori*, in particular if it applies a knock-out rule; in this case, objective connecting factors should then be applied.[61]

This approach is complicated and its results may be fortuitous.[62] It has also been said that it favours parties referring to jurisdictions using a first- or last-shot approach (as opposed to parties designating a law using a knock-out rule).[63] When some of the proponents of this approach suggest having recourse to the *lex fori*, all the above mentioned arguments against applying the *lex fori*[64] apply here as well. It has further been argued, and rightly so, that this approach tends to ignore that either there is a choice of law agreement or there isn't; to apply two laws in parallel in order to determine whether there is consent would lead to the existence (or the non-existence) of two rather than one contract on the applicable law.[65] Last but not least it is hardly convincing that the choice of law in one of the standard terms should be respected if the other standard terms do *not* form part of the contract under the law they designate, whereas recourse to objective connecting factors should be made if under both of the designated laws the standard terms (and the choice of law clauses they contain) are validly integrated into the contract.[66]

5. Comparing the Rules on the Battle of Forms under the Chosen Laws. Knock-Out as Residual Rule

According to a fifth proposal, regard should be had to the solutions to battle of forms situations under the laws designated in the standard forms of both parties.[67] The situation is uncomplicated, according to this proposal, if both designated laws provide the same solution to the battle of forms. If under both laws, conflicting standard terms knock each other out, the choice of law clauses would annul each other and the applicable law would be determined by objective connecting factors.

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[61] G. DANNEMANN (note 4), at 210; D. LOOSCHELDERS, *Internationales Privatrecht – Art. 3-46 EGBGB*, Heidelberg 2004, Art. 27, para. 31; S. EGELER, *Konsensprobleme im internationalen Schuldvertragsrecht*, St. Gallen 1994, p. 202 *et seq.*; O. SIEG, Allgemeine Geschäftsbedingungen im grenzüberschreitenden Rechtsverkehr, *RIW* 1997, 811, 817; S. TIEDEMANN, Kollidierende AGB-Rechtswahlklauseln im österreichischen und deutschen IPR, *IPRax* 1991, 424, 425 *et seq.*; W. MEYER-SPARENBERG, Rechtswahlvereinbarungen in Allgemeinen Geschäftsbedingungen, *RIW* 1989, 347, 348.

[62] S. MAIRE (note 44), at 155.

[63] A. DUTTA (note 44), at 471, 478.

[64] *Supra,* 1.

[65] F. VISCHER/ L. HUBER/ D. OSER (note 37), at para. 156; A. DUTTA (note 44), at 470 ; S. MAIRE (note 44), at 155; L. MÖLL (note 5), at 214 *et seq.*

[66] A. DUTTA (note 44), at 470.

[67] A. BONOMI, in *Commentaire Romand – Loi sur le droit international privé, Convention de Lugano,* Bâle 2011, Art. 116, para. 49.

If on the contrary both designated laws applied last-shot rules, the choice of law clause in the standard terms of the party who fired the last shot should prevail. The situation is more complicated if both laws designate different rules when it comes to dealing with the battle of forms. The only solution to this situation would be a mutual knocking out of the contradictory choice of law clauses.[68] In the case of a knock-out of the choice of law clauses, the applicable law is to be determined by objective connecting factors. When looking for support for this recourse to a knock-out rule as a residual rule, reference to the UNIDROIT Principles and the PECL is made, both of them providing knock-out rules (though at a substantive law level).[69]

This approach achieves very reasonable results in all kinds of battle of forms situations without giving preference to any of the parties or any of the laws designated. If this rule is phrased as a specific PIL rule, it is possible to avoid any recourse to the *lex fori*. – When it comes to actually applying this approach, the challenge lies in determining the precise solutions that foreign laws provide for the battle of forms situation for the case under examination.

6. Combining the above Solutions No. 5 and No. 3

A sixth approach combines the above solutions No. 5 and No. 3: If both designated laws use a last-shot rule, the choice of law clause in the standard forms introduced last shall prevail. If both laws use knock-out rules, the choice of law clauses knock each other out.[70] So far, the approach is similar to the one presented *supra*, 5.

If both laws designate different rules for dealing with the battle of forms, the law that decides the battle of forms shall, according to this approach, be determined through objective connecting factors, *i.e.* according to the rules applicable in the absence of a choice (first step). The law thereby determined shall then decide the battle (second step). If this law uses a last-shot rule, the law designated in the last shot shall prevail. If it uses a knock-out rule, there is no choice of law and objective connecting factors apply instead (compare the solution *supra*, 3.).[71]

To give an example: A German company submits a request for services to a service provider established in England. Both parties use standard terms designating the law of their respective jurisdictions to govern the contract. The English party fires the last shot. English law uses a last-shot, German law a knock-out rule. Both laws thus designate different rules when it comes to dealing with the battle of forms. At this stage it is suggested to use objective connecting factors (instead of the knock-out rule which is suggested under the approach presented *supra*, 5.). Under many PIL systems (such as, *e.g.* Art. 4(1)(b) of the Rome I Regulation), this would lead to the application of the law of the service provider, in

[68] A. BONOMI (note 67), Art. 116, para. 49. This solution coincides with the solution at the substantive law level in the jurisdiction for which Bonomi made this proposal.

[69] A. BONOMI (note 67), Art. 116, para. 49.

[70] A. DUTTA (note 44), at 475.

[71] A. DUTTA (note 44), at 476 *et seq*.

the example: English law. Under English law a last-shot rule applies and the service provider's standard terms prevail. The choice of law agreement would thus be governed by English law.

This solution achieves very reasonable results indeed.[72] It is, however, complex to the extent that not every judge, not being particularly trained in private international law, might be capable, and willing, to follow its complexity,[73] let alone parties who are not trained in law at all. A black letter rule trying to adopt this approach would necessarily have to be complex.

IV. The Hague Solution

A. Introduction

The above analysis shows the high degree of uncertainty that currently exists when the parties designate different laws in their standard terms. Court decisions on this issue are rare and the doctrine is divided. When comparing laws it is a frequent experience to discover three, sometimes four fundamentally different solutions for solving a precise legal problem. With regard to the battle of form in PIL, six[74] different solutions, some of considerable complexity, could be identified. For parties to international contracts in this situation, it is highly unpredictable which law will ultimately govern their contract.

In November 2012, a Special Commission of the Hague Conference of Private International Law approved the *Hague Principles on Choice of Law for International Contracts* (in the following: "the Hague Principles").[75] One of the main aims of this instrument is to promote party autonomy and legal certainty with respect to the law governing transnational contracts. Given the uncertainty in battle of forms situations, the Special Commission decided in its November 2012

[72] U. SPELLENBERG, in *Münchener Kommentar, Band 10* (note 53), Art. 10 Rom I-VO, para. 169; see also the overall positive evaluation by S. MAIRE (note 44), at 157.

[73] S. MAIRE (note 44), at 157: "sehr kompliziert".

[74] In legal doctrine, even more proposals can be found: (7.) A. BOGGIANO, International Standard Contracts – A comparative study, *Recueil des Cours* 170 (1981), 9, 41: analogous application of Art. 19 of the CISG, interpreted as a knock-out rule. (8.) D. UNGNADE, Die Geltung von Allgemeinen Geschäftsbedingungen der Kreditinstitute im Verkehr mit dem Ausland, *Wertpapier-Mitteilungen* 1973, 1130, 1132: preference to the choice of law clause of the party required to effect the characteristic performance of the contract. For arguments against these proposals see L. MÖLL (note 5), at 208-210.

[75] www.hcch.net. The final text of the Hague Principles and the official commentary are yet to be accepted by the Council. The approval is expected for April 2014. See on the Hague Principles O. LANDO, The Draft Hague Principles on the Choice of Law in International Contracts and Rome I, in *Festschrift Hans van Loon*, p. 305-316 (forthcoming); S. SYMEONIDES, The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, *Am. J. Comp. L.* (forthcoming), French language version in *Rev. crit. dr. int. pr.* (forthcoming).

meeting to include this issue in its considerations and to introduce a specific provision addressing this problem. It states:

> "Article 6 – Agreement on the Choice of Law and Battle of Forms
>
> 1. Subject to paragraph 2,
>
> a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
>
> b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.
>
> 2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1."

Art. 6(1)(b) of the Hague Principles addresses, for the first time in black letter rules, the issue of the law applicable to choice of law in battle of forms situations. When deliberating the provision that eventually became Art. 6 of the Hague Principles, the Special Commission used a series of case scenarios. The following chapter adopts the same approach using scenarios in order to illustrate the functioning of Art. 6 of the Hague Principles.

B. Case Scenarios

1. Scenario 1: Choice of Law Clause in the Standard Forms of One Party Only [Art. 6(1)(a) of the Hague Principles]

> *Scenario 1:* One of the parties to an international service contract[76] designates the law of the Canadian Province Quebec as the law applicable to the contract in its standard forms. The other party's standard terms do not provide a choice of law clause.

The starting point for the analysis of the first scenario is Art. 6(1)(a) of the Hague Principles: If the law applicable to the contract was designated during the negotiations, the question of whether a valid agreement on the applicable law was is "determined by the law that was purportedly agreed to". "Once the consent is confirmed by that law, all issues relating to the remainder of the main contract are then assessed under the chosen law as the *lex causae*, not as the putatively applicable law."[77] The Principles do not establish a formal requirement as to the

[76] For international sales contracts with respect to which the CISG enters into consideration, see *infra*, V.

[77] Hague Conference on Private International Law (note 38), Prel. Doc. No 1 of October 2012, para. 65.

choice of the applicable law.[78] The choice can very well be made in standard forms, just as in scenario 1.[79]

This first case thus falls within the scope of application of Art. 6(1)(a) of the Hague Principles. Given that only one law was designated during the contract negotiations, this law *purportedly agreed to* determines whether there was an *actual agreement* on the choice of law clause. The special provision on battle of forms in lit. (b) of Art. 6(1) of the Hague Principles does not apply since it is limited to situations in which both "parties have used standard terms designating different laws". In the first scenario, "whether the parties have agreed to a choice of law is [thus] determined by the law that was purportedly agreed to", Art. 6(1)(a), *i.e.* the law of Quebec.

2. Scenario 2a: Both Designated Laws Apply Last-Shot Rules [Art. 6(1)(b) 1st alt. of the Hague Principles]

> *Scenario 2a*: A makes an offer designating in its standard terms a Common Law jurisdiction (other than English law) containing a last-shot rule;[80] B declares acceptance providing in its standard terms the application of English law. B fires the last shot.

In legal doctrine it has been argued that in a scenario such as case 2a, there is no consensus on the applicable law. The choice of law clauses in both parties' standard terms should thus be disregarded and the law governing the contract were to be determined by way of objective connecting factors.[81]

The Hague Principles choose a different approach to deal with this situation. In its November 2012 Meeting, the Special Commission assumed that in transnational contracts, choice of law (and choice of jurisdiction) clauses are

[78] *Supra* (note 38) Prel. Doc. No 1, October 2012, para. 65.

[79] See for the similar approach under the Rome I Regulation: *Dicey, Morris and Collins on the Conflict of Laws* (note 45), at para. 32-165: "If one only of the sets of terms contains a choice of law provision, then the law purportedly chosen will be the putative applicable law"; F. FERRARI in *Internationales Vertragsrecht* (note 37) Rom I-VO, Art. 3, para. 24: "auch die in Formularen oder allgemeinen Geschäftsbedingungen erfolgte Bestimmung des anwendbaren Rechts stellt eine ausdrückliche Rechtswahl dar, und dies selbst dann, wenn die allgemeinen Geschäftsbedingungen ihrerseits stillschweigend vereinbart worden sind" (with numerous further references); R. HAUSMANN (note 53), Art. 10 Rom I-VO, para. 36; for Switzerland M. AMSTUTZ/ N.P. VOGT/ M. WANG, in *Basler Kommentar IPR* (note 53), Art. 116, para. 47: "Richtiger Auffassung nach ist […] die Frage der Rechtswahlübernahme nach dem in den AGB gewählten Recht zu beurteilen." – CONTRA: Against the application of "bootstrap-rules" in situations where the applicable law was designated in the standard terms of only one party: *Benjamin's Sale of Goods* (note 39), at para. 25-034 (for Rome I): "In such circumstances, it does not seem possible to conclude that a choice of law has been expressed or demonstrated with reasonable certainty for the purposes of Article 3(1) of the Convention"; *Chitty on Contracts* (note 8), at para. 30-059.

[80] See *supra*, II.A.

[81] References *supra*, III.B.2.

frequently included in standard terms. The Commission further assumed that most parties prefer to have their own law applied and thus have a tendency to choose their own law in their standard terms. There is much evidence today to support these assumptions which were also confirmed by representatives of the international lawyers' associations present at the Hague meeting. If this is so, the potential for conflicting choice of law clauses in standard terms is enormous.[82] If in these situations the choice of law in the parties' standard terms were always deprived of their effect, the scope of application for a choice of the applicable law by the parties would be considerably reduced, even though – in situations such as scenario 2a – both parties prefer a choice of the applicable law rather than having the applicable law determined through objective connecting factors.

Given the high degree of uncertainty that currently reigns in battle of forms scenarios, the Special Commission decided to explicitly address such situations and to adopt a solution that respects party autonomy as much as possible, while, at the same time, avoiding needless complexities. According to Art. 6(1)(b) 1st alt. of the Hague Principles "if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies". This is exactly the situation in scenario 2a: Both parties have designated jurisdictions applying last-shot rules to the battle of forms. Under both laws, the standard forms that were submitted last prevail, *i.e.* B's standard terms designating English law. Pursuant to Art. 6(1)(b) 1st alt. of the Hague Principles, this result is respected and English contract law applies.

Since both laws designated by the parties solve the battle of forms in favour of the forms submitted by the same party (in the above scenario: B), the apparent conflict is in fact a *false conflict*. The choice of law clause in B's standard forms is thus respected and no recourse to objective connecting factors is needed.

3. Scenario 2b: Both Designated Laws Apply First-Shot Rules [Art. 6(1)(b) 1st alt. of the Hague Principles]

> *Scenario 2b*: A makes an offer designating in its standard terms Dutch law as the law governing the contract. B responds declaring acceptance but providing in its standard forms the application of another law applying a first-shot rule to the same scenario.

Given that from a comparative perspective first-shot rules are much rarer than last-shot or knock-out rules,[83] scenario 2b will much less frequently appear in practice than any other scenario. The approach of the Hague Principles to this situation is basically the same as in scenario 2a: Once again "the parties have used standard terms designating different laws [Dutch law and another law applying a first-shot

[82] This does not necessarily mean that these conflicts are frequently resolved in litigation before courts. For reasons not to go to courts in battle of forms situations, and arguably in contract cases in general, see C. KEATING (note 4); see also G.G. MURRAY, A Corporate Council's Perspective of the "Battle of Forms", [1979-1980], 4 *Can. Bus. L. J.* 290.

[83] See *supra*, II.B.

rule] and under both of these laws the same standard terms prevail [*i.e*. the standard term first referred to]", so that it is governed by Art. 6(1)(b) 1st alt. of the Hague Principles. Since in scenario 2b the first-shot was fired by A designating Dutch law in its standard terms, Dutch law applies and no recourse to objective connecting factors is to be made.

4. Scenario 3: One Designated Law Applies a First-Shot Rule, the Other a last-shot rule [Art. 6(1)(b) 2nd alt. of the Hague Principles]

> *Scenario 3*: A makes an offer designating Dutch law in its standard terms as the applicable law; B, established in the UK, declares acceptance providing in its standard terms the application of English law.

In scenario 3, both parties designate different laws in their standard terms. These laws apply different rules when it comes to dealing with battle of forms situations (Dutch law applies a first-shot rule contrary to the last-shot rule prevailing in English law). This scenario thus addresses the situation not of a false but of a *true conflict*: The parties have designated different laws under which the battle of forms is won by different parties.

This scenario is governed by Art. 6(1)(b) 2nd alt. of the Hague Principles: "if the parties have used standard terms designating different laws and […] if under these laws different standard terms prevail, […] there is no choice of law". In such situations, the choice of law clauses in the parties' standard terms thus knock each other out, no standard terms prevail, there consequently is no choice of law, and the law applicable to the contract is to be determined by way of objective connecting factors. In the following procedure, the choice of law clauses in the standard terms are then to be disregarded.

5. Scenarios 4a and b: At Least One of the Designated Laws Applies a Knock-Out Rule [Art. 6(1)(b) 3rd alt. of the Hague Principles]

> *Scenario 4a*: One party makes an offer designating Chinese law in its standard terms. The other party declares acceptance providing in its standard terms the application of French law.
>
> *Scenario 4b*: A German, Swiss, or Austrian party makes an offer designating German, Swiss, or Austrian law respectively as the law applicable to the contract. The other party, established in France, Poland, Estonia, or Lithuania, declares acceptance providing in its standard terms the application of the French, Polish, Estonian, or Lithuanian law.

Scenario 4a addresses the situation in which both parties designate different laws in their standard terms, one of these laws applying a last-shot rule (the Chinese Contract Act of 1999, *e.g.*[84]), the other a knock-out rule (French law, *e.g.*[85]).

[84] See *supra* (note 12).

[85] *Supra* (note 18).

Scenario 4b finally addresses the scenario which is in practice arguably rather frequent,[86] that both parties designate different laws, both of them applying knock-out rules.

Once again we are dealing with a true conflict without being in a position to determine consent of the parties as to the applicable law. These scenarios are addressed by Art. 6(1)(b) 3rd alt. of the Hague Principles: "the parties have used standard terms designating different laws and under one or both of these laws no standard terms prevail". Consequently "there is no choice of law" (3rd alt. *in fine*) and objective connecting factors are needed in order to determine the law applicable to the contract.

C. Level of Precision of the Comparison under Art. 6(1) of the Hague Principles

As seen above,[87] some laws give a different answer to the battle of forms depending on the circumstances. In Dutch law, *e.g.*, a *first-shot rule* applies in principle.[88] If however the other party rejects the first standard terms explicitly in a separate statement (*i.e.* not only in its own standard terms) and if the standard forms in the second shot differ only with respect to minor points when compared to the terms referred to in the first-shot, a *last-shot rule* applies instead.[89] If, on the contrary, the other party rejects the first standard terms explicitly and the second terms differ considerably from those in the first-shot, a *knock-out rule* may apply.[90] Given that in some jurisdictions different rules may apply depending on the circumstances of the case, the question is whether Art. 6(1) of the Hague Principles refers to the outcome under the respective domestic law *in general* or to the outcome *in the specific case under examination*.

Under Art. 6 (1)(b) of the Hague Principles, in a given case it needs to be established whether under both designated laws "the same standard forms *prevail* […], different standard terms *prevail*, or […] no standard terms *prevail*".[91] It thus needs to be shown that, under each law designated respectively, the standard terms of the party designating this law meet, in principle, the conditions set for the inclusion of standard terms (*i.e.* that there definitely is a battle of forms), and that, under both laws, in the battle of forms situation under examination the same standard terms prevail. The terms definitely need to *prevail* which is to be established for the *precise case under examination*.

[86] For the more and more widespread use of knock-out rules, see *supra*, II.C.

[87] II.D.

[88] Dutch Civil Code, Art. 6:225(3) 1st alt.

[89] Dutch Civil Code, Art. 6:225(3) 2e alt. and (2); C.B.P. MAHÉ (note 16), at para. 3.

[90] C.B.P. MAHÉ (note 16), at para. 3.

[91] Emphasis added.

D. An Evaluation of the Hague Solution when Compared with Possible Alternatives

1. Benefits of the Principles with Respect to their Competitors

The above scenarios show that the Hague Principles provide an explicit solution for all possible choice of law scenarios in battle of forms situations. Contrary to the *first* of the alternative solutions presented above,[92] under the Principles no recourse to the *lex fori* is necessary. In contrast with the *second* proposal, the Principles respect the parties' desire to avoid objective connecting factors and to have their choice respected as much as possible and notably in situations of a *false conflict* with respect to the choice of the applicable law. Contrary to the *third* of the above solutions, the Principles avoid proceeding in a two-step approach (*i.e*. determining the applicable law first by way of objecting connecting factors and then respecting the choice in the prevailing standard forms) and they thus avoid deciding the battle of forms under a law that is eventually not applicable. The Principles' approach to the battle of forms is less complex than the *fourth* of the above proposals and, contrary to the fourth approach, the Principles analyse the choice of law for one single contract (instead of presuming the existence of two agreements for the sake of the analysis). The Hague solution is very much in line with the *fifth* of the above proposals and shares the same benefits: They do not systematically give preference to any of the parties or any of the laws designated and they achieve very reasonable results in the different battle of forms situations; the knock-out rule is applied only when there is a *true conflict* between the solutions to the battle of forms under the laws designated by the parties in their respective forms; in situations of *false conflicts* the parties' choice eventually prevails. Compared to the *sixth* of the above approaches, the Hague solution is at a lower level of complexity while still achieving very reasonable results.

2. Challenge: Determining the Solutions to the Battle of Forms Situation under Foreign Laws – a Duty of the Parties to Co-operate?

When applying Art. 6(1) of the Hague Principles the challenge lies in determining the precise solutions for the battle of forms situation under examination in the laws designated by the parties. This challenge is twofold: first of all, there is an information problem. According to Art. 6(1)(b) it needs to be established whether, under both of the designated laws, "the same standard terms prevail". For the court it might be difficult to determine the content of the applicable foreign law and to determine whether, in the case at hand, it applied a first-shot, last-shot or knock-out rule.

Consequently, during the meeting of the Special Commission at The Hague in November 2012, the delegation of the European Union suggested providing a

[92] *Supra*, III.B.

duty of the parties to co-operate with regard to finding and comparing the applicable law under Art. 6 of the Hague Principles.[93]

In fact, the parties to the contract (or their lawyers), having designated the respective laws in their standard forms, should well be able to co-operate with regard to finding the applicable rule to battle of forms scenarios under the law designated in their forms. For the courts a duty of the parties to co-operate would certainly be helpful and make the solution easier to apply. The duty could be created, as the case may be, when the Principles are adopted by national or international legislators. When looking for inspiration, Art. 16(1) of the Swiss Federal Act on Private International Law (on the "Establishment of foreign law") might be taken into consideration[94] stating that "[t]he content of the applicable foreign law shall be established ex officio. [However] [t]he assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties."

A second challenge lies in the fact that, at the substantive law level, some laws are still unclear when it comes to solving battle of forms situations, even for lawyers trained in the respective jurisdiction. In these situations it will be impossible to establish that "under both of these [designated] laws the same standard terms prevail". The consequence for the purpose of Art. 6 of the Hague Principles should then be that since an agreement on the applicable law cannot be established "there is no choice of law", Art 6(1)(b) *in fine*.

V. Conflicting Choice of Law between Domestic Laws and the CISG

A. Introduction

In the situations analysed so far, choices were to be made between domestic legal systems in areas of law where no uniform laws apply. The following chapter addresses situations of possibly conflicting choices when the uniform sales law of the United Nations Convention on Contracts for the International Sale of Goods (CISG) enters into consideration. The CISG is currently in force in almost 80 countries worldwide, including the USA, Canada, Russia, China, Japan, most South American States (apart from Brazil and Bolivia), Australia, Singapore, most

[93] The drafters of the Commentary to Art. 6 are invited to address this issue, see: Draft Hague Principles as approved by the November 2012 Special Commission meeting on choice of law in international contracts and recommendations for the commentary, Agreed additions, Art. 6, in <www.hcch.net/upload/wop/contracts2012principles_e.pdf> (last consultation: 30.6.2013).

[94] English translation in <www.umbricht.ch/pdf/SwissPIL.pdf> (last consultation: 30.6.2013).

EU Member States (except the UK, Ireland, Portugal and Malta) and Switzerland.[95] The possible interactions between the CISG and the Hague Principles are again illustrated using case scenarios.

B. Case Scenarios

1. Scenario 5: Choice of Law Clause in the Standard Forms of One Party Only; the Designated Law is the Law of a Contracting State to the CISG

> *Scenario 5:* Party A to a transnational sales contract designates in its standard forms the law of Contracting State A to the CISG; party B's standard forms do not contain a choice of law clause. The case is to be analysed from the perspective of a Contracting State to the CISG.[96]

In Contracting States to the CISG, judges are treaty-bound to apply the CISG provided that the conditions of application of Art. 1(1) of the CISG are met. According to its Art. 1(1), the CISG "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law [of the forum][97] lead to the application of the law of a Contracting State".

If, in scenario 5, the places of business of both parties are in different Contracting States to the CISG, the CISG applies by virtue of its Art. 1(1)(a) unless the parties have excluded the application of the CISG (Art. 6 CISG). The choice of the law of a Contracting State to the CISG (in scenario 5: the choice of law A in A's standard terms) is not regarded as an exclusion of the CISG[98].

If one of the parties does *not* have its place of business in a Contracting State, the CISG still applies if the PIL of the forum designates the law of a Contracting State, Art. 1(1)(b) of the CISG. Whether the parties to an international contract can choose the applicable law, and if so, under which conditions, is determined by the PIL of the forum. In EU Member States *e.g.*, Art. 3 of the Rome I-Regulation establishes (or confirms) the parties' freedom to choose the applicable

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[95] Text, list of Contracting States and case-law on the CISG, available at <www.unilex.info>. For the situation in the UK see S. MOSS, Why the United Kingdom Has Not Ratified the CISG, [2005-06] 25 *Journal of Law and Commerce* 483.

[96] For the application of the CISG in non-Contracting States if the PIL of the forum designates the law of a Contracting State, see Th. KADNER GRAZIANO, The CISG Before The Courts Of Non-Contracting States? - Take foreign sales law as you find it, *YPIL* 2011, 165.

[97] It is unanimously understood that Art. 1(1)(b) CISG refers to the PIL rules of the forum, see *e.g.* F. FERRARI, *Contracts for the International Sale of Goods*, Leiden/ Boston 2012, p. 76 with further references; J. FAWCETT/ J. HARRIS/ M. BRIDGE (note 48), at para. 16.26; I. SCHWENZER/ P. HACHEM, in P. SCHLECHTRIEM/ I. SCHWENZER (eds) (note 13), Art. 1, para. 32; L. MISTELIS, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (note 2), Art. 1, para. 51; K. SIEHR, in H. HONSELL (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed.), Heidelberg 2010, Art. 1, paras 4, 16; R. HAUSMANN (note 53), Art. 1, para. 93.

[98] L. MISTELIS, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (eds), (note 2), Art. 6, para. 18 with numerous references; SCHWENZER/ HACHEM, in P. SCHLECHTRIEM/ I. SCHWENZER (eds) (note 13), Art. 6, para. 14 *et seq*. with many references.

law. In scenario 5, A has explicitly designated in its standard forms the law of State A. The question then is whether the parties have validly agreed on the application of this law.

According to, for example, Art. 10(1) of the Rome I Regulation "[t]he 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 Regulation if the contract or term were valid." The existence of the *choice of law agreement* is thus governed by the law that would govern it if the agreement were valid.[99] If the standard terms of only one party contain a choice of law clause, the existence and validity of a choice of law agreement is thus to be determined according to the law designated in these standard terms, in case 5: A's forms designating the law of State A.

The Hague Principles arrive at the same conclusion: According to Art. 2(1) of the Principles the parties are free to choose the law applicable to their contract. Under Art. 6(1)(a) of the Hague Principles, the question of whether a *valid agreement on the applicable law* has been formed is to be examined according to the law that the parties have purportedly agreed to. The agreement on the choice of law is thus to be analysed under the law designated in A's standard terms, *i.e*. the law of State A.[100]

Consequently, if party A designated in its standard terms the law of Contracting State A to the CISG, the choice of law agreement is governed by the law of State A. Is this then the CISG (being an integrated part of the law of Contracting State A) or, as the case may be, the civil code of State A, its code of obligations or its general case-law on contracts?

There are arguably two reasonable answers to this question: One possible answer is that the CISG (in particular Art. 14 *et seq*.) applies not only to the formation of the sales contract but also to the formation of the choice of law agreement[101] (with respect to the issues covered by the CISG[102]). If the choice of law agreement is valid under the CISG, the sales contract then is governed by the CISG.

Another possible answer is that the starting point for the solution is to be found in Art. 4 of the CISG. Art. 4 states that: "This Convention governs only the formation of the *contract of sale* and the rights and obligations of the seller and the buyer arising from such a contract."[103] The CISG thus applies with respect to the *contract of sale* only. The *choice of law agreement*, being a separate contract, is

[99] Art. 3(5) and 10 of the Rome I-Regulation; see *supra*, III.A. and IV.B.1.

[100] Compare *supra*, IV.B.1.

[101] This is currently the dominant opinion, see *e.g.* A. DUTTA (note 44), at 463 fn. 12: "Statut des CISG-Abwahlvertrages sind hinsichtlich des rechtlichen Zustandekommens die Vertragsabschlussregeln der Art. 14 ff. CISG"; F. FERRARI, Zum vertraglichen Ausschluss des UN-Kaufrechts, *ZEuP* 2002, 737, 742; R. HAUSMANN (note 53) Art. 10 Rom I-VO, para. 36 *in fine* (opting for an "entsprechende Anwendung" of the CISG); S. MAIRE (note 44), at 104 *et seq.* and 152 *et seq*.; L. MÖLL (note 5), at 183 *et seq.*; AG Kehl 6.10.1995, CISG-online 162.

[102] For important the limits of the CISG with respect to issues concerning the validity of the contract, see Art. 4(a) of the CISG.

[103] Emphasis added.

not governed by the CISG but by country A's (non-unified) *general contract law*. If, in scenario 5, the choice of law agreement is valid under the general contract law of State A (a Contracting State to the CISG), the CISG then applies to the sales contract. – Given that the CISG only governs some issues of contract formation (notably consent in general) while leaving others out (such as the validity of the contract or any of its provisions, notably specific conditions and requirements with respect to standard terms),[104] this solution would have the benefit of applying one single law (even though a non-unified one) to the formation and to the validity of the choice of law agreement. This solution would further avoid the application of Art. 19 of the CISG with regard to the choice of law clause. Given that the interpretation of Art. 19 of the CISG is currently highly controversial, this might be seen as a further benefit of the second approach.

2. Scenario 6: Exclusion of the CISG in the Standard Terms of one Party

> *Scenario 6:* Party A to a transnational sales contract designates in its standard forms the law of CISG Contracting State A as the law applicable to the contract. Party B designates the law of Contracting State B but explicitly excludes the CISG. The general contract law of State B provides a knock-out rule.

According to Art. 6 of the CISG, the parties may exclude the application of the CISG. B provides an exclusion of the CISG in his standard terms whereas A does not. With respect to the battle of forms, the case falls under Art. 6(1)(b) 3rd alt. of the Hague Principles: A's standard terms designate the CISG (providing either a first-shot or a knock-out rule, according to the interpretation of the CISG); B's standard terms exclude the CISG (which is possible under Art. 6 of the CISG) and designate the non-unified domestic law of B instead, providing a knock-out rule. In this scenario, under one (or both) of the designated laws no standard terms prevail, and "there is no choice of law."

3. Scenario 7: One Party Designates in its Standard Terms the Law of a Contracting State to the CISG, the Other the Law of a Non-Contracting State

> *Scenario 7:* Seller A has its place of business in non-Contracting State A to the CISG (*e.g.* England). He designates in his standard terms the law of A. The courts of A apply a last-shot rule. Buyer B's place of business is in Contracting State B (*e.g.* Switzerland). He designates in his standard forms the law of B. The general contract law of B provides a knock-out rule. Seller A fires the last shot. The case is brought before the courts of a Contracting

[104] See Art. 4 of the CISG: "This Convention governs only the formation of the contract of sale […]. [I]t is not concerned with: (a) the validity of the contract or of any of its provisions […]."

State to the CISG (*e.g.* Switzerland). Under the PIL of the (*e.g.* Swiss) forum the parties may choose the applicable law.[105]

The court in a Contracting States to the CISG (*e.*g. Switzerland)[106] is treaty-bound to analyse the conditions of application of Art. 1(1) of the CISG. Since the seller has its place of business in a non-Contracting State to the CISG (*e.g.* England), the conditions of Art. 1(1) lit. (a) of the CISG are not fulfilled. The CISG still applies to the sales contract if the PIL of the forum designates the law of a Contracting State, Art. 1(1)(b) of the CISG. Under the PIL of the Forum, the parties may choose the applicable law (*e.g.* Art. 116 of the Swiss PIL Act). A has designated in its standard terms the law of a non-Contracting State to the CISG (English law), B the law of a Contracting State (Swiss law). The question is how to decide the battle of forms with respect to the choice of law clauses (and, consequently, which law to apply to the choice of law agreement and – if the choice of law agreement is valid – to the main contract).

With respect to the choice of law clause, scenario 8 is a battle of forms situation. So far, neither the Rome I Regulation, nor Swiss PIL, nor any other existing black letter rule on PIL addresses the issue of the law applicable to the choice of law in battle of forms situations. The Hague Principles, on the contrary, state in Art.6(1)(b)1st alt. that "if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies". The question then is whether under both designated laws the same standard terms prevail.

In case 8, A has designated the law of a non-Contracting State to the CISG applying a *last-shot rule* (*e.g.* English law). – B has designated the law of a Contracting State (*e.g.* Swiss law). With respect to the law applicable to the *sales contract*, the choice of the law of a Contracting State comprises also the CISG (in particular its Art. 19). The question is, however, whether this is also the case with respect to the *choice of law agreement*. Under the CISG, there are two possible answers to this question[107]:

(a) If the law of a Contracting State to the CISG is designated, the CISG applies both to the sales contract *and* to the choice of law agreement.[108] The battle of forms is then decided under Art. 19 of the CISG. Art. 19 of the CISG may be understood as a *last-shot rule* (which is most controversial),[109] just as English law. Consequently then, under both designated laws (English law and the CISG), the same standard terms prevail: *i.e.* the standard terms of the English seller firing the last shot. According to Art.6(1)(b)1st alt. of the Hague Principles the law designated in the prevailing terms (English law) thus applies. If under English law the choice of law agreement is valid, the sales contract is governed by English law.

Issues not covered by the CISG: For issues *not* covered by the CISG (such as questions regarding the validity of the contract, Art. 4 lit. b) of the CISG), under

[105] Art. 116 of the Swiss Federal Act on Private International Law.

[106] For the perspective of a non-Contracting State, see the reference *supra* (note 96).

[107] See supra, 1.

[108] See *supra*, 1.

[109] See the references *supra* (note 13) on the one hand, and (note 27) on the other.

English law a last-shot rule prevails whereas under Swiss general contract law a knock-out rule applies. In this case, under one of the designated laws "no standard terms prevail", "there is no choice of law" (Art. 6(1)(b) 3rd alt. of the Hague Principles), and the law applicable to the contract is determined by way of objective connecting factors.

Variation: If under the CISG a knock-out rule applied (instead of a last-shot rule),[110] the case would be governed by Art. 6(1)(b) 3rd alt. of the Hague Principles. There would be "no choice of law", and objective connecting factors would be needed to determine the law applicable to the contract.

(b) The second possible interpretation argues as follows: The choice of the *sales law* of a Contracting State to the CISG includes, in principle, the CISG. However, the choice of law agreement itself (being a separate contract, not governed by the CISG) is governed by the *general contract law* of the designated State.

English law applies a *last-shot rule,* Swiss general contract law a *knock-out rule*. According to Art. 6(1)(b) 3rd alt. of the Hague Principles, if "under one or both of [the chosen] laws no standard terms prevail, there is no choice of law". The law applicable to the contract is then to be determined by way of objective connecting factors.

When the CISG enters into consideration, the outcome thus much depends on several disputes concerning the interpretation of the CISG. Ambiguities of the CISG and uncertainties concerning its interpretation can unfortunately, but obviously, not be solved by the Hague Principles.

VI. Conclusions

Currently, in basically every jurisdiction analysed, there is very much uncertainty as to how to solve the problem of conflicting choice of law clauses in standard terms. The issue has so far never been explicitly addressed in a black letter rule, neither in the Rome I Regulation nor the Hague Sales Conventions nor in any other international instrument or national PIL statute. Case-law on this issue is rare and the law is complicated to the point that the courts try to avoid the problem, they bypass the issue at the PIL level or they simply apply the *lex fori* without even addressing the problem.[111] The international legal doctrine currently suggests six different solutions to the problem, some of considerable complexity.[112]

As long as the solution to the battle of forms with regard to choice of law is unclear, it is wholly unforeseeable for the parties which law governs their contractual relationship. They then lack the most fundamental basis for their

[110] For references supporting this view, see *supra* (note 27).

[111] See the numerous references by M.J. SHARIFF/ K. MARECHAL DE CARTERET (note 1); L. MÖLL (note 5), at 202 with references; see *e.g.* OLG Frankfurt, *IPRax* 1988, 99.

[112] *Supra*, III.B.1-6. When trying to teach the issue of conflicting choice of law clauses in standard terms, one might quickly be tempted to abandon the idea of mentioning it at all, given that the issue is so controversial and the outcome so vague.

negotiations should a problem in their contractual relations arise.[113] With respect to a solution to the problem of conflicting choice of law clauses, the law currently leaves the parties alone.

During the negotiations leading to the Hague Principles on Choice of Law for International Contracts in November 2012, the experience was that by addressing case scenarios on conflicting choice of law clauses in standard terms, it was possible to find consensus with respect to a reasonable solution for any of them. Based on the solutions agreed upon, a rule achieving these solutions was drafted. This procedure eventually resulted in Art. 6 of the Hague Principles. The purpose of this provision is to promote party autonomy on the one hand and, on the other, to enhance legal certainty and foreseeability with respect to the law applicable to choice of law clauses in battle of forms situations.

In a first comment it was argued that Art. 6 of the Hague Principles is too complicated when compared with competing solutions suggested in legal doctrine?[114] It would possibly be easier to apply a knock-out rule on the PIL level and to entirely disregard choice of law clauses when the parties point to different laws in their standard terms.[115]

There is, however, a widespread discomfort in international legal doctrine with respect to such a solution,[116] and arguably rightly so. Art. 6(1)(b) of the Hague Principles thus upholds party autonomy when the conflict is only a *false conflict*, *i.e.* in cases in which, under the laws chosen by the parties, the same standard terms prevail. The Principles will be accompanied by an official commentary that will facilitate their use. In order to further facilitate the application of Art. 6, comparative legal doctrine might help clarifying the solutions in force at the substantive law level in as much jurisdictions as possible with respect to battle of forms scenarios.[117]

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[113] A. BOGGIANO (note 74), at 40: "Conflicts arising out ouf choice-of-law clauses are particularly embarrassing"; L. MÖLL (note 5), at 188: "Die Kollision vorformulierter Rechtswahlklauseln ist das paradoxe Ergebnis einer umsichtigen und vorausschauenden Vertragsgestaltung international agierender Handelspartner. In der Praxis wird den Unternehmern regelmäßig empfohlen, ihren AGB eine Rechtswahlklausel hinzuzufügen, um die Unwägbarkeiten der Anwendung eines fremden Rechts zu vermeiden. Diese Empfehlung schlägt fehl, wenn ihr beide Parteien folgen." Im Ergebnis wird dann "das Rechtswanwendungsergebnis unvorhersehbar."

[114] See the critical appreciation by O. LANDO (note 75), at 314 *et seq*.

[115] If one day the knock-out rule has become the prevailing rule worldwide at the substantive law level, the proposal of a knock-out rule at the PIL as the only rule to follow will have to be reconsidered. The above comparative overview (*supra*, II) shows however that such uniformity is far from being achieved. Should such uniformity be achieved one day, the Hague Principles' Art. 6(1)(b) 2nd and 3rd alt. will apply containing a knock-out rule at the PIL level.

[116] See the proposals and solutions presented *supra*, III.B.3.-6.

[117] The author of this contribution is currently preparing such a comparative overview at the substantive law level.

By suggesting a black letter rule addressing the issue, the Hague Principles make a substantial contribution to solving the riddle of conflicting choice of law clauses in battle of forms situations. In a first commentary, Ole LANDO has suggested to address this issue also in the next revision of the Rome I Regulation.[118] Hopefully the Hague Principles will prevent the battle of the forms in transnational scenarios from continuing for yet another "hundred years" and they will not just be another "attempt to end the battle" proving "only to inflame it".[119]

[118] O. LANDO (note 75), at 316: "I have mentioned a few points – rules of law and battle of forms […] where, in my view, the Principles may give rise to consider a revision of Rome I."

[119] See *supra*, p. 1 and fn. 1.

RECOGNITION OF A FOREIGN JUDGMENT OVERTURNED BY A NON-RECOGNISABLE JUDGMENT

Sirko HARDER*

I. Introduction

This article investigates whether an English court can, and should, recognise a foreign judgment overturned on appeal. Such a judgment cannot be enforced or otherwise recognised in England where the appellate judgment is entitled to recognition or where the overturned judgment could not be recognised in England even if no appeal had been lodged. In other circumstances, the question of whether the overturned judgment can be recognised is less easy to answer. Those circumstances arise where both foreign judgments are generally entitled to recognition in England but a certain factor prevents the recognition of the appellate judgment while not affecting the recognition of the overturned judgment. For example, the appellate court's substantive decision may be repugnant to English public policy (while the overturned judgment is not because a different law was applied), or an irreconcilable judgment from a third country that is entitled to recognition in England was rendered after the overturned judgment but before the appellate judgment, or the appellate proceedings involved fraud, a violation of public policy or another procedural irregularity incompatible with English public policy.

A foreign appellate judgment that cannot be recognised in England may still have effect in the foreign country, rendering the overturned judgment void in that country. Can the overturned judgment nonetheless be enforced or otherwise recognised in England? This article investigates that question for judgments in civil and commercial matters. The discussion of the position at common law involves a review of the recent decisions in *Merchant International Co Ltd v Natsionalna*

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Aktsionerna Kompaniia Naftogaz Ukrainy.[1] Beforehand, the position under the other main regimes for the recognition and enforcement of foreign judgments in civil and commercial matters will be examined.

II. The Position under the Brussels/ Lugano Regime and Domestic Statutes

A foreign judgment overturned on appeal cannot be enforced in England if it was rendered in a Member State of the European Union and falls within the material scope of the Brussels I Regulation.[2] Art. 38(1) of the Regulation provides that a judgment given in a Member State shall be enforced in other Member States if it is enforceable in the rendering Member State. This might be interpreted as providing merely that Member States are not obliged, but still permitted, to enforce a foreign judgment that is not enforceable in the rendering Member State. But Art. 38(1) is commonly interpreted as prohibiting Member States from enforcing a foreign judgment that falls within the scope of the Regulation and is unenforceable in the rendering Member State.[3] This is in line with the equally accepted view that the enforcement procedure set out in the Regulation is the only procedure that can be used for the enforcement of judgments falling within the scope of the Regulation.[4]

The position under the Brussels I Regulation is less clear with regard to the recognition of a judgment outside the context of enforcement. The Regulation's provisions on recognition, which again exclude the application of domestic recognition rules,[5] do not expressly require the enforceability of the foreign judgment in

[1] [2011] EWHC 1820 (Comm), [2011] 2 All ER (Comm) 755; [2012] EWCA Civ 196, [2012] 1 WLR 3036.

[2] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 2001 L 12, p. 1). The judgment cannot be enforced even if the foreign court issued a European Enforcement Order certificate: Arts. 6(2), (3), 11 of Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (*OJ* 2004 L 143, p. 15).

[3] Case C-267/97, *Coursier v Fortis Bank*, [1999] *ECR* I-2543 at [23]; Case C-420/07, *Apostolides v Orams*, [2009] *ECR* I-3571 at [66]; P. JENARD, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (*OJ* 1979 C 59, p. 47-48).

[4] Case 42/76, *De Wolf v Cox*, [1976] *ECR* 1759; J.J. FAWCETT/ J.M. CARRUTHERS, *Cheshire, North & Fawcett on Private International Law* (14th ed.), Oxford 2008, p. 598; J. HILL/ A. CHONG, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th ed.), Oxford 2010, para. 13.4.27; P. STONE, *Civil Jurisdiction and Judgments in Europe*, London 1998, p. 152.

[5] A. BRIGGS/ P. REES, *Civil Jurisdiction and Judgments* (5th ed.), London 2009, para. 7.43; J.J. FAWCETT/ J.M. CARRUTHERS (note 4), at 598; R. FENTIMAN, *International Commercial Litigation*, Oxford 2010, para. 18.40.

the rendering Member State,[6] and Art. 37 permits, but does not oblige, the courts of the Member State in which recognition is sought to stay proceedings where an appeal has been lodged in the rendering Member State.[7] It is arguable that a foreign judgment overturned on appeal can be recognised, without being enforced, under the Regulation. However, it may be implicit in the Regulation that a judgment that has no effect in the rendering Member State can have no effect in other Member States.[8]

Everything said on the Brussels I Regulation applies *mutatis mutandis* to a judgment rendered in Iceland, Norway or Switzerland and falling within the material scope of the Lugano Convention 2007,[9] whose provisions on the recognition and enforcement of foreign judgments are relevantly identical to the provisions of the Brussels I Regulation.[10]

If a foreign judgment overturned on appeal falls within the scope of the Administration of Justice Act 1920, it cannot be enforced in England under that Act. Enforcement of a foreign judgment under the Act occurs through registration of the judgment in the High Court. Section 9(2)(e) of the Act prohibits the registration of a foreign judgment against which an appeal is pending. *A fortiori*, registration must be prohibited where the appeal has been decided, at least where the judgment whose enforcement is being sought was overturned.[11] But this does not preclude the recognition and enforcement of the overturned judgment at common law since the enforcement procedure provided by the Act is not exclusive.[12]

If a foreign judgment overturned on appeal falls within the scope of the Foreign Judgments (Reciprocal Enforcement) Act 1933, it cannot be enforced in England either under that Act or at common law. Enforcement of a foreign judgment under the Act occurs, again, through registration of the judgment in the High Court. Section 2(1)(b) of the Act prohibits the registration of a foreign judgment

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[6] By contrast, the recognition of a European order for payment expressly requires the enforceability of the order in the Member State of origin: Art. 19 of Regulation (EC) No 1896/2006 creating a European order for payment procedure (*OJ* 2006 L 399, p. 1).

[7] The challenge of a judgment given in the European Small Claims Procedure permits other Member States to stay enforcement proceedings but apparently not proceedings in which the recognition of the judgment is sought: Arts. 20 and 23 of Council Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (*OJ* 2007 L 199, p. 1).

[8] See Case 43/77, *Industrial Diamond Supplies v Riva*, [1977] *ECR* 2175 at [30]; Case C-420/07, *Apostolides v Orams*, [2009] *ECR* I-3571 at [66].

[9] Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[10] Art. 8(3) of the Hague Convention of 30 June 2005 on Choice of Court Agreements, to which the UK might accede, provides: "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin."

[11] It is a moot point whether the higher court's judgment or the lower court's judgment is registrable where the higher court has completely upheld the lower court's judgment.

[12] This is implicit in section 9(5) of the Act, which addresses the cost of enforcement at common law and thus presupposes the possibility of enforcement at common law.

that "could not be enforced by execution" in the foreign country, which includes a total annulment of the judgment on appeal,[13] and section 6 prohibits enforcement procedures other than registration for foreign judgments to which the Act applies.[14] But the Act does not preclude the judgment's recognition (other than enforcement) at common law since section 8(3) preserves the common law rules on recognition. Even the recognition (other than enforcement) *under the Act* may be possible. Section 8(2)(a)(iii) and (b) permit the recognition of a foreign judgment even though it "could not be enforced by execution" in the foreign country. However, it is unclear whether that phrase has the same meaning in section 8 as it does in section 2, encompassing a total annulment of the judgment on appeal, or whether its meaning in section 8 is confined to mere bars to execution, which may be conditional, partial or temporary.

III. The Current Position at Common Law

It is not settled whether a foreign judgment overturned by a non-recognisable judgment can generally be enforced or otherwise recognised in England at common law. The question arose recently in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* ("*Naftogaz*").[15] Natsionalna Aktsionerna Kompaniia ("NAK") is an oil and gas company wholly owned by the Ukrainian state. In 1997, NAK's legal predecessor incurred a substantial debt to Gazprom, an oil and gas company controlled by the Russian state. In 1998, Gazprom assigned this debt to Merchant International Co Ltd ("MIC"), a company incorporated in Delaware. NAK failed to pay the debt, and MIC sued NAK in the Kiev Commercial Court. In April 2006, the court gave judgment in favour of MIC for what was described as a debt of $9,733,334, a penalty of $19,551,581 and costs. In June 2006, the Supreme Commercial Court of the Ukraine ("SCCU") varied the Commercial Court's order by reducing the penalty element of the judgment to $14,981,180. In September 2006, the Supreme Court of the Ukraine refused to permit a cassation appeal to review the judgment by the SCCU.

[13] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279, 297, 300, 302, 307.

[14] Section 6 prohibits at least the bringing of an action for debt arising out of the foreign judgment. A fresh action on the underlying cause of action may also be precluded by section 6 and, in any event, is precluded by section 34 of the Civil Jurisdiction and Judgments Act 1982.

[15] [2011] EWHC 1820 (Comm), [2011] 2 All ER (Comm) 755; [2012] EWCA Civ 196, [2012] 1 WLR 3036. The question almost arose in *Re Trepca Mines Ltd* [1960] 1 WLR 1273, where it was argued that a certain foreign judgment overturned on appeal ought to be recognised because the appellate court had made a political decision. However, the argument was not made strongly, and the impeachment of the foreign appellate judgment failed. HODGSON L.J., with whom ORMEROD L.J. and HARMAN L.J. agreed, said that the foreign appellate judgment "was based on legal grounds and not so tainted with political considerations as to make it absurd from our point of view to regard it as a judgment in the juristic or legal sense": [1960] 1 WLR 1273, 1278.

However, MIC was unable to enforce the judgment in the Ukraine since a law passed in 2005 suspended execution of judgments against energy companies. In 2010, MIC brought an action for debt against NAK in the English High Court, pleading the Ukrainian judgments as the source of the debt. NAK served no defence, and default judgment was given in February 2011. The same month, NAK applied to the SCCU to review the 2006 decisions by the Commercial Court and by the SCCU itself, on the basis of "newly discovered circumstances", namely that according to the Delaware Corporation Register MIC acquired legal capacity in 2002 and had thus lacked capacity to enter into the assignment agreement in 1998. In April 2011, the SCCU overturned the 2006 judgments and ordered a re-trial on the ground that NAK had recently discovered new circumstances. A week later, NAK applied to the English High Court to set aside the default judgment in favour of MIC.

David STEEL J. rejected that application. He held that section 6 of the Human Rights Act 1998, which obliges courts and other public authorities to comply with the European Convention on Human Rights (ratified by both the Ukraine and the UK), prevented the recognition of the SCCU's latest judgment in England since the SCCU had flagrantly breached the principle of legal certainty enshrined in Art. 6 of the Convention.[16] He further held that a foreign judgment overturned on appeal can be recognised if the foreign appellate proceedings lacked due process.[17] He relied on a Dutch case in which arbitral awards made in Russia and set aside by a Russian court were enforced on the ground that the Russian judges had been biased against the award-creditor.[18]

David STEEL J.'s judgment was upheld on appeal. All judges in the Court of Appeal shared David STEEL J.'s view that the SCCU's latest judgment could not be recognised in England since it involved a breach of Art. 6 of the European Convention on Human Rights.[19] But there were different views as to the preferable basis of the refusal to set aside the default judgment. TOULSON L.J. based the outcome solely on the fact that, under rule 13.3 of the Civil Procedure Rules 1998, the court is merely entitled, but not obliged, to set aside a default judgment even if the defendant has a real prospect of successfully defending the claim.[20] In exercising this discretion, he said, it must be considered that a default judgment is a form of property, which may have real value.[21] He found it unjust to set aside the default judgment *in casu* since NAK had had no defence when that judgment was given and sought a setting aside of the judgment on the basis of later proceedings that

[16] [2011] EWHC 1820 (Comm), [2011] 2 All ER (Comm) 755 at [31]-[36]. The reasoning on this issue is not relevant for present purposes.

[17] [2011] EWHC 1820 (Comm), [2011] 2 All ER (Comm) 755 at [30].

[18] *Yukos v Rosneft*, Amsterdam Court of Appeal, 28 April 2009. Subsequently, enforcement of the awards in England was sought: *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479; [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208.

[19] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [68]-[73], [86]. Again, the reasoning on this issue is not relevant for present purposes.

[20] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [77].

[21] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [78].

involved a fundamental denial of legal certainty and fair process.[22] TOULSON L.J. made clear that he did not base his decision on any analogy to the treatment of foreign arbitral awards.[23] He refrained from commenting on David STEEL J.'s broader proposition that an English court can recognise a foreign judgment overturned by a non-recognisable judgment.

The other two judges in the Court of Appeal indicated support for that broader proposition, without making it the basis of their judgments and thus part of the ratio of the court's decision. HOOPER L.J.'s judgment consisted of this sentence: "I would be minded to agree in its entirety with the judgment of David STEEL J, however I am content to dismiss the appeal for the reasons given by TOULSON LJ".[24] Lord NEUBERGER M.R. started by saying that David STEEL J.'s view "may well be right",[25] and that "there is obvious force that the courts in this country should recognise, and give effect to, the 2006 judgment".[26] After acknowledging "the force of the argument to the contrary",[27] he said: "It is very tempting to resolve this difficult issue, and, indeed, in the light of the obvious common sense merit of MIC's case, to do so on the ground adopted by David STEEL J."[28] But he added that it was "wiser" to decide the case on the narrower ground identified by TOULSON L.J. and to leave open the correctness of David STEEL J.'s wider proposition.[29]

Naftogaz supports the proposition that a foreign judgment overturned on appeal can be recognised in England where the appellate proceedings involved a significant procedural irregularity that prevents the recognition of the appellate judgment in England. However, *Naftogaz* is binding authority only where an English default judgment based on a foreign judgment had been obtained before the foreign judgment was overturned on appeal. Nothing was said in *Naftogaz* on the recognisability of a foreign judgment overturned on appeal where the appellate proceedings were fair.

IV. The Preferable Position at Common Law

It shall now be discussed whether a foreign judgment overturned by a non-recognisable judgment should in principle be recognised in England at common law. In favour of recognition, it may be pointed out that one of the reasons for the

[22] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [79].
[23] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [80].
[24] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [83].
[25] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [85].
[26] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [86].
[27] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [87].
[28] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [88].
[29] [2012] EWCA Civ 196, [2012] 1 WLR 3036 at [88].

recognition of foreign judgments is the interest in finality of litigation.[30] The judgment-creditor should not have to re-litigate the same matter,[31] and court resources should not be expended on matters already fairly adjudicated.[32] It is the premise of the present discussion that the proceedings before the lower court in the foreign country were fair.

Against the recognition of a foreign judgment overturned on appeal, it may be argued that a foreign judgment cannot have a greater effect in England than in the foreign country itself. It has indeed been held that a foreign judgment entitled to recognition at common law cannot create an issue estoppel in English proceedings unless it would do so in fresh proceedings in the new country.[33]

On the other hand, it is established, at least for judgments *in personam*,[34] that a foreign judgment can be recognised even though the foreign court failed to comply with its own procedural law,[35] and even though this non-compliance renders the foreign judgment void under the foreign law.[36] But this does not necessarily entail the recognition of a foreign judgment that is void because it has been overturned by a higher court.

In favour of recognition, it may be pointed out that there is support for the view that, at least in certain circumstances, a foreign arbitral award annulled by the courts at the seat of the arbitration can be enforced in England if the annulment decision is not entitled to recognition in England.[37] But this view faces opposition,[38]

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[30] *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433, 440; N. GAL-OR, The concept of appeal in international dispute settlement, 19 *European Journal of International Law* 43 (2008), p. 49-50; W.L.M. REESE, The Status in this Country of Judgments Rendered Abroad, 50 *Columbia Law Review* 783 (1950), p. 784-85.

[31] H.E. YNTEMA, The Enforcement of Foreign Judgments in Anglo-American Law, 33 *Michigan Law Review* 1129 (1935), p. 1145-46.

[32] R.C. CASAD, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 *Iowa Law Review* 53 (1984-85), p. 58-59; H.L. HO, Policies Underlying The Enforcement of Foreign Commercial Judgments, 46 *I.C.L.Q.* 443 (1997), p. 460.

[33] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 919 per Lord Reid, 970 per Lord Wilberforce; *Helmville Ltd v Astilleros Espanoles SA* (*The Jocelyne)* [1984] 2 Lloyd's Rep 569, 573; *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 at [56]-[58].

[34] Conflicting decisions exist for judgments *in rem*; see L. COLLINS *et al.*, *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.), London 2012, paras 14.132-14.135.

[35] *Vanquelin v Bouard* (1863) 15 CBNS 341, 143 ER 817; *Doglioni v Crispin* (1866) LR 1 HL 301, 315; *Castrique v Imrie* (1870) LR 4 HL 414, 448; *Salvesen or von Lorang v Administrator of Austrian Property* [1927] AC 641, 659; *Adams v Cape Industries plc* [1990] Ch 433, 567-568.

[36] *Pemberton v Hughes* [1899] 1 Ch 781, 790; *Merker v Merker* [1963] P 283, 297-298.

[37] L. COLLINS *et al.* (note 34), at para. 16.148; J. HILL, The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England, 8 *Journal of Private International Law* 159 (2012), p. 173-74; W.W. PARK, Duty and Discretion in International Arbitration, 93 *American Journal of International Law* 805 (1999), p. 813. This view was impliedly accepted in *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479; [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208.

and the treatment of foreign arbitral awards is not necessarily relevant to foreign judgments since parties to arbitration have opted out of the court system.

Since the arguments are finely balanced, it is undesirable to lay down a hard-and-fast rule that applies to every foreign judgment overturned by a non-recognisable judgment. The question of whether such a judgment is to be recognised in England at common law ought to be resolved on the facts of the individual case. Several factors may influence the decision. Some important factors shall now be examined.

One factor is the time at which the English courts are approached. If they are approached only after the foreign appellate court has given judgment, it is inappropriate to recognise the overturned judgment in cases in which the appellate proceedings were fair to both parties. This occurs, for example, where the foreign appellate judgment cannot be recognised in England because its substantive decision is repugnant to English public policy or because an irreconcilable judgment from a third country that is entitled to recognition in England was rendered after the overturned judgment but before the appellate judgment. Where the foreign appellate proceedings were fair to both parties, it must be assumed that the appellate judgment is correct, and the overturned judgment is incorrect, under the foreign law. The fact that the presumably correct judgment cannot be recognised cannot justify the recognition of the presumably incorrect judgment. The English court ought to decide the matter afresh.

Things are different where the foreign appellate proceedings involved a significant procedural irregularity, such as fraud or a violation of natural justice. Since it is possible that the appellate court would have made a different decision without the procedural irregularity, it cannot simply be assumed that its judgment is correct, and the overturned judgment is incorrect, under the foreign law. But the opposite cannot be assumed either. Other factors need to influence the decision on whether to recognise the overturned judgment.

One factor is the availability of a further appeal against the appellate judgment. Before recognising a foreign judgment that has no effect in the foreign country because it has been overturned on appeal, the English court ought to ensure that all available avenues to impeach the appellate judgment have been taken, unless it is clear that those avenues would have been futile. Where a further appeal against the appellate judgment is still possible, the English court should generally stay proceedings until an appeal has been lodged and decided. Where the deadline for an appeal has already passed and no appeal was lodged, the recognition of the overturned judgment should generally be refused. If in *Naftogaz* MIC had approached the English courts only after the SCCU ordered a re-trial, the previous Ukrainian judgments ought to have been recognised only if an appeal against the order of a re-trial would have been unavailable or futile.

Where the foreign appellate judgment is not subject to further appeal, the recognisability of the overturned judgment may depend upon the type of order made by the appellate court. It may be appropriate to recognise the overturned

[38] H.G. GHARAVI, Chromalloy: Another View, 12:1 *Mealey's International Arbitration Report* 21 (1997); A.J. VAN DEN BERG, Enforcement of Arbitral Awards Annulled in Russia, 27 *Journal of International Arbitration* 179 (2010).

judgment where the appellate court made a final decision on the substance of the claim or referred the matter back to a lower court with significant instructions. By contrast, where the appellate court simply ordered a re-trial, the English court ought to wait until the conclusion of the re-trial. If the re-trial itself involved a procedural irregularity, it may be appropriate to recognise the judgment rendered after the initial trial. If the re-trial proceedings were conducted in a manner fair to both parties, the judgment rendered after the re-trial ought to be recognised, even if it differs from the judgment rendered after the initial trial. The recognition of a judgment rendered after a fair re-trial should not be refused only because a re-trial should not have occurred in the first place. After all, the judgment rendered after the re-trial is the one that has force in the foreign country, and the court conducting the re-trial was able to consider evidence not available during the initial trial.

It has been assumed so far that the English courts are approached only after the foreign appellate court has given judgment. But what if an English court renders a default judgment based on a foreign judgment before the foreign judgment is overturned on appeal? Does the foreign appellate judgment require the English court to set aside its default judgment? In *Naftogaz*, a negative answer was given for the situation in which the foreign appellate proceedings involved a significant procedural irregularity. This is convincing. An English judgment should not be set aside only because of a new foreign judgment that was rendered without due process and cannot be recognised in England for that reason. The procedural irregularity casts doubts upon the correctness of the appellate decision under the foreign law.

The English default judgment ought to stand even where the foreign appellate court has ordered a re-trial. This is exactly what happened in *Naftogaz*. After the decision by the English High Court, the Kiev Commercial Court gave a fresh judgment, this time in favour of NAK. An appeal to the Kiev Commercial Court of Appeal was dismissed. The English Court of Appeal said nothing on whether the re-trial in the Ukraine had been conducted fairly. It was appropriate for the court to disregard the re-trial since an English default judgment had already been obtained before the re-trial was ordered.

Things may be different where the foreign appellate proceedings were fair to both parties. Again, this occurs, for example, where the foreign appellate judgment cannot be recognised in England because its substantive decision is repugnant to English public policy or because an irreconcilable judgment from a third country that is entitled to recognition in England was rendered after the overturned judgment but before the appellate judgment.[39] Where the foreign appellate proceedings were fair to both parties, the appellate judgment casts doubt upon the correctness of the overturned judgment under the foreign law. It does not follow that the English default judgment ought to be set aside in every such case. Other factors may clinch matters on a case-by-case basis.

[39] Moreover, the judgment from the third country must have been rendered before the English default judgment since the latter would otherwise preclude the recognition of the former: *Vervaeke v Smith* [1983] 1 AC 145.

V. Conclusion

Whether a foreign judgment in civil and commercial matters that has been overturned by a non-recognisable judgment can be enforced or otherwise recognised in England depends on the applicable regime for its enforcement or recognition. If the judgment falls within the scope of the Brussels/ Lugano regime, it cannot be enforced and probably cannot be otherwise recognised. If the judgment could be registered under the Administration of Justice Act 1920 had no appeal been lodged, it cannot be enforced under that Act, but this does not preclude its recognition or enforcement at common law. If the judgment could be registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933 had no appeal been lodged, the judgment cannot be enforced either under that Act or at common law, but this does not preclude its recognition (other than enforcement) at common law nor perhaps under the Act.

The position at common law is not entirely settled. *Naftogaz* supports the proposition that a foreign judgment overturned on appeal can be recognised where the foreign appellate proceedings involved a significant procedural irregularity that prevents the recognition of the appellate judgment. However, *Naftogaz* is binding authority only where an English default judgment based on a foreign judgment had been obtained before the foreign judgment was overturned on appeal. In those circumstances, the general recognition of the overturned judgment can be justified on principle. Where the English courts are approached only after the foreign appellate court has given judgment, the recognition of the overturned judgment ought to be decided on a case-by-case basis, considering factors such as the availability of a further appeal against the appellate judgment and the type of order made in that judgment.

Nothing was said in *Naftogaz* on the recognisability of a foreign judgment overturned on appeal where the appellate proceedings were fair. In those circumstances, the recognition of the overturned judgment ought to be refused at least where the English courts are approached only after the foreign appellate court has given judgment.

THE USE OF FORCE, HUMAN RIGHTS VIOLATIONS AND THE SCOPE OF THE BRUSSELS I REGULATION

Marta REQUEJO ISIDRO*

I. Introduction

Cross-border claims for damages have increasingly been brought by victims of human rights violations for the last two decades. Resort to civil liability appears as a complement or substitute for other roads which are not available to private persons, or not under their control, such as criminal prosecution before domestic or international jurisdictions. The civil approach, which may be referred to as "privatisation of disputes concerning human rights", is mainly a US phenomenon.[1]

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[1] H. MUIR-WATT, Privatisation du contentieux des droits de l'homme et vocation universelle du juge américain: réflexions à partir des actions en justice des victimes de

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Europe has also been the scene of civil litigation related to cross border violations of human rights, but besides remarkably less media attention, the number of suits (as well as their success) has also been lower.

A large number of cross border civil disputes in the EU Member States are primarily regulated by Community regulations on jurisdiction, applicable law, and recognition and enforcement of resolutions. The applicability of the procedural regulations is a guarantee of due process: exorbitant grounds of jurisdiction have been barred from them, and there is almost absolute certainty that a judgment handed down in a Member State will be recognised, or even directly executable, in all other Member States. At first glance, a liability claim for damages to defenceless civilians in the context of war is covered by the EU private international law regime;[2] it is not so, however, when the defendant is a State or one of its emanations.

In the well-known case C-292/05 of 2007 *Lechouritou*, the ECJ ruled on the meaning of "civil and commercial matters" for the purposes of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in a situation of alleged human rights violations consequential to the use of force. The main proceedings involved a civil liability claim against Germany for damage caused by military actions against civilians in a war context. The ECJ referred to the use of force by the State in the course of warfare as a characteristic manifestation of state sovereignty, *acta jure imperii*, by definition excluded from the scope of the Convention. With such a statement, the ECJ reinforced the affinity between controversies that do not fall within the material scope of the Convention and those in which the defendant, being a public subject, enjoys immunity from jurisdiction.

Only five years separate us from the above mentioned ECJ ruling. One can nevertheless question whether the delimitation of the scope of the Convention (now, Regulation No 44/2001 or the Brussels I Regulation) based on the public status of one of the parties to the proceedings and linked to the characterisation of its activity as *acta iure imperii*, is still valid. The grounds for calling it into question are twofold: first, taking as a point of departure the identity between the Regulation's scope in cases where the State is being sued and the material scope of immunity from jurisdiction, we question whether and how the search for new balances in the field of immunity (new balances which no longer rely on the distinction *acta iure imperii / acta iure gestionis*) affects the definition of the Regulation's boundaries (II). Secondly, the privatisation of activities hitherto typically carried out by the State is giving way to situations of use of force by individuals which result in loss or damage to other individuals; it is not clear if the compensation claims of the latter fall within the material scope of the EU instrument (III).

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l'holocauste devant les tribunaux des États-Unis, *Revue Internationale de Droit Comparé* 2003, p. 883-901.

[2] The proceedings must have been brought after its entry into force (1 March 2002), against a defendant domiciled in a Member State.

II. State, Immunity of Jurisdiction and the Use of Force

A. The Equivalence *Cliché*

Since the Brussels Convention entered into force, there have been several references to the ECJ for a preliminary ruling on what constitutes civil and commercial matters within the meaning of the Convention (and, at least at first sight, also of other instruments such as the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, or the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations)[3] in lawsuits against, or brought by, a public entity. The original wording of the document adopted the public/private divide, which was common to the first six Community States, together with the idea that States, as well as corporations exercising public functions, may become involved in legal transactions in two ways: either in the same way as private individuals, or outside private law in a sovereign capacity.[4] This led to the association between the lawsuits where the State enjoys immunity from jurisdiction and lawsuits against the State which are excluded from the material scope of the Convention.

The connection between the material scope of the EU Regulations and the jurisdictional immunity of the States and their emanations has been strengthened through the practice of the ECJ. Statements as follows do not, therefore, come as a surprise:

> "Immer dann, wenn es an der Gerichtsbarkeit wegen Immunität des Beklagten fehlt, ist auch die EuGVVO sachlich unanwendbar".[5]

Since the entry into force of the Regulation No 805/2004 on the European Enforcement Order for uncontested claims, many EU private international law instruments expressly name the *acta iure imperii* in their text,[6] evoking the classical distinction between these and the *acta iure gestionis* on which the attempts to restrict the immunity of jurisdiction have traditionally relied. As stated above, the

[3] From now on we will only refer to the Brussels I Regulation.

[4] Report by Professor P. SCHLOSSER on the Accession Convention of 9 October 1978, under which Denmark, Ireland and the United Kingdom acceded to the Brussels Convention, published in *OJ* C 59 of 1979, p. 71, paras 23, 25. From a very early stage academia used to link the *acta iure imperii/acta iure gestionis* distinction, characteristic of the immunity realm, with the ECJ rulings on the material scope of the Convention in proceedings affecting a public entity: see (critically) G.A.L. DROZ, Note, *Rev. crit. dr. int. pr.* 1977, p. 781.

[5] M. STÜRNER, Staatenimmunität und Brussels I-Verordnung, *IPRax* 2008, p. 203.

[6] On the rationale of the express reference see M. REQUEJO ISIDRO, *Violaciones de derechos humanos y responsabilidad civil*, Cizur Menor, 2009, paras 103, 104; and *infra sub* B. 2.

ECJ ruling in case C-292/05, *Lechouritou*, has been read as backing the international law solutions in the field of State immunities.[7] National case law offers examples of identity between immunity and the scope of the Brussels I Regulation, too;[8] and according to some authors the Regulation has no definition of its own for the category of *acta iure imperii*: it borrows it from international law.[9]

The conformity between what *acta iure imperii* are for the purposes of Regulation, and what they are in the context of jurisdictional immunity is so firmly entrenched that it has become accepted as a matter of course. However, its explanation is not completely satisfactory. A statement such as this "weder ist eine wirklich überzeugende Rechtfertigung für eine Differenzierung ersichtlich noch überhaupt eine Möglichkeit, für den sachlichen Anwendungsbereich der EuGVVO eigene, von den völkerrechtlichen Masstäben abweichen Kriterien zu entwickeln",[10] may be true, but it does not explain the equivalence of the notion when used in two contexts governed by different principles and aims. The alignment is not justified by reasons of practical expediency either: actually, it implies bringing into the EU private international law instruments the mess that still reigns over the binomial *acta jure imperii / iure gestionis* division in international law, as well as in each individual legal system.[11] Moreover, the evolution experienced in the field of immunity of jurisdiction begs the question of its impact (if any) on the boundaries of the Brussels I Regulation.

[7] A. BORRÁS RODRÍGUEZ/ J.D. GONZÁLEZ CAMPOS, La inmunidad de ejecución de los estados y sus bienes: en torno a la STJCE de 15 de febrero de 2007 (TJCE 2007, asunto C -292/05, Lechouritou), *Revista Española de Derecho Europeo* 2007, p. 421-436, at para. 19.

[8] *Grovit v. de Nederlandsche Bank and Others*, [2005] EWHA 2944, (QB); [2007] EWCA Civ 953.

[9] P. MANKOWSKI, Art. I Brussels I-VO, in Th. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht – Kommentar*, München 2011, p. 93, para. 2 c (to be more precise, the author refers to "orientation" towards international law standards). I. RUEDA, La place de la matière administrative et des immunités au sein d'un code européen de droit international privé, in M. FALLON/ P. LAGARDE/ S. POILLOT-PERUZZETTO (eds), *Quelle architecture pour un code européen de droit international privé?*, Bruxelles *et al*. 2011, p. 226. See nonetheless TUGENDHAT J in *Grovit v. de Nederlandsche Bank and Others* [2005] EWHC 2944, paras 48-68, holding this is an autonomous interpretation, as neither the objectives of the regulation nor the general principles stemming from Member States' legal systems support the proposition that proceedings concerning the exercise of sovereign authority arise in civil and commercial matters.

[10] P. MANKOWSKI, Gerichtsbarkeit und internationale Zuständigkeit deutscher Zivilgerichte bei Menschenrechtsverletzungen, in B. VON HOFFMANN (ed.), *Universalität der Menschenrechte*, Frankfurt am Main *et al*. 2009, p. 169.

[11] M. REQUEJO ISIDRO (note 6), at paras 50, 51.

B. Immunity Struggles and the Scope of the Regulation

1. Immunity Challenged

In recent times jurisdictional immunity has evolved towards a more restricted application in search of new balances that do not rely on the classical distinction between *acta iure imperii / acta iure gestionis*.[12] Developments tend to adjust the procedural exception as much as possible not only to conform to its original rationale, but also to prevent it from counterbalancing other values. From this point of view, the strongest attacks against immunity come from the advocates of fundamental rights such as access to justice, and human rights (in particular those considered to be inalienable), and of the rules of *jus cogens*.

The end of the twentieth century and the beginning of this one have witnessed a number of battles in these contexts. All of them have favoured the supporters of extensive immunity.[13] However, the contest is not over yet; another future is still possible. The ICJ ruling of February 3, 2012 (*Jurisdictional Immunities of the State, Germany v. Italy: Greece intervening)*,[14] has indeed found that State immunity for *acta jure imperii* extends to civil proceedings for acts occasioning death, personal injury or damage to property committed by armed forces in conduct of armed conflicts. It has also recalled the absence of State practice to support the proposition that a State is deprived of immunity in cases of serious violations of international humanitarian law. The decision is a serious blow to supporters of restrictive immunity, and it certainly slows the progression towards the end of the privilege in cases such as *Lechouritoru*.[15] It is interesting to note, however, that it immediately evoked criticism,[16] and that there were dissenting opinions among the ICJ members. Particularly worth mentioning is Judge CANÇADO TRINDADE's view and his defence of a *jus cogens* exception independent of State consent as a rule demanded by the dynamic nature of international law,[17] as well as the academic criticism of the ruling, not only with respect to its outcome, but also with respect to the Court's reasoning.[18] Also to be recalled is the fact that even if the UN Convention on Jurisdictional Immunities of States and Their

[12] M. REQUEJO ISIDRO (note 6), at para. 51. See, for instance, the European Convention on State Immunity, 16 May 1972, of the Council of Europe, which accepts the *tort exception* (Art. 11). According to H. MUIR WATT/ E. PATAUT, Les actes *iure imperii* et le Règlement Bruxelles 1, *Rev. crit. dr. int. pr.* 2008, p. 61-79, para. 19, immunity is discarded here "par l'effet d'un raissonement localisateur".

[13] M. REQUEJO ISIDRO (note 6), at paras 48-74.

[14] Available at <http://www.icj-cij.org/docket/files/143/16883.pdf>.

[15] Pessimistic, I. WUERTH, Comment, available at <http://opiniojuris.org/2012/02/07/icj-issues-jurisdictional-immunities-judgment/>.

[16] B. HESS, Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf, *IPRax* 2012, p. 201-207.

[17] Dissenting opinion <http://www.icj-cij.org/docket/files/143/16891.pdf>. See also P. STEPHAN's comment published in *Lawfare*, Sunday, 5 February 2012.

[18] K.N. TRAPP/ A. MILLS, Smooth Runs the Water where the Brook is Deep: the Obscured Complexities of *Germany v. Italy*, *Cambridge Journal of International and Comparative Law* 2012, p. 153-168.

Property, 2004,[19] which allegedly codifies the practice of European States, does not include an exception to immunity for the cases of human rights violations or infringement of *jus cogens* rules, it does not limit development in this area either.[20]

2. No Impact on the Scope of the Regulation

In this paper, it is submitted that setting aside of State immunity of jurisdiction in cases such as *Lechouritou*, which can be considered as one of human rights violations, would not automatically lead to the claim being classified as "civil or commercial" for the purposes of the Brussels I Regulation. It is important to underline that although the phrasing of the ECJ in the case C-292/05 has a distinct resonance with the typical narrative of immunity of jurisdiction, no express mention to it is made in the ECJ's reasoning. The ECJ's understanding of the Regulation has determined the exclusion from its scope of claims bringing together these two factors: first, the public character of one of the parties to the dispute (*i.e.*, a formal aspect); secondly, the fact that the activity of this party finds no functional parallel in the activities that private individuals can also undertake – or that it implies the exercising of prerogatives to which private individuals have no access.[21] In other words, what qualifies a claim as civil/commercial within the meaning of the Brussels I Regulation in a case involving a public person, is the linkage of the public condition to legal consequences affecting the parity of the parties to the litigation. In some of these situations (but *only* in some of them) the public entity enjoys jurisdictional immunity.[22] Therefore, immunity should be considered as a strong sign when it comes to defining the material scope of the Regulation, as it confers, on one of the parties, a prerogative that the other lacks; it is a privilege which produces an imbalance, an inequality of arms;[23] it may even be described as the quintessential privilege in cross border relationships between individuals and the State; but it is not the only one.[24] If the assessment of immunity helps to iden-

[19] Adopted by the General Assembly of the United Nations on 2 December 2004; not yet in force. See General Assembly resolution 59/38, annex, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49).

[20] See Switzerland's interpretative declaration to the Convention: "[…] article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to developments in international law in this regard". Norway and Sweden have declared they understand "that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict […]".

[21] See a summary of the ECJ rulings on this subject until 2009 in M. REQUEJO ISIDRO (note 6), at paras 99-102. Subsequent decisions (C- 406/09 and C- 154/11), follow the same trend.

[22] The mere waiver by the defendant would change the situation.

[23] B. HESS, *Europäisches Zivilprozessrecht,* Heidelberg 2010, p. 251, para. 11.

[24] It may be controversial whether any difference in the treatment of the parties to the proceedings is a prerogative or privilege within the meaning of the Regulation. Having a State as a defendant results in a number of special circumstances that are justified precisely

tify situations that are not civil and commercial matters within the meaning of the Regulation,[25] its absence does not necessarily imply that the dispute is part of the Regulation's material scope.[26] In short, the coinciding of the material scope of jurisdictional immunity of the States and the material scope of Regulation No 44/2001 is a one-way phenomenon: it only occurs when the conditions for immunity to be granted are met.

The question of the substantive scope of the EU private international law instruments must be answered in light of the reasons (or the complex of reasons) that justify their existence and their original purpose: the mutual recognition of judicial resolutions as a cornerstone of a developing European space of freedom, justice and security. The engine of this project is the mutual trust that each State professes to others' systems of justice. Thus, the limits of mutual trust are also the limits of what the Member States are willing to leave in the hands of other Member States once the barrier of immunity has been overcome (or has failed).[27] Regulation No 805/2004 provides the strongest evidence in this regard. The textual allusion to the *acta iure imperii* in the EU instruments, appeared for the first time in Regulation No 805/2004. The inside story explains the inclusion of a reference that

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by sovereignty: see F. GASCÓN INCHAUSTI, *Inmunidades procesales y tutela judicial frente a Estados extranjeros*, Cizur Menor 2008, chap. 9. To begin with, the immunity exception may be subject to additional conditions, such as the litigation having some particular connection to the forum (see Arts. 12 and 13 UN Convention); those conditions also work as grounds for jurisdiction, thus removing the plaintiffs from the regime normally applicable to their relations with other individuals (N. JOUBERT, *La notion de liens suffisants avec l'ordre juridique (Inlandsbeziehung) en droit international privé*, Paris 2007, paras 348-377). Special rules apply to service of process on foreign States, not only with respect to their organisational complexity, but also because the principles of equality and dignity among States recommend certain precautions in the initial notification (for instance, to avoid fictional mechanisms: F. GASCÓN INCHAUSTI (*supra*), at para. 278). Similarly, the condition of the defendant justifies the extension of the deadlines to act (see Art. 16.4 of the Basel Convention on State Immunity). The powers of national courts regarding the management of the process are also curtailed due to the special status of the defendant: for reasons of dignity and parity among the States, a domestic court should neither compel the defendant to perform certain actions, nor impose sanctions for contempt upon him (see Art. 18 Basel Convention, Art. 24.1 UN Convention on Jurisdictional Immunities of States and Their Property). Finally, both instruments outlaw the requirement to provide any security, bond or deposit to guarantee the payment of judicial costs or expenses in any proceeding (Art. 17 Basel Convention, Art. 24.2 UN Convention).

[25] Once the inability to adjudicate has been established (due to the lack of *pouvoir*, which is different from lack of *compétence*, even if the distinction is not always properly understood (H. GAUDEMET-TALLON, Note, *Rev. crit. dr. int. pr.* 2011, p. 717-722), all concerns about the grounds for jurisdiction are redundant.

[26] We agree with P. MANKOWSKI's (note 10) assertion at p. 171: when there is no jurisdictional immunity for the purposes of international law, there is no jurisdictional immunity for the purposes of Regulation 44/2001 either. But, in our view, this alone does not confer a "civil/commercial" quality (within the meaning of Regulation) to the claim.

[27] In the context of the European Union, it is indeed arguable that mutual trust can develop to absorb the concept of immunity in relations between or among Member States.

is often described as merely declaratory:[28] it follows the particular interest of Germany in avoiding the certification as a European Enforcement Order of certain judgments, rendered against it by the Greek courts for acts committed in Greece – in particular against the inhabitants of the village of Distomo – by the German army during the Second World War. An express mention was deemed indispensable in light of the qualitative leap forward incarnated by the Regulation on the European Enforcement Order: the reference to *acta iure imperii* is explained by the abolition of the intermediate process of exequatur as among Member States. The exequatur stage served as a channel to "import" foreign judgments, allowing the receiving State to exercise over them some procedural and substantive control. For example, the German BGH could deny recognition of the Greek decision in favour of the plaintiffs in the *Distomo* affair, arguing that it was contrary to the public policy exception (judgment of 26 June 2003).[29] Abolition of exequatur means this outcome is no longer possible, hence the preventive exclusion of sovereign acts from the scope of the Regulation.

From what has been said above, it emerges that a central issue when defining the scope of the EU Regulations is in which areas the Member States stand ready for distribution (of disputes) among their judicial systems, therefore accepting that proceedings are substantiated, and decisions are taken, by foreign tribunals (and, as the other side of the coin, in which areas they are willing to allow their own judges to decide on matters which principally concern other Member States). The difficulties so far experienced in private law matters are well-known; they are more acute in the public law realm.

According to some authors, the contemporary blurring of the traditional public/private divide under a confluence of events – private law developing a regulatory role, private law entities assuming typical public functions – is an argument in favour of the opening of the private international law EU instruments to a broader material scope, particularly in order to cover "hybrid" disputes, *i.e.* disputes which are difficult to classify as purely public or private. We agree with this view.[30] At the same time, we are not oblivious to the obstacles to be surmounted, in particular those related to the application of foreign public law and to the ability (or willingness) of the States to effectively protect foreign legislative policies they do not share.[31] These shortcomings have led to associate the application of public law of a State to its exclusive jurisdiction, and to exclude the bilateral approach when determining the applicable law.

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[28] P. MANKOWSKI (note 9), at 93, para. 2 c).

[29] *NJW* 2003, p. 3448.

[30] See, for instance, the French debate over the inclusion of administrative contracts under the *Rome I* Regulation: S. BRACONNIER, L'extranéité dans les contrats de partenariat, *La Revue du Trésor* 2007, p. 2241-2245; S. LEMAIRE, Le règlement Rome I du 17 juin 2008 et les contrats internationaux de l'administration, *Actualité Juridique-Droit Administrative* 2008, p. 2042-2045; M. LAAZOUZI, *Les contrats administratifs à caractère international*, Economica, 2008, *passim.*

[31] P. DE VAREILLES-SOMMIÈRES, Lois de police et politiques législatives, *Rev. crit. dr. int. pr.* 2011, p. 207-290, *passim.*

At any rate, if – or when – mutual trust reaches the most "sensitive" matters (meaning those that affect public policies), it should still be decided whether the EU Regulations on jurisdiction, recognition and applicable law, currently in force, provide for appropriate solutions.[32] It is here submitted that a deep revision of the grounds for jurisdiction and of the rules concerning their application (such as the *lis pendes* rule) would be needed in order to meet the specific demands of hybrid or public litigation, where a State-individual relation is at stake. According to academic writings, the exclusion of public matters from the scope of the Brussels I Regulation "ne tient pas à des raisons propres à la compétence juridictionnelle […]".[33] The assertion, being true, does not necessarily imply that the existent grounds of jurisdiction (or the remaining rules which help build the Regulation's edifice) are the most suitable for the purposes of administering justice if the above mentioned cases are to be included within the scope of the Brussels I Regulation. In other words: a second reason to hesitate about the application of the Regulation to cases similar to *Lechouritou* is that it is a legal corpus designed to protect the right to due process of equal parties, *i.e.*, parties who only fight for their individual rights rather than for the general good of a community. And this is a condition that the *Lechouritou* case would not have met: not even after removing immunity.

III. Privatisation of the Use of Force and the Brussels I Regulation

A. Outsourcing the Use of Force

Now, what about a claim stemming from the massacre of civilians perpetrated, not by soldiers of some country's armed forces, but by employees of a private military or security contractor (PMSCs)? Will the Regulation No 44/2001 apply under these circumstances?

Following the Montreux Document,[34] "PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to

[32] H. MUIR WATT/ E. PATAUT (note 12), at para. 30; I. RUEDA (note 9), at para. 15 (conflict of law rules).

[33] H. MUIR-WATT/ E. PATAUT (note 12), at para. 27. Accordingly, in a case such as C-292/05, the Regulation grounds of jurisdiction would lead (after rejection of the immunity exception) to "à des solutions qui n'auraient rien de déraisonnable": *loc. ult. cit.*, para. 30.

[34] Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, 17 September 2008 (Preface, para. 9). The document is not legally binding and has only a limited scope: it describes international law as it applies to the activities of private military and security companies in the specific context of an armed conflict; it does not attempt to regulate the industry of PMSCs.

or training of local forces and security personnel". Another, maybe more accurate definition is provided by the Draft of a Possible Convention on PMSCs,[35] Article 2:

> "(a) Private Military and/or Security Company (PMSC): refers to a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities."
>
> "(b) Military services: refers to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities."
>
> "(c) Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities."

PMSCs are private companies. They lack a structural link with the State: their relationship is contract-based. PMSCs are part of the current phenomenon of privatisation of State functions (what has been called the "new public management"); but theirs is a distinguishable case, because it involves, or may involve, the outsourcing of activities traditionally linked to the monopoly of force by the State, thus apt to create risks of human rights violations, and therefore inherently governmental. It has rightly been said that the proliferation of PMSCs marks a profound change in the State monopoly on the legitimate use of force: a monopoly considered as one of the defining criteria of the State, which has suffered, along with security management, a shift towards a market approach.[36]

Actually, not all functions assumed by PMSCs are core State functions. In fact, very few contracts guarantee direct participation in combat.[37] The appropriateness of privatising "sensitive" functions has been the subject of intense debate and opposition from various points of view. There is – at least theoretically – a common understanding about the existence of a hard core of inherently governmental activities *per se*, thus non-outsourceable; however, the exact boundaries are anything but clear. The international documents that have dealt with this issue (the Montreux Document; the Draft of a Possible Convention on PMSCs) offer diver-

[35] See Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self Determination, UN Doc A/HRC/15/25 (2 July 2010). Should the Convention come into force, it would be a binding treaty.

[36] C. ORTIZ, Compañías militares privadas: hacia la transformación del estado y la nueva gerencia pública de la seguridad, translated by V. MANJAVACAS, *Revista Académica de Relaciones Internacionales*, num. 9, October 2008, available at <http://www.relacionesinterna-cionales.info/ojs/article/view/119.html>, p. 10.

[37] That was nonetheless the case of Executive Outcomes in Sierra Leone, and Sandline in Papua New Guinea, where the government appointed all Sandline employees as "special constables" of the country's defence force.

gent concepts.[38] In the US, the pioneer country in the privatisation of these activities, there are up to four definitions for "governmental activities";[39] the dynamic character of the concept of "inherent functions of the State" adds to the lack of agreement on the notion. On the other hand, whatever the definition, in real life, political and military needs prevail and the true fact remains that PMSCs effectively undertake (albeit often unexpectedly and due to the circumstances) those functions together with other services such as safety, training and support services.[40] Security services often include the protection of assets and personnel, particularly in high-risk areas; training is usually provided to military and regular State forces; the support segment covers a wide range of activities such as logistical support in troop mobilisation, intelligence support and military advice and planning, but also restoration, cleaning, and supplying material. When classifying a company as a "private security" or "private military" contractor what matters is the real business it undertakes, not how it labels itself. In this regard it is worth highlighting that nowadays, the use of force does not always imply *active* use of force; a broad range of the services related to the use of force is the element that distinguishes PMSCs from other business entities, while simultaneously assimilating PMSCs with the State from a functional perspective.[41] It can be said, therefore, that PMSCs' activities increasingly mirror those of the military.

B. A Global Business in a Legal Void? Accountability through Domestic Litigation

PMSCs are global actors: they operate worldwide. It is not uncommon for them to be incorporated in one country and to provide their services in another through a contract with a third State (home State, host State, hiring State). The best known PSMCs, which became infamous for their involvement in human rights violations, were hired by the US: Blackwater Security – Nisour Square incident of 16 September 2007; Titan and CACI – interrogators and translators at Abu Ghraib in 2003.[42] But other countries,[43] such as Canada and Australia,[44] are also familiar with

[38] See N.D. WHITE, Regulatory Initiatives at the International Level, in C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contracts*, Oxford/ Portland 2012, p. 18-22.

[39] L. GROTH, Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms, 35 *Hastings International and Comparative Law Review* 29, p. 72-75.

[40] C. ORTIZ (note 36), at 4, with further references.

[41] C. ORTIZ (note 36), at 4.

[42] For other examples see L. GROTH (note 39), at 40, 42-44. The use of civilian contractors in the US goes back to the war of Vietnam; it evolves during the 1980s, and (dramatically) in the 1990s in direct relation to the Balkan conflict. By 2007, the number of contractors in Iraq had exceeded the number of troops.

[43] International organisations such as the UNO also use the services of PSMCs.

[44] Three lawsuits were initiated by Guatemalan nationals before Ontario courts in 2010 and 2011: *Choc v. HudBay Minerals Inc.* (the suit concerns the murder of Adolfo Ich,

PSMCs; States which may be alluded to as "weak" States, like Angola and Sierra Leone, have used PMSCs for training and combat services as well.[45] With the notable exception of the UK, EU Member States refuse to outsource functions related to the power of defence, claiming even constitutional concerns. In some countries, private military companies are prohibited on national territory while in others they are fairly rare or non-existent.[46] In recent times, some EU countries have nevertheless moved towards a more tolerant attitude, in general or just for specific areas such as maritime piracy. This is the case of France, as demonstrated in the *Rapport d'information déposé en application de l'article 145 du Règlement par la commission de la défense nationale et des forces armées sur les sociétés militaires privées*, reviewed by the *Commission de la Défense Nationale et des Forces Armées* on 14 February 2012,[47] which concludes "[n]otre pays doit construire un modèle qui lui soit propre, susceptible de s'élargir à une approche commune aux États européens pour être en mesure de peser sur l'organisation de ce secteur d'activités stratégique au niveau mondial, en y soutenant les valeurs qui sont les nôtres". In Spain, the Parliament voted, in October 2009, a law authorising the presence of armed guards aboard ships carrying the Spanish flag and navigating in hazardous areas.[48] Moreover, the fact that EU Member States decline to outsource services close to the core of the sovereign functions has not prevented EU incorporated PMSCs from providing such services under contracts entered into with third countries.[49]

Academic writings assert almost unanimously that PMSCs – especially PMCs – operate in a legal vacuum: in 2012, it has been said that "a careful review of existing domestic and international legal structures suggests that PMCs exist largely outside the purview of the law".[50] Another commonly shared opinion argues that the accountability gap has to be filled with international regulation.[51] However,

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an indigenous Guatemalan national who opposed Hudbay's Fenix project. Mr Ich's widow claims that Hudbay security guards were responsible for her husband's brutal murder); *Chub v. HudBay Minerals Inc.* (shooting of Guatemalan national German Chub by the same security personnel who killed Adolfo Ich); and *Caal v. HudBay Minerals Inc.* (gang rape of eleven women from the Lote Ocho community by mining company security personnel, police and military forces).

[45] *Vid.* A. MCINTYRE/ T. WEISS, Weak Governments in Search of Strength: Africa's Experience of Mercenaries and Private Military companies, in S. CHESTERMAN/ C. LEHNARDT (eds), *From Mercenaries to Markets*, Oxford 2007, p. 67-81.

[46] The state of affairs is reflected in the on-line provided documents of the PRIV-WAR research project. See also C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contracts*, Oxford/ Portland 2012. For a comparative overview, O. QUIRICO, A Comparative Overview of European and Extra-European national Regulation of Private Military and Security Services, *idem*, p. 105-121.

[47] Available at <http://www.assemblee-nationale.fr/13/rap-info/i4350.asp>.

[48] Royal Decree 1628/2009, of 30 October.

[49] Such as CACI NV, a Netherlands corporation accused of illegal conduct at the Abu Ghraib Prison in Iraq.

[50] L. GROTH (note 39), at 32. See L.A. DICKINSON, *Outsourcing War & Peace*, 2011, p. 41, 42.

[51] L. GROTH (note 39), at 58: "efforts to regulate PMSCs at the domestic level face the same problems seen with regulation of corporations more broadly – the development of

domestic litigation has also been proposed as a means of control.[52] Civil litigation might not have an enormous potential for purposes such as the protection of human rights, or for generating common standards in that respect; still, it is one tool among others to achieve this outcome. In this regard, it is mentioned in the *PRIV-WAR Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services, March 2011*, num. 7 and 10.b). In the same vein, para. 59 of the Council of Europe's *Report On Private Military And Security Firms And Erosion Of The State Monopoly On The Use Of Force*[53] states that "[c]ivil law claims provide the potential for strengthening PMSCs compliance with good practices, especially whatever Code of Conduct which might emerge from the ongoing branch negotiations". Besides, the Parliamentary Assembly supports the idea of a recommendation or treaty to regulate the area of private security/private military companies, and the introduction therein of specific rules for PMSCs in civil law, especially with respect to conditions of liability. These rules should help to overcome the difficulties which are caused when PMSC personnel injure or otherwise cause harm to individuals in another country, who, for reasons of practicality or law (*e.g.* agreements relating to immunity of PMSCs) are unable to effectively sue the PMSC in the courts of that country.[54]

C. PMSCs and the Brussels I Regulation

1. A Public Entity Enjoying Public Prerogatives

In its judgment in case C-292/05 *Lechouritou*, the ECJ referred to the operations conducted by armed forces as one of the characteristic emanations of State sovereignty, *acta iure imperii* by definition, and ruled that the damages caused during military manoeuvres are not subject to the Regulation. Would the same solution apply if damages are inflicted by a PMSC allowed by contract to exercise elements of governmental authority entailing the use of force, or a PMSC which actually exercises them, if it is subsequently sued in civil proceedings by a victim? Very few authors have addressed private international questions relating to the actions of PMSCs. The issue of the law applicable to their liability has been considered as a common case of civil liability, though academics only mention national rules of

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an international «race to the bottom»." On contracts as a regulatory tool, L. DICKINSON, Contract as a Tool for Regulating Private Military Companies, in S. CHESTERMAN/ C. LEHNARDT (eds), *From Mercenaries to Markets*, 2007, p. 217-238.

[52] L.A. DICKINSON (note 50), at 43, 51; J. COCKAYNE, Make or Buy? Agent Theory and the Regulation of Private Military Companies, in S. CHESTERMAN/ C. LEHNARDT (eds), *From Mercenaries to Markets*, OUP, 2007, p. 196, 213-216; followed by C. RYNGAERT, Litigating Abuses Committed by Private Military Companies, *European Journal of International Law* 2008, p. 1035.

[53] Endorsed by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), available at <http://www.venice.coe.int/docs/2009/CDL-AD(2009)038-E.asp?MenuL=E>.

[54] PMSCs have been sued by third parties and troops injured by contractors. Proceedings have also been instituted by contractor employees against their employer.

private international law, *i.e.* no reference is made to the applicability or inapplicability of the EU Regulations.[55] To our knowledge, only one author has addressed this particular issue, expressing doubts as to the characterisation of the subject matter as civil or commercial within the meaning of Regulation No 44/01.[56]

As already seen, the criteria to determine whether a lawsuit is civil or commercial for the purposes of Regulation 44/2001 is twofold. First, it is necessary to examine whether the dispute involves a public person (a). Secondly, the functions or activities of this party must be analysed to determine whether they could also be assumed by a private individual or if, on the contrary, they constitute an exercise of public powers, *i.e.* powers going beyond those existing under the rules applicable to relations between private individuals (b).

a) So far, the ECJ rulings on the exclusion of certain subject matter from Art. 1.1 of the Brussels I Regulation have always dealt with controversies against the State or a public agency or body; PMSCs are not public persons.[57]

Whether a dispute between private individuals is always "civil or commercial" within the meaning of the Regulation, even when one of the parties to the claim holds a public role (actually, private entities devoid of any organic or structural relationship with the State, but qualified to exercise public authority, are not unusual), is still open to debate,[58] though ECJ case law seems, indeed, to require the presence of a public entity and, conversely, lawsuits between private parties have always been included within the scope of the Regulation even when they derive from claims of a public nature.[59]

Though we would certainly support a presumption in favour of a civil/commercial characterisation when both parties to a claim are private individuals, we also agree that formal or organic criteria are not conclusive.[60] What really matters is not the status of the parties, but whether one of them is granted public

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[55] I. MILUNA, The Baltic States, and R. EVERTZ, Germany, both in C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contractors*, Oxford/ Portland, 2012, p. 148 for the first, and p. 225, the second.

[56] A. ATTERITANO, Italy, in C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contractors*, Oxford/ Portland 2012, p. 248-250.

[57] Whether a party to a claim is a "private" or "public" subject seems to depend on national law. In the ECJ case C-167/00, *Henkel*, the UK Government argued that an action brought by a consumer association does not fall within the scope of the Brussels Convention: the association deserved to be classified as a public authority because it assumed a mission of general interest. The ECJ (para. 30) did not share the argument; it provided no explanation, though. According to information given by the AG Jacobs, the consumer association was a private non-profit organisation established under the Austrian *Vereinsgesetz* (Associations Act) of 1951.

[58] See for instance H. MUIR WATT, Note, *Rev. crit. dr. int. pr.* 2005, p. 80-89, para. 15 a (German company that "hired" forced workers for the Third Reich).

[59] B. HESS (note 23), at 251, para. 11, in relation to cases C-266/01, *Préservatrice Foncière TIARD S.A.*, and C-265/02, *Frahuil*.

[60] Also J.M. BISCHOFF, Note, *Clunet* 1994, p. 530; or J.A. GARCÍA LÓPEZ, El concepto de materia civil y mercantil en el Convenio de Bruselas y su formulación en la reciente jurisprudencia del TJCE, *La Ley*, Friday 31 October 2003, p. 4; P. MANKOWSKI (note 9), at 96.

power prerogatives which create an imbalance between the claimant and the defendant. The more the privatisation of functions, formerly carried out by the State, the more reasonable it is that the decisive element for qualifying a subject matter as civil/commercial for the purposes of Regulation No 44/2001 lies in one of the parties being vested with public authority, or bestowed with faculties going beyond those existing under the rules applicable to relations between private individuals. This may be the case with PMSCs.

b) To decide if one of the parties to the dispute enjoys public prerogatives, the ECJ has relied on several guidelines: notably, on a comparative analysis of the functions of individuals and public officers (b.1), and on whether the defendant may plead sovereign immunity (b.2).

b.1) In its ruling in case C-172/91, *Sonntag*, para. 23, the ECJ concluded that school teachers assume identical functions, no matter the type (private or public) of the school. It is here submitted that the same approach may be used for PMSCs, at least when they provide security services. In fact, the identity has been endorsed by the ECJ in the context of permitted derogations from freedom of establishment. In proceedings brought by the European Commission against Spain, Italy and the Netherlands,[61] the ECJ ruled that such derogations must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority; and that this is not the case of private security services whose activity is to carry out surveillance and protection tasks on the basis of relations governed by private law, making a contribution to the maintenance of public security which, in the words of the ECJ, any individual may be called upon to do.

It is worth recalling that only some private contractors meet this description. Even outside the war context, private security companies are sometimes vested with powers to which private individuals have no access (detention on the premises; accompaniment to the police station, *i.e.* faculties that could affect the rights and freedoms of citizens). In a conflict or post-conflict scenario, where the best known incidents concerning PMSCs have occurred, active involvement of PMSCs in the battlefield and their use of force in a manner that is similar to that of the military, are perfectly imaginable.

In Europe, the reluctance, already alluded to, on the part of a number of countries, towards PMSCs – or to the outsourcing of certain functions – determines the absence of any rule or practice permitting either to affirm or to deny whether these entities are granted a privileged regime in their relationships with private individuals. In light of the studies carried out under the PRIV-WAR Project[62] it seems that PMSCs are subject to common substantive liability rules and standards;[63] the idea of an identity with any other private subject, referred to by the ECJ,

[61] ECJ, 29 October 1998, Case C-114/97, *Commission v Spain*; ECJ, 9 March 2000, Case C-355/98, *Commission v Belgium*; ECJ, 31 May 2001, Case C-283/99, *Commission v Italy*; ECJ, 29 April 2004, Case C-171/02, *Commission v Portugal*; ECJ, 5 May 2003, Case C-189/03, *Commission v Netherlands*; ECJ, 26 January 2006, Case C-514/03, *Commission v Spain*; ECJ, 13 December 2007, Case C-465/05, *Commission v Italy*.

[62] Especially, C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contractors*, Oxford/ Portland 2012, specially Part I.5 and Part II.

[63] Academics have pointed to the need for special rules: I. MILUNA (note 58), at 153.

is thus reinforced. Notwithstanding, it should not be forgotten that the PMSCs analysed in the framework of the PRIV-WAR project, mainly provide security services, *i.e*. they are PMSCs tolerated precisely because they do not engage in "sensitive" activities directly and specifically connected with the exercise of official authority; they generally lack powers of coercion; they do not conduct (or only under very exceptional circumstances) operations to maintain public order which may be associated with the exercise of official authority.

b.2) As seen in the previous section, immunity from jurisdiction is a reliable index of the subject matter not being civil or commercial for the purposes of the Brussels I Regulation in cases with a State as a defendant. Does this also apply to PMSCs?

PMSCs have already been granted some kind of immunity from civil jurisdiction. The privilege is usually provided for in an international agreement, such as the Status of Forces Agreements (SOFAs), which were originally conceived for State officials but which may also include private contractors;[64] or by special rules, as it happened in Iraq through the Coalition Provisional Order No 17,[65] or in Sweden, where the employees of the Vesper Group, working for the embassy in Kabul, providing the mission with security coordinators and bodyguards, enjoyed diplomatic status.[66] Private separate legal persons do not fall within the meaning of "agencies or instrumentalities" of the US Foreign Sovereign Immunities Act, section 1603; nevertheless, PMSCs have been conferred a "derivative immunity" in some cases via the application of the "common law agent test".[67] PMSCs being granted a limited immunity of jurisdiction is also supported by US academics subject to certain conditions: if the private contractor carries out activities for which the State would have been immune, and if PMSCs develop activities that should be qualified as "governmental in nature",[68] insofar as their assessment would imply a judgment on the appropriateness of political acts.

As a matter of fact, the above mentioned examples of immunity do not really amount to genuine immunity, but rather to a division of powers between the host State and the sending State. Immunity bestowed by national law on PMSCs usually results from a decision to give priority to policy considerations.[69] True, the

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[64] The scope of applicability is defined in each agreement; see for instance the SOFAs concluded between the US and Bulgaria (2001), and the US and El Salvador (2007).

[65] Available at <http://www.usace.army.mil>.

[66] A. BERGMAN, Sweden, in C. BAKKER/ M. SOSSAI (eds), *Multilevel Regulation of Military and Security Contracts*, Oxford/ Portland 2012, p. 294.

[67] *Butters v. Vance International,Inc*., 225 F.3d 462; *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 379 (S.D. Tex. 1994); both cases involved American companies employed by a foreign State. For criticism, see A. HING WEN, Suing the Sovereign's Servant: the Implications of Privatization for the Scope of Foreign Sovereign Immunities, 103 *Columbia Law Review* 1583, *passim* – though the author agrees with a limited extension of immunity of jurisdiction to private contractors.

[68] *Ib*., Part III.

[69] M. FRULLI, Immunity versus Accountability for Private Military and Security Companies and their Employees: Legal Hurdles or Political Snags, in F. FRANCIONI/ N. RONZITI (eds), *War by Contract*, Oxford 2011, p. 452-454.

practical effect of these provisions often resembles quite closely that of immunity: for instance, if the SOFA confers exclusive jurisdiction to the sending State over its nationals. On the other hand, for our purposes (*i.e.*, to determine whether a subject matter deserves to be qualified as civil or commercial), the basis or rationale of the regime accorded to PMSCs may be irrelevant: what really counts is whether the regime effectively undermines the parity between the parties to a claim such that their relationship becomes uneven due to PMSCs being granted a position of dominance which places the counterpart in a subordinate role.[70]

2. PMSCs before the American Courts

Whatever the personal view on the appropriateness of the solution,[71] the fact is that the more the practice relative to State immunity relegates to secondary importance the criterion of organic or structural linking to the State, the more likely it seems that PMSCs benefit from immunity privileges.[72] This cannot be said to be a surprising outcome; it simply follows the way that has been paved by other private legal entities, such as ship classification companies: private entities of private capital, which enjoy immunity from jurisdiction in relation to services (such as control of ships and issuance of certificates) provided on behalf of the State which delegates to them. Theoretically, it could even be argued that PSMCs have a place under the "other entities" label of art. 2, par. 1, b iv), of the UN Convention on Jurisdictional Immunities of States and Their Property, 2004, whose definition of "States" also embraces private entities besides agencies or other instrumentalities of the State, but only to the extent that they are "entitled to perform and are actually performing acts in the exercise of sovereign authority of the State".

The complete lack of practice in Europe with respect to PMSCs does not permit any assumption as to when the above mentioned circumstances are met. Some guidance may be drawn instead from US case law of the latter half of the twentieth century, where private military contractors enjoyed some kind of domestic immunity from civil suits filed under the Alien Tort Statute (ATS), or from common tort law claims for assault and battery, wrongful death, intentional infliction of emotional distress, and negligence. The special treatment results from judicially made doctrines, such as the political question doctrine (a), the government contractor's defence (b), and the combatants' exception (c).[73]

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[70] *Supra*, Part II.

[71] Strongly against extending immunity from jurisdiction is the UN Working Group, which fears problems of legal accountability and *de facto* impunity. Academics have nevertheless argued in favour of immunity: "declining to extend immunity may diminish the financial benefits of privatization and ultimately discourage its use", or "detract privatization from its effectiveness": A. HING WEN (note 67), at 1566, 1568.

[72] See P. MANKOWSKI (note 10), at 145-146.

[73] Other arguments in favour of narrowing the scope and different rationales have also been made occasionally (and unsuccessfully): the *Feres* doctrine, created by the US Supreme Court to bar suits of members of the military against the government for injuries arising out of activities of military service; the "foreign country exception", which protects the government from being subject to the laws of a foreign jurisdiction; the Defence Base

a) It is well known that, in the past, individuals have been barred from presenting war-related claims for reparations to domestic courts on grounds so close to the immunity of jurisdiction exception in their effect that sometimes they were simply mixed up together: they reach identical practical results, and therefore sometimes appear to be interchangeable, even though they have a different origin and rationale.[74] In the US, where private parties do not enjoy immunity from jurisdiction as agents or instrumentalities of the State,[75] the political question doctrine works as an exclusionary principle to produce the same outcome. It is unsurprisingly the argument most commonly used by PMSCs.

The political question doctrine reflects separation of powers concerns; it "excludes from judicial review all controversies which revolve around policy choices and value determinations constitutionally committed for resolution in the halls of Congress or the confines of the Executive Branch".[76] A non-justiciable political question has to meet the test that the Supreme Court established in *Baker v. Carr:*[77] 1) a textually demonstrable constitutional commitment of the issue to a

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Act, available as defence to PMSCs against their employees, when they are sued for negligent or fraudulent acts. See K.A. HUSKEY/ S.M. SULLIVAN, The American Way: Private Military contractors & US Law after 9/11, PRI-WAR Report, 30/04/2009, available at <www.privwar.eu>, p. 37-39.

[74] N. RONZITTI, Azioni belliche e risarcimento del danno, *Riv. dir. int.* 2002, p. 686; A. GATTINI, To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individual Claims for War Damages?, 1 *Journal of International Criminal Justice* 348. On other rules preventing the courts from adjudicating on certain subject matters, see M. REQUEJO ISIDRO (note 6), at paras 75-77; on the relation between them and the material scope of the Regulation, see A. SCOTT, Exclusionary Principles and the Judgments Regulation, *Journal of Private International Law* 2007, p. 309-320.

[75] The political question doctrine is not exclusive to the US. A similar form of judicial deference also exists in other countries. This accounts for the following statements: "[f]rom a more general perspective, it may not be excluded that the non-justiciability arguments could emerge with respect to acts performed by contractors before the courts of different countries"; "it could well represent an obstacle before other national courts": J.F. ADDICOTT, The Political Question Doctrine and Civil Liability for Contracting Companies on the Battlefield, 28 *Revue of Litigation* 343, at 363; M. FRULLI (note 69), at 467. Actually, such a possibility is anything but sure; the impossibility of an *a priori* ascertainment of the absolute limit that, if crossed by a court, would imply invading the functions of the executive, has been rightly pointed out. Although judiciary control of "political acts" is expanding, it still remains confined to certain aspects, and doubts survive as to the scope and the intensity of the faculty of review. State services related to defence are usually spared from judicial checking; however, it is perfectly arguable that tort suits (the decision on whether damages should or should not be awarded), even if stemming from controversies linked to the conduct of war, do not pertain to the non-justiciable realm. But, again, under certain circumstances it seems preferable that decisions on damages be left to the legislative or executive branches, not only for reasons of political expediency, but also for reasons of economic or resource allocation.

[76] *Japan Whaling Ass'n v. American Cetacean Society*, 478 US 221, 230, cited by J.F. ADDICOTT (note 75), at 350.

[77] 369 US 186. The actual usefulness of these factors has been criticised both generally and in particular in its projection to PMSCs: M.R. KELLY, Revisiting and Revising the Political Question Doctrine: *Lane v. Halliburton* and the Need to Adopt a Case-Specific

coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Just *one* of the six factors of the exam is enough for an issue to be qualified as a political question; that is why authors have affirmed that tribunals are given wide latitude to dismiss cases before them.[78]

It has been accepted (although with some dissent) that the defendant's *private* status has no relevance when it comes to decide whether a claim raises a political question.[79] The political question doctrine has been invoked several times in civil suits against PMSCs since 2004, with uneven success. It was rejected in *Ibrahim et al. v. Titan Corp.*,[80] *Lessin v. Kellog Brown & Root Inc.*,[81] *McMahon v. Presidential Airways Inc.*,[82] *Potts v. Dyncorp Int'l*,[83] or *Gezt v. Boeing*;[84] and accepted in *Smith v. Halliburton Co.*,[85] *Whitaker v. Kellogg Brown & Root Inc.*,[86] *Fisher v. Halliburton, Inc.*[87] (though remanded after appeal for further factual hearings – the Fifth Circuit held that evidence was yet not enough to dismiss the case under the political question doctrine), and *Carmichael v. Kellogg, Brown & Root Services.*[88] It should be noted that some of these cases had similar facts but had diverging outcomes regarding the political question doctrine.[89]

As a matter of fact, US Courts have not followed a distinct guideline in terms of the political question doctrine; also, there has been no discussion about it

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Political Question Analysis for Private Military Contractor Cases, 29 *Mississippi College Law Review* 219, at 244-249.

[78] M.R. KELLY (note 77), at 241, 243.

[79] *United States v. Muñoz Flores*, 495 US 385 (1990).

[80] 391 F. Supp 2d 10 (D.D.C. 2005), aff'd on other grounds sub nom. *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009).

[81] 2006 WL 3940556 (S.D. Tex. 2006).

[82] 502 F.3d 1331 (11th Cir. 2007).

[83] 465 F. Supp. 2d 1245 (M.D. Ala. 2006).

[84] 2008 WL 2705099 (N.D. Cal. 2008).

[85] 2006 WL 252 1326 (S.D. Tex. 2006).

[86] 444 F.Supp. 2d 1277 (M.D. Ga. 2006).

[87] 454 F. Supp. 2d 637 (S.D. Tex. 2006), rev'd sub nom. *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

[88] 572 F.3d 1271, 1287 (11th Cir. 2009).

[89] See *Lessin v. Kellogg Brown & Root, Inc., Whitaker v. Kellogg Brown & Root, Inc.*, and *Carmichael v. Kellogg, Brown & Root Services*, all related to soldiers acting as armed escorts, and victims of road accidents.

in the specific framework of PMSCs.[90] According to academics, however, the doctrine should, at any rate, be limited "to cases potentially involving scrutiny of pivotal political decisions", "only when the judiciary runs the risk of intruding in crucial political decisions".[91] It has also been said that for the political question to serve as a jurisdictional bar, the nexus between the contractor and the military must affect "core military decisions",[92] so that getting into the merits of the controversy would imply judicial review of the decisions made by the Executive during wartime, or adjudicating questions that the Constitution intended to be left to the legislative or executive branches; or it would mean that the court would substitute its judgment for that of the military, thus assessing the wisdom of military decision-making.[93] In short, the mere existence of some nexus between the contractor and the military does not preclude judicial review. Now, taking this as a point of departure, the difficulty lies in ascertaining whether a situation involving PMSCs falls within, or remains outside the borderline. Following a review of the case law, authors have concluded that a decisive factor in evaluating if the political question doctrine applies to civilian contractors on the battlefield is "the specific contractor's relationship to the military and the actual military operation in question".[94] The assessment of such a relationship requires an analysis of whether, and to what extent, the military controlled the actions of the PMSC's employees; reciprocally, what degree of control the contractor has retained over the operation, and whether his actions are separable from those of the military. But how intense the military control over the PMSC must be is still subject to discussion.[95]

b) The government contractors' defence (GCD) is a judicially created defence, linked by the US Supreme Court to the "discretionary function" exception to the Federal Tort Claims Act (FTCA). According to the FTCA, the government waives its sovereign immunity for personal injury in cases of negligent acts of its employees, provided they were acting within the scope of their employment. However, the FTCA allows for certain exceptions; the "discretionary function" exception protects the government against claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government (…)".[96]

Since government contractors are not government employees, they should not be entitled to the privilege. Nevertheless, case law has evolved in order to cover them too: in the first place, to protect contractors who designed and manufactured military equipment according to governmental specifications, when these

[90] M.R. KELLY (note 77), at 249, 255, points out that the courts fail to recognise the peculiarity of these cases and that PMSCs rulings "merely allude to the doctrine". At 249-254 the author puts forward a different approach.

[91] J.F. ADDICOTT (note 75), at 363; M. FRULLI (note 69), at 467.

[92] *Id*.

[93] K.A. HUSKEY/ S.M. SULLIVAN (note 73), at 33.

[94] J.F. ADDICOTT (note 75), at 363, quoting the Eleventh Circuit.

[95] L.A. DICKINSON (note 50), at 53. It is worth noting that most cases have been heard in the Fifth and Eleventh Circuit, *i.e*. it is unknown how another Circuit would decide.

[96] 28 U.S.C. par. 2680(a).

led to an accidental injury or death.[97] It was afterwards extended to PMSCs in *Boyle v. United Tech. Corp*.,[98] where the Supreme Court also ruled that the defence is based on the "discretionary function" exception to the FTCA. At any rate, the derogation is granted only after an in-depth examination to guarantee that only activities actually authorised by the government are granted immunity from liability.

The GCD was argued by the defendants in the District Court of Columbia in the Titan litigation – *Ibrahim v. Titan Corp*. and *Saleh v. Titan Corp*.–,[99] brought by Iraqi nationals against the employees of Titan and CACI, two private contractors that provided interrogation and interpretation services in the Abu Ghraib prison. In both claims the defendants were sued under the ATS and state common law. The ATS claims were dismissed[100], and the cases consolidated as *Ibrahim II*.[101] Litigation was centred on the governmental involvement in the private contractors' acts, *i.e*. on whether the contractors' employees were in fact agents of the government because they performed their activities under the control of the military. The Court held that this was the case for Titan's employees, but not for CACI, which retained significant authority over his employees.[102]

c) A third typical tool of defence in lawsuits against PMSCs is the combatant activities exception, which enlarges the GDC so that it can be argued upon the basis of another exception to the FTCA.[103]

The combatant activities exception was conceived to bar claims against the combatant activities of the military in times of war, keeping them free from the burden of a damages suit based on their conduct in the battlefield. PMSCs have already invoked the exception several times (*Fisher v. Halliburton*; *Lane v. Halliburton*; *McMahon v. Presidential Airways Inc*.; *Carmichael v. Kellogg Brown and Root Services*; *Saleh v. Titan*; *Ibrahim v. Titan*; *Smith v. Halliburton*; *Whitaker v.*

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[97] For the history of the GCD, see K.L. RAKOWSKY, Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan, 2 *Stanford Journal of Civil Rights & Civil Liberties* 365, at 378-385. Actually, the discretionary function development is part of a broader reasoning aiming to determine whether a dispute deserves federal pre-emption, *i.e*. whether it involves "uniquely federal interests" which justify the displacement of state law (applicable to torts) and its replacement by federal law. Besides the unique federal interest, a significant conflict between an identifiable federal policy and the operation of state law is required. See J. JOSEPH, Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors, 5 *Georgetown Journal of Law & Public Policy* 691, at 692, 710-711.

[98] 487 U.S. 200 (1988)

[99] 391 F. Supp. 2d 10 (D.D.C. 2005), and 436 F. Supp. 2d 55 (D.D.C. 2006).

[100] For a discussion on the difficulties in applying the ATS to this kind of suit, see E. STAINO, Suing Private Military Contractors for Torture: How to Use the Alien Tort Statute without Granting Sovereign Immunity Defences, 50 *Santa Clara Law Review* 1277.

[101] 391 F. Supp 2d 10 (D.D.C. 2005), aff'd on other grounds sub nom. *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009).

[102] See E. STAINO (note 100), at 1298-1302. The D.C. Court upheld the district court decision for TITAN and reversed the CACI decision: *Saleh v. Titan Corp*, 580 F.3d 1.

[103] The extension to government contractors was made in *Koohi v. United States*, 976 F.2d. 1328 (9th Circuit 1992). See K.L. RAKOWSKY (note 97), at 385-387.

Kellogg Brown and Root Inc.; *Lessin v. Kellogg Brown and Root*).[104] It has been successful only in *Ibrahim v. Titan*, where contractors were deemed to have acted as soldiers in everything but in name.[105] The defence is thus restricted to the situations where the military retains command authority and direct operational control over the contractor employee, implying military decision-making.

3. Back to Europe

Let us now come back to the guiding thread of this part of the study, *i.e.* whether a claim for damages brought against a PMSC by a victim of human rights violations in a conflict situation is a civil or commercial matter for the purposes of the Brussels I Regulation. Despite the lack of clarity of the current praxis, it is easy to discern the commonality of the three defences upon which PMSCs have so far relied against civil claims in the US: they require a specific connection, of a particular intensity, between the PMSCs' activity and the contracting State. Such a condition is not only hard to prove, but it is also at odds with the philosophy of privatisation, and thus hard to meet. Privatisation or transfer of functions by the State is usually accompanied by transfer of – or the will to transfer – responsibility. States ignore and often deny any kind of relationship with the perpetrators of wrongdoings; it has been noted that the US government made no statement of interest in cases concerning PMSCs.[106] That means that in cases brought before an EU Member State, PMSCs will not find it absolutely impossible to avoid the Brussels I Regulation calling upon their relationship with a State (and the privileges attached); but they will certainly face serious difficulties.

Besides, a number of complex questions need to be answered in order to assess whether a PMSC acted as a *de facto* soldier, the real control resting with the State – or if, on the contrary, the PMSC was given discretion to achieve the purposes of the agreement in which it entered. American praxis provides a non-exhaustive list of items to review: the contractual responsibilities of the employees, to whom they reported, how they were supervised, the structures of command and control.[107] Determining if the State has instructed or controlled the private conduct thus requires "at least a cursory analysis of the merits of the case"[108] resulting in a high degree of evidentiary activity. In terms of the Brussels I regulation, it has been submitted that the costs associated with discovery, combined with the need for certainty in the application of the Regulation, make it preferable to rely on the criterion of the nature of the parties, putting aside that of the type of function they perform; in other words, for the purposes of the Brussels I Regulation, PMSCs are

[104] For references see *supra*, footnotes 80 *et seq.*

[105] *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007).

[106] M. FRULLI (note 69), at 467.

[107] *Ibrahim v. Titan Corp.*, 391 F.Supp. 2d 10, at 19.

[108] M.R. KELLY (note 77), at 224, 230.

to be considered as private corporations in all cases, whatever their activities.[109] We fail to see the advantage, in terms of certainty, of limiting an instrument to the costs of the delimitation process. However, the above mentioned opinion might be endorsed by the ECJ's statement in *Lechouritou*, para. 44, rejecting to deal with preliminary questions of substance if raised before the scope of the Brussels Convention has been determined with certainty.

IV. Conclusion

The privatisation of human rights litigation in cases of abuse by the State or its emanations through the use of force has not found an echo in the EU Regulations on jurisdiction. As a prototypical example of the *acta iure imperii* category, the subject matter of such claims has been considered to fall outside the scope of the Regulations: so says the ECJ; it is also reflected in the wording of the EU instruments. The parallels between the material scope of Regulation No 44/2001, and the immunity from jurisdiction, a constant in the history of the community document, has been strengthened. This does not mean, however, that the criteria applied in the field of jurisdictional immunity must always reflect in the definition of substantive scope of the Regulation. A (still unlikely, but not completely excluded) restriction of the privilege of jurisdiction in cases of serious human rights violations would not lead to such cases being immediately included within the scope of the EU Regulation.

The privatisation of the use of force through its outsourcing to PMSCs is likely to result in civil litigation. At first sight, claims for damages brought by victims of human rights abuses against PMSCs fall within the scope of the Regulation. However, the affirmative answer is not as obvious as it may seem: private individuals engaged in typically sovereign functions might not be deemed "private" for the purposes of Regulation. It is here submitted that this would be the case if PMSCs come to be granted prerogatives so far reserved to the States, or if in order to perform their task they enjoy forms of protection not accessible to private persons, thereby occupying a position of superiority that disturbs the balance between the parties to private relationships. While this is not the most likely of scenarios, it should not be excluded at the outset either.

[109] A. ATTERITANO, Liability in Tort of Private Military and Security Companies: Jurisdictional Issues and Applicable Law, in F. FRANCIONI/ N. RONZITTI (eds), *War by Contract*, Oxford 2011, p. 475.

A GENERAL PART FOR EUROPEAN PRIVATE INTERNATIONAL LAW?

THE IDEA OF A "ROME 0 REGULATION"

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The unification of private international law within the European Union is progressing steadily, devoting itself to one particular subject matter at a time. This incremental progress involves challenges to transparency, coherence and avoidance of redundancies and has recently triggered the question whether there is a need for the unification of all general matters in private international law, an

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idea labelled as "Rome 0 Regulation", possibly the first step to a future comprehensive conflict of laws codification. This article, with reference to a similar challenge that faced the creators of a civil code in the 19th Century in the territory currently encompassing Germany, assumes the position that a Rome 0 Regulation is desirable and, on this basis, outlines the legal basis and legislative procedure, as well as its possible content. Furthermore, it recommends to the European legislature efficiency as an additional standard for policy choices among contrary options.

I. Introduction

The setting may be different, but in essence history is being repeated. At the beginning of the 19th Century two German legal scholars, *Anton Friedrich Justus THIBAUT* and *Friedrich Carl VON SAVIGNY*, initiated a debate regarding the need for a civil code for the territory of Germany.[1] THIBAUT proposed the idea of a comprehensive and comprehensible codification replacing the complex mixture of the universal *ius commune* and the special *ius proprium*.[2] SAVIGNY, though not categorically opposed to unification, rejected this proposal arguing that the law was not the static result of logical deductions, but a product of history. Accordingly, jurisprudence would have to derive the law from the "spirit of the people" ("Volksgeist") before any codification could be implemented.[3] As the idea of unification of law was closely related to the idea of national unification, he found support among conservatives who favoured a restoration of the status quo before the Napoleonic Wars. A unification of civil law was not achieved until the enactment of the *Bürgerliche Gesetzbuch* in 1900.

Almost two hundreds after the debate between SAVIGNY and THIBAUT, a comparable challenge has arisen at the European level with respect to private international law. The legal situation in this area is characterised by the existence of a steadily increasing number of universal European Union rules on specific matters[4]

[1] For a survey see H. SCHLOSSER, *Grundzüge der Neueren Privatrechtsgeschichte*, Heidelberg 2001, p. 141 *et seq.*

[2] See A.F.J. THIBAUT, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland*, 1814.

[3] See F.C. SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1814.

[4] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 *OJ* (L 199) 40 *et seq.*; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 *OJ* (L 177) 6 *et seq.*; Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), 2010 *OJ* (L 343) 10 *et seq.*; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in

and national rules on all general and specific matters that are subject to the well-established primacy of application of European Union law. This has recently triggered a discussion on whether there is a need of unification of all general matters in private international law, an idea labelled as "Rome 0 Regulation",[5] possibly being the first step towards a full-blown conflict of laws codification in the future. On the one hand, this idea is less ambitious than the idea of a civil code for the German territory at the beginning of the 19th century as the unification of European law – respecting the diversity of its Member States' substantive laws – only targets the unification of private international law. On the other hand, the aim is more ambitious as the idea of unified private international law is not supported by the intention to create a pan-European unified state, as was the case in the German territories after the Napoleonic Wars.

The current spectrum of opinion on the idea of a Rome 0 Regulation reflects the spectrum of opinion in the controversy between THIBAUT and SAVIGNY. Some legal scholars, following in the footsteps of THIBAUT, argue for a prompt unification referring to the unquestionable advantages of such an instrument, *e.g.* increased transparency,[6] coherence and an accompanied reduction in redundancies.[7] Others, in line with SAVIGNY's approach, favour a rather evolutionary process, focussing on filling the existing gaps and thereafter assessing the need and feasibility of an instrument for general private international law matters.[8] Support can also be found from eurosceptics, today's conservatives in this context.

The parallel between the debate then and the debate now is supposed to highlight that the pros and cons do not have to be re-invented, but can be found in the former controversy. From the authors' point of view, the advantages outweigh the disadvantages. Based on the underlying assumption that the concept of a Rome 0 Regulation is able to find sufficient support from the European political bodies

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matters of succession and on the creation of a European Certificate of Succession, 2012 *OJ* (L 201) 107 *et seq.*

[5] The term "Rome" indicates the consistency to the prior Rome I, II and III Regulations and the term "0" clarifies its general scope of application for all Rome Regulations.

[6] However, while THIBAUT pursued the idea of an intelligible code for *everyone*, this seems unrealistic nowadays and the relevant addressees are considered to be *legal practitioners*.

[7] The general desirability of a Rome 0 Regulation was the implied assumption by the organisers of two recent conferences on this topic in France and Germany and, thus, though partly with certain reservations, by the majority of contributors. See S. LEIBLE/ H. UNBERATH (eds), *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013; M. FALLON/ P. LAGARDE (eds), *Quelle architecture pour un code européen de droit international privé*, Bruxelles 2011; see also P. LAGARDE, *RabelsZ* 75 (2011), p. 673 *et seq.* providing for an elaborate draft.

[8] This is the result of a comprehensive study on behalf of the European Parliament by X. KRAMER, Current gaps and future perspectives in European private international law: towards a code on private international law?, *passim*. Available at <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=83495>; see also F. WILKE, Brauchen wir eine Rom 0-Verordnung? Eine Skizze anlässlich einer Bayreuther Tagung, *Zeitschrift für Gemeinschaftsprivatrecht*, 2012, p. 334, 341.

and its Member States' representatives, this article intends to make an argument for a Rome 0 compared to a BRome 0 Regulation (II.), to delineate the legal basis and the legislative procedure for such an instrument (III.), to outline its contents by presentation of possible options (IV.) and to propose the standards that the European legislature could and, from the authors' point of view, should apply to decide among the options (V.). The article ends with a conclusion on the perspectives for a Rome 0 Regulation (VI.).

II. Rome 0 vs BRome 0

The traditional dividing line between the Rome Regulations (choice of laws) and Brussels Regulations (international procedural law) seems to be becoming blurred. More recent legislation reveals a tendency to incorporate matters of conflict of laws, international jurisdiction and recognition of judgments in the same instrument.[9] This is in accordance with common law approaches that do not see a strict dichotomy between choice of law rules and international civil procedural law. These jurisdictions cover all these questions with the term "conflict of laws". If this approach was to be adopted within the European Union, it would be consistent to extend the idea of a general private international law regulation to a general conflict of laws regulation. The agenda of this article would not have to be a Rome 0 but a "BRome 0"[10] Regulation indicating the merger of Rome and Brussels topics. However, as the underlying principles vary,[11] choice of law rules and rules of international civil procedural law ought to be treated separately. Besides, Brussels I having just undergone a long reform process already fulfils the function of a general part of European civil procedural law. Thus, the idea of a Rome 0 Regulation offers a sufficient framework for the debate.

[9] See Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 2012 *OJ* (L 201) 107 *et seq*; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 *OJ* (L 7) 1 *et seq*. See also Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127/2.

[10] For the use of this term see H. HEISS/ E. KAUFMANN-MOHI, „Qualifikation" – Ein Regelungsgegenstand für eine Rom-0-Verordnung, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 181, 186; F. WILKE (note 8), at 340.

[11] See H.J. SONNENBERGER, in *Münchener Kommentar zum BGB*, Volume 10, Munich 2010, Einleitung, para. 458.

III. Legal Basis and Legislative Procedure

The legal basis for judicial cooperation in civil matters with cross-border implications is found in Art. 81 of the Treaty on the Functioning of the European Union (TFEU). According to Art. 81(1)(2) TFEU, such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. This clarifies that the principle of mutual recognition, though not questioning its primacy, is to be supplemented by a principle of harmonisation allowing for the enactment of uniform European Union law.[12] Art. 81(2)(c) TFEU specifies for the area of private international law that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, are entitled to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and jurisdiction. By degrading the reference to the internal market to a presumptive example, this reference does not impose any significant restriction, unlike presumably its predecessor in Art. 65 of the Treaty establishing the European Community, and the universal scope of European private international law rules can no longer be challenged.[13] Choice of law rules determining the applicable civil law in cases with connections to more than one state satisfy these requirements by their very nature, and, thus a Rome 0 Regulation could generally also be based upon Art. 81(2)(c) TFEU and be passed by European Parliament and Council in accordance with the ordinary legislative procedure.

However, according to Art. 81(3) TFEU measures concerning family law with cross-border implications have to be established by the Council, acting in accordance with a special legislative procedure requiring an unanimous vote of the Council after consultation with the European Parliament.

Therefore, the enactment of a Rome 0 Regulation defining its own scope of application and covering regulations in the field of international family law would have to comply with the special legislative procedure. A Rome 0 Regulation dispensing with such a definition could be passed in the ordinary legislative procedure.[14] However, this would require the amendment of all Rome Regulations in their respective legislative procedure declaring Rome 0 applicable by reference.[15] In this scenario, one would have to decide whether to draft a static or variable reference.[16] A static reference would facilitate subsequent amendment of a Rome 0 Regulation, but would lead to the applicability of different versions of Rome 0 if the reference was not updated. In contrast, a variable reference, if it were

[12] See M. ROSSI, in C. CALLIESS/ M. RUFFERT (eds), *EUV/AEUV*, Munich 2011, Art. 81 AEUV, para. 6; S. LEIBLE, in R. STREINZ (ed.), *EUV/AEUV*, Munich 2012, Art. 81 AEUV, para. 15.

[13] See M. ROSSI (note 12), Art. 81 AEUV, para. 13; S. LEIBLE (note 12), Art. 81 AEUV, para. 12.

[14] F. WILKE (note 8), at 339.

[15] F. WILKE (note 8), at 339.

[16] F. WILKE (note 8), at 339.

permissible,[17] would complicate a later amendment, but would not entail the applicability of more than one version of Rome 0 at any one time.

IV. Contents

The contents of a Rome 0 Regulation should follow the structure of a choice of law rule, *i.e.* characterised by three elements: the subject matter (A.), the connecting factor (B.) and the determination of the governing law (C.)

A. The Subject Matter

The subject matter refers to the legal relations to which the particular choice of law rule is to be applied. Three overarching matters with sufficient significance[18] can be identified in this context: characterisation (1.), incidental question (2.) and internationally mandatory rules (3.). While sometimes discussed as a general matter,[19] the significance of agency seems to be restricted to contracts and, thus, should be regulated to the Rome I Regulation.

1. Characterisation

Characterisation ("Qualifikation") is a term not uniformly used in legal doctrine.[20] As understood here, it describes a method by which the applicable choice of law rule is determined.[21] It involves both an element of interpretation of the subject matter and an element of classification of the facts at hand. The first element covers definitions and interpretive methods. Definitions of specific subject matters could be incorporated into a Rome 0 Regulation. However, in order not to overload this general instrument it seems preferable to leave them in the respective specific instrument.[22] The significance of interpretive methods is not limited to choice of

[17] For a rather sceptical analysis see F. WILKE (note 8), at 340.

[18] Further questions may include the principle of *fraus omnia corrumpit*, the method of substitution and the method of adaptation ("Anpassung"), see F. WILKE (note 8), at 338.

[19] M. GEBAUER, Stellvertretung, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 325 *et seq.*; F. WILKE (note 8), at 338.

[20] See for a survey T. NEHNE, *Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts*, Tübingen 2012, p. 170 *et seq.*; H. HEISS/ E. KAUFMANN-MOHI (note 10), at 186.

[21] In German legal doctrine, this is also called first stage characterisation ("Qualifikation erster Stufe") distinguishing it from a second stage characterisation ("Qualifikation zweiter Stufe") which describes the method to determine the *extent* of the governing law (see *e.g.* Art. 12 Rome I Regulation clarifying that prescription is part of the governing law for contracts).

[22] F. WILKE (note 8), at 337.

law rules. Apart from that, they are well established in the case law of the ECJ.[23] For the purpose of codification, classification of the facts remains. One may deny its necessity, as classification of the facts seems closely intertwined with the interpretation of the subject matter.[24] However, from a theoretical perspective, it is an independent second step in the process of characterisation. Thus, a Rome 0 Regulation should provide for a particular rule.[25] As to its substance, the options are autonomous, *lex fori* or *lex causae* characterisation. For the purpose of uniform application of law, autonomous characterisation should be the natural default rule, however, a *lex fori* characterisation would have to step in whenever European Union law lacks sufficient standards to ascertain an autonomous solution.[26]

2. Incidental Question

The term incidental question ("Vorfrage") has its roots in German legal doctrine of private international law,[27] however, it is also of significance for European private international law.[28] It refers to the situation that the answer to a main question depends on the answer to a preceding question (*e.g.* the spouse's right of succession depends upon the validity of marriage). It is common, though not undisputed, to distinguish it from the concept of sub-question ("Teilfrage") and initial question ("Erstfrage"), the first of which covering any preceding question that can never be a main question as it is a dependent part of a main question (*e.g.* form or legal capacity)[29] and the second which refers to any preceding question in a private international law rule of the *lex fori* in contrast to a substantive law rule of the *lex causae*.[30] Proponents argue that this option improves international harmony of decisions,[31] whilst opponents point to the lack of clarity and practical relevance.[32] Incidentally, an incidental question only turns out to be a problem if the main

[23] For the particularities as to the interpretation of European Union law see M. MÜLLER, *Finanzinstrumente in der Rom I-VO*, Jena 2011, p. 35 *et seq.*; T. NEHNE (note 20), p. 40 *et seq.*

[24] Arguably F. WILKE (note 8), at 337.

[25] For a proposal see T. NEHNE (note 20), p. 195; contra H.J. SONNENBERGER, Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR, in *Festschrift für Jan Kropholler*, Tübingen 2008, p. 227, 240 who tends to prefer leaving characterisation to the ECJ and academics.

[26] Generally in accordance with T. NEHNE (note 20), at 189 *et seq.* who, however, supports a *lex causae* characterisation in case a non-Member State law is applicable.

[27] See G. MÄSCH, Zur Vorfrage im europäischen IPR, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 201 *et seq.*

[28] S.L. GÖSSL, Die Vorfrage im Internationalen Privatrecht der EU, *ZfRV* 2011, p. 65, 66 *et seq.*; contra G. MÄSCH (note 27), at 202.

[29] C.C. BERNITT, *Die Anknüpfung von Vorfragen im Europäischen Kollisionsrecht*, Tübingen 2009, p. 10 *et seq.*; T. NEHNE (note 20), at 200 *et seq.*

[30] C.C. BERNITT (note 29), at 12 *et seq.*; T. NEHNE (note 20), at 198.

[31] See G. MÄSCH (note 27), at 210 *et seq.*

[32] See G. MÄSCH (note 27), at 216 *et seq.*

question is not subjected to the *lex fori*, the private international law rule of the *lex causae* differs from the *lex fori* and the respective substantive laws reach different results.[33] With regard to the universal character of European private international law, however, it is possible.

Accepting the idea of an incidental question raises the question of whether to apply the choice of law rules of the *lex fori* or the *lex causae* of the main question.[34] While the second alternative furthers international harmony of decisions, the first alternative serves internal harmony of decisions. The prevailing view in German legal doctrine[35] solves this conflict in favour of the latter approach. In the European context, application of private international law of the *lex fori* would entail the application of the uniform European Union rules on this subject matter in the first place, with only subsidiary reference to national rules.[36]

3. Internationally Mandatory Rules

Internationally mandatory rules are rules that are applicable regardless of the law declared applicable by the choice of law rules for the specific subject matter. The subject of a mandatory rule may or may not be covered by the subject matter of a choice of law rule. However, if the subject of the mandatory rule is covered, the mandatory rule supersedes respective rules of the otherwise governing law. In this sense, internationally mandatory rules operate as a restriction of the subject matter.

With respect to a Rome 0 Regulation, a general definition should be implemented. Adopting Art. 9(1) Rome I Regulation seems to be an adequate choice.[37] However, it ought to be clarified in the wording that a certain connection to the forum is required in order to apply its internationally mandatory rule. Apart from that, the extent to which the forum can, or has to, give effect to internationally mandatory rules of another state has to be determined. In particular, the way in which effect must be granted – either by direct application or indirect consideration– needs clarification.[38] Thus, Art. 9(3) Rome I Regulation – failing to be a masterpiece of legislation – could not be more than a starting point for the debate.

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[33] C.C. BERNITT (note 29), at 12 *et seq.*; T. NEHNE (note 20), at 205.

[34] It would also be theoretically possible to immediately apply the substantive law rule of the *lex fori* or the *lex causae*. However, this would contravene the idea of private international law, because the preceding question is not part of the main question and, thus, its applicability has not yet been determined. See T. NEHNE (note 20), at 203 *et seq.*

[35] See S.L. GÖSSL (note 28), at 67; H.P. MANSEL, Zum Verhältnis von Vorfrage und Substitution - Am Beispiel einer unterhaltsrechtlichen Vorfrage des iranischen Scheidungsrechts, in *Festschrift für Jan Kropholler*, Tübingen 2008, p. 353, 358; T. NEHNE (note 20), at 206 *et seq.*

[36] For a proposal see T. NEHNE (note 20), at 227.

[37] For details see S. LEIBLE, Rom I und Rom II: Neue Perspektiven im Europäischen Kollisionsrecht, Bonn 2009, p. 61 *et seq.*; H.J. SONNENBERGER, Eingriffsnormen, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 429, 434 *et seq.*

[38] See S. LEIBLE (note 37), at 64 *et seq.*; H. J. SONNENBERGER (note 37), at 439 *et seq.*

B. Connecting Factor

The connecting factor serves the function to connect the subject matter with the legal system of a particular state. In this regard, four general questions require answers: choice of law (1.), habitual residence (2.), nationality (3.) and the nature of the underlying principle (4.).

1. Choice of Law

Choice of law rules pursue the goal of finding the most adequate substantive law for a legal relationship. On the assumption that nobody knows better than the individuals which law suits them best, in bilateral conflicts of interest party autonomy seems to be the natural default rule for a connecting factor.[39] However, if a bilateral conflict of interest is characterised by a structural imbalance (*e.g*. consumer law, labour law), limitations to choice of law clauses seem to be warranted. The same holds true for multilateral conflicts of interest. Thus, a Rome 0 Regulation should establish party autonomy as the basic rule subject to modifications in special instruments.[40]

As a choice of law clause is a legal act, it needs rules to determine its conclusion and validity. Establishing a particular private international law rule as to these issues could be one option but uniform substantive law rules seem to be preferable.[41] Coherence will be a major challenge in this field facing a multitude of rules in various EU regulations.[42]

2. Nationality

Nationality is the traditional connecting factor for persons in private international law. It is well-settled that nationality is subject to the state's law concerning to which it might have been acquired or lost.[43] Difficulties are caused if the result of such analyses is a lack of any or a multiple nationality. In the first case, habitual

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[39] See S. LEIBLE, Parteiautonomie im IPR - Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?, in *Festschrift für Erik Jayme*, Munich 2004, p. 485 *et seq.*

[40] F. WILKE (note 8), at 335; for a comprehensive analysis see H.P. MANSEL, Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeinen Teil des europäischen Kollisionsrechts, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 241, 265 *et seq*.; for a proposal see T. NEHNE (note 20), at 270.

[41] See E. JAYME, in Kodifikation und Allgemeiner Teil im IPR, *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 33, 38 *et seq*.

[42] For a survey as to these rules see H.P. MANSEL (note 40), at 256 *et seq*; E. JAYME (note 41), at 36 *et seq*.; for an analysis of the rules relating to choice of law clauses in Rome I and Rome II see T. NEHNE (note 20), at 231 *et seq*.

[43] H. DÖRNER, in R. SCHULZE *et al*. (eds), *Bürgerliches Gesetzbuch*, Baden-Baden 2012; S. LORENZ, in *Beck'scher Online-Kommentar BGB*, Munich 2013, Art. 5 EGBGB, para. 2; H.J. SONNENBERGER (note 11), at para. 699.

residence ought to operate as subsidiary connecting factor.[44] To solve the second issue, one might either refer to the nationality of the forum, the effective nationality being the nationality actually practised by the person or the nationality chosen by the person.[45] A limited choice of law approach seems to fit best with the tendency to emphasise party autonomy in modern private international law. However, if a conflict of law rule intends to implement a certain *favor*, declaring each nationality relevant seems to be adequate (*e.g. favor testamentis* in Art. 83(2) EU Regulation on Succession and Wills).[46]

3. Habitual Residence

Habitual residence is increasingly more important as a connecting factor used to establish a connection of a person to a state. Currently, Union law only provides for definitions as to companies, partnerships and individual professionals.[47] Therefore, a general definition would be more than helpful and could bring an end to the ongoing debate between proponents of an objective, subjective or combined approach.[48] Legal clarity argues for objective criteria such as the duration of the residence, but may lead to inequitable results in particular cases. Reference to an *animus manendi* avoids these hardships, and if combined with a presumptive rule triggered by a certain minimum length of stay, the partial loss of legal clarity seems to be acceptable.[49]

4. Principle of Closest Connection vs Principle of Protection of the Weaker Party

The principle of closest connection has been the traditional connecting concept since its discovery by SAVIGNY.[50] It is based on the assumption of the existence of a specific standard of fairness in private international law saying that the legal system with the closest connection to a conflict offers the most adequate solution.[51] It may operate as a subsidiary default rule (*e.g.* Art. 4(4) Rome I Regulation) or as

[44] F. WILKE (note 8), at 337.

[45] See E. JAYME (note 41), at 40 *et seq.*

[46] F. WILKE (note 8), at 337.

[47] See Art. 19 Rome I and Art. 23 Rome II.

[48] For the development, significance of and various opinions as to the determination of habitual residence see M.-P. WELLER, Der „gewöhnliche Aufenthalt" in einer Rom 0-Verordnung - Plädoyer für einen willenszentrierten Aufenthaltsbegriff, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 293 *et seq.*; see also H. J. SONNENBERGER (note 25), at 227, 237.

[49] M.-P. WELLER (note 48), at 317 *et seq.*

[50] See F.C. SAVIGNY, *System des Römischen Rechts*, Volume 8, Berlin 1849, p. 18, 28.

[51] J. KROPHOLLER, *Internationales Privatrecht*, Tübingen 2006, p. 24 *et seq.*; see also A. JUNKER, *Internationales Privatrecht*, Munich 1998, paras 82 *et seq.*

an exception to an otherwise applicable private international law rule (*e.g.* Art. 4(3) Rome I Regulation).

However, the predominance of a principle of closest connection seems to be challenged by the recent politicisation of the traditionally apolitical rules of private international law. A principle of protection of the weaker party is on its way to becoming an equal antagonist.[52] Art. 6(1) Rome I Regulation serves as a prominent example. In compliance with this development, it is submitted that a principle of closest connection should, if at all, be mentioned in the recitals of a Rome 0 Regulation.[53]

Nevertheless, with regard to its function as a subsidiary default rule, a principle of closest connection flexible enough to cover all factors traditionally relevant to private international law still seems to be the best solution. In contrast, in respect of its function as an exceptional rule, it should be codified only with an explicit reservation to special rules deemed to protect the weaker party regardless of the closest connection. Due to its indeterminate character, it could be useful to establish a catalogue of different factors that could be considered relevant for the determination of the closest connection.

C. Governing Law

In principle, the interplay of the subject matter and the connecting factor determines the governing law. However, the reference to the governing law poses four general questions to its extent: the acceptance of *renvoi* (1.), the extent of the reference in case of conflict of different personal or local laws (2.), the establishment and application of foreign law (3.) and *ordre public* as a last resort (4.)

1. Renvoi

The question concerning the acceptance of *renvoi* equates to the question whether the reference by the choice of law rule is restricted to a state's substantive law or also extends to the respective private international law rules of that State. Only in the second case, is it possible that the adjudicator is referred back to his own law or to the law of a third state. The practical significance, comparable to the issue of incidental questions, may be diminishing due to the increasing harmonisation of private international law rules within the European Union. Nonetheless, in accordance with the universal scope of European private international law the question of *renvoi* is not a matter of legal history just yet. Especially international harmony of

[52] See E. LEIN, The new Rome I/Rome II/Brussels I synergy, *YPIL* 10 (2008), p. 177, 186 *et seq*.; E. LEIN, La nouvelle synergie Rome I/Rome II/Bruxelles I, in *Le nouveau règlement européen «Rome I» relatif à la loi applicable aux obligations contractuelles*, Geneva 2008, p. 27, 35 *et seq.*

[53] See O. REMIEN, Engste Verbindung und Ausweichklauseln, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 223, 239 *et seq*.; F. WILKE (note 8), at 336.

decisions pleads for its acceptance, legal clarity against.[54] The European legislature would appear to favour mere references to the substantive law,[55] but has recently incorporated *renvoi* in the EU Regulation on Succession and Wills.[56] A possible solution for a Rome 0 Regulation could be to establish a default rule against *renvoi*, unless expressly admitted by a specific instrument.[57]

2. Conflict of Personal or Local Laws

Particular problems have to be solved when states provide for different rules depending upon the geographical region or a person's particular, *e.g.* religious or faith-based, affiliation. In these cases, a mere reference to the law of the state does not suffice, but an additional sub-reference is required. A Rome 0 Regulation could establish such a sub-reference autonomously or it could leave it to the national law.

Subjecting the question to national law is probably without alternative in cases of conflicts of personal laws.[58] Accordingly, Art. 37 EU Regulation on Succession and Wills and Art. 15 Rome III Regulation envision respective rules.

As to conflicts of local laws, the answer depends on the nature of the connecting factor. If it is nationality, recourse to the national conflict of local laws rules seems to be most appropriate.[59] In case of a connecting factor indicating a particular location, *e.g.* habitual residence, it is possible to extend its effect from the reference to a state to a particular region. Legal clarity supports such a solution and so do Art. 22 Rome I Regulation and Art. 25 Rome II Regulation. However, international harmony of decision militates in favour of applying national conflict of local laws rules.[60] In the absence of national law on conflicts of personal or local laws, a subsidiary autonomous rule is necessary.[61] Art. 36 EU Regulation on Succession and Wills, accepting the primacy of national conflict of local law rules in the first place, but providing for subsidiary autonomous rules in the second place, might serve as a guideline.

Choice of law requires particular consideration in this context. Generally, it has to be clarified whether its rules as to permissibility and limitations also apply to a conflict of personal or local laws; in particular, it has to be settled which legal

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[54] For a detailed analysis of pros and cons see J. VON HEIN, Der Renvoi im europäischen Kollisionsrecht, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 341, 344 *et seq.*; see also S. LEIBLE (note 37), p. 51 *et seq.*; H.J. SONNENBERGER (note 25), at 227, 238.

[55] See Art. 20 Rome I, Art. 24 Rome II and Art. 11 Rome III.

[56] See Art. 34.

[57] J. VON HEIN (note 54), at 394 *et seq.*; T. NEHNE (note 20), at 315; F. WILKE (note 8), at 335.

[58] F. EICHEL, Interlokale und interpersonale Anknüpfungen**,** in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 397, 422 *et seq.*; S. LEIBLE (note 37), at 58.

[59] S. LEIBLE (note 37), at 58; contra F. EICHEL (note 58), at 405 *et seq.*

[60] See H.J. SONNENBERGER (note 25), at 227, 239.

[61] See S. LEIBLE (note 37), at 58; T. NEHNE (note 20), at 317.

sub-order applies if choice of law rules only refer to the legal order of a state in general.[62]

3. Establishment and Application of Foreign Law

The abstract determination of the applicable law leads to questions regarding the establishment and application of foreign law.[63] Establishing foreign law involves four aspects:[64] Establishing the facts of a case qualifying it as international, permissibility of a subsequent choice of law, (non-)mandatory application of private international law and establishing the specific contents of foreign law.

The first issue belongs to, and ought to remain within, the province of national civil procedural law. The others should be targeted by a Rome 0 Regulation. The second issue could be additionally conditioned upon admission of the *lex fori*. The third issue would have to be decided in compliance with the preceding issue; to the extent that a choice of law clause is possible parties to a lawsuit could dispense with the application of private international law. With respect to the fourth issue, in accordance with the common law approach, it could be incumbent upon the parties of the lawsuit to procure legal rules other than those of the forum. However, it could also be considered to be the province of the adjudicator to determine the content of the foreign law.[65] A basic rule ought to adopt the second approach otherwise harmony of decisions would be jeopardised. An exception could be made if the efforts necessary to inquire into the content of foreign law are disproportionate in comparison to the value of the matter in dispute. Finally, if such efforts fail or are disproportionate, a rule should clarify which law is to be applied.

On the other hand, the mode of application of foreign law is straightforward. The forum ought to apply it the same way as the foreign judge.[66] Whether foreign law has been applied correctly should be subject to control by superior courts. It seems to be of a genuinely civil procedural nature and, thus, lies outside the scope of a potential Rome 0 Regulation.

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[62] See F. EICHEL (note 58), at 408 *et seq*.

[63] For a comprehensive dissertation on this subject matter see C. TRAUTMANN, *Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren*, Tübingen 2011; for a recent comparative study see SWISS INSTITUTE OF COMPARATIVE LAW, *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future, Synthesis Report*, 2011. Available at <http://ec.europa.eu/justice/civil/files/foreign_law_iii_en.pdf>.

[64] For the following analysis see E.M. KIENINGER, Ermittlung und Anwendung ausländischen Rechts, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 479, 482 *et seq.*

[65] See *e.g.* § 293 German Civil Procedure Code.

[66] See F. WILKE (note 8), at 338.

4. Ordre public

Having applied the applicable law to the case at hand, the final question is whether the result complies with the indispensible legal standards of the forum, a concept traditionally labelled *ordre public*. In the field of recognition of judgments, the *ordre public* exception may be retreating,[67] but as a result of remaining significant differences in national substantive laws, particularly in family and succession matters, private international law cannot forgo an *ordre public* reservation.[68] Accordingly, Art. 21 Rome I Regulation, Art. 26 Rome II Regulation, Art. 12 Rome III Regulation and Art. 35 Regulation on Succession and Wills still provide for respective rules. A Rome 0 Regulation should adopt this merely negative concept of *ordre public* blocking the application of a certain rule.[69] It ought to apply *ex officio* and be restricted to a control of the result rather than the legal rule.[70] Whenever the application of the *ordre public* exception leads to a gap in the application law, a standard rule should apply to enable the gap to be filled appropriately. Some argue for a principle of the least intense interference with the *lex causae*.[71] One might also consider taking recourse to the *lex fori* or a functional approach. A Rome 0 Regulation also ought to clarify that the reservation is not limited to purely national values but susceptible to European standards, too, especially the EU Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[72]

V. Standards for Policy Choices

It has been argued above that a Rome 0 Regulation will increase transparency and coherence and decrease redundancies. However, these arguments do not determine the choice among the options for drafting the specific content of the Regulation. Current European private international law rules are predominantly meant to serve foreseeability of the applicable law and harmony of decisions, the embodiment of

[67] Since its reform, Brussels I Regulation only allows for the *ordre public* exception on petition (see Art. 45 (1)); other regulations have already dispensed with this requirement completely, see Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, 2004 *OJ* (L 143) 15 *et seq*; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, 2006 *OJ* (L 399) 1 *et seq.*; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 2007 *OJ* (L 199) 1 *et seq.*

[68] See S. LEIBLE (note 37), at 67 *et seq.*; F. WILKE (note 8), at 335.

[69] W. WURMNEST, Ordre public**,** in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 445, 457 *et seq.*

[70] W. WURMNEST (note 69), at 465 *et seq.*

[71] F. WILKE (note 8), at 335; W. WURMNEST (note 69), at 475.

[72] S. LEIBLE (note 37), at 70 *et seq.*; W. WURMNEST (note 69), at 465.

the almost universally accepted principles of legal certainty and equal treatment. In particular, recital 6 of both the Rome I and the Rome II Regulation refer to the "predictability of the outcome of litigation, certainty as to the law applicable" – the reference to legal certainty is evident – and the "free movement of judgments". In this case the connection with the principle of equality follows from the insight that the free movement of judgments depends on their recognition, which is most likely if an internal court has to decide a case in the same way as courts of other jurisdictions.

However, as has recently been put forward, the European legislature should also consider efficiency as a standard.[73] The Treaty of the European Union expressly legitimates the use of efficiency as a standard for legislation (see Art. 120). Efficiency is a category of utilitarian philosophy striving for the greatest happiness for the greatest number of people. Consequently, goods should be allocated to those people for whom they produce the greatest use. Legal rules should enable, but not hinder such an allocation. One specific deduction of this approach says that transaction costs ought to be minimized.[74] If this is true, the quest for efficiency is in accordance with the quest for legal certainty as in a scenario with full legal certainty there is no need to take precautions as to legal risks and employ extensive and expensive legal expertise. However, the quest for equality may conflict with the quest for efficiency. In this case, it is submitted that the European legislature can, and has to, take into account efficiency as an equally legitimate aim. The result of the balancing process, however, is not predetermined, but depends on a genuinely political decision.

VI. Conclusion

Private international law is an area of law with a long academic tradition. The general matters discussed in this article and to be included in a Rome 0 Regulation can, in particular, look back on a comprehensive academic debate. Pros and cons for a specific solution in the various contexts have been intensely, sometimes maybe redundantly, discussed. If certain issues have not been settled, this is due to the fact that there are no clear answers. However, this lack of clarity is inherent to conflicts of interest. It is the province of any legal system to decide these conflicts. Such decisions are genuinely political ones after a legislative procedure during which all stakeholders have a fair chance to proffer their interests.

[73] G. RÜHL, Allgemeiner Teil und Effizienz – Zur Bedeutung des ökonomischen Effizienzkriteriums im europäischen Kollisionsrecht, in *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 161, 166 *et seq.*

[74] For the relation between transaction costs and efficiency see H.B. SCHÄFER/ C. OTT, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, Berlin 2005, p. 100 *et seq.*

As to a Rome 0 Regulation, particular practical and political challenges may exist,[75] however, leaving the task of producing coherence to the ECJ seems to be a comparably unpleasant alternative.[76] Private international law specialists might be able to forgo a Rome 0 Regulation, but as cross-border commerce becomes mainstay business in the internal market even general legal practitioners are increasingly confronted with demands for advice in the international setting. They, and consequently their clients, will profit to a degree that seems worth the effort. Thus, it is time to take the first step of a legislative procedure: the Commission should issue a Green Paper for a Rome 0 Regulation.

[75] See R. WAGNER, in Das rechtspolitische Umfeld für eine Rom 0-Verordnung, *Brauchen wir eine Rom 0-Verordnung?*, Jena 2013, p. 51 *et seq*.; F. WILKE (note 8), at 339 *et seq.*

[76] Aptly reluctant also F. WILKE (note 8), at 340.

THE METHODOLOGY AND THE GENERAL PART OF THE PORTUGUESE PRIVATE INTERNATIONAL LAW CODIFICATION: A POSSIBLE SOURCE OF INSPIRATION FOR THE EUROPEAN LEGISLATOR?

Luís de Lima Pinheiro*

I. Introduction

The Portuguese Codification of 1966 is contained in Chapter III of Title I of Book I of the Portuguese Civil Code of the same year ("Foreigners rights and choice of law"). The Code came into force on the Portuguese mainland and adjacent islands on 1 June 1967.

The Chapter on Private International Law (PIL) had been preceded by two drafts. The first draft, drawn up by António Ferrer Correia, was published in 1951.[1] The second draft, drawn up by António Ferrer Correia and João Baptista Machado, was published in 1964.[2] To a great extent, the solutions

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[1] *BMJ* 24, p. 9 *et seq.*

[2] *BMJ* 136, p. 17 *et seq.*

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applied followed the prevailing views adopted by the country's most prominent scholars and by the courts.

The above-mentioned Chapter includes two sections. The first section ("General provisions") contains one provision that deals with the legal standing of foreigners (Article 14) and ten provisions on the interpretation and operation of choice-of-law rules (Articles 15 to 24). The second section ("Choice-of-law rules") contains 41 choice-of-law provisions (Articles 25 to 65).

The provisions in the second section tend to cover all matters governed by the Civil Code and, more generally, by Private Law. Accordingly, they have been viewed as abrogating some of the choice-of-law rules contained in the Commercial Code. This section is divided into six subsections. The first concerns the "Extent and determination of personal law" and deals with both individuals and corporations. The second covers the "Law governing legal acts" and deals with issues common to all legal acts and the limitation of actions. The third deals with the "Law governing obligations", namely contracts and torts, while the fourth focuses on the "Law governing property", including intellectual property. The fifth and the sixth subsections comprise, respectively, the "Law governing family relationships" and the "Law governing succession".

In 1977, the Civil Code underwent a reform to bring it into line with the rules and principles of the 1976 Constitution. This reform included significant changes to the PIL subsection that deals with family relationships in the light of constitutional principles ensuring spousal equality and non-discrimination between children of married parents and children of unmarried parents. In 2007, a minor adjustment was made to Article 51 regarding the form of marriage.

The main changes to the Portuguese PIL Codification result from the growing importance of international and European Union sources. Presently, the main sources of choice-of-law rules in many matters are international or supranational. This is the case in matters dealing with protection of minors, maintenance, agency, contracts, torts, negotiable instruments, intellectual property, insolvency, divorce and succession.

Among the international sources, the Rome Convention on the Law Applicable to Contractual Obligations (1980) and several conventions adopted by the Hague Conference on Private International Law are of particular importance. Of note among European Union regulations are EC Regulation No 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation), EC Regulation No 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II Regulation), EU Regulation No 1259/2010 on the Law Applicable to Divorce and Legal Separation (Rome III Regulation) and EU Regulation No 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession (Rome V Regulation).

Regarding domestic sources, it is also worth mentioning that many choice-of-law rules have been adopted in other codes and statutes. Such is the case for Commercial Corporations, Securities, Insolvency and Labour Codes, as well as for legislation regarding arbitration, adhesion contracts, agency contracts, individual establishment of limited liability, consumer credit contracts and insurance.

In order to consolidate sources and articulate the choice-of-law rules with rules on jurisdiction and recognition of judgments in a coherent system, I have advocated a reform of Portuguese PIL leading to a PIL Act consisting of these three areas. However, since the trend has been toward a general Europeanisation of PIL, the issue of PIL codification at the EU level has now become a significant point on the agenda. The need for this codification is felt, in particular, with respect to the General Part.[3]

Indeed, the purpose of the PIL unification at the EU level can to a certain extent be undermined by different solutions regarding the interpretation and application of EU instruments in matters such as characterisation, *fraude à la loi*, and application of foreign law. Furthermore, its systematic consistency can be challenged in matters that are, in principle, covered by these instruments, such as *renvoi*, public policy and mandatory rules.

Below I deal with general methodology (II) and the main rules contained in the General Part (III) of the Portuguese PIL Codification. I briefly comment on suitability of the rules for codification at the EU level and complement this with a few final observations (IV).

II. Methodology

A. Legal Certainty and Flexibility

Portugal's 1966 Codification is characterised by hard-and-fast choice-of-law rules that leave little discretion to the courts. A good example is the choice-of-law rule on voluntary obligations (*i.e*. obligations arising from a legal act, either a contract or a unilateral act) that, in the absence of a choice by the parties, relies on

[3] See, namely, H. SONNENBERGER, Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR, in *Die richtige Ordnung – Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen 2008, p. 227-246; K. KREUZER, Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechtes?, in B. JUD/ W. RECHBERGER/ G. REICHELT (eds), *Kollisionsrecht in der Europäischen Union. Neue Fragen des Internationalen Privat- und Zivilverfahrensrechtes*, Sramek 2008, p. 1-62; K. SIEHR, Die Kodifikation des Europäischen IPR – Hindernisse, Aufgaben und Lösungen, B. JUD/ W. RECHBERGER/ G. REICHELT (eds), *op. cit.*, p. 77-95; P. LAGARDE, Rapport de synthèse, in M. FALLON/ P. LAGARDE/ S. POILLOT-PERUZZETTO, *La matière civile et commerciale, socle d'un code européen de droit international privé ?*, Paris 2009, p. 196 *et seq*.; J. BASEDOW, Kodifizierung des europäischen internationalen Privatrechts?, *RabelsZ* 2011/75, p. 671-676, containing an "Embryon de Réglement portant Code européen de droit international privé" drawn up by P. LAGARDE; Ch. KOHLER, Musterhaus oder Luftschloss? Zur Architektur einer Kodifikation des europäischen Kollisionsrechts – Tagung in Toulouse am 17./18.3.2011, *IPRax* 2011/31, p. 419-420 ; E. JAYME, Zur Kodifikation des Allgemeinen Teils des Europäischen Internationalen Privatrechts. 20 Jahre GEDIP (Europäische Gruppe für Internationales Privatrecht) – Tagung in Brüssel, *IPRax* 2012/32, p. 103-104. On the codification of PIL at the EU level, see also E.-M. KIENINGER, Das europäische IPR vor der Kodifikation, in *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann*¸ Bielefeld 2011, p. 184-197.

traditional connecting factors such as the common habitual residence of the parties and the contracting place. At the time the rule was drafted, several European systems had already adopted "soft" connecting factors or flexible approaches to the issues in question.

Notwithstanding, a few Portuguese choice-of-law rules allow for a degree of flexibility. Article 33(4) provides that the merger of corporations with different personal laws is "evaluated" with regard to both personal laws. With regard to voluntary obligations, Article 41 gives the parties the freedom to choose a law that is unconnected to the contract when they have a "serious interest" in its applicability. Article 44 states that unjust enrichment is governed by the law "upon which" occurred the patrimonial value transference in favour of the enriched person, a formula that apparently allows the courts to develop appropriate solutions for different types of unjust enrichment. Lastly, regarding torts, Article 45(3) provides for deviation from the general rule when the agent and the victim are of the same nationality or, in the absence of a common nationality, if they share the same country of residence, and are occasionally in a foreign country, a solution that may have been inspired by the ruling in the U.S. *Babcock v. Jackson* case.[4] The Codification also contains general provisions on *fraude à la loi* and public policy, which grant some discretion to the courts.

The reform of 1977 introduced "soft" connecting factors in matters involving spousal relationships and adoption. In the first case, Article 52 provides that in the absence of common nationality and common habitual residence, relationships between spouses are governed by the law of the country with the closest connection to the family's life. In the second case, Article 60(2) provides that adoption by a married couple or by the spouse of the biological parent is governed by the law of the country with the closest connection to the family life of the adoptive parents, in the absence of a common nationality or habitual residence of the spouses.

A remarkably flexible approach was adopted by the Voluntary Arbitration Act of 1986 (*Lei* No 31/86, of 29 August) regarding the law applicable to the merits of the dispute. In the absence of a choice by the parties, Article 33(2) prescribed the application of the law most appropriate to the dispute. Regrettably, this approach was abandoned by the Voluntary Arbitration Act of 2011 (*Lei* No 63/2011, of 14 December), which reverted to the traditional application of the law of the country most closely connected with the dispute (Article 52(2)).

Additional flexibility has been introduced mainly by the above-mentioned Rome Convention and by the Rome I and Rome II Regulations. The courts have not consistently created exceptions to the codified choice-of-law rules. Nevertheless, many scholars maintain that the courts may deviate from the particular choice-of-law rules based on the general principles underlying the choice-of-law system, namely the principle of the closest connection.[5] The admission of an unwritten general escape clause is therefore a disputed point.[6]

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[4] See R. MOURA RAMOS, Da Lei Aplicável ao Contrato de Trabalho Internacional, Coimbra 1991, p. 377 *et seq.*, p. 399 *et seq.* and fn. 19.

[5] See J. BAPTISTA MACHADO, *Lições de Direito Internacional Privado*, 2nd ed., Coimbra 1982, p. 162-163, 168 *et seq.*; and R. MOURA RAMOS (note 4), at 380 *et seq.*; followed by D. MOURA VICENTE, *Da Responsabilidade Pré-Contratual em Direito Internacional Privado, Coimbra 2001*, p. 534 *et seq.*; and M.J. MATIAS FERNANDES,

In my view, *de lege ferenda*, a general escape clause should be adopted, allowing the courts to deviate from the law primarily applicable when the case is manifestly more closely connected to another law. The same may be said of a PIL General Part Codification at the EU level.[7] In this respect, Article 19 of the Belgian Code of Private International Law is particularly inspiring. It stipulates that the operation of the escape clause should take into account namely the need for predictability of the applicable law and the circumstance that the legal relationship in question was validly established in accordance with the Private International Law of the States with which it was connected when it was created.[8] A judicial trend of the Portuguese courts to deviate from the statutory choice-of-law rules is only visible in the context of the well-known homeward trend (see under III. E.).

B. Issue-by-Issue Choice and *dépeçage*

Although the Portuguese PIL Codification does not favour issue-by-issue choice, it does admit *dépeçage* in given cases. For example, in the case of contracts, there is not only a rule in Articles 41 and 42 on the obligations arising therefrom and the substantial validity thereof, but also rules for capacity (Articles 25, 31(1) and 32), conclusion of the contract (Article 35) and formal validity (Article 36). Furthermore, the parties may choose different laws to govern severable parts of the contract.

Besides capacity and formal validity, there are other choice-of-law rules on specific issues, for instance on the beginning and end of legal personality (Article 26), agency (Article 39), construction of wills, lack or defective consent on wills and the admissibility of joint wills (Article 64).

In general terms, this approach – which reflects a compromise between the convenience of a single connection for all the aspects of a legal relationship and the search for solutions that cater to the specificity of some of these aspects seems to be suitable for a codification at the EU level.

A Cláusula de Desvio no Direito de Conflitos, Coimbra 2007, p. 282 *et seq.* For the contrary view, see L. DE LIMA PINHEIRO, *Direito Internacional Privado, vol. I – Introdução e Direito de Conflitos/Parte Geral*, 2nd ed., Coimbra 2008, p. 301-302. See further A. FERRER CORREIA, *Direito Internacional Privado. Alguns Problemas*, Coimbra 1981, p. 105 *et seq.*

[6] Compare R. MOURA RAMOS, Les clauses d'exception en matière de conflits de lois et de conflits de juridictions – Portugal, in *Das Relações Privadas Internacionais. Estudos de Direito Internacional Privado*, Coimbra 1995, p. 309 *et seq.*; J. SENDIM, Notas sobre o princípio da conexão mais estreita no Direito Internacional Privado Matrimonial Português, *Direito e Justiça* 7 (1995), p. 351 *et seq.*; and M. FERNANDES (note 5), at 217 *et seq.*, with A. FERRER CORREIA, *Lições de Direito Internacional Privado - I*, Coimbra 2000, p. 145; A. MARQUES DOS SANTOS, *Direito Internacional Privado. Introdução*, vol. I, Lisboa 2001, p. 308 *et seq.*; and L. DE LIMA PINHEIRO (note 5), at 398-401.

[7] See also Article 137 of the "Embryon de Réglement portant Code européen de droit international privé" drawn up by P. LAGARDE (note 3).

[8] See also K. KREUZER (note 3), at 38-39 and, with regard to the Belgian provision, M.J. MATIAS FERNANDES (note 5), at 117 *et seq.*

C. "Conflict Justice" versus "Content-Oriented Law Selection" and Material Justice"

The Portuguese PIL Codification primarily aims to achieve "conflict justice". Most of the choice-of-law rules operate the selection of a law based on the idea of the most significant connecting factor.

However, the principle of *favor negotii* plays an important role in matters of formal validity. Articles 36 and 65 provide for alternative connections, which allow for the formal validity of legal acts not only in accordance with the law applicable to the substantial validity, but also to other laws such as the law of the contracting place or the place where the will was executed.

The principle of *favor negotii*, extended to the *favor legitimitatis*, also operates as a limit to *renvoi* in Article 19(1). This provision shows that in this codification the principle of *favor negotii* prevails over the principle of international uniformity of solutions that is often seen as the main principle of "conflict justice".

According to the best view, when prescribing the application of the law most appropriate to the dispute, Article 33(2) of the Voluntary Arbitration Act of 1986 allowed the arbitrators to take into consideration the content of the laws at stake.[9] This possibility is now doubtful because of the restrictive wording of Article 52(2) of the Voluntary Arbitration Act of 2011.

Largely through the influence of European and international sources, Portuguese PIL has evolved to include new content-oriented choice-of-law rules, namely regarding the protection of minors and the typically weaker contracting parties.

In my view, PIL Codification at the EU level should also have "conflict justice" as its starting point, but should be open to "material justice" considerations when the international trend favours a certain substantive solution (a transnational policy) or when there is a need to compensate the disadvantages caused by the transnational nature of the relationship.

D. Unilateral Rules and Overriding Mandatory Rules

The Portuguese PIL Codification is based on *bilateral choice-of-law rules*. Article 28(1) and (2) contain a deviation regarding the competence of personal law, which provides for the application of Portuguese law to the capacity of a person who makes a contract in Portugal and who has capacity according to Portuguese law but not according to his personal law. But Article 28(3) "bilateralises" this deviation, granting relevance to an identical rule contained in the law in force in the foreign contracting place.

In other statutes there are many *unilateral rules*. I refer here to two statutes found in contract law and the Code of Commercial Corporations. With regard to the prohibition of certain adhesion clauses in contracts with consumers, Article 23 of the *Decreto-Lei* No 446/85, of 25 October, as modified by *Decreto-Lei* No. 249/99, of 7 July, is to be taken into particular consideration. Article 23(1)

[9] See L. DE LIMA PINHEIRO, *Direito Comercial Internacional*, Coimbra 2005, p. 541.

provides for the applicability of the rules contained in Articles 20 *et seq.* of the statute regardless of the law chosen by the parties to govern the contract, whenever there is a close connection with the Portuguese territory. Article 23(2) operates as a kind of "bilateralisation" of this rule by stating that when the contract shows a close connection with the territory of another Member State of the European Community, the corresponding provisions of the said Member State shall be applicable to the extent provided for by that State. The new wording given to this provision is aimed at transposing Article 6(2) of Dir. 93/13/CEE on Unfair Terms in Consumer Contracts; however, it seems to go beyond that.[10]

Regarding agency contracts, Article 38 of the *Decreto-Lei* No 178/86, of 3 July, provides that a foreign law will only apply to the termination of a contract exclusively or mainly performed in Portugal if that foreign law is more favourable to the agent than the Portuguese law. This extension of the scope of application of Portuguese law is permitted by Article 16 of the Hague Convention on the Law Applicable to Agency to which Portugal is a Contracting Party. As a result of the European Court of Justice's ruling in the 2000 *Ingmar* case,[11] this rule shall, to a certain extent, be "bilateralised" when the contract is performed by the agent in another Member State and the parties have chosen the law of a third State.

Turning now to the Code of Commercial Corporations, a rule with a unilateral element can be found in Article 3(1). This provision starts off by reaffirming the general rule of Article 33(1) of the Civil Code according to which commercial corporations are governed by the law of the State where the main and effective seat of the administration is located. However, it adds that corporations with their formal seat in Portugal may not invoke the applicability of a foreign law against third parties.

Academic authors are divided when it comes to the "bilateralisation" of this part of the rule.[12] In my view, if the *ratio legis* is to protect third-party reliance on

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[10] Compare R. MOURA RAMOS, Remarques sur les développements récents du droit international privé portugais en matière de protection des consommateurs, in *E Pluribus Unum. Liber Amicorum Georges A. L. Droz*, La Haye/ Boston/ Londres 1996, p. 248 *et seq.*; *idem*, La transposition des directives communautaires en matière de protection du consommateur et le droit international privé portugais (2004), in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, vol. II, Coimbra 2007, p. 234-235; E. GALVÃO TELES, *A protecção do consumidor nos contratos internacionais*, 1997, p. 232 et *seq.*; *idem*, A lei aplicável aos contratos de consumo no "labirinto comunitário", in *Est. Inocêncio Galvão Telles*, vol. I, Coimbra 2002, p. 710-711, 718 *et seq.* and p. 732-733; M.J. DE ALMEIDA COSTA, *Síntese do Regime Jurídico das Cláusulas Contratuais Gerais*, 2nd ed., Lisboa 1999, p. 26; L. DE LIMA PINHEIRO, *Direito Internacional Privado, Direito de Conflitos/Parte Especial*, vol. II, 3nd ed., Coimbra 2009, § 66 C; and E. DIAS OLIVEIRA, *A Protecção dos Consumidores nos Contratos Celebrados Através da Internet. Contributo para uma análise numa perspectiva material e internacionalprivatista*, Coimbra 2002, p. 295 *et seq.*

[11] ECJ, 9 November 2000, C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc*, *ECR* [2000] I-9305.

[12] R. MOURA RAMOS, *Aspectos recentes do Direito Internacional Privado português*, (Sep. Est. Afonso Rodrigues Queiró – BFDC 1986), Coimbra 1987, p. 31, and A. MARQUES DOS SANTOS, *Direito Internacional Privado. Sumários*, 2nd ed., Lisboa 1987, p. 128 and p. 252, maintain that it cannot be "bilateralised"; A. FERRER CORREIRA, O Direito

the formal seat rather than safeguarding national interests against foreign interests, there should be no objection to "bilateralisation".[13]

In any case, the unilateral choice-of-law rules contained in the Portuguese PIL are special rules. Judicial practice has not yet "bilateralised" unilateral rules that are not otherwise "bilateralised" by statutory provision.

Since European choice-of-law rules are supranational, they are logically bilateral in nature. Therefore, the only doubt is whether they should be universal or applicable only to cases involving EU Member States. The universal approach generally adopted by EU Regulations merits approval since the issues dealt with and the aims to be achieved through the regulation of transnational relationships are essentially the same, whether or not they are connected with a Member State.

The Portuguese PIL Codification does not recognise the concept of *règles d'application immediate* (overriding mandatory rules). Nevertheless, the concept has attracted the attention of academics and subsequently been voiced by the courts and in other statutes.[14]

Two international conventions in force in the Portuguese PIL system contain provisions on overriding mandatory rules: the above-mentioned Rome Convention (Article 7) and the Hague Convention on the Law Applicable to Agency (Article 16). Both provisions grant relevance to overriding mandatory rules of the forum and of third countries, but Portugal has made use of the reservation provided for in Article 22(1)(a) of the Rome Convention against the application of Article 7(1) of this Convention regarding overriding third-country mandatory rules.

Article 9 of the Rome I Regulation introduced a material concept of overriding mandatory rules, stating that they are:

Internacional Privado Português e o princípio da Igualdade, *RLJ* (1987/1988) No. 3762, fn. final, p. 270, seems to accept "bilateralisation".

[13] L. DE LIMA PINHEIRO (note 10), § 59 D. For a convergent view, see F. PIRES, *Direitos e Organização dos Obrigacionistas em Obrigações Internacionais*, Lisboa 2001, p. 196, and D. MOURA VICENTE, Liberdade de estabelecimento. Lei pessoal e reconhecimento das sociedades comerciais, in *Direito Internacional Privado. Ensaios*, vol. II, Coimbra 2005, p. 108, fn. 47. This last author only admits "bilateralisation" when the law of the formal seat contains an identical provision.

[14] See, for instance, A. FERRER CORREIRA, *Lições de Direito Internacional Privado*, Coimbra 1973, p. 24; *idem*, Considerações sobre o método do Direito Internacional Privado, in *Estudos Vários de Direito*, Coimbra 1982, p. 387 *et seq.* ; *idem* (note 5), at 161 *et seq.*; A. MARQUES DOS SANTOS, *As Normas de Aplicação Imediata no Direito Internacional Privado. Esboço de Uma Teoria Geral*, vol. 2, Coimbra 1991, p. 852 *et seq.*; *idem* (note 6), at 274 *et seq.*; R. MOURA RAMOS (note 4) p. 657 *et seq.*; *idem*, Droit international privé vers la fin du vingtième siècle: avancement ou recul?, *DDC/BMJ* 73/74 (1998), p. 85-125, 97-98; *idem*, Linhas gerais da evolução do Direito Internacional Privado português posteriormente ao Código Civil de 1966, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, Coimbra 2006, p. 535 *et seq.*; L. DE LIMA PINHEIRO, *Contrato de Empreendimento Comum (Joint Venture) em Direito Internacional Privado*, Almedina/ Coimbra 1998, p. 1088 *et seq.*; *idem* (note 5), at 243 *et seq.* and 269 *et seq.*; and D. MOURA VICENTE (note 5), at 640 *et seq.*

> "(1) provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

Article 9(2) permits the application of the overriding mandatory rules of the law of the forum. Regarding overriding mandatory rules of third countries, Article 9(3) adopts a restrictive approach, stating that,

> "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful."

Scholars disagree on many issues outside the scope of these instruments and particular statutory provisions, namely those regarding the feasibility of a material concept that embraces all of the overriding mandatory rules,[15] the possibility of inferring the overriding nature of a provision from its interpretation,[16] the exceptional occurrence of these provisions,[17] and the basis upon which the courts of the forum may apply mandatory rules of third countries.[18]

The courts have not yet settled these contentions. Cases in which provisions of the forum override the foreign law designated by the choice-of-law rule are not frequent. Early cases are based on the public policy clause.[19] Since the 1990s, a number of cases have employed the concept of overriding mandatory rules regarding the termination of employment contracts by the employer. Apart from contracts of employment performed in Portugal, these cases are not consistent (namely regarding employees of Portuguese consulates).[20] Furthermore, one non-

[15] In favour of this view, see, for instance, A. FERRER CORREIRA, A. MARQUES DOS SANTOS and R. MOURA RAMOS, *loc. cit.*; against, see L. DE LIMA PINHEIRO and D. MOURA VICENTE, *loc. cit.*

[16] In favour of this view, see, for instance, R. MOURA RAMOS (note 4), at 679-680, and, more restrictively, A. FERRER CORREIRA (note 5), at 38 *et seq.* and 60 *et seq.*, *maxime* fn. 31; and A. MARQUES DOS SANTOS (note 14), at 381 *et seq.* and 655; against, see L. DE LIMA PINHEIRO (note 14), at 1092-1093; *idem* (note 5), at 247-248.

[17] For a convergent view, see, for instance, R. MOURA RAMOS, L'ordre public international en droit portugais (1998), in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra 2002, p. 252, and L. DE LIMA PINHEIRO (note 5), at 253; against, see A. MARQUES DOS SANTOS (note 14), at 964 *et seq.*

[18] Compare, for instance, I. DE MAGALHÃES COLLAÇO, *Da Compra e Venda em Direito Internacional Privado, Aspectos Fundamentais*, vol. I, Lisboa 1954, p. 319 *et seq.*, in a first stage of her thinking; A. FERRER CORREIRA, Considerações sobre (note 14), at 389-390; A. MARQUES DOS SANTOS (note 14), at 1046 *et seq.*, *idem* (note 6), at 278-279 and fn. 636; L. DE LIMA PINHEIRO (note 14), at 1100 *et seq.*; *idem* (note 5), at 276 *et seq.*

[19] See, for instance, STJ 8/10/1935 [*RLJ* 68 (1935) 284] and RLx 24/11/1980 [*CJ* (1980-V) 56].

[20] See, for instance, RPt 25/11/1991 [*CJ* (1991-V) 232], RLx 10/3/1993 [*CJ* (1993-II) 155] and 10/01/1996 [*CJ* (1996-I) 160] and STJ 11/06/1996 [*CJ/STJ* (1996-II) 266], 30/9/1998 [*BMJ* 479: 358] and 23/5/2001, available at <www.dgsi.pt/jstj.nsf>. Compare

reported case has classified statutes on international payments as overriding mandatory statutes.[21]

As far as I know, there is no case in which a foreign mandatory rule of a third country has been unambiguously applied.[22]

In codifying the General Part of the PIL at the EU level, it would seem apposite to insert a provision that allows for the application of overriding mandatory rules of the forum.[23] A material definition of these rules, such as the one contained in Article 9(1) of the Rome I Regulation, should, in my view, be avoided. The application of overriding mandatory rules shall be exceptional, but any attempt to limit the autonomy of the legal systems of the Member States in the determination of these rules, namely by reference to the criterion of "public interests", would be a source of embarrassment for the courts and for the parties.[24]

On the contrary, I do not recommend a general clause regarding the relevance of mandatory rules of third States since this would jeopardise much-desired legal certainty and predictability. The appropriation of provisions on the relevance of third-state mandatory rules should depend on the matter at hand and be left to the special part. In principle, even in contractual matters, where the issue often arises, preference should be given to special connections based on determinate connecting factors regarding certain categories of mandatory rules.[25]

E. International Uniformity and Protection of National Interests

It has already been mentioned (*supra* C.) that international uniformity is an important goal of the Portuguese PIL Codification. It is, however, not its supreme objective. This is mainly due to the importance placed on the principle of *favor negotii*, not to any special concern over the protection of "national interests". Aside from the rules promoting *favor negotii* (*supra* C.), the only provision designed to promote values and policies of "material justice" is the public policy clause examined below.

STJ 19/3/1992 [*BMJ* 415: 412] and 26/10/1994 [*BMJ* 440: 253], and REv 12/1/1999 [*CJ* (1999-I) 294].

[21] RLx 26/1/2006, appeal no 10483/05-2.

[22] Compare STJ 25/6/1981 [*BMJ* 308: 230], in which Angolan law has been taken into account as a fact creating an impossibility of performance, and STJ 7/6/1983 [*BMJ* 328:447], in which the application of public law rules of the foreign country of performance of an employment contract was apparently based on the reference made by the parties to these rules.

[23] See also Article 136 of the Embryon de règlement portant Code européen de droit international privé drawn up by P. LAGARDE (note 3), and K. KREUZER (note 3), at 42-43.

[24] See L. DE LIMA PINHEIRO, Rome I Regulation: Some Controversial Issues, in *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann*, Bielefeld 2011, p. 253 *et seq*. Compare, for a different view, K. KREUZER (note 3), at 42-43.

[25] See L. DE LIMA PINHEIRO (note 24), at 253 *et seq.*, with further development and references.

Many statutes subsequently adopted contain unilateral choice-of-law rules and provisions on overriding mandatory rules, which are often designed to promote the values and policies of Portuguese material law. This is the case of the rule regarding the termination of agency contracts, referred to above (D.); Article 3 of the Securities Code; and, Article 9 of the Statute on Insurance Contracts (adopted by the *Decreto-Lei* No 72/2008, of 16 April).

Academic authors agree that PIL should, to a certain extent, pursue values and policies of "material justice". The bibliography on overriding mandatory rules is clear in this respect. In my opinion, this goal should be reconciled with the principle of international uniformity. Therefore, as was mentioned above (C.), in principle, the forum should only adopt content-oriented rules where a certain substantive solution is favoured not only by the law of the forum, but also by a recognisable international trend (a transnational policy), or justified by disadvantages stemming from the transnational nature of the relationship.

The promotion of values and policies of "material justice" should be viewed as distinct from the protection of national public interests or the safeguarding of private local interests against foreign interests. The prevailing view is that PIL is primarily concerned with promoting Private Law justice and not with conflicts of States' interests. It is also generally accepted that PIL should strike a fair balance between the interests of private persons, not promote the interests of nationals or residents above the interests of foreigners. Although one cannot discount the need for special rules to protect national public interests against foreign interests, it is noteworthy that the unilateral choice-of-law rules and overriding mandatory provisions in the Portuguese system tend to perform other functions (namely the protection of the weaker contracting party). In principle, these general guidelines seem to be suited to a PIL Codification at the EU level.

III. Main General Part Rules

A. Characterisation or Qualification

Article 15 of the Civil Code states that reference to a law shall comprise only those rules that correspond in content and function, as defined by that law, with the legal category referred to in the choice-of-law rule. This provision must be viewed in the light of significant studies on qualification carried out by Portuguese scholars.[26]

[26] See, for instance, I. DE MAGALHÃES COLLAÇO, *Da qualificação em Direito Internacional Privado*, Lisboa 1964; A. FERRER CORREIA (note 6), at 150 *et seq.*; *idem*, (note 5), at 199 *et seq.*; *idem*, Le principe de l'autonomie du droit international privé dans le système juridique portugais, in *Festschrift Gerhard Kegel II*, Stuttgart 1987, paras 7 *et seq.*; *idem*, O Direito Internacional Privado Português e o princípio da Igualdade, *RLJ* 120 (1987/1988) paras 3755-3756, 3758, 3760 and 3762, paras 5 *et seq.*; J. BAPTISTA MACHADO (note 5) at 93 *et seq.*; A. MARQUES DOS SANTOS (note 12) at 193 *et seq.*; R. MOURA RAMOS (note 4), at 631 *et seq.*; L. DE LIMA PINHEIRO, *A Venda com Reserva da Propriedade em Direito Internacional Privado*, Lisboa *et al.*, McGraw-Hill 1991, at 154 *et seq.*; *idem* (note 5), at 506 *et seq.*; D. MOURA VICENTE (note 5), at 381 *et seq.*

The findings of these studies converge on fundamental methodological guidelines although some conceptual controversy persists.

It has been discussed whether the object of qualification is the state of facts (for instance, ISABEL DE MAGALHÃES COLLAÇO and LIMA PINHEIRO) or the rules of the potentially applicable law (for instance, FERRER CORREIA and BAPTISTA MACHADO. The second view influenced the drafting of Article 15, according to which the material scope of the reference made to the applicable law is still a matter of qualification. For those who consider the state of facts as the object of qualification, the material scope of the reference made to the applicable law, albeit linked to qualification, concerns the legal consequence of the choice-of-law rule.[27]

Academic authors have pinpointed three stages with regard to qualification. The first focuses on *interpretation of the concept* that defines the state of facts that are the object of the choice-of-law rule. It is generally accepted that while the interpretation of this concept has its starting point in the material law of the forum, it must also take into account the special nature of the choice-of-law system. This special nature requires that these concepts be given a wide meaning in order to embrace foreign legal relationships that are different from or even unknown to the law of the forum. Consequently, when it comes to choice-of-law rules of internal source, it may be said that the interpretation is anchored in the material law of the forum yet autonomous.

With regard to the choice-of-law rules contained in international conventions, the interpretation should be autonomous in relation to the contracting states' particular legal systems and should be grounded in a comparison of legal systems. The interpretation of choice-of-law rules contained in EU Regulations must also be autonomous.[28] Some additional remarks regarding the interpretation of these rules will be made below.

The second stage centres on the *delimitation of the state of facts* that are to be brought under the concepts interpreted above. Since choice-of-law rules use legal concepts that refer to the legal content and functional features of relationships, the state of facts must be legally characterised. This characterisation must be carried out in face of all potentially applicable laws. Thus, one may say that the characterisation is done *lege causae*.

In the third stage – *qualification stricto sensu* – the *concretum* legally characterised as above shall be placed under the concept that defines the object of the choice-of-law rule. Although the object of the qualification must be characterised according to potentially applicable law or laws, the ultimate decision on qualification must be based upon the qualification criterion of the system containing the choice-of-law rule at stake.

This qualification criterion is defined by the structure and goals pursued by the applicable choice-of-law system. Regarding choice-of-law rules of internal source, it is the criterion of qualification of the choice-of-law system of the forum.

From the determination of the meaning of the concept that defines the object of the choice-of-law rule and the delimitation of the state of facts that

[27] See also M. KELLER and K. SIEHR, *Allgemeine Lehren des internationalen Privatrechts*, Zürich 1986, p. 490.

[28] See also ECJ, 14 October 1976, C-364/92, *Eurocontrol, ECR* [1976], 629.

constitutes this object, it follows that the reference made by the rule is materially limited. The reference made by each of the choice-of-law rules at stake may only embrace the rules and principles that shape the aspect of the relationship that can be brought under that concept. Therefore, Portuguese choice-of-law rules operate a reference of limited material scope (Article 15).

The courts have, at least formally, complied with Article 15. The cases that have dealt with qualification issues do not provide a clear justification of the result achieved and, thus, do not shed any light on the interpretation of the provision.

The methodology developed in the Portuguese PIL for the characterisation process regarding domestic choice-of-law rules can only inspire codification at the EU level to a certain extent. There are specific aspects of the characterisation process regarding EU choice-of-law rules that must be taken into consideration for this purpose.

The autonomous interpretation of these rules means that reference must not be made to the law of one of the States concerned but rather "having regard to the context of the provision and the objective pursued by the legislation in question",[29] and in conformity with "the fundamental rights protected by the Community legal order or with the other general principles of Community law".[30]

Furthermore, in addition to other relevant interpretation standards,[31] recourse to a comparative interpretation that takes into account the "general principles, which stem from the corpus of the national legal systems" of the Member States, is justified.[32] Should a general convergence of the national legal systems of the Member States fail, it could be thought that the solutions accepted by the Member States having a greater interest in the matter should be followed. However, the ECJ and the academic writings tend to follow the solutions accepted in the majority of the Member States.[33]

Insofar as the EU choice-of-law rules use legal concepts that refer to the legal content and the functional features of relationships, it seems that the methodology developed in the Portuguese PIL for delimiting the state of facts would be suitable for these rules. The same may be said of the limited material scope of the reference.

To what extent these methodological guidelines shall be enshrined in legal rules concerning characterisation may well be a matter of controversy.[34] In my

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[29] See ECJ, 2 April 2009, C-523/07, *A.*, *ECR* [2009] I-02805, para. 34, regarding the Brussels II*bis* Regulation.

[30] See ECJ, 23 December 2009, C-403/09, *Deticek*, *ECR* [2009] I-12193, para. 34, regarding the Brussels II*bis* Regulation.

[31] See, with further developments, J. KROPHOLLER, *Internationales Privatrecht*, 6th ed., Tübingen 2006, p. 79 *et seq*., and U. MAGNUS, in U. MAGNUS/ P. MANKOWSKI (eds), *Brussels I Regulation*, 2nd ed., München 2012, Introduction, paras 98 *et seq.*

[32] This is the understanding of the ECJ since the judgment of 14 October 1976, in the case *Eurocontrol* (note 28).

[33] See J. KROPHOLLER (note 31) and U. MAGNUS (note 31) with extensive case law references.

[34] Compare, for instance, H. SONNENBERGER (note 3), at 240, and K. KREUZER (note 3), at 54.

opinion, it is a very important issue that should be addressed in a codification of the PIL General Part at the EU level.

B. *Fraude à la loi*

Article 21 of the Civil Code states that,

> "in the application of the choice-of-law rules the state of facts or of law are irrelevant if they are created with the fraudulent intention of preventing the applicability of the law which, in other circumstances, would be applicable."

In line with the prevailing opinions expressed in Portuguese legal literature, the Portuguese legislator has given autonomy to *fraude à la loi* in PIL, taking the position held namely by French courts and authors.

The *fraude à la loi* rule operates where two prerequisites are met: an objective element and a subjective element. The objective element involves the manipulation of the connecting factor or the fictitious internationalisation of a domestic relationship. The subjective element is the intention to displace a mandatory rule of the normally applicable law.

When these two prerequisites are met, *fraude à la loi* is sanctioned by the application of the law that would have been displaced by manipulation of the connecting factor or the fictitious internationalisation of the domestic relationship. Article 21of the Civil Code has the merit of clarifying that the sanction does not imply, *per se*, that the acts included in the fraudulent process are invalid. For example, a Portuguese citizen changes his nationality in order to take advantage of the more extensive freedom of will granted by the law of the new nationality, thereby depriving his children of their inheritance rights. The *fraude à la loi* is sanctioned by the application of the Portuguese law to the substantive validity of the will, which entails the reduction of the disposition upon death, rather than the absolute invalidity of the act.

The *fraude à la loi* safeguards "conflict justice" by preventing normally applicable law from being displaced, regardless of whether or not it is forum law or foreign law. Thus, its autonomy regarding the public policy rule is justified, since public policy aims to protect the fundamental substantive standards of justice in force in the forum's legal order.

Since there are divergences among the various Member States' PIL systems, and even doubts in legal practice and theory in the context of particular systems, it would seem advisable for the European legislator to address these issues when codifying the General Part of the PIL.[35]

[35] For a different view, see H. SONNENBERGER (note 3), at 244-245.

C. *Renvoi*

The Portuguese PIL Codification allows for *renvoi*, in principle, in two cases. The first is when the PIL of the law referred to by the Portuguese choice-of-law rule applies another law and this law accepts the reference (transmission – Article 17(1)). The second involves cases in which the PIL of the law referred to by the Portuguese choice-of-law rule applies Portuguese material law (remission – Article 18(1)). Nevertheless, the acceptance of *renvoi* in these cases is limited by the principle of *favor negotii* and in matters regarding personal status.

According to Article 19(1), the *renvoi* accepted under the terms of Articles 17 and 18 is blocked when it leads to the invalidity of a legal act or the illegitimacy of a status that would be valid or legitimate according to the law referred to by the Portuguese choice-of-law rule.

Moreover, *renvoi* is limited in matters of personal status (namely capacity, rights of personality, family relationships and succession). In these matters, a transmission, accepted under the terms of Article 17(1), ceases when the law referred to by the Portuguese choice-of-law rule is the national law and when the interested party habitually resides either in Portugal or in a country whose PIL applies the material law of the State of his nationality (2). The transmission is, however, re-established in matters of guardianship, patrimonial relationships between spouses, parental rights, relationships between the adoptive parent and the adopted person and succession, where the national law refers to the law where immovables are situated and this law claims applicability (3).

With regard to the same matters, a remission that is admissible under the terms of Article 18(1) only remains in effect when the interested party habitually resides in Portugal or when the PIL of his country of residence applies Portuguese material law (2).

As a result of these limitations, the general rule in the Portuguese PIL Codification is that the reference made to a foreign law includes only material law (material reference – Article 16).

Furthermore, Article 19(2) excludes *renvoi* when the reference is made by the interested parties, namely in cases involving international organisations (Article 34) and voluntary obligations (Article 41).

Other PIL sources exclude *renvoi* in certain matters. With regard to contracts, such is the case of Article 15 of the above-mentioned Rome Convention and, with certain exceptions, of Article 20 of the Rome I Regulation. Regarding torts and other non-contractual obligations, such is the case of Article 24 of the Rome II Regulation. Regarding divorce and legal separation, such is the case of Article 11 of the Rome III Regulation.

Other matters in which *renvoi* is not permitted by international conventions involve maintenance obligations and agency. As a matter of fact, most of the choice-of-law rules of the Hague Conventions on the Law Applicable to Maintenance Obligations (1973) and the Law Applicable to Agency (1978) refer to the "internal law" of a State, with the meaning of material law. One may infer therefrom that the reference made by the choice-of-law rules of these conventions should be understood as a material reference. Article 12 of the Hague Protocol on the Law Applicable to Maintenance Obligations (2007) also excludes *renvoi*.

In my view, the general exclusion of *renvoi* operated by the above-mentioned conventions and by the Rome I, Rome II and Rome III Regulations is unjustified. The goal pursued by unification only justifies the exclusion of *renvoi* where the unified choice-of-law rules refer to the law of a State bound by the unification instrument. Where the unified choice-of-law rules refer to the law of a third State, the goal of international uniformity points towards the acceptance of *renvoi*.[36]

The same criticism may be levelled at Article 42 of the Securities Code, which excludes *renvoi* in certain matters concerning securities. This viewpoint has prevailed in the recent Rome V Regulation, which allows the application of the PIL rules of third States, provided that those rules "make a *renvoi*" (Article 34(1)) to the law of a Member State or to the law of another third State which would apply its own law.

According to Article 34(2) of the same Regulation, the *renvoi* does not apply where the law governing the succession results from an escape clause (Article 21(2)) or choice by the deceased (Article 22) in matters of formal validity of dispositions of property upon death made in writing (Article 27) or of acceptance or waiver of the succession (Article 28).

The exclusion of *renvoi* in cases where there is reference to the law of a third State resulting from an escape clause seems unjustified. If the law of the third State most closely connected with the case applies the law of the forum or the law of a third State that accepts the reference, the *renvoi* should be accepted. In effect, the legislative option in favour of choice-of-law flexibility does not imply, *per se*, the sacrifice of the principle of international uniformity of solutions.

On the other hand, a number of interpretation problems arise from the provision contained in Article 34(1) of the Rome V Regulation.[37] In the first place, one may ask if, as in Portuguese law, remission or transmission to the law of another State should not be construed in terms of the applicability of this law according to the PIL of the third State. Reference to the "rules of Private International Law" of the third State (and not only to "choice-of-law rules" of this State) suggests that its *renvoi* system should be taken into consideration and the principle of international uniformity points in the same direction. Therefore, the question should be answered in the affirmative.

Second, it appears that the provision allows for *renvoi* whenever the law of a third State would apply the law of a Member State, even if it is not the forum Member State. Thus, both cases of transmission (to the law of a Member State which is not the forum law) and cases of remission are included.

The acceptance of transmission to the law of another Member State raises a number of issues. Undoubtedly, it promotes harmony with the law of the third

[36] See L. DE LIMA PINHEIRO (note 5), at 479-480. See also Article 134 of the Embryon de Règlement portant Code européen de droit international privé drawn up by P. LAGARDE (note 3) ; K. KREUZER (note 3), at 24 *et seq*., and K. SIEHR (note 3), at 90-91. For a different view, see D. Henrich, Der Renvoi: Zeit für einen Abgesang, in *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann*¸ Bielefeld 2011, 159 *et seq.*

[37] Regarding the Commission's Proposal, see also J. GOMES DE ALMEIDA, *Direito de Conflitos Sucessório*, Coimbra 2012, p. 41 *et seq*., with further references.

State and the judgment rendered will be, in principle, recognised in every Member State. However, in this case, a law is being applied that is not designated by the choice-of-law rule either of the forum or of all the other Member States bound by the Regulation. Therefore, it is doubtful whether, under these circumstances, the forum Member State should disregard the connection that the European legislator deems most suitable to the matter.

At the end of the day, it seems that a system of *renvoi* as provided for in Articles 17(1) and 18(1) of the Portuguese Civil Code would be suitable for a PIL codification at the EU level in cases of reference to the law of third States. Most likely, the best approach would be to enshrine these rules in a General Part, and leave the itemisation of cases in which the rules do not operate, for the Special Part.[38]

D. Public Policy

Article 22(1) of the Civil Code excludes the application of the provisions of a foreign law designated by the choice-of-law rule whenever such application would lead to a violation of the fundamental principles of the public policy of the Portuguese State. Article 22(2) provides that, in such cases, the most appropriate rules of the governing foreign law or, in the last resort, the rules of Portuguese domestic law shall be applicable.

Scholars have emphasised the exceptional nature of the public policy clause, whereby the internal *ordre public* that comprises all mandatory rules and principles of Portuguese law and the international *ordre public* that protects only a restricted core of these rules and principles are distinct.[39] Article 22 refers to the international *ordre public*. Although the courts have tended to conform to this interpretation, in some cases they have applied the clause without the required restraint.[40] Also, in older cases, there had been a discernible trend to deny application to foreign rules concerning institutions unknown to the law of the forum.[41]

EU Regulations stress the exceptional nature of the public policy clause by requiring that the application of the foreign law be "manifestly incompatible" with the public policy of the forum. This formulation would be welcome in a PIL

[38] Rather than excluding the operation of these rules whenever they are incompatible with the purpose of the choice-of-law rule at stake, as proposed in Article 134 of the Embryon de Règlement portant Code européen de droit international privé drawn up by P. LAGARDE (note 3), in line with Article 4(1) of the German *Einführungsgesetz zum Bürgerlichen Gesetzbuche*, which would raise problems of interpretation that could hinder desirable legal certainty and predictability.

[39] See R. MOURA RAMOS (note 17), at 248-249 and 257-258, and L. DE LIMA PINHEIRO (note 5), at 587 *et seq*. and 593, with more references.

[40] Some of these cases deal with recognition of divorces in light of Article 1096(f) of the Code of the Civil Procedure that establishes compatibility with the *ordre public* as a condition for the recognition of foreign awards. See STJ 15/5/1973 [*BMJ* 227: 176] and 25/5/1982 [*BMJ* 317: 207].

[41] This was the case of foreign rules regarding adoption before the Civil Code of 1966; see R. MOURA RAMOS (note 17), at 259.

General Part Codification at the EU level, which could also clarify – as LAGARDE proposes[42] – that the incompatibility with the rights guaranteed by the European Charter of Fundamental Rights triggers the operation of the clause, and that consideration shall be given to the intensity of the connection of the case with the forum State. One could also add that the connection of the case with another State sharing a fundamental standard of justice with the forum State should be taken into account.[43]

Moreover, the European legislator could adopt a rule on the consequences of the operation of the public policy exception.[44] In this respect, inspiration could be drawn not only from Article 22(2) of the Portuguese Civil Code, but also from Article 16(2) of the Italian PIL Act under which recourse to the substantive law of the forum only takes place when no appropriate rules exist either in the governing foreign law or in other foreign law that is successively applicable.

In line with the wording of Article 22 of the Portuguese Civil Code, Portuguese scholars have also stressed that the public policy exception operates *a posteriori*, as a limit to the application of the governing foreign law.[45] Mandatory rules that claim applicability *a priori*, displacing the operation of the choice-of-law system, fall under the concept of overriding mandatory rules (*supra* II. D.). This does not prevent the operation of the public policy from triggering application of the law of the *forum* when there are no appropriate foreign governing law rules that produce a result compatible with the public policy. There appear to be no cases in which the application of mandatory rules of a foreign state has been based on the public policy clause.

E. Application of Foreign Law

According to Article 348(1) and (2) of the Civil Code, foreign law is considered "law" by the Portuguese PIL Codification. Indeed, Portuguese courts are obliged to apply *ex officio* the choice-of-law rules and to ascertain the content of foreign law *ex officio*. Therefore, the interested party is not required to plead the applicability of foreign law or prove its content. In this respect, the Portuguese PIL Codification is in line with the German and Italian PIL systems.

Nevertheless, the parties have a duty to cooperate with the courts in ascertaining the content of foreign law (Article 348(1) of the Civil Code), and a breach

[42] Article 135 of the Embryon de Règlement portant Code européen de droit international privé drawn up by P. LAGARDE (note 3). See also K. SIEHR, Der ordre public im Zeichen der Europäischen Integration: Die Vorbehaltsklausel und die EU-Binnenbeziehung, in *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann*, Bielefeld 2011, p. 430 *et seq.*

[43] See also the remarks of P. MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé. Cours générale de droit international privé, *RCADI* 327 (2007), p. 9-378, 315-316, 327-328 and p. 350. In my view, this possibility should not be limited to a connection with a European State – compare K. SIEHR (note 42), at 430 *et seq.*

[44] See also K. KREUZER (note 3), at 46-47.

[45] See R. MOURA RAMOS (note 17), at 249 *et seq*., and L. de LIMA PINHEIRO (note 5), at 589 *et seq*., with more references.

of this duty may, in special circumstances, make it impossible to ascertain that content. In such a case, the court must resort to the successively applicable law or, failing this, to Portuguese substantive law (Articles 23(2) and 348(3) of the Civil Code).

Formally, the courts have not deviated from the statutory rules of PIL. In practice, there is an important homeward trend.[46] Sometimes the courts favour the application of the *lex fori*. This is often the case in contract matters when none of the parties plead the application of foreign law. As a result, many international cases are dealt with by the courts as if they were domestic. This is a clear violation of the duties mentioned above.

When combined with an extensive autonomy of the parties to choose the governing law and with the increasing relevance of the law of habitual residence in personal status matters, as provided for especially by EU PIL Regulations, the solution offered by the Portuguese PIL regarding the applicability of foreign law deserves endorsement by the European legislator.[47] It promotes the "conflict justice" by assuring the application of the law designated by the connecting factor best suited to the matter. The possibility to choose the forum law in many circumstances and the shift to the law of habitual residence in many personal status matters prevent an excessive burden on the courts with the application of foreign law.

The Portuguese solution for cases where it is impossible to ascertain the content of foreign law, which is to first resort to the law that is successively applicable, also seems better than immediately resorting to the substantive law of the forum, as provided for by many PIL systems.[48]

IV. Final Remarks

The Portuguese Codification of 1966 was a significant milestone in the development of PIL. More recent codifications, such as the Swiss, Italian and Belgian codifications, are undoubtedly more detailed, as well as more advanced in certain

[46] For a detailed examination of this trend, see A. MARQUES DOS SANTOS (note 14), at 41 *et seq.*

[47] See also Principle IV of the "Madrid Principles", annex to C. ESPLUGUES MOTA, Application of foreign law – Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles"of 2010", *YPIL* 13 (2011), p. 273-297; and Article 133(1) of the Embryon de Règlement portant Code européen de droit international privé elaborated by P. LAGARDE (note 3). For a convergent view, see K. KREUZER (note 3), at 12-13. Rather than allowing the parties to choose the *lex fori* in patrimonial matters, as foreseen in Article 133(2) of the Embryon de Règlement, it would seem preferable to leave the point to the choice-of-law rules dealing with each matter, which can exclude this possibility in some patrimonial matters or include it in some personal matters.

[48] As well as by the Principle IX of the "Madrid Principles" and Article 133(3) of the Embryon de Règlement portant Code européen de droit international privé drawn up by P. LAGARDE (note 3).

aspects, and the evolution that has taken place will require a reform of the Portuguese PIL insofar as the codification at the EU level does not pre-empt its opportunity. In any case, the Portuguese Codification can still serve as a source of inspiration for the European legislator regarding a number of important issues.

PROTECTION OF PERSONALITY RIGHTS

NEW DEVELOPMENTS IN THE UNITED KINGDOM: THE DEFAMATION ACT 2013

William BENNETT*

I. Introduction

2012 may transpire to be a pivotal year for the law of defamation, not because of developments in case law but for the heralding of changes to the law arising from the coming into law of the Defamation Act 2013 on 25 April 2013.

This paper considers the implications of the Act in regard to jurisdiction. It suggests that the reform to the substantive law of defamation will make England a less attractive forum in which to bring claims. There was a concern in political and media circles, which may have been more imagined than real, that England was wrongly attracting forum shoppers because its defamation laws were too claimant-friendly. This was a driving factor for the drafting of the Act. The imminent reforms are likely to complete a trend started in the common law for over a decade towards a system of law which is more favourable to freedom of speech. Thus the spectre of "foreign" claimants using the English court somehow wrongly to stifle free speech will recede and the English jurisdiction will become less attractive for claimants *per se* and therefore for forum shoppers.

It analyses section 9 of the Act, the only part which deals explicitly with the issue of jurisdiction. It concludes that it will have little practical effect.

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II. Background to the Act

The Defamation Act was preceded by a strong and well-organised campaign to reform the law in favour of the right to freedom of expression. This campaign was successful and secured strong support within Parliament. At one stage the Deputy Prime Minister, Nick CLEGG, described existing defamation law as "an international laughing stock".

A significant element in the campaign for law reform was an argument that England was out of step with most other jurisdictions by reason of an alleged skewing of the law against freedom of expression. The campaign asserted that the evidence for this was the fact that claimants based in other jurisdictions were choosing to bring defamation claims in England because they stood a better chance of winning under English law than under other systems of law which might apply to the publication in issue (where it had been published in more than one jurisdiction).[1] Such claimants were referred to as "libel tourists", a defamation-specific variation of "forum shoppers".

There has been some debate as to whether defamation law is currently too claimant-friendly and whether the Act will significantly alter that position.

There has been a gradual shift in the law in favour of defendants from before the Human Rights Act 1998 became law.

The offer of amends procedure introduced by the Defamation Act 1996 permitted defendants to pay discounted damages to defamation claimants if they admitted liability during the very early stages of litigation. The same Act reduced the limitation period for bringing such claims from three years to one year and increased the number of occasions on which publication would be protected by privilege defences.

The most significant common law development was the new defence established by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, by which a defendant could escape liability for defamation if the subject matter of the defamatory allegation concerned a matter of public interest and had resulted from responsible journalism. Previously a defendant would have had to prove such an allegation to be substantially true in order to escape liability in defamation. The introduction of the Reynolds defence shifted the law against claimants. It gave rise to a situation whereby a claimant who had in fact been falsely defamed by a grave allegation would not be able to vindicate his or her reputation. Whether or not the allegation in issue was true would not be considered by the court. Thus, following the successful mounting of a Reynolds defence, not only might a claimant have to further endure the continuing effects of the false allegation which had been made against him or her but also have to pay the defendant's costs bill.

[1] However, a comparative analysis of English law with that of most Western democracies shows that was not anymore favourable to claimants (Evidence given by Professor Gavin Phillipson to Parliament's Joint Committee on Human Rights in 2012). Claims that London was besieged by foreign libel claimants were found to have been significantly exaggerated.

Following the passing of the Human Rights Act 1998, the UK government became formally obliged to balance the Article 8 right to reputation with the Article 10 right to freedom of speech. Since its passing there has been a further gradual shift in favour of Article 10. When the English appellate courts have found that the balance needs to be shifted one way or the other, they have done so (usually in favour of Article 10). They have had the power to do so because so much of defamation law is based on the common law rather than statute.

There has been some debate about whether the Act will further shift the ground in favour of freedom of speech. Parts of it appear to do little more than codify the existing common law. However, without analysing it section by section, it does represent a further shift in favour of freedom of speech/defendants.

It is implicit in the passing of the Act that the English law of defamation strikes the right balance, as judged by Parliament, between the right to reputation and the right to freedom of speech.

Following the passing of the Act, all other things being equal, if a claimant has a choice of jurisdictions but chooses England because the law is favourable compared to that in the alternative jurisdiction, there can be no proper reason for such a person to be criticised or for commentators to regard such a decision as somehow wrong or as an abuse.

It follows from the fact that the gradual common law reforms of the last decade or so and the imminent statutory reform means that the English law of defamation has become less favourable to claimants *per se*. Therefore it will also be less attractive to "foreign" claimants. Thus whilst the Act includes no provisions which seek explicitly to curtail the bringing of defamation claims by claimants domiciled outside of the jurisdiction, it makes the jurisdiction inherently less attractive by further reforming the law in a way which favours defendants. Thus the perceived problem of "libel tourism" may have been solved by the reform of the substantive law. This might explain why, despite the clamour to include provisions in the Act to stop "foreign" claimants from being claims in the English court, the Act takes no measures to target that category of claimant.

III. Section 9

There is one part, section 9, which concerns jurisdiction. It imposes restrictions upon claimants (domiciled in any jurisdiction) from suing defendants who are neither domiciled in the EU nor in a contracting party to the Lugano Convention ("outsiders") within the English jurisdiction. It reads as follows:

(1) This section applies to an action for defamation against a person who is not domiciled –

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section –

(a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(5) In this section –

"the Brussels Regulation" means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L299 16.11.2005 at p62);

"the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

In order to assess the importance of section 9, it is necessary briefly to outline some aspects of the relevant law and procedure.

The available remedies under English law for defamation are damages and an injunction. An injunction will be appropriate when no publication has yet taken place or where it has taken place but there is a need to prevent further publication. Damages are designed to compensate for the damage caused to the reputation and, where the claimant is a natural person, to compensate for the hurt to feelings arising from the publication. When deciding upon the size of the award of damages, the court will ensure that the size of the award acts as a clear signal to the world at large that the defamatory statement is untrue.

It is extremely difficult to obtain an injunction prior to trial (an "interim injunction"). The common law holds that freedom of speech ought not to be fettered unless the full merits of a claim have been adjudicated upon. This will usually only be possible following a contested trial. Thus it is rare for a claim to be brought and concluded and an injunction obtained before any meaningful publication has taken place. Claimants generally have to endure the harm caused by publication and then, if successful at trial, recover compensation for that harm and an injunction to prevent further publication by that defendant. The fact of success at a trial will generally act as a signal to the public at large that the relevant accusation was untrue and the claimant's reputation will have been vindicated.

Injunctions can only be obtained against the publisher against whom the defamation claim is brought *i.e.* the particular defendant to the litigation. There is no means of obtaining an injunction preventing anyone who is not a defendant to a formal claim from publishing a particular defamatory allegation.

It is important to note the following points concerning a claim which might be brought in the jurisdiction against an outsider (some of which are obvious):

Under English law damage is presumed to occur where publication takes place.

Where publication takes place (or about to take place) within the jurisdiction, that will normally be a proper place in which to bring a claim. This is subject to certain exceptions outlined below.

Publications of the same allegation by the same publisher in the same medium are often made in various jurisdictions. Discrete harm may be caused to the claimant in several of those jurisdictions. Because a claimant is more seriously defamed in country A than country B, it does not follow that therefore the harm incurred in country B is not serious or that for some reason the claimant ought to be deprived of a remedy in jurisdiction B. This would appear to be the case even more so where a claimant is seeking an injunction. Simply because greater harm might occur following publication (or further publication) in jurisdiction A, it would be illogical therefore to conclude that the claimant ought not to be able to bring a claim and therefore secure an injunction to prevent (further) serious harm occurring in jurisdiction B.

Attempts within England to develop case law in order to introduce a principle that where publication has taken place in several jurisdictions, the claimant ought only to be allowed to sue in one in one of those jurisdictions, have been rejected. In *Berezovksy v Forbes Inc. and Another Berezovsky v Michaels* [1999] E.M.L.R. 278[2] it was argued on behalf of the defendant that: "The court should concentrate on identifying the place which is the real focus of the dispute, and not treat different publications of the same tort in several countries as constituting separate segments." (at 298) If accepted, this would mean that in a multi-jurisdictional case a claimant could only sue in one jurisdiction (which would usually mean that damage caused in other jurisdictions might not be compensated and that an injunction could not be obtained in those other jurisdictions in order to prevent harm or further harm). The Court of Appeal dismissed this submission as "fallacious" and "unhesitating" rejected it. The court stated that:

[2] Berezovsky was a Russian businessman domiciled in Russia. The defendant was domiciled in the United States, from where it published *Forbes*, an influential business magazine. It accused Berezovsky of being a Mafia godfather, a gangster and a fraudster. Berezovsky brought a libel claim in England. Forbes argued that the English court ought not to accept jurisdiction because the United States was the appropriate forum. It was accepted that he had links with England and conducted business there. There was evidence that publication of such allegations in England caused him harm in that jurisdiction and adversely affected his ability to do business. Berezovsky had a far stronger connection with England than with the United States. In England the magazine sold roughly 2,000 copies per issue and it was estimated that each copy was read by three people, including the purchaser. 788,000 were published worldwide and nearly 99% of this number was published in the United States, Canada or to member of the United States armed forces. Publication in Russia was "minute". The English court accepted jurisdiction.

The proposed principle was out of step with the reasoning adopted by the European Court of Justice in *Shevill v Press Alliance SA* [1995] 2 AC 18 (each state in which the defamation is published is territorially best placed to assess the defamation and to determine the extent of the resulting damage).[3]

It was inconsistent with the principle in English law that each publication constitutes a separate tort.

"It would disable the (claimant) from seeking in appropriate cases an injunction in all but the one country where he would be obliged to sue." (page 299)

There are additional difficulties arising from the defendant's proposition in *Berezovsky*:

Where the defendant is neither domiciled in the EU or a Contracting State, the claimant will most probably not be able to sue for compensation in one jurisdiction for the harm caused by the publication of the same defamatory statement in another jurisdiction.

A claimant will not be able to obtain an injunction in one jurisdiction against a named defendant which prevents the same defendant from publishing the same allegation in other jurisdictions. Realistically the only way of achieving this might be where the defendant is sued in the place from which it publishes and the terms of the injunction prevent it from taking any steps within that jurisdiction to bring about publication anywhere.

Under English law and procedure a defamation claimant *cannot* obtain an injunction to prevent *any* third party from publishing a particular allegation *i.e.* a claimant will not be able to obtain a *contra mundum* injunction in regard to a particular imputation. An injunction can only be obtained against a particular named defendant.[4] This is probably the case in most jurisdictions.

A claimant will almost undoubtedly never be able to obtain an injunction in one jurisdiction which forbids the publication by *any* person of a particular imputation in another jurisdiction.

In order to obtain the court's permission to serve a Claim Form out of the jurisdiction *i.e.* to bring a claim against an [outsider], the claimant has to prove that:

The claim is made for an injunction ordering the defendant to refrain from publishing the relevant imputation and/or the claim is in tort and the damage has

[3] "The place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced it harmful effects on the victim.

In the case of an international libel through the press, the injury caused by a defamatory allegation to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

It follows that the courts of each contracting state in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that state to the victim's reputation." (paragraphs 28 – 30).

[4] Although an injunction could be obtained against a defendant who is as yet unidentified *e.g.* it could be worded to apply to the person who published the words complained of but whose identity has not yet been ascertained.

been sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction.[5]

There is a serious issue to be tried (the claimant has to demonstrate a real prospect of success).[6]

England and Wales is the proper place to bring the claim; the *forum conveniens* test. The claimant will have to prove that England is "clearly the appropriate forum in which the case should be tried in the interests of all the parties and the ends of justice."[7] "The case" is the claim for damages and/or an injunction regarding publications which have been made or about to be made in the jurisdiction, therefore it would seem to be obvious in most situations that the most appropriate forum would be England and Wales. However, there will be situations where a different jurisdiction would be more appropriate (although if the section 1 test has been passed, the number of such situations might be limited). For instance, if the imputation complained of concerns allegations about events which took place in a different jurisdiction and the defendant wants to prove at trial that the imputation is true, the court might conclude that it would be better to hold such a trial in the jurisdiction in which those events are said to have taken place and where the relevant witnesses will be located (and where they will be able to give evidence in their own language). Such an argument would be significantly strengthened if the claimant and/or defendant was also domiciled within that other jurisdiction. However, this will not enable the claimant, having won in the foreign jurisdiction, to secure damages and/or an injunction in England.

Returning to section 9, it provides that where the publisher is an outsider, a claim cannot be brought unless "the court is satisfied that, of all the places in which the *statement* complained of has been published, England and Wales is *clearly* the *most* appropriate place in which to bring an action in respect of the statement." This echoes the existing test which requires a claimant to prove that England was clearly the most appropriate forum for the trial of a claim against a particular defendant *i.e*. the person who has or is about to publish the relevant material in the jurisdiction.[8] However, section 9 introduces a novel element by defining the "statement" as constituting "any statement which conveys the same, or substantially the same, imputation as the statement complained of." The Act does not make it clear whether the test introduced by section 9 is in addition to the existing test *forum conveniens* test (outlined above) or represents an additional test. In reality, it probably does not matter either way. It is assumed that it provides for an additional test.

If a claimant has satisfied all criteria apart that set out in section 9, the court will have found that serious harm has been or is about to be caused within the jurisdiction and England is clearly the appropriate forum to sue the particular defendant. If these conditions have been met, it is difficult to envisage circumstances in which the need to satisfy the additional section 9 test will prevent such a case from proceeding within the English jurisdiction.

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[5] CPR6.37(1).

[6] This is less onerous than it sounds. The test applied is the same used to decide whether a case ought to be struck out or not.

[7] *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1018 per Lord Hoffman.

[8] *The Spiliada* [1987] AC 460.

If the claimant were able to sue a different publisher in a different jurisdiction for publication of the same imputation, why would that cause the court to conclude that a claim which could otherwise proceed in England ought to be prevented?

The even more interesting question is why, as a matter of policy, Parliament thinks that it would be proper to stop a claim from proceeding in such circumstances. The only discernible rationale is that it wants to introduce a variant of the single publication rule whereby a similar imputation to that complained of in the jurisdiction has been published by a different published who is domiciled in a jurisdiction outside the EU and which is not a signatory to the Lugano Convention. In such circumstances, the claimant ought only to be able to sue in a different jurisdiction regardless of the identity of the publisher in that other jurisdiction.

The court would have to conclude that if there was any real threat of publication or further publication causing "serious harm", why should the claimant not have the opportunity to prevent that harm from occurring because a similar imputation had been published in a different jurisdiction by a different publisher?

Thus the court will be tasked not with deciding whether the claim against a particular defendant regarding a particular imputation is best brought in England but whether the claim regarding a particular imputation is best brought in England. Thus it introduces the possibility that a claimant will be prevented from suing a chosen defendant in the jurisdiction because a *different* publisher published the same or substantially the same imputation in a different jurisdiction. The important point to note is that if the claimant sued the other publisher in a different jurisdiction, the alleged wrongdoer who had published or was about to publish the relevant information within the jurisdiction would escape liability and for possibly for no apparent public interest reason (there is not a public interest stipulation in section 9).

For this reason, it appears to be possible that the court might not apply section 9 in order to shut out such a case from being litigated in England. This is because in such circumstances a claimant's Article 6 and 8 rights might trump the relevant Article 10 right. Why would the court prevent a claimant from litigating in order to obtain remedies for a breach of his or her Article 8 right to reputation because someone else had published a similar allegation in a different jurisdiction?

INTERNET DEFAMATION, FREEDOM OF EXPRESSION, AND THE LESSONS OF PRIVATE INTERNATIONAL LAW FOR THE UNITED STATES

Laura E. LITTLE*

For those residing in the United States, international internet activity brings significant risks and challenges. Courts and officials worldwide seek to apply laws from outside the U.S. to judge and to constrain actions and communications of the U.S.-based entities.[1] The result is a cornucopia of private international law developments

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[1] Examples abound, including Brazil, Italy, the United Kingdom, Canada, Australia, and France. See, *e.g.*, Brazil Detains Google Chief in YouTube Case, available at <http://foxnews.com/latino/news/2012/09/27> (published September 27, 2012) (reporting that Google chief was arrested and detained for failure to remove YouTube video that violated Brazilian electoral law in its presentation of comments about a paternity suit pertaining to a mayoral candidate); *Lewis v. King*, [2004] EWCA (Civ) 1329, [31], [34] (Eng.) (holding that allegedly defamatory materials uploaded on a United States-based website were "published" in the jurisdiction where they were downloaded and reasoning that the defendant effectively "targeted every jurisdiction where his text may be downloaded"); *AI-Amoudi v Kifle*, [2011] EWHC 2037 (QB), available at <http://www.bailii.org/ew/cases/

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pertaining to personal jurisdiction, choice of law, and judgments. For domestic U.S. conflict of laws doctrines, however, matters relating to internet defamation reflect less remarkable changes. To resolve personal jurisdiction and choice of law issues in internet defamation cases, U.S. courts have adapted doctrine from the non-internet context with relative ease. Reported cases tend to concern domestic disputes between U.S. entities, with few plaintiffs attracted to U.S. courts for the purpose of litigating cross-border defamation claims. Although the U.S. serves as a magnet jurisdiction for many types of litigation, two liability-defeating laws render the country inhospitable to defamation claims: (1) the U.S. Constitution's First Amendment speech protections[2] and (2) a statute affording immunity to internet "providers or users" for information "provided by another content provider."[3] These provisions are both U.S. federal laws, and thus have preemptive force over U.S. state laws, which provide the source of defamation law in the U.S. Perhaps because of these two federal law provisions, the U.S. has not had much occasion to develop a unique jurisprudence governing international internet defamation. Litigants are inspired instead to go elsewhere. The resulting libel tourism has, however, prompted important U.S. developments pertaining to enforcement and recognition of foreign defamation judgments in U.S. courts. Thus, for conflict of laws matters pertaining to internet defamation, it is judgments law that reflects the greatest activity and most profound change.

When adjudicating matters touching the internet generally, courts often tend toward exceptional rules and approaches. For example, courts adjudicating multi-jurisdictional internet disputes appear prone to unilateral decision-making, declining sophisticated choice of law concepts developed for multilateral consideration of several sovereigns' policies and choosing instead to consider forum law only.[4]

EWHC/QB/2011/2037.html> (default judgment in a UK libel action brought by Ethiopian businessman against Ethiopian journalist based in Washington D.C.); A. LIPTAK, When Free Worlds Collide, *N.Y. Times*, Feb. 28, 2010, sec. WK, p. 1 (describing Italian prosecution of Google executive for a third-party post of a YouTube video of teenagers from Turin, Italy teasing a disabled boy); *Bangoura v. Washington Post*, 235 D.L.R.4th 564, 571 (Can. Ont. Sup. Ct. J. 2004) (exercising power over defamation suits based on materials uploaded onto a United States-based website and made available in Canada); *Licra and UEJF v. Yahoo! Inc.*, Tribunal de Grande Instance de Paris, May 22, 2000 (requiring U.S. website operator to take necessary action to disable French citizens' access to auctions featuring Nazi artifacts or to communications constituting an apology for Nazism); *Dow Jones & Co. v. Gutnick*, (2002) 210 C.L.R. 575 (Austrl.) (upholding jurisdiction and imposing defamation liability for Australian injury suffered from article uploaded in the U.S.).

[2] The portion of the First Amendment protecting free expression provides: "Congress shall make no law [...] abridging the freedom of speech, or of the press." U.S. Cons. Amend. I. Although the amendment's words suggest that the provision restrains only the legislative branch of the U.S. federal government, the United States Supreme Court has read the amendment to constrain other governmental entities (known as "state actors") as well.

[3] Communications Decency Act, 47 U.S.C. § 230(c), provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

[4] L.E. LITTLE, Internet Choice of Law Governance, *International Law Review* (forthcoming Tsinghua University Press 2013), available at <http://papers.ssrn.com/sol3/

This tendency also appears in U.S. law related to recognition and enforcement of internet judgments rendered by foreign jurisdictions. The usual deference accorded foreign country judgments – along with well-cabined exceptions to recognition and enforcement – is suspended so as to give wide berth to the U.S. Constitution's free expression protections in the First Amendment.

Legal thinkers in the United States treat the First Amendment with great care, sometimes as a non-negotiable truth. The Amendment serves as an emblem for freedom, a handmaiden to crucial values: democratic governance, individual self-determination, truth discovery, and tolerance.[5] This respect and reverence creates a form of First Amendment exceptionalism, controlling the development and application of legal doctrines controlling legal matters that implicate freedom of expression. Decisions pertaining to internet communications – which by definition can be read or heard outside the U.S. – are no exception to the trend of holding the First Amendment above other concerns and regulations. Yet because the First Amendment and existing statutory immunity channels defamation suits offshore, this exceptionalism emerges with special clarity when litigants bring foreign judgments back to the U.S. for recognition and enforcement.

This article describes – and critiques – the legal developments pertaining to recognition and enforcement of defamation judgments. First, however, the article reviews trends in U.S. courts for adjudicating personal jurisdiction and choice of law issues in internet defamation cases.

I. Small Adjustments: Modifying Personal Jurisdiction and Choice of Law Doctrines for Internet Defamation Cases

As a large country with overlapping jurisdictional authorities among its many state and federal courts, the U.S. exhibits considerable diversity in how it adjudicates various categories of litigation. Internet defamation cases are no exception. One would readily predict that this is particularly true for choice of law matters, which are governed largely by one of the fifty state laws that operate with only a few overarching federal law constraints. But one sees variation in personal jurisdiction decisions as well: a result more surprising since the United States Supreme Court has constitutionalized most personal jurisdiction law. The Due Process Clauses of the Fifth and Fourteenth Amendments constrain the circumstances under which state and federal courts may exercise jurisdiction and the United States Supreme Court has expended considerable effort delineating the scope of the Clauses' restrictions. In the internet context, U.S. state and federal courts have still managed to develop a variety of approaches. Common trends nonetheless have emerged and

papers.cfm?abstract_id=2045070> (outlining examples of how courts adjudicating internet cases tend to consider only forum law principles).

[5] See, *e.g.*, E. CHEMERINSKY, *Constitutional Law: Principles and Policies* (4th ed.), New York 2011, p. 949.

reveal notable rigor in restricting personal jurisdiction in internet defamation cases. In the choice of law context, the U.S. Supreme Court has injected considerably less rigorous constitutional doctrine – and recent experience with choice of law decisions has revealed little variation from choice of law in defamation cases outside the internet context.

A. Personal Jurisdiction Doctrine in U.S. Internet Defamation Cases

Current personal jurisdiction cases governing internet defamation disputes derive from two lines of doctrine. The U. S. Supreme Court developed one line of doctrine in the mid-1980's for general defamation litigation. Lower courts developed the second doctrinal line a decade later for the purpose of adjudicating internet disputes. Lower courts in the U.S. have handled the two doctrinal threads in different ways when confronting personal jurisdiction in internet defamation cases.

1. U.S. Supreme Court Cases

After a series of cases decided in quick succession in the 1980's, the United States Supreme Court fell largely silent on the personal jurisdiction rules. When the internet emerged and cyberspace controversies developed with regularity, lower courts in the U.S. developed strategies for accommodating existing constitutional doctrine to the internet personal jurisdiction issues that arose. In 2011, the Supreme Court finally broke a twenty-year silence on the subject of personal jurisdiction, deciding two cases. Ultimately, however, the Court did little to clarify personal jurisdiction law generally and contributed almost nothing to refining personal jurisdiction doctrine for internet disputes.[6] Accordingly, major Supreme Court guidance on personal jurisdiction in internet defamation continues to derive from two cases from the 1980's: *Keeton v. Hustler Magazine*[7] and *Calder v. Jones*.[8] Although both cases concern defamatory communication, the First Amendment plays little, if any, explicit role in the Court's disposition of the disputes. Presumably, the Court determined that the fairness protections of the U. S. Constitution's Fourteenth

[6] One case, *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011), which dealt with the principles of general jurisdiction, was unanimous. Nonetheless, the case presents potentially conflicting interpretations. M.H. HOFFHEIMER, General Personal Jurisdiction after *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 *Kansas Law Review* 2012, p. 549 (outlining battling interpretations of the case). The other case, *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780 (2011), yielded only a plurality opinion on the subtleties of personal jurisdiction in a stream of commerce case. *J. McIntyre* raised more questions than it settled. See, *e.g.*, J.T. PARRY, Due Process, Borders, and the Qualities of Sovereignty – Some Thoughts on *J. McIntyre Machinery v. Nicastro*, 16 *Lewis & Clark Law Review* 2012, p. 827 (stating that the "*Nicastro* opinions collectively undermine more personal jurisdiction doctrine than they create").

[7] 465 U.S. 770 (1984).

[8] 465 U.S. 783 (1984).

Amendment provided a sufficiently protective role in honouring individual freedoms at issue in the personal jurisdiction context.

In *Keeton*, the plaintiff chose to sue a magazine publisher in the state of New Hampshire because that state had the only U.S. statute of limitations that was long enough to allow the case to proceed. The Court upheld personal jurisdiction in New Hampshire, a result that not only allowed the action to continue to redress injury that had incurred in New Hampshire, but also to recover for injury occurring elsewhere. The Court explained that New Hampshire had a "substantial interest in cooperating with other States [...] to provide a forum for efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding."[9]

The second defamation case, *Calder v. Jones*, was similarly favourable to the defamation plaintiff and amenable to the forum's exercise of personal jurisdiction. Perhaps the most influential personal jurisdiction decision for defamation cases, *Calder* evaluated whether courts in California had jurisdiction over the writer and editor of a tabloid newspaper in a suit challenging a story about a U.S. actress. Although the writer and editor worked only in Florida, the U.S. Supreme Court held that they had "aimed" their work at California where the actress lived and would suffer greatest harm. In other words, the defendants had a significant contact with California not because they had done something when they personally went there, but because they intentionally caused an effect there. Although construed differently in some U.S. jurisdictions than in others, the *Calder* "effects" test for determining that the defendant purposefully directed activity toward a forum is often interpreted to include three parts, requiring that the defendant must have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."[10] *Calder*'s recognition that personal jurisdiction can arise from effects within a jurisdiction has proven important to courts trying to evaluate if personal jurisdiction can arise solely from an out-of-state defendant's internet activity.[11]

An additional segment of U.S. due process jurisprudence is pertinent to internet cases, which can easily implicate the rights of non-U.S. entities. At least superficially, U.S. personal jurisdiction law is not influenced by whether the defendant is a U.S. citizen or a citizen of a foreign country. In this context, the Fourteenth and Fifth Amendments' Due Process Clauses protect all defendants. Nonetheless, a defendant's foreign status is relevant to the hardship of litigating in

[9] *Keeton*, 465 U.S. at 777.

[10] *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004); See, *e.g.*, *ALS Scan, Inc. v. Digital Servo Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002); *Audi AG & Volkswagen of Am., Inc. v. D'Amato*, 341 F. Supp.2d 734, 746 (E.D. Mich. 2004).

[11] The U.S. is, of course, not the only jurisdiction to apply some version of an effects test, recognizing jurisdiction based on the foreseeability that a foreign defendant's conduct may have effect in the forum. See, *e.g.*, Developments, The Law of Media: V. Internet Jurisdiction: A Comparative Analysis, 120 *Harvard Law Review* 2007, p. 1031 (discussing cases in the Australia, the United Kingdom and Canada); Y.A. TIMOFEEVA, Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis, 20 *Connecticut Journal of International Law* 2005, p. 199 (discussing cases in Germany, France, Italy, Canada, and Australia).

the U.S., a factor weighed heavily in evaluating the fairness a U.S. court's assertion of personal jurisdiction. That being said, U.S. courts continue to adhere to certain jurisdictional bases that may be found "excessive and exorbitant" by other countries – such as jurisdiction founded solely on a defendant's temporary presence in the forum (so-called "tag" jurisdiction) or general jurisdiction founded solely on the defendant's actions in "doing business" in the forum.[12] And, of course, the absence of any treaty obligation pertaining to personal jurisdiction allows U.S. courts latitude in exercising jurisdiction over foreign defendants.

2. General Internet Personal Jurisdiction Cases from the Lower Courts

For internet disputes generally, the U.S. District Courts and U.S. Courts of Appeals have contributed the vast majority of legal guidance in the United States. State courts have been remarkably silent.[13] For analysing internet disputes, lower federal courts have continued to use a defendant's purposeful contact with the forum state as the dominant point of reference. Indeed, some scholars have observed little difference between internet and non-internet cases, stating that courts adjudicating internet disputes have done no more than put "new wine" in "old bottles."[14]

Perhaps the most famous (and influential) early U.S. internet case to grapple with personal jurisdiction is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[15] The U.S. district judge in *Zippo* reasoned that the type of website activity involved in a case determined whether a defendant had sufficient contacts in given jurisdiction to merit jurisdiction, and sorted website activity on a sliding scale:

- Passive Websites: On one end of the spectrum were passive websites, in which the defendant merely posts information that is accessible from the forum state. In such an instance, the court reasoned that the defendant does not purposefully avail herself of the forum, but merely makes "information available to those who are interested", thus failing to provide the foundation of jurisdiction.[16]

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[12] L.J. SILBERMAN/ A.F. LOWENFELD, A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute, *Am. J. Comp. L.* 2005, p. 543, 548.

[13] There are, of course, some exceptions. For example, in *Internet Solutions v. Marshall*, 39 So. 3d 1201, 1215 (Fla. 2010), the Florida Supreme Court said that jurisdiction would be proper in a circumstance where the defendant made an internet posting outside of Florida, which "is then accessed by a third party in Florida." Under those circumstances, the Florida court ruled that the material has been "published" in Florida and the poster has communicated the material "into" Florida, thereby committing the tortious act of defamation within Florida." *Id.* In the United States, personal jurisdiction in state courts over an out-of-state defendant requires both compliance with the United States Constitution's due process requirements as well as a state long arm statute authorizing the jurisdiction. A large part of the *Internet Solutions* analysis focused on Florida's long arm statute.

[14] M.H. REDISH, Of New Wine and Old Bottles: Personal Jurisdiction, the Internet and the Nature of Constitutional Evolution, 38 *Jurimetrics J.* 1998, p. 575, 577.

[15] 952 F. Supp. 1119 (W.D. Pa. 1997).

[16] *Zippo*, 952 F. Supp. at 1124.

- Interactive Websites: In the middle of the spectrum, a defendant maintains an interactive website, which she can use to receive or send information.

- Active Websites: On the other end of the spectrum, a defendant uses an active website to transmit files to the forum, enter contracts with forum residents, and the like. Active Websites are the strongest basis for exercising jurisdiction premised on internet activity.

Zippo itself involved an active website, which was supported by seven internet service providers in the forum, had 3,000 subscribers in the forum, and downloaded electronic messages from the forum. Under these circumstances, the court held that the forum had personal jurisdiction over the defendant, Zippo Dot Com, in a trademark infringement action brought by the manufacturer of cigarette lighters.[17]

3. Current Strands of Internet Defamation Case Law

U.S. courts confronting personal jurisdiction in internet defamation disputes have handled the *Zippo* and *Calder* precedent in different ways. A number of courts have combined the two: using the *Zippo* sliding scale to explain and evaluate whether the *Calder* effects test is satisfied. For example, in *Broadvoice, Inc. v. TP Innovations LLC*,[18] an internet telephone company located in Massachusetts sued a Texas entity and its Texas owner in Massachusetts. The plaintiff alleged that the owner had created a web site, where the owner posted derogatory remarks about

[17] U.S. law often distinguishes between specific jurisdiction (when a court exercises power over a lawsuit that arises out or relates to a defendant's contacts with the forum) and general jurisdiction (when the lawsuit may be unrelated to the defendant's activity in the forum, but the court nonetheless has jurisdiction because the defendant's contacts are continuous and systematic). Until recently, U.S. courts were not inclined to find general jurisdiction based on internet activity. See, *e.g., Weber v. Jolly Hotels*, 977 F. Supp. 327, 333-34 (D.N.J. 1997) (holding that maintenance of website accessible in New Jersey did not render Italian hotel subject to jurisdiction in New Jersey). The court did find general jurisdiction, however, in *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003). Focusing on web activities of the retailer, L.L. Bean, rather the hard copy catalogues that the company sends into California, the court evaluated whether California had general jurisdiction over L.L. Bean and concluded that the website was "clearly and deliberately structured to operate as a sophisticated virtual store in California." *Id.* at 1078. Using *Zippo* analysis, the court held that L.L. Bean's active website, which included accepting California orders and sending emails to customers in the state, was tantamount to physical presence in the state and thus qualified as continuous and systematic activity in the state. The *L.L.Bean* dispute was rendered moot by subsequent developments on appeal, but the case nonetheless stands as an important development, having provoked considerable reaction. On the basis of more unusual facts, the court in *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 711 (8th Cir. 2003), also found allegations sufficient to make a prima facie showing of general jurisdiction. See also *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 785-88 (E.D. Tex. 1998) (holding that the nature of manufacturer's website combined with business volume in the state and other factors provided basis for general jurisdiction in action by parents of three-year-old who was asphyxiated when entangled in a bunk bed).

[18] 733 F. Supp.2d 219 (D. Mass. 2010).

plaintiffs' phone service, urging others to express their dissatisfaction on the site's "public forum." Characterizing the site as "semi-interactive" on the Zippo scale, the *Broadvoice* court denied personal jurisdiction.[19] The court reasoned that the nature of the site did not support personal jurisdiction because the plaintiff had not alleged that the site was used for "interaction or exchange of information" between Massachusetts residents and defendants.[20] Invoking *Calder*, the court reasoned that the website "was aimed a Massachusetts only in the sense that it could be assessed by Massachusetts residents (along with the rest of the world)."[21] Many other decisions have typically included a *Zippo* website characterization together with their identification of *Calder* effects, with several courts using the *Zippo* website characterization as part of its effects test reasoning.[22] Other courts have treated *Zippo* and *Calder* both as legitimate, yet mutually exclusive and independently sufficient, tests for jurisdiction,[23] and yet another group of courts have treated *Zippo* and *Calder* as incremental components of the personal jurisdiction inquiry – together providing the necessary prerequisites for jurisdiction.[24]

Most notably, however, many courts have begun to move away from using the *Zippo* analysis. In some of these cases, the courts' decision to reject *Zippo* accompanies their decision to exercise personal jurisdiction.[25] More often, however, the move away from *Zippo* signals – and perhaps strengthens – the trend found in many published cases: a strong tendency for courts to decline personal jurisdiction in internet defamation cases.[26]

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[19] *Id*. at 226.

[20] *Id*.

[21] *Id*.

[22] *Toys R Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (concluding that "there must be evidence that the defendant «purposefully availed» itself of conducting activity in the forum states, by directly targeting its web site to the state, knowingly interacting"); *Miller v. Kelly*, 2010 WL 4684029 (D. Colo.) (holding that blog – "LiveJournal" – was a passive Website and thus that defendant's blog entry was not purposefully directed at the state where the plaintiff was domiciled.)

[23] See, *e.g.*, *Lifestyle Lift Holdings, Inc. v. Prendiville*, 768 F. Supp. 2d 929, 936-39 (E.D. Mich. 2011) (holding that website was neither sufficiently interactive under *Zippo* nor the effects in the jurisdiction sufficiently significant to merit asserting personal jurisdiction).

[24] See, *e.g.*, *Cadle v. Schlichtman*, 123 Fed. Appx. 675, 678-80 (6th Cir. 2005) (concluding that a semi-interactive website is not itself sufficient to establish jurisdiction, court looked for further guidance to the *Calder* effects test).

[25] See, *e.g.*, *Kauffman Racing Equipment, LLC v. Roberts*, 930 N.E.2d 784, 790-92 (2010) (declining to follow *Zippo*, yet exercising personal jurisdiction in a defamation dispute where an out-of-state buyer posted messages highly critical of seller on various internet sets).

[26] See, *e.g.*, *Shrader v. Biddinger*, 633 F.3d 1235, 1344 n. 5 (10th Cir. 2011) (refusing to find personal jurisdiction, while explicitly refusing to take a position on the merits of the *Zippo* approach); *Best Van Lines v. Walker*, 490 F.3d 239, 251-52 (2d Cir. 2006) (declaring limited usefulness of *Zippo* and finding that website operator did not transact business with the forum); *Xcentric Ventures, LLC v. Bird*, 683 F. Supp. 2d 1068, 1071-75 (D. Ariz. 2010) (finding *Calder* test more relevant than *Zippo* test in holding that defendants' alleged conduct was insufficient to justify specific personal jurisdiction); *Caiazzo v. American Royal*

Even more suggestive of the reluctance of U.S. courts to exercise personal jurisdiction in internet defamation cases is the influential decision in Young v. New Haven Advocate.[27] In *Young*, a Virginia prison warden filed a Virginia defamation suit against two newspapers as well as reporters and editors for statements made in articles and blogs published on the papers websites. Although at least some interpretations of the *Calder* test would have likely justified personal jurisdiction, the court declined to find jurisdiction, concluding that the defendants had not directed their statements about Young to readers or an audience within the forum state. Thus, rather than focusing on the communication's effects on the plaintiff within the forum state, the *Young* court concentrated on whether the plaintiff could establish that the defendant targeted an "audience" within the forum state.[28] In so doing, the court analysed the type of websites used (in the manner of the *Zippo* approach), and determined that that the websites were essentially local to Connecticut. Ultimately, the court concluded that the statements were intended to encourage public debate within Connecticut only, and refused to exert personal jurisdiction.[29]

As described by commentators, the approach followed in *Young* begins from the premise that the internet is "targeted nowhere," and thus places a heavy burden on the plaintiff to establish that the defendant focused the communication on the forum state.[30] Because the plaintiff may find it difficult to satisfy the burden, the approach tends to insulate non-resident libel defendants from being sued outside their home state for internet communication. Indeed, one commentator has been able to document that at least seven libel defendants have successfully avoided defending themselves outside their home jurisdiction as a result of *Young*'s safe harbour.[31] The *Young* approach has proven appealing throughout the U.S. – with at least 12 separate courts either adopting the approach or citing the approach with approval.[32]

Among the published decisions of the U.S. courts in the last decade, a discernible trend orients courts away from finding personal jurisdiction in internet defamation cases. (Importantly, one must note that there could be a "publication bias" embedded in this observation: courts might regard cases in which they denied a motion to dismiss on personal jurisdiction grounds as a routine decision that did

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Arts Corp., 73 So.3d 245, 253-56 (D. Ct. App. Fla. 2011) (rejecting *Zippo* and refusing to find personal jurisdiction).

[27] 315 F.3d 256 (4th Cir. 2002).

[28] *Id.* at 263.

[29] *Id.* at 263-264.

[30] S.H. LUDINGTON, Aiming at the Wrong Target: The "Audience Targeting Test for Personal Jurisdiction in Internet Defamation Cases, 73 *Ohio State Law Journal* 2011, p. 541, 543. See also A.B. SPENCER, Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts, *University of Illinois Law Review* 2006, p. 71, 87 (discussing the "presumption of aimlessness" for internet communication and criticizing courts for rejecting "the ubiquitous nature of Internet activity in favour of a fictitious presumption that Internet activity is targeted nowhere").

[31] S.H. LUDINGTON (note 30), at 541, 542 fn. 4.

[32] S.H. LUDINGTON (note 30), at 573 fn. 156.

not merit a full, published opinion). Although the United States Supreme Court has suggested that courts need not incorporate First Amendment concerns in the personal jurisdiction context, one nonetheless wonders whether this trend toward strict personal jurisdiction standards reflects U.S. courts' concern with suppressing speech and free expression by imposing liability in internet defamation cases.[33] In making personal jurisdiction requirements more stringent in internet defamation cases, the courts may be using due process principles to accomplish much of what the First Amendment accomplishes in the judgments context: protection of freedom of expression.

B. Choice of Law Doctrine in U.S. Internet Defamation Cases

As noted above, the force of the First Amendment as well as the federal internet immunity statute[34] appears to have channelled international litigants away from U.S. courts. Accordingly, the choice of law jurisprudence in internet defamation cases focuses largely on domestic disputes involving litigants from inside the U.S.[35] Even for domestic litigation, however, the case law is relatively sparse. One reason for the limited case law may be the enactment in many states of the Uniform Single Publication Act.[36] This statute limits a plaintiff's defamation litigation to a single cause of action arising from publication, which is generally deemed to occur on the first general distribution to the public. Most – if not all – courts to consider the issue have applied the single publication rule to internet defamation actions.[37] So-called "Anti-SLAPP statutes" may provide yet another reason for reduced internet

[33] It was in *Calder* that the Supreme Court explicitly stated that courts need not incorporate First Amendment concerns into their personal jurisdiction analysis. The *Calder* Court stated that First Amendment concerns are reflected in substantive law and "to reintroduce those concerns at the jurisdictional stage would be a form of double counting." *Calder v. Jones*, 465 U.S. 783, 790 (1984).

[34] *See supra* note 3 for the text of the statute, the Communications Decency Act, 47 U.S.C. § 230(c).

[35] One of the few exceptions is *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010), which concerns actions and statements that occurred in South Africa. Ultimately, the court determined that the plaintiff was domiciled in Pennsylvania, and applied Pennsylvania law.

[36] Section 1 of The Uniform Act provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions."

[37] See, *e.g,. Nationwide Bi-Weekly Admin., Inc. v. Belo Corp*., 512 F.3d 137 (5th Cir. 2007); *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 89 (2d Cir.2003); *Mitan v. Davis*, 243 F.Supp.2d 719, 724 (W.D.Ky.2003); *Churchill v. State*, 378 N.J.Super. 471, 876 A.2d 311, 316 (2005); *McCandliss v. Cox Enters*., 265 Ga.App. 377, 593 S.E.2d 856, 858 (2004); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal.App.4th 392, 13 Cal.Rptr.3d 353, 361-62 (2004).

defamation litigation. Enacted in several states, these statutes are designed to protect internet speech and deter plaintiffs from filing suits for the purpose of silencing a defendant and deterring others from filing such suits.

If all of defamation law in the United States were controlled by the First Amendment, there would be little occasion for domestic conflict of laws issues. As a federal standard, the First Amendment would displace state laws that might come into conflict with each other. Such state choice of law issues do emerge in defamation cases, however, since state law controls most aspects of defamation, with the First Amendment imposing constraints on the extent to which states can impose liability. While some uniformity exists among U.S. defamation principles, state defamation laws do vary, thus giving rise to conflict of laws problems. For example, one court recently declared that New York law grants the expression of an opinion "greater protection from defamation actions than does California law."[38] Another notable difference among states is the "innocent construction rule," which holds that "even if a statement falls into one of the categories of words that are defamatory per se, it will not be actionable per se if it is reasonably capable of an innocent construction."[39] The state of Illinois provides for the defence, while other states, such as Pennsylvania,[40] do not allow for it. State laws also differ as to the required degree of fault a publisher must bear in order for a private individual to recover for defamation.[41] Finally, the presence or absence of so called anti-SLAPP statutes in various states also gives rise to variations in state laws. Anti-SLAPP statutes have different parameters, varying among the states that have enacted them. Some anti-SLAPP statutes allow a defendant to file a counterclaim or bring a separate suit for punitive and compensatory damages on the theory that a defamation plaintiff abused the legal process. Other Anti-SLAPP statutes are confined to communications involving public officials or an attempt to petition government.[42]

In negotiating differences in state laws governing defamation, courts in internet cases overwhelmingly apply the orientation of the Restatement (Second) of Conflict of Laws, which serves as the most popular choice of law approach among states in the U.S.[43] The Restatement (Second) rule for choice of law in multistate defamation cases states that the law of the plaintiff's domicile will presumptively govern liability issues for the dispute.[44] This rule provides a convenient standard

[38] *Condit v. Dunne*, 317 F. Supp. 2d 344, 352-353 (S.D.N.Y. 2004).

[39] *Tuite v. Corbitt*, 866 N.E.2d 114, 121 (Ill. 2006).

[40] *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 470 (E.D. Pa. 2010).

[41] N.M. ROSENBAUM, Pick a Court, Any Court: Forum Shopping Defamation Claims in the Internet Age, 12 *Journal of Internet Law* 2011, p. 18, n. 43 (comparing cases from Kentucky and New York).

[42] Note, S.L. SPINOSA, Yelp! Libel or Free Speech: The Future of Internet Defamation Litigation in the Massachusetts in the Wake of *Noonan v. Staples*, 44 *Suffolk University Law Review* 2011, p. 747, 758-759 (describing variety in Anti-SLAPP statutes).

[43] At last count, 28 states had adopted the Restatement (Second) for either contract cases, tort cases, or both. S.C. SYMEONIDES, Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey, *Am. J. Comp. L.* 2012, p. 291, 308.

[44] Restatement (Second) of Conflict of Laws § 150 provides in full:

for internet cases, in which courts usually apply the law of the plaintiff's domicile reflexively where state law differences exist. Indeed, many courts – whether or not they have officially adopted the Restatement (Second) for all choice of law matters – have chosen to apply the law of the plaintiff's domicile in internet defamation cases.[45] The result of this orientation, of course, heightens the importance of the domicile determination, and has yielded occasionally unusual and complex opinions on the subject.[46] While overwhelmingly the most popular rule, the place-of-

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(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.

[45] See, *e.g.*, *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000) (holding that the law of the plaintiff's domicile should govern publication from an internet site, since the publication would amount to internet defamation); *Rice v. Nova Biomedical Corp.*, 38 F.3d 909 (7th Cir. 1995) (stating that "throwing up their hands in despair at the inoperability of modern conflicts laws, the Illinois cases say that in a multistate defamation case [...] the applicable law is that of the [plaintiff's] domicile."); *Hudson Associates Consulting, Inc. v. Weidner*, 2010 WL 1980291 (D. Kan. 2010) (not designated for publication) (observing that in internet defamation case, court should apply law of the plaintiff's domicile since that is where plaintiff felt wrong); *Cornelius v. DeLuca*, 709 F.Supp.2d 1003, 1004 (D. Id. 2010) (holding that Idaho's choice of law rules call for application of the law of the plaintiff's domicile in internet defamation case); *Aoki v. Benihana*, 839 F.Supp.2d 759 (D. Del. 2012) (holding that Delaware choice of law rules applicable to defamation claims, when there is widespread dissemination of allegedly defamatory matter, such as via the internet, the most important consideration in choosing the applicable law is the residence of the party allegedly defamed); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) (emphasizing that the plaintiff was domiciled in Pennsylvania at the time of the alleged internet defamation, the court concluded that this gave Pennsylvania a greater interest in defamation claim in the former school headmistress's action against the school's founder as Pennsylvania).

Occasional cases applying the Restatement Second decline the presumptive rule and apply the law of other jurisdictions that appear to be the centre of the dispute. See J.R. PIELEMEIER, Choice of Law for Multistate Defamation – The State of Affairs as Internet Defamation Beckons, 35 *Arizona State Law Journal* 2003, p. 55, 90.

It is important to remember that the Second Restatement approach is not, however, the universally followed by all states in the U.S. Several other approaches flourish, such as Governmental Interest Analysis, the First Restatement of Conflict of Laws, the Better Rule of Law Approach, *Lex Fori*, and hybrid approaches unique to particular states. Nonetheless, the place of plaintiff's domicile rule continues to provide an attractive solution in internet defamation cases.

[46] See, *e.g.*, *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010) (engaging in extensive analysis of domicile for the purpose of choice of law analysis).

plaintiff's domicile rule is not, however, the exclusive approach. Some courts recognize that the inquiry is more complicated where the defamatory statements are published nationwide. These courts follow a more comprehensive analysis in internet defamation cases, such as identifying the jurisdiction with the "most significant relationship" to the suit.[47]

II. More Dramatic Responses: Judgment Enforcement and Recognition in Internet Defamation Cases

As in legal systems around the world, U.S. conflict of laws doctrine traces its lineage to territorial principles. Also tracking the experience of other nations, U.S. courts have therefore encountered difficulty navigating the "territory free" issues that arise from cyberspace disputes. Indeed, the nature of cyberspace creates a disconnect between standard doctrine and internet governance.[48] But the misfit between territorially focused legal principles and the borderless nature of the internet is not the only source of challenge for courts enforcing judgments from internet disputes. Complications also arise because of the internet's capacity to connect individuals from diverse cultures and to provide untested, vibrant platforms for communication and expression.[49] Where the bridge wrought by internet communications breaks down – and ultimately results in a law suit and judgment – the judgment recognition and enforcement process often stumbles on practical problems and sovereignty issues.[50]

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[47] See, *e.g.*, *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007) (court applied "most significant relationship" approach in concluding that Texas law applied in defamation suit against Texas newspaper for article published on its website); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1091 (S.D.N.Y. 1984) (recognizing that a comprehensive analysis is necessary where statements are published in more than one jurisdiction and stating that New York courts undertaking a choice of law analysis in such circumstances evaluate the broad ranging policy factors of section 6 of the Restatement (Second) of Conflict of Laws).

[48] P.S. BERMAN, Dialectical Regulation, Territoriality, and Pluralism, 38 *Connecticut Law Review* 2006, p. 944-45 (arguing that "it is clear that judgment recognition is increasingly the place where deterritorialized jurisdictional assertions meet the reality of territorial enforcement").

[49] The internet provides unparalleled opportunities for creative expression (through such outlets of blogging, webpage design, online magazines, and video sharing), for community building (through such outlets as LinkedIn, Craigslist, Facebook, Instagram, Pinterest, and dating websites), and for political action (as evidenced by the internet use during the Arab Spring, Occupy Wall Street, and U.S. political campaigns).

[50] In the United States (as elsewhere), judgments from a foreign jurisdiction have force only if courts are willing to provide to recognize and enforce a judgment. As with domestic United States judgments, the distinction between recognition and enforcement is important: recognition integrates concepts akin to domestic principles of claim and issue

Enforcement jurisdiction calls for a court to deploy its sovereign power to make real something that – without recognition and execution – might remain abstract and symbolic only. (Without enforcement, a judgment might amount to only a written notation.) By calling on the court's "strong arm" power, recognition and enforcement jurisdiction implicates the rule of law itself – including sensitive issues of power and sovereignty. A relatively casual internet interchange can thus transform into clashes over policy concerns striking at the core of a nation's identity. As in other foreign choice of law contexts pertaining to defamation liability, this policy clash tends to implicate freedom of expression principles.

The U.S. judgment and recognition process has emerged as a particularly active battleground for negotiating cultural and legal differences over regulating expression. This results largely from the practical reality that plaintiffs have an incentive to go abroad in order to avail themselves of more defamation friendly laws, but by necessity must bring the judgment to the location of the defendant's assets in order to execute. This section will provide an overview of how U.S. courts have grappled with legal and cultural differences arising in the internet defamation context, including the early reactions to libel tourism, the federal statute regulating libel tourism (the Speech Act of 2010), and the uniform state laws governing foreign country judgment recognition and enforcement. The section concludes with a brief critique of the U.S. approach in light of private international law principles.

A. Overview of U.S. Recognition and Enforcement of Foreign Defamation Judgments

1. Early Leading Cases and General State Statutes

Early reaction of U.S. courts to libel tourism in cross-border defamation cases is illustrated in two cases in which the alleged defamatory matter would have likely been constitutionally protected under U.S. First Amendment rules: *Telnikoff v. Matusevich*[51] and *Bachchan v. India Abroad Publications, Inc.*[52] In *Telnikoff*, a U.S. citizen published a letter in the London *Daily Telegraph* accusing the plaintiff of advocating racialism and a "blood test" for ethnic status. An English citizen, the plaintiff sued in England, obtaining a libel judgment. After the plaintiff sought enforcement in the U.S., a state court in Maryland ruled that the recognition would offend Maryland public policy protecting freedom of expression. In support of this

preclusion, while enforcement involves a court's use of its coercive power to compel a defendant to honour and satisfy a foreign country judgment. The act of requesting a court to recognize a foreign judgment is sometimes called "domesticating" a judgment. Under current legal principles, once a plaintiff has convinced one United States court to recognize a foreign judgment, the plaintiff may take the judgment to another jurisdiction to enforce it and can assume that all United States courts must enforce the judgment once it has been domesticated. *See* L.E. LITTLE, *Conflict of Laws: Cases, Problems, and Materials*, New York forthcoming 2013.

[51] 347 Md. 561, 702 A.2d 230 (1997).

[52] 154 Misc.2d 228, 585 N.Y.S.2d 661 (N.Y. Supp. 1992).

ruling, the court pointed to Maryland's adoption of a uniform state law, the Uniform Foreign Money-Judgments Recognition Act, which includes a public policy exception to foreign country judgment recognition.

In *Bachchan v. India Abroad Publication, Inc.*[53] a New York news service published an article accusing an Indian public figure of holding money from an arms company that had been accused of paying kickbacks to obtain a government contract. The plaintiff obtained a libel judgment in English courts against the news service operator and the Supreme Court of New York refused enforcement. Although New York had adopted the same Foreign Money-Judgments Recognition Act that was enacted in Maryland and applied in *Telnikoff,* the New York court in *Bachchan* did not clarify whether the basis for its refusal to enforce the judgment was the conflict between the judgment and New York's public policy or defective "procedures" in the English proceeding. Nonetheless, courts and commentators have generally viewed *Bachchan* as based on the public policy favouring freedom of expression.[54]

The statute invoked in both *Bachchan* and *Telnikoff* – the Uniform Foreign Money-Judgments Recognition Act – was promulgated in 1962. Many U.S. states adopted this 1962 Act, which generally provides for ready and efficient recognition and enforcement of judgments rendered by other countries. The 1962 Act provides for non-recognition, however, when a foreign country judgment reflects certain defects. For example, the 1962 act instructs that U.S. courts should not enforce foreign judgments if the litigation system that produced the judgment lacked impartial tribunals or procedures compatible with U.S. conceptions of due process. The 1962 Act also includes a discretionary section, providing that a court may decline to enforce a judgment if the cause of action "on which the judgment is based is repugnant to the public policy of this state […]"[55]

In 2005, the U.S. National Conference of Commissioners on Uniform State Laws drafted a new uniform act, known as the Uniform Foreign-Country Money Judgments Recognition Act (some states have adopted this 2005 Act, some retain the 1962 Act, and some follow neither act). The 2005 Act continued the basic approach of the 1962 Act, but expanded the public policy exception. The 2005 Act provides that a court may decline to recognize a foreign judgment if the "judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States."[56]

Like the 1962 Act, the 2005 Act's public policy exception is not mandatory. Commentary accompanying the 2005 Act provides that the exception is narrow, and should be invoked only where the foreign country judgment would "tend clearly to injure the public health, the public morals, or public confidence in the administration of law, or would undermine that sense of security for individual

[53] 154 Misc.2d 228, 585 N.Y.S.2d 661 (N.Y. Supp. 1992).

[54] This interpretation is reasonable because the procedural problem related to the defendant's burden of proving the truth of the statement, a matter with First Amendment implications under U.S. law.

[55] 1962 Uniform Act §4(b)(3).

[56] 2005 Uniform Act §4(c)(3).

rights […] which any citizen ought to feel."[57] Despite this admonition to invoke the exception sparingly, some case law has treated the exception as mandatory where foreign judgments infringe First Amendment rights.[58]

2. State Anti-Libel Tourism Laws, the SPEECH Act of 2001 and Relevant Case Law

Apparently reacting to the exceptional nature of First Amendment protections, U.S. lawmakers have supplemented the "public policy" safety net of the uniform state judgment recognition and enforcement laws. Leading this movement for specialized protection against libel judgments obtained abroad, the New York legislature enacted a statute designed to discourage defamation plaintiffs from suing U.S. residents outside the U.S. Entitled the Libel Terrorism Protection Act (and also referred to as "Rachel's Law"), the statute bars New York courts from enforcing a foreign libel judgment unless the country rendering the judgment extended the same or better protection as U.S. standards for freedom of speech.[59] Other states soon followed New York's lead, passing similar statutes.[60]

Within a few years, the U.S. Congress passed (and President Obama signed into law) an equally uncompromising statute, the Speech Act of 2010. The Speech Act, also known unofficially as the federal libel tourism act, describes itself formally as an act "to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services." The Speech Act provides that courts in the U.S. shall not recognize a foreign judgment for defamation unless the court determines that the adjudication effectively provided at least as much protection of freedom of speech and press as would be provided by the U.S. Constitution's First Amendment and the law of the state where the U.S. court is located.[61] Parts of the statutory text are grandiose, suggesting that the statute reflects what might be described as "political

[57] 2005 Uniform Act §4 cmt. 8, 13 U.L.A. pt. II.

[58] *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007) (stating that "[f]oreign judgments that impinge on First Amendment rights will be found to be repugnant to public policy").

[59] See *McKinney's N.Y. Civil Practice Laws and Rules* § 5304, 2008 (providing that a foreign defamation judgment can only be recognized if the court determines the law used by the foreign court provided for as much protection for free speech as would be provided by the U.S. and New York Constitutions). This statute is a reaction to *Ehrenfeld v. Mahfouz*, 489 F.3d 542 (2d Cir. 2007), in which a English court awarded a plaintiff a libel judgment, basing its jurisdiction on the sale of a small number of book copies in the United Kingdom and the availability of the first chapter of the book online. The defendant in the action filed a declaratory judgment action in the U.S., asking for a declaration that the judgment was unenforceable on constitutional and public policy grounds. Ultimately the U.S. courts dismissed the action, finding that they lacked personal jurisdiction against the original plaintiff in the U.K. suit.

[60] Among the several states that adopted laws similar to New York's law are Utah, Tennessee, Maryland, Illinois, Florida, and California.

[61] 28 U.S.C. §4101-4104.

theatre" or "message politics" as much as (or more than) a regulatory effort to restrict the effect of off-shore libel verdicts. The following preliminary findings reflect examples of the Speech Act's rhetorical flourishes:

(1) The freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy;
(2) Some persons are obstructing the free expression of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.[62]

The operative provision of the Speech Act requires that a United States court refusing to recognize or enforce a foreign defamation judgment must make one of the following findings:

(1) The defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or
(2) Even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.[63]

As a federal law, the Speech Act overrides or preempts any state laws that conflict with its terms or stand as an obstacle to achieving its purpose. U.S. courts have not yet identified the exact preemptive scope of the statute. Indeed, very few cases have actually confronted the Speech Act since its enactment,[64] and only one of

[62] 28 U.S.C. §4101 note.

[63] 28 U.S.C. §4101(a)(1).

[64] Only two opinions discussing the Speech Act are currently available, and the first opinion did not interpret the Speech Act in any detail. In this first case, *Pontigon v. Lord*, 340 S.W.3d 315 (Mo. Ct. App. 2011), a defamation defendant, Lord, had self-published a life-story detailing an incident that gave rise to litigation. In the litigation, Lord had sought to set aside of a deed against Sanchez on the basis of fraud. A resident of Canada, Sanchez filed a defamation suit against Lord in Canada. Lord did not appear in the Canadian court, which therefore entered judgment against Lord. The judgment was brought to a Missouri state court, which granted the request to register the judgment. The Missouri Court of Appeals set aside the judgment registration, since the lower court had not required plaintiff to establish that the Canadian court complied with freedom speech standards established in

these cases grappled with the important question of how courts should evaluate the law of the foreign country for compliance with U.S. freedom of speech standards. (The court took a strict approach, suggesting that foreign law must track closely the approach of U.S. law.)[65]

Several explanations for this dearth of cases present themselves. First, one might interpret the scarcity of cases as reinforcing the conclusion that the Speech Act may be more symbolic than regulatory. Alternatively, one might conclude that the need for the Speech Act has reduced because fewer libel tourism cases are occurring outside the U.S., perhaps as a result of developments in the United Kingdom to reform libel laws and reduce incentives for libel tourism.[66] Nonetheless, the Act stands as an important symbol of the U.S. position on the role of the First Amendment and judgment recognition – a position that is a cause for some embarrassment to many U.S. scholars. Critique of the Speech Act appears in the next section.

B. Critique of the U.S. Approach to Foreign Libel Judgments

The scholarly reaction to the U.S. treatment of foreign libel judgments has been mixed, although largely critical of the Speech Act and the state anti-libel tourism

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the Speech Act (as well as the standards of the Missouri state recognition of foreign judgments statute). In so doing, the Court of Appeals interpreted little of the Speech Act itself, although the court's action does illustrate that the Speech Act creates a significant obstacle for parties seeking recognition of foreign country judgments.

[65] In this case, *InvestorsHub.com, Inc. v. Mina Mar Group, Inc.*, 39 Media L. Rev. 2078, 2011 U.S. Dist. LEXIS 87566 (N.D. Fla. June 20, 2011), Mina Mar Group had filed a defamation suit in Canada over internet posts on Investor Hub's webpage. Mina Mar obtained a default judgment. In seeking to enforce the judgment in U.S. District Court, Mina Mar admitted it could not establish its burden under the Speech Act. The federal court agreed, observing that Canada lacked the same free speech protections as the First Amendment, federal law, and Florida law. In reaching this conclusion, the federal court pointed out that, unlike under First Amendment law, Canada does not require that a defamation plaintiff who is either a public official or public figure must prove that the defendant made the defamatory statement with actual malice, a standard requiring that the defendant either knew the statement was false or acted with reckless disregard to the statement's truth or falsity. The court also noted that Canadian law does not provide the protections for freedom of on-line speech provided by the Communications Decency Act, 47 U.S.C. §230.

[66] After debates about how to prevent or deter libel tourism from occurring, British authorities considered a proposed draft defamation bill that would diminish or undercut incentives for travelling to the U.K. to file defamation actions there. A.R. KLEIN, Some Thoughts on Libel Tourism, 38 *Pepperdine Law Review* 2010, p. 101, available at <http://ssrn.com/abstract=1733139>; citing Libel Laws Making Mockery of Justice, Say Lib Dems, B.B.C. News (Jan. 18, 2010), available at <http://news.bbc.co.uk/2/hi/uk_news/politics/8466297.stm>; Defamation Bill, 2010-11, H.L. Bill [3] (U.K.), available at <http://www.publications.parliament.uk/pa/ld201011/ldbills/003/11003.i-ii.html>. While the U.K. is an important option for those seeking plaintiff-friendly defamation laws, other jurisdictions – such as Australia, New Zealand, Singapore, and Kyrgyzstan – may continue to provide appealing options for libel tourism if the U.K. does indeed amend its law.

statutes.[67] Some criticism is fine-tuned to the specifics of the U.S. governmental system and the statutory frameworks reflected in the federal and state laws. Other criticism focuses more on the laws' strict approach to First Amendment regulation in the transnational context.

One criticism specific to the U.S. system questions whether state law is a suitable vehicle for regulating a problem such as libel tourism, which implicates the relationship between the U.S. and the rest of the world. At first glance, this may seem an unfounded criticism since several arguments suggest that state law is perfectly situated for regulating the phenomenon. For one thing, state law is the fundamental source of defamation regulation in the United States. Second, the question of libel tourism implicates judgment enforcement authority, a power well within state court power. Under the U.S. allocation of judicial authority, federal courts are courts of limited jurisdiction, while state courts enjoy the balance of power and can exercise general jurisdiction if state governments so desire. Indeed, the U.S. Constitution envisions that there might have never been any lower federal courts, only a Supreme Court with the authority to exercise federal judicial power. From the premise, one might reason that state courts should be deemed ready, willing, and able to handle a problem such as libel tourism.

Why then should federal law have a dominant role? The answer is that the prerogatives of state courts do not negate the authority of federal *law* to establish the standards for transnational defamation judgment recognition and enforcement.

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[67] This includes scholarship from inside and outside the U.S. See, *e.g.*, H. MELKONIAN, *Defamation, Libel Tourism, and the Speech Act of 2010*, Amherst/ New York 2011, p. 258 (describing the Speech Act as an American overreaction and "a step backward" from the "internationalist tradition of the United States"); A.R. KLEIN (note 66), at 375 (finding fault with both U.S. state and federal legislative responses to libel tourism); S. STAVELEY-O'CARROLL, Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment, 4 *New York University Journal of Law & Liberty* No. 3 2009 (describing the New York libel tourism statute as an important step toward punishing libel tourists and deterring harassment of American authors), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350994>; M.D. ROSEN, The SPEECH Act's Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism, 53 *Virginia Journal of International Law* 2012, p. 99, 104-117 M.D. ROSEN, Exporting the Constitution, 53 *Emory Law Review* 2004, p. 229-230 (pointing out that where American courts refused to enforce judgments under First Amendment authority the courts undertook "a wholly America-centric analysis" that led them to ignore the "possible effect that non-enforcement might have on international law); C.A. STERN, Foreign Judgments and the Freedom of Speech: Look Who's Talking, 60 *Brooklyn Law Review* 1994, p. 1036 (arguing against the approach of transforming the First Amendment in "a universal declaration of human rights" in the judgment recognition context); T. STURTEVANT, Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home, 22 *Pace International Law Review* 2010, p. 269 (expressing support for the Speech Act, but admonishing that systematic rejection on foreign libel judgment could strain foreign affairs); D.C. TAYLOR, Libel Tourism: Protection Authors and Preserving Comity, 99 *Georgetown Law Journal* 2010, p. 189 (criticizing the mandatory non-recognition approach of the Speech Act); Note, C.M. MONDORA, 36 *Hofstra Law Review* 2008, p. 1177 (arguing that uniform state judgment enforcement laws should ensure that the public policy exception is discretionary, except for the cases implicating the First Amendment).

To begin, federal law is the primary source of freedom of expression principles. Moreover, the U.S. constitutional allocation of authority designates to the federal government, not to the states, the power to control matters dealing with foreign affairs. In fact, a broad preemption doctrine prevents states from directly regulating many issues implicating the relationship between the U.S. and foreign countries.[68] Aside from expertise and capability rationales for federal government dominance, concern with uniformity supports federal supremacy. One can easily conclude, therefore, that it is problematic for the various states to be fabricating and applying a diversity of doctrines that explicitly disapprove of the laws and policies of other countries.[69]

Of course, this criticism does not cover the Speech Act, which is a federal, not state, statute and is thus legitimized by federal constitutional authority over foreign affairs and free expression. Nonetheless, the Speech Act does require that the "defamation law applied in the foreign court's adjudication" must provide "at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located." In this way, the Speech Act allows state law to insert regulatory control if it gives greater protection than federal law. This Speech Act provision therefore injects a potential "patchwork" of requirements from the various U.S. states for foreign entities to consider in evaluating the potential enforceability of U.S. law, a task daunting even for insiders who are intimately familiar with potential variations among state constitutions, statutes, and common law.[70]

In a similar vein, the language of the Speech Act suggests that the foreign judgment must respect the First Amendment "line and verse," rather than require only that the judgment reflect a general respect for the "core First Amendment policy of fostering robust and unfettered public debate."[71] While it is not clear whether a domestic U.S. court applying the Speech Act might forgive "minor deviations"[72] from formally announced First Amendment doctrine, the Speech Act language does make clear that foreign litigants and courts must navigate successfully the overall architecture of First Amendment law to ensure that a foreign judgment might be enforced in a U.S. court. This – it turns out – can be very challenging: First Amendment jurisprudence is among the most difficult of all U.S.

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[68] *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (expressing concern with state regulations that "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments").

[69] D. RENDLEMAN, Collecting a Libel Tourist's Defamation Judgment?, 67 *Washington & Lee Law Review* 2010, p. 467 (suggesting that U.S. courts are inappropriately making foreign policy in this context).

[70] A.R. KLEIN (note 66), at 388 (arguing that the Speech Act could be improved "by making clear that the federal constitutional alone sets the standard for determining the enforceability of a foreign judgment, rather than opening the door to evaluation of foreign judgments on the basis of state laws that might impose additional requirements on defamation plaintiffs").

[71] A.R. KLEIN (note 66), at 388.

[72] A.R. KLEIN (note 66), at 388.

constitutional law. First Amendment doctrine is not only complex, but is filled with apparent contradictions and parallel lines of authority. One illustrative challenge that might confound a foreign lawyer or judge in defamation litigation is the elusive distinction among "fighting words"[73] or "true threats"[74] (which both are unprotected categories of speech under the First Amendment) and hate speech (which is often a protected category of speech).[75] Likewise, one can easily imagine foreign courts becoming ensnared in the tangle of requirements regarding the concept of "actual malice" as these concepts relate to the distinctions the U.S Supreme Court has identified for defamation actions brought by public officials, public figures, limited purpose public figures, and private citizens.

Other critiques of the Speech Act and the state statutes focus on their core premises. First is the argument that these statutes overlook the important difference between a court decision that regulates speech in the first instance and a court decision that simply enforces another court's judgment that happens to have free speech ramifications. U.S. law has long differentiated a court's obligation to apply another jurisdiction's law or cause of action from a court's obligation to extend the comity required to enforce another jurisdiction's judgments. Constitutional as well as adjudicative principles grant U.S. courts far more latitude in applying a public policy escape for the former activity (law application) than for the latter activity (judgment recognition).[76] Many argue that strident adherence to First Amendment principles in judgment recognition and enforcement fails to account for the type of comity and respect for judicial action that normally accompanies judicial role.[77]

Other critics go further and assail the Speech Act's assumption that the U.S. can bind the rest of the world to U.S. freedom of expression principles. In evaluating this criticism, it is important to remember that U.S. lawmakers are concerned

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[73] See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (establishing the fighting words test and holding fighting words are not entitled to First Amendment protection because they "are of such slight social value [...] that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[74] *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (defining a true treat as occurring when "a speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals.").

[75] *Virginia v. Black*, 538 U.S. 343, 366 (2003) (explaining there is a difference between a cross burning at a group meeting of like-minded believers and a cross burning directed at an individual).

[76] See, *e.g.*, *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (refusing to recognize a public policy exception to the obligation of one state court to give the judgment of another state court the same validity and effect as that judgment would have in the rendering state); *Telnikoff v. Matusevitch*, 347 Md. 561, 620 702 A.2d 230, 259 (1997) (CHASANOW, J., dissenting) (arguing that courts should hesitate before equating a judgment's repugnance to the forum's public policy with a cause of action's repugnance to the forum's public policy and urging "an individualized determination as to whether enforcement of the foreign judgment would have a chilling effect on First Amendment protection") (quoting C.A. STERN (note 67), at 1031, and J. MALTBY, Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in the U.S. Courts, 94 *Columbia Law Review* 1994, p. 1982).

[77] See *supra* notes 67 and 76 for references to legal thinkers who take this view.

that other countries' regulation of Internet communication causes the freedom of communication rules from the *most restrictive nation* to dominate the internet. U.S. lawmakers are motivated to protect enormously important values – democratic governance, economic success, creativity, community building, and cultural richness – which all hang in the balance.

Yet for the U.S. to respond with its own unilateral approach results in a parallel problem: regulators in what may be the *least restrictive nation* (presumably the U.S.) impose on the rest of the world their own heightened standards of protected communication (and correspondingly reduced standards of human dignity and reputation threatened by defamation).[78] U.S. law and discourse following a policy of First Amendment exceptionalism does not provide an adequate explanation for why countervailing policies implicated in defamation actions – values such as respect for human dignity and reputation – should always yield to freedom of expression values.

The dynamic between the less restrictive and more restrictive nations suggests that accommodating diverse views about freedom of expression is one of the greatest challenges of internet regulation. This is not, however, a challenge that is new in the area of private international law. Even within United States conflict of laws doctrine, formal techniques for accommodating competing values provide tools that are ignored in the Speech Act, the state anti-libel tourism statutes, and the case law uncritically invoking a public policy exception to judgment recognition based on freedom of expression. Principles of private international law provide further guidance – which U.S. courts and regulators are well advised to consult.[79] Finally, persuasive authority points out that First Amendment values do not support a "one size fits all approach" to enforcing foreign libel judgments. First Amendment concerns differ in magnitude and contour depending on "whether the speaker, the audience, or both are located with or outside U.S. territory."[80] The U.S. approach to libel tourism would benefit from providing room for courts to incorporate these concepts in decision making.

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[78] See F. SCHAUER, The Exceptional First Amendment, p. 2-32, available at <http://ssrn.com/abstract=668543> (explaining the contours and reasons for the exceptional approach that the U.S. takes toward hate speech and defamation); T. ZICK, Territoriality and the First Amendment: Free Speech at – and Beyond – our Borders, 85 *Notre Dame Law Review* 2010, p. 1610 (observing that the U.S. policy of "[l]ibel protectionism effectively supplants the speech laws and policies of other states" thereby inserting the First Amendment into global regulation).

[79] See generally M.D. ROSEN, Should "Un-American" Foreign Judgments Be Enforced?, 88 *Minnesota Law Review* 2004, p. 798 (pointing out the positive lessons flowing from case law recognizing the interests of comity and the smooth operation of the international system implicated by foreign judgment recognition).

[80] See T. ZICK (note 78), at 1610. See generally R.D. KAMENSHINE, Embargos on Exports of Ideas and Information: First Amendment Issues, 26 *William & Mary Law Review* 1985, p. 866-873 (discussing the implication of location of speaker and audience for the purpose of First Amendment regulation).

III. Conclusion

In adjudicating questions of personal jurisdiction and choice of law, U.S. state and federal courts in internet defamation cases have proven relatively faithful to the lessons of traditional private international principles. For judgment enforcement and recognition, however, the story unfolds differently. Experience reveals that U.S. regulators have generally declined to develop an approach for internet defamation judgments that accommodates nuances in substantive law policies of other countries. Nor have U.S. regulators integrated decision-making tools for evaluating competing values, tools that private international law has utilized. The stakes are high – not only for foreign judgments from internet defamation actions – but also for judgments from internet invasion of privacy actions as well.[81]

Responding to this state of the law on recognition and enforcement of foreign libel judgments, many U.S. legal thinkers have proposed that regulators embrace a less categorical, more cosmopolitan, approach to recognition and enforcement. For example, Dean Paul Berman advocates that U.S regulators should "take seriously" private international law values "effectuated by enforcing" foreign judgments, weighing "the importance of such values against the relative importance of the local public policy or constitutional norm, and then consider the degree to which the parties have affiliated themselves with the forum."[82] Scholars have also urged a return to well-developed principles used in regulating domestic judgments. These principles, which derive in large part from the Full Faith and Credit Clause of the U.S. Constitution,[83] show considerable tolerance for differences in substantive law and in public policies where one U.S. jurisdiction is asked to honour the judgment of another U.S. jurisdiction.[84]

Within U.S. choice of law rules, existing state common law and uniform state statutes governing foreign judgment recognition and enforcement provide a starting point for reform. Yet, as shown above, U.S. governmental structure counsels that federal, not state, law is the best source of regulation. Unfortunately, attempts to persuade Congress to enact general federal legislation on foreign judg-

[81] For analysis of the ramifications of the Speech Act and other U.S. laws on "privacy tourism" and the enforceability of foreign judgments from invasion of privacy actions, see S. BATES, More SPEECH Preempting Privacy Tourism, 33 *Hasting Communication and Entertainment Law Journal* 2011, p. 379 (advocating that Congress should extend the Speech Act to invasion of privacy judgments). See also R.A. EPSTEIN, Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism, 52 *Stanford Law Review* 2000, p. 1003 (exploring the ramification of "First Amendment exceptionalism" in regulating invasion of privacy in cyberspace).

[82] P. BERMAN, Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era, 153 *University of Pennsylvania Law Review* 2005, p. 1872.

[83] U.S. Cons. art IV, section 1.

[84] See, *e.g.*, D. RENDLEMAN, (note 69), at 467 (arguing that "instead of a categorical negative decision, a court in the United States should view refusing recognition to a foreign-nation judgment, including one for defamation, as extraordinary").

ment recognition and enforcement have been unsuccessful.[85] Nonetheless, the plethora of academic criticism of the Speech Act and related state anti-libel tourism statutes suggests a strong and continuing will to advocate for change. In the meantime, those who must confront the litigation realities presented by the existing statutory systems are likely to find critiques of the Speech Act, the state anti-libel tourism statutes, and the uniform state laws useful in navigating ambiguities and gaps in the U.S. judgment enforcement and recognition schemes.

[85] Although the American Law Institute proposed the Foreign Judgments Recognition and Enforcement Act in 2005, Congress failed to enact it into law. Attempts to form treaties regarding mutual enforcement of judgments have also been unsuccessful. For helpful discussion of some the problems encountered with attempts to devise an international convention on recognition and enforcement of foreign country judgments, see S. GROSSI, Rethinking the Harmonization of Jurisdictional Rules, 86 *Tulane Law Review* 2012, p. 623. The Hague Choice of Court Agreements Convention does provide for recognition of judgments entered by courts specified by parties in forum selection clauses – and to that extent preempts contrary rules of state common law. For discussions of this Convention's relationship with foreign country judgment enforcement, see, *e.g.*, S.B. BURBANK, A Tea Party at the Hague?, 18 *Southwestern Journal of International Law* 2012, p. 114-115; W.W. HEISER, The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts, 31 *University of Pennsylvania Journal of International Law* 2010, p. 1013-1032. With exceptions, the Convention would require the court of one signatory country to enforce a judgment rendered by another signatory country. Nonetheless, most nations, including the United States, have not ratified the Convention.

JURISDICTION IN CASE OF PERSONALITY TORTS COMMITTED OVER THE INTERNET: A PROPOSAL FOR A TARGETING TEST

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I. Introduction

Cross-border personality torts, which include privacy violations and defamation, remain to this day one of the thorniest issues faced by private international law. The pressing need for an organised response with respect to both jurisdictional rules and choice of law rules was once again highlighted in 2012, when the Duchess of Cambridge Kate Middleton and her spouse Prince William brought proceedings before the *Tribunal de Grande Instance de Nanterre* against the owners of French tabloid *Closer*, which published unauthorised photographs of the topless Duchess.[1] Though the couple managed to obtain an injunction against the publisher, covering the printed and the electronic formats, the picture themselves had already circulated thanks to the Internet, and were also appropriated by other tabloids. This case – while not exceptional in itself – gave scholars the opportunity to again examine the many problems linked with cross-border damage to a person's personality. These problems range from the effectiveness of speech-silencing injunctions in the digital age, to the choice-of-law rule that should fill the gap found in the Rome II Regulation.[2] Dedicating a section to this topic, this edition of the *Yearbook of International Private Law* further demonstrates the current wealth of activity surrounding this area of law.

This contribution will focus on the sole issue of jurisdiction over speech-related offences made over the Internet and more specifically those made through the World Wide Web.[3] Its main proposition will be the construction of a so-called "targeting test", which will verify the adequacy of the jurisdictional claim made by a tribunal situated at the place of receipt of allegedly wrongful content.[4] For this proposition to be convincing, it will first be necessary to identify why such a test is needed, and in what context it should be adopted. Thus, a short rejection of the "accessibility" doctrine, which is currently in force in the European Union, will follow this introduction. Due to the restricted focus of this article, discussions that fall outside of the range of the proposed test, such the impact of jurisdictional considerations on the determination of the applicable law, will not be covered.

[1] Tribunal de Grande Instance de Nanterre, 18 September 2012, *William Arthur Philip Louis Mountbatten-Windsor c. SAS Mondadori Magazine France*, 12/02127.

[2] See the contributions to an online symposium organised for this occasion, available at <http://conflictoflaws.net/2012/kate-provence-pictures-online-symposium>.

[3] The World Wide Web is the service of the Internet that forms the collection of websites and links usually referred to as "the Internet" in common-day language. For the remainder of this article, the term "Internet" will be used to designate the World Wide Web.

[4] In essence, the present article is a condensed version of the proposition laid out in a doctoral thesis on the subject: M. REYMOND, *La compétence internationale en cas d'atteinte à la personnalité par Internet*, Thesis to be published.

II. The *eDate* Accessibility Standard

According to Article 7(2) of the revised Brussels Regulation[5] – which corresponds to Article 5 (3) of the old Regulation[6] – special jurisdiction in tortious matters is given to the courts of the place where the harmful event occurs or may occur. In the field of cross-border defamation, as defined by the European Court of Justice in the *Shevill* case, this is understood as designating both the courts of the place of the establishment of the publisher and the courts situated in each and every jurisdiction in which the content has been published and in which the claimant alleges reputational harm. However, the courts designated by the latter rule will only be able to consider the damages suffered locally; a rule applied to discourage excessive forum shopping.[7] When confronted with privacy violations perpetrated through the Internet, the European Court of Justice (ECJ), in the 2011 *eDate / Martinez* case,[8] confirmed this approach and added a clarification: a website only has to be accessible in a given jurisdiction in order to satisfy the second prong of the *Shevill* rule. The rest of its characteristics, such as its language, its commercial positioning or even the reach of its business activities, are irrelevant.[9]

Acceptance of jurisdiction through the presence of a website is not a novelty and has been done by a number of high-profile courts across the globe. In *Dow*

[5] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[6] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[7] ECJ, 7 March 1995, C-68-93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, *ECR* [1995] I-00415, para. 33.

[8] ECJ, 25 October 2011, joined cases C-509/09 and C-161-19, *eDate Advertising GmbH v. X* and *Olivier Martinez and Robert Martinez v. MGN Limited*, (hereafter *eDate*); references will also be made to the preceding opinion by the Advocate General, P.C. VILLALÒN (hereafter "*eDate* opinion"). For comments on this decision, see M. BOGDAN, Defamation on the Internet, *forum delicti* and the E-Commerce Directive: Some Comments in the ECJ Judgment in the *eDate* Case, *YPIL* 2011/13, p. 483 *et seq.*; A. DICKINSON, By Royal Appointment: No Closer to an EU Private International Law Settlement?, available at <http://conflictoflaws.net/2012/by-royal-appointment-no-closer-to-an-eu-private-international-law-settlement>; T. HARTLEY, Cross Border Privacy Injunctions: the EU Dimension, *Law Quarterly Review* 2012/128, p. 197 *et seq.*; L. IDOT, Compétence en matière délictuelle et atteinte aux droits de la personnalité, *Europe* 2011/12, p. 499 *et seq.*; P.D. MORA, Jurisdiction and Applicable Law for Infringements of Personality Rights Committed on the Internet, *European Intellectual Property Review* 2012/34(5), p. 350 *et seq.*; H. MUIR WATT, Note, *Rev. crit. dr. int. pr.* 2012/2, p. 389 *et seq.*; M. REYMOND, The ECJ *eDate* Decision: A Case Comment, *YPIL* 2011/13, p. 493 *et seq.*; H-P. ROTH, EuGH: Internationale gerichtliche Zuständigkeit bei Online-Persönlichkeitsrechtsverletzungen, *Computer und Recht* 2011, p. 811 *et seq.*; L. SMITH, CJEU Clarifies Jurisdiction to Award Damages for the Infringement of "Personality Rights" Online, *Entertainment Law Review* 2012/23(2), p. 34 *et seq.*

[9] *eDate* (note 8), at para. 51.

Jones Inc. v. Gutnick, a majority of the High Court of Australia accepted jurisdiction over the American owner of the online edition of the Barron's magazine through the presumption that "[...] those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction."[10] Left unmentioned was the fact – though duly considered by the lower court[11] – that the website knowingly did business with users located in the forum through a subscription system. In *Lewis v. King*, the English Court of Appeal adopted the same rationale, considering that "it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has «targeted» when in truth he has «targeted» every jurisdiction where his text may be downloaded."[12] In *Madras v. New York Times*, this approach was followed by the English High Court of Justice, and jurisdiction was confirmed regarding the availability of an application with respect to the online edition of the International Herald Tribune, even though the defendant could prove that the harmful article had only been accessed 26 times from England.[13] Other examples can be found in the realm of intellectual property, albeit in early, and either debated or discredited decisions. Such is the 1996 case of *Inset Sytems Inc. v. Instruction Set, Inc.*, a Connecticut District Court opined that a website was to be considered as a continuously available advertisement directed to all states.[14] One can also consider *Société Castellblanch v. Société Champagne Louis Roederer*, a 2003 judgment rendered by the French *Cour de Cassation*, in which the court concluded that the mere fact that a website was accessible in France was

[10] High Court of Australia, 10 December 2002, *Dow Jones Inc., v. Gutnick*, [2002] HCA 56, para. 14. For detailed presentations of this decision, see B.F. FITZGERALD, Dow Jones & Company Inc v. Gutnick [2002] HCA 56: Negotiating American Legal Hegemony in the Transnational World of Cyberspace, *Melbourne University Law Review* 2003/27, p. 590 *et seq.* and U. KOHL, Defamation on the Internet – Nice Decision, Shame about the Reasoning: Dow Jones & Co Inc. v. Gutnick, *I.C.L.Q.* 2003/52(4), p. 1049 *et seq.*

[11] Supreme Court of Victoria, 28 August 2001, *Gutnick v. Dow Jones Inc.*, [2001] VSC 305, paras 1 and 41.

[12] Court of Appeal, Civil Division, 19 October 2004, *Lewis v. King* [2004] EWCA Civ 1329, para. 34.

[13] High Court of Justice, Queen's Bench Division, 17 December 2008, *Mardas v. New York Times Company & Anor*, [2008] EWHC 3135 (QB), para. 9.

[14] United States District Court, D. Connecticut, 17 April 1996, *Inset Systems Inc. v. Instruction Set Inc.*, 937 F.Supp 161 (D. Conn., 1996). Following this idea, see United States District Court, E.D. Missouri, Eastern Division, 19 August 1996, *Maritz Inc. v. Cybergold Inc.*, 947 F.Supp. 1328 (E.D.Mo.,1996). This stance has been widely criticized by American doctrine and has been abandoned by courts. See B.D. BOONE, Bullseye! Why a "Targeting" Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally, *Emory International Law Review* 2006/20, p. 253-255; G.B. DELTA/ J.H. MATSUURA, *Law of the Internet*, Austin 2003, paras 3-33, and 3-41 to 3-43; M.A. GEIST, Is There a There There? Towards Greater Certainty for Internet Jurisdiction, *Berkeley Technology Law Journal* 2001/16, p. 1361-1363; D.T. YOKOYAMA, You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction, *Depaul Law Review* 2005/54, p. 1156-1157.

sufficient to cause actionable harm there.[15] The ECJs decision in *eDate*, though it did seem somewhat more concerned about the situation of publishers in the online context than the courts mentioned here,[16] falls in line with this long-standing accessibility doctrine.

It is, however, suggested that the accessibility principle is marred by a number of flaws, both practical and conceptual. It allows claimants to bring proceedings before the courts of any place in which the website has been made accessible regardless of its foreseeable impact in that location.[17] This, in turn, opens wide avenues for forum shopping and fosters "libel tourism"; a term understood as the strategic misuse of foreign courts made in order to scare, frustrate, or otherwise silence publishers.[18] As libel tourism has been recognised as a real issue by both English[19] and European[20] legislatures, the accessibility doctrine does appear as

[15] Cour de Cassation, 1ère chambre civile, 9 December 2003, *Société Castellblanch c. Société Champagne Louis Roederer*, available at <http://www.legalis.net/spip.php?page=breves-article&id_article=1017>. For comments on this decision, see O. CACHARD, Note, *Rev. crit. dr. int. pr.* 2004/93, p. 632 *et seq.*; C. CARON, Marque reproduite sur un site étranger : large compétence des juridictions françaises, *Communication-Commerce électronique* 2004/4, p. 26 *et seq.*; C. CHABERT, La distinction entre site passif et site actif à l'épreuve des conflits de juridictions, *La Semaine Juridique – Edition Générale* 2004/15, p. 685 *et seq.*; A. HUET, Note, *Clunet* 2004/3, p. 872 *et seq*. Subsequent judgments rendered by the same court – though not by the same chamber – seem to have abandoned this viewpoint for the adoption of a targeting test. Compare with Cour de Cassation, Chambre Commerciale, 13 July 2012, *soc. Google c. soc. Louis Vuitton Malletier*, 06-20.230 and Cour de Cassation, Chambre Commerciale, 23.11.10, *SA Axa c. SARL Google France*, available at <http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3039>. For more on this progression, see also C. CARON, Liens commerciaux et règles de compétence dans le contentieux international, *Communication-Commerce électronique* 2011/2, p. 27 *et seq.* ; V. PIRONON, Dits et non-dits sur la méthode de la focalisation dans le contentieux - contractuel et délictuel – du commerce électronique, *Clunet* 2011/4, p. 915 *et seq.*

[16] *eDate* (note 8), at paras 45-47.

[17] O. CACHARD (note 15), at 642; M. FAGIN, Regulating Speech Across Borders: Technology vs. Values, *Michigan Telecommunications and Technology Law Review* 9/2003, p. 433-434; T. HARTLEY (note 8), at 201; U. KOHL (note 10), at 1055; G.J.H. SMITH, *Internet Law and Regulation*, London 2002, para. 6-048; L. USUNIER, Note, *Clunet* 2010/3, p. 883. It can also be said that an accessibility-based approach has the effect of giving almost universal jurisdictional power to any court, see Cour d'Appel de Paris, 4ème Chambre A, 26 April 2006, *SA Normalu c. SARL Acet*, Juris-Data num. 2006-302856; N. DALTON/ J.F. HUGOT, The Universal Jurisdiction of French Courts in Civil and Criminal Cases: the Road to Digital Purgatory?, *Entertainment Law Review* 2002/13(3), p. 50-51.

[18] L. LEVI, The Problem of Trans-National Libel, *American Journal of Comparative Law* 2012/60(2), p. 512-523.

[19] A substantial part of the ongoing libel law reform in England concerns an effort to curb libel tourism by the adoption of more stringent requirements for jurisdiction. The proposed Draft Bill contains a new rule of private international law, which only permits the English courts to take jurisdiction over foreign defendants in personality cases if the court is satisfied that, of all the possible forums, England and Wales is "clearly the most appropriate in respect of the statement"; Defamation Bill 2012-13, HL Bill 84, at 11. As regards internet defamation in particular, the Lord Chancellor and Secretary of State for Justice Kenneth

inadequate in that regard.[21] Even from a conceptual point of view, this argument does not withstand scrutiny. It hinges on the premise that content put on the Internet is inherently directed at a worldwide audience, and that publishers that use this medium are aware of the far-reaching jurisdictional consequences of this medium of communication.[22] This characterisation may ring true for some publishers present on the Internet, such the online BBC portal.[23] Nevertheless, it fails to recognise that websites, especially those fostering speech and harbouring opinions, come in all shapes and sizes and are not by default addressed to a universal audience. It is indeed doubtful whether the personal blog of a teenager or the online edition of a local Japanese newspaper[24] should be considered as targeted towards any country in which they may be accessed and that their owner accepted, by the mere posting of online content, the risk of being sued anywhere.[25] As the

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CLARKE stressed the need for a "libel regime for the internet that makes it possible for people to protect their reputations effectively, but which ensures that information online cannot be easily censored by casual threats of litigation against website operators"; House of Commons, 12 June 2012, Daily Debate, at c. 184. For comments on this reform, see L. LEVI (note 18), at 533-544; P. TWEED, *Privacy and Libel Law*, Haywards Heath 2012.

[20] Committee on Legal Affairs, Rep: D. WALLIS, Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), p. 6-7.

[21] A much publicised example of libel tourism is the *Ehrenfeld* case, in which a Saudi national brought an American scholar before the English courts, on the basis of a few sales in the forum and of the accessibility of the allegedly harmful material on the Internet. See High Court of Justice, Queen's Bench Division, 3 May 2005, *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 (QB); and United States Court of Appeals, Second Circuit, 3 March 2008, *Ehrenfeld v. Mahfouz*, 518 F.3d 102 (C.A.2 (N.Y.), 2008.) for the scholar's unsuccessful attempt at challenging the English judgment's enforceability before her home courts. The ensuing backlash in the United States led to the adoption of State laws prohibiting the enforcement of foreign defamation judgements, and the subsequent adoption of a similar instrument at the federal level. See Libel Terrorism Protection Act (NY), 6687-C; Cal. N. 323; Libel Terrorism Protection Act (IL), S.B. 2722, 95th Gen. Assem., Public Act 095-0865 (Ill. 2008); Florida Statutes 2013, Ch. 55.605 and 55.6055; Securing the Protection of our Enduring and Established Constitutional Heritage Act, H.R. 2765, 111th Congress (2009-2010). For more on this act, see L. LEVI (note 18), at 523-532.

[22] P.J. BORCHERS, Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction, *Northwestern University Law Review* 2004/98, p. 490; O. BIGOS, Jurisdiction over Cross-Border Wrongs on the Internet, *I.C.L.Q.* 2005/54, p. 612; Y. FARAH, Jurisdictional Aspects of Electronic Torts, In the Footsteps of Shevill v. Presse Alliance SA, *Computer and Telecommunications Law Review* 2005/11(6), p. 198; A. HUET (note 15), at 878-879. Arguing for a wider jurisdictional regime in the light of the increased risks of harm posed by recent developments like Youtube and social networks, see A. MACDONALD, Youtubing Down the Stream of Commerce: Eliminating the Express Aiming Requirement for Personal Jurisdiction in User-Generated Internet Content Cases, *Albany Journal of Science and Technology* 2009/19, p. 519 *et seq.*

[23] <http://www.bbc.co.uk>.

[24] See the online version of the Hokkaido Shimbun newspaper, which does not offer any articles in English, see <http://www.hokkaido-np.co.jp>.

accessibility doctrine is blind to the variety of content present on the Internet and it encourages forum shopping and libel tourism, it should be rejected.[26]

Evidently, a court situated at the place of alleged harm should require something more than mere accessibility in order to properly assert its jurisdictional powers over a foreign website owner.[27] In particular, consideration must be taken of the relationship between that website and the forum. It is thus submitted that a "targeting test" should be inserted into the jurisdictional enquiry made at the place of receipt of the communication. A detailed description of the proposed test will be presented, following a general presentation of the "targeting" concept and a consideration of the criticisms addressed against it.

III. The Targeting Test – Concept and Response to Criticism

The term "targeting test" – popularised by Professor Michael GEIST – refers to a methodology which seeks to ascertain whether the website of the defendant "targeted" the forum, or "directed its activities" towards it. Its role is thus to protect the defendant's expectations as to the foreseeable consequences of its online activity.[28] This is achieved through an analysis of elements pertaining to the structure of the website in question, such as its language or its choice of top-level domain. Once these elements (which will be referred to as "criteria" in the remainder of this article) have been ascertained, they are used to form a picture of the relationship between the defendant and the forum, allowing for an informed decision on jurisdiction. Due to some dissatisfaction concerning the doctrine of accessibility, many courts have adopted this methodology, although under different names and guises. Following the watershed case of *Young v. New Haven Advocate* of the Court of Appeal of the Fourth Circuit, it has become the test of choice when considering jurisdiction over foreign website owners in defamation cases. This test seeks to establish if the defendant's "internet activity is expressly targeted at or directed to the forum state."[29] In France, this test has been adopted in the field of intellectual

[25] Noting that websites and their publishers can be of a local nature, see G.B. DELTA/ J.H. MATSUURA (note 14), at paras 3-84.2 and 3-85; J.L. GOLDSMITH/ T. WU, *Who Controls the Internet?: Illusions of a Borderless World*, New York 2006, p. 49-53 and p. 158-158 (these authors, though, conclude that localized content providers should not worry about the extraterritorial effects of their conduct, due to a lack of enforceable assets abroad); G.J.H. SMITH (note 17), at para. 6-048; D.J.B. SVANTESSON, *Private International Law and the Internet*, Alphen aan den Rijn 2012, p. 349.

[26] See also our previous criticism of this solution in the context of the *eDate* decision; M. REYMOND (note 8), at 502-503.

[27] United States Court of Appeals, Ninth Circuit, 2 December 1997, *Cybersell, Inc v. Cybersell Inc.*, 130 F.3d 414 (CA.9 (Ariz.), 1997), p. 418.

[28] M.A. GEIST (note 14), at 1381.

[29] United States Court of Appeals, Fourth Circuit, 13 December 2002, *Young v. New Haven Advocate*, 315 F.3d 256 (C.A.4 (Va.), 2002.), p. 262-263. For subsequent case law

property by the *Cour d'Appel de Paris* in the *Normalu* case, in which it established the need for a "sufficient, substantive or significant link"[30] between the defendant and the forum.[31] In England, it has similarly become used in intellectual property cases.[32] Finally, in the European Union, the targeting test has explicitly been adopted by the ECJ, first in the field of consumer contracts in the *Pammer / Hotel Alpenhof* case, and later in intellectual property torts in *L'Oréal SA v. eBay International AG*.[33] The Court defines this test as a requirement of the "intention to establish commercial relations with consumers from one or more other Member States."[34]

The varying definitions that these courts have given to the same test betray its principal weakness, which is its indeterminate nature. It is indeed difficult to

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following this methodology, see United States Court of Appeals, Fifth Circuit, 31 December 2002, *Revell v. Lidov*, 317 F.3d 467 (CA.5 (Tex.), 2002); United States Court of Appeals, Second Circuit, 26 June 2006, *Best Van Lines Inc. v. Walker*, 490 F.3d 239 (CA.2 (N.Y.), 2007); United States Court of Appeals, Seventh Circuit, 08.04.10, *Tamburo v. Dworkin*, 601 F.3d 693 (CA.7 (Ill.), 2010); United States Court of Appeals, Tenth Circuit, 28 February 2011, *Shrader v. Biddinger*, 633 F.3d 1235 (C.A.10 (Okla.), 2011). Criticizing this development from an American law viewpoint, see P.J. BORCHERS, (note 22), at 484-485.

[30] "Lien suffisant, substantiel ou significatif" (author's own translation).

[31] Cour d'Appel de Paris, 4e Chambre A, 26 July 2006, *SA Normalu c. SARL Acet*, Juris-Data num. 2006-302856. For subsequent case law following this methodology, see Cour d'Appel de Paris, 11e Chambre, Section B, 14 February 2008, *Unibet Ltd. c. Assoc. Real Madrid*, available at <http://www.legalis.net/breves-article.php3?id_article=2815>; Ordonnance du Tribunal de Grande Instance de Paris, 3e Chambre, 2e Section, 14 December 2007, *Kenzo c. Ebay Inc*., available at <http://www.legalis.net/breves-article.php3?id_article=2121>; Cour d'Appel de Versailles, 12e chambre, 26 June 2008, *Sté Novo Nordisk c. Sté Sanofi-Aventis*, available at <http://www.legalis.net/breves-article.php3?id_article=2847>; Cour d'appel de Paris, 4e Chambre, Section B, 22 May 2009, *eBay Inc. c. Louis Vuitton Malletier*, Juris-Data num. 2009-378872; Cour d'Appel de Paris, 1e chambre, 9 September 2009, *République du Chili c. Florence et Clara G.*, available at <http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2730>. See also C. CHABERT, Règles de compétence internationale en matière de contrefaçon et de concurrence déloyale sur Internet, *La Semaine Juridique – Edition Générale* 2008/44, p. 38 *et seq*. In francophone literature, targeting has also been referred to as "focalisation", "critère de destination" or "critère de prévisibilité du dommage" see T. VERBIEST / E. WÉRY, *Le droit de l'Internet et de la société de l'information*, Bruxelles 2001, p. 484-490; O. CACHARD, *La régulation internationale du marché électronique*, Paris 2002.

[32] High Court of Justice, Chancery Division, 20 December 1999, *1-800 FLOWERS Inc. v. Phonenames Ltd.*, [2000] E.T.M.R. 369; High Court of Justice, Chancery Division, 25 July 2000, *Euromarket Designs Incorporated v. Peters*, [2000] E.T.M.R. 1025; Court of Appeal, Civil Division, 17.05.01, *1-800 FLOWERS Inc. v. Phonenames Ltd*., [2001] EWCA Civ 721; High Court of Justice, Chancery Division, 28 February 2007, *Dearlove v. Combs*, [2008] E.M.L.R. 2. Confirmed by High Court of Justice, Chancery Division, 4 March 2013, *Stichting BDO v. BDO Unibank, Inc.* [2013] EWHC 418, para. 106.

[33] ECJ, 12 July 2011, C-324/09, *L'Oréal SA v. eBay International AG*, para. 64.

[34] ECJ, 7 December 2010, joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH* and *Hotel Alpenhof GesmbH v. Heller*, *ECR* [2010] I-12527, para. 75 (hereafter *Pammer / Hotel Alpenhof*). See also O. CACHARD, Note, *Rev. crit. dr. int. pr.* 2011/2, p. 429 *et seq*.

exactly pinpoint what this "directing" or "targeting" language entails and what the required threshold is as regards to the defendant's cross-border activity. The criteria used to provide more depth to this standard are diverse, unorganised and their respective weight can vary depending upon the facts of the case. It is conceded that currently the targeting test suffers from an exceedingly open-ended texture.[35] This flaw should not be understated, as unprincipled judicial use of the test can lead to different interpretations and contradictory results, each in turn undermining any kind of foreseeability it might provide website owners. Even worse, the malleable nature of the test leaves it vulnerable to manipulation, as judges can easily exacerbate the importance of a particular criterion in order to manufacture their own desired outcome. This criticism is particularly strong in the field of personality offences, in which the substantive clashes between differing national views on the equilibrium between freedom of speech and the protection of personality give judges a moral incentive to assert their jurisdictional powers over cross-border infringements.[36] An unrelated, yet equally powerful criticism is that the targeting test is too focused on the defendant and tends to shift the focus away from the actual harm suffered by the victim. This may lead to counterintuitive decisions, which do not adequately protect the legitimate interests of the claimant.[37]

Rather than undermine the usefulness of the targeting test as a whole, these two criticisms highlight the need for a restatement of the targeting methodology. As regards the test's clarity, it is important to note that, of all the courts that have purported to adopt the test, none has really come forward with a principled, structured targeting proposition. While some, like the ECJ in *Pammer / Hotel Alpenhof*, did enumerate a list of elements which should be assessed in the overall analysis, this was done without proper attention to the details that may influence a judge's appreciation of these criteria.[38] Doctrinal propositions have also been limited, with

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[35] B.D. BOONE (note 14), at 270; C. CARON (note 15), at 27; H.P. HESTERMEYER, Personal Jurisdiction for Internet Torts, Towards an International Solution?, *Northwestern Journal of International Law and Business*, 2006/26, p. 279 ; G. KAUFMANN-KOHLER, Internet: Mondialisation de la communication – mondialisation de la résolution des litiges?, in *Internet, Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s'applique?*, Den Haag 1998, p. 109-114; V. PIRONON (note 15), at 923 (noting that much remains to be done to make this test workable); T. SCHULTZ, Carving Up the Internet: Jurisdiction, Legal Orders, and the Private / Public International Law Interface, *European Journal of International Law* 2008/19(4), p. 818-819.

[36] T. VERBIEST/ E. WERY (note 31), at 490. Criticising this aspect of the test even outside of this area of law, see M. FAGIN (note 17), at 435-436 ("Were disputes to hinge on whether a site was targeting a specific forum, regulatory uncertainty would merely shift toward a given court's definition of "targeting" and a case-by-case assessment of the defendant's actions. This discretion is likely to reintroduce the difficulties inherent in the subjective application of an effects-test, as courts will be likely to interpret "targeting" in a way that befits their own national interest.").

[37] C. CHABERT (note 15), at 686; R.J. CONDLIN, "Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again, *Catholic University Law Review* 2004/54, p. 143-146; A. HUET (note 15), at 878-879; T. SCHULTZ (note 35), at 818-819.

[38] *Pammer/ Hotel Alpenhof* (note 34), at para. 83.

the most extensive example being Professor GEIST's 2001 article.[39] It is thus submitted that a thorough discussion of every known facet of the targeting enquiry, which would include a detailed "checklist" of the measurement criteria, could lead judicial practice to coalesce into a single model. At the very least, it would allow courts to speak a common language when applying targeting considerations. Concerning the second criticism, the reformulated targeting proposition would take into account the reality of the harm suffered by the victim.

It is thus submitted that a well-formulated targeting test has the potential to adequately deal with the problem of jurisdiction with regard to internet websites; it would take into account the interests of both parties by adapting itself to the capacities of the different types of publishers found on the Internet. Furthermore, it would curtail forum shopping and provide judges with a principled ground for accepting jurisdiction over content found on the Internet.[40] Alternatively, even if one were to reject this proposed targeting test in jurisdictional matters, it is further submitted that the following discussion, which establishes criteria capable of assessing the foreseeability of reputational harm caused by the Internet, remains of considerable interest to the field of the applicable law. This is suggested by the work currently conducted in the European Union concerning the development of a choice of law rule pertaining to personality torts and defamation, which would amend the Rome II Regulation. At the time of this writing, the European Parliament's proposed article subjects the application of the law of the country of the most significant element of the damage (which will usually be the victim's habitual residence) to a requirement of "reasonable foreseeability" on the part of

[39] M.A. GEIST (note 14). The targeting test proposed by this author is characterised by a three-tier structure. First are contracts, which must be understood as choice of court clauses concluded over the Internet by the parties and which are irrelevant in personality torts. Second are geolocation concerns, which are discussed extensively later in this article. Third is a general consideration of actual or implied knowledge by the website operator. To our knowledge, there has been no example of a court following this structure. For another, more recent discussion of the targeting's nature and criteria, see V. PIRONON (note 15).

[40] In favour of the targeting test, see B.D. BOONE, (note 14), at 262-273; O. CACHARD (note 15), at 642-643 and (note 31), at 399-404; N. DALTON/ J.F. HUGOT (note 17), at 52-53; M.A. GEIST (note 14), at 1404-1405; M.H. GREENBERG, A return to Lilliput: The LICRA v. Yahoo Case and the Regulation of Online Content in the World Market, *Berkeley Technology Law Journal*, *2003/18*, p. 1253-1258; T. HARTLEY, "Libel Tourism" and Conflict of Laws, *I.C.L.Q*. 2010/59, p. 36; H. MUIR WATT, Yahoo! Cyber-Collision of Cultures: Who Regulates?, *Michigan Journal of International Law*, 2003/24, p. 685-686; V. PIRONON (note 15), at 919-920; G.J.H. SMITH, (note 17), at para. 6-049. Some authors consider the use of a targeting test, but only in a specific framework: see H.P. HESTERMEYER, (note 35), at 286-288 (advocating the use of an international convention to give a global character to the test); T. SCHULTZ (note 35), at 821-824 (discussing a two-tiered test that would only award damages to the claimant if the website targets the forum, if it is merely accessible, the remedies are limited to declaratory judgments), D.J.B. SVANTESSON (note 25), at 458-460 (using the targeting test as a part of a greater model covering defamation in international private law).

the defendant.[41] There is little doubt that the developments pertaining to the targeting test will also be of assistance in that context.

IV. Proposal for a Targeting Test

The following considerations will be devoted to a description of the proposed targeting test, and will be structured in two steps. The first will address the very nature of the targeting enquiry, by the way of a critical discussion of the threshold of activity required to fulfil this standard. This will then allow for a detailed discussion of the criteria that may be used to assess this analysis.

As previously stated, the main concern addressed in this article will be the development of a test capable of adapting the jurisdictional ground found at the place of receipt of the communication as defined by the *Shevill* and *eDate* case law to internet situations. However, one may further ponder whether the adoption of the proposed methodology could lead to more ambitious developments, such as the removal of the damages cap found at the place of distribution of the content. This will not be discussed in this article. However, it will be sufficient to say that, as long as the determination of the applicable law to personality harms is as disorganised as it is today, such a move should be considered with caution.[42]

A. The Standard for Targeted Activity

In order to construct an efficient targeting test, it is first necessary to define what the aim of the test is – that is, to affix a single meaning to the all-too vague terms "targeting" and "directed activity". To that end, two duelling definitions of the targeting test will be described and compared.

1. The Objective and Subjective Definitions of Targeted Activity

The first definitional strand depicts the targeting test as a measure of the subjective intent of the website operator; it "seek[s] to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction";[43] it

[41] European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)), P7TA(2012)0200, Annex, Article 5a (1) and (2). Due to the rather unclear wording of the article, it is only posited that paragraphs 1 and 2 of the article apply to personality torts committed on the Internet, see J. VON HEIN, Von Hein on Kate Provence Pictures, available at <http://conflictoflaws.net/2012/von-hein-on-kate-provence-pictures>. If this is not the case, then paragraph (3) would apply. As the latter relies on a "direction of broadcast" standard, then an inclusion of targeting considerations in internet cases would be all the more appropriate.

[42] For a few words on this issue, see M. REYMOND (note 8), at 502-503.

[43] M.A. GEIST (note 14), at 1380.

"measures the deliberate efforts of on-line content providers to target a given area".[44] This definition has most notably been used by the ECJ in the *Pammer / Hotel Alpenhof* consumer contracts case, in which it was established that "the trader must have manifested its intention to establish commercial relations with consumers" to fulfil the targeting requirement.[45] In the field of defamation, it is also this interpretation of the test that dominates the current U.S. case law following *Young v. New Haven Advocate*. By requiring the showing of an "intent to direct their website content" towards the forum, *Young* and its following decisions rely heavily on the subjective analysis of a website owner's intended activity.[46] While this strand, which we will call the "subjective targeting requirement" for the purposes of this article, is undoubtedly the most well-known and used permutation of the test, it is not alone.

The second strand rejects this subjective analysis, and instead aims for an evaluation of the website's foreseeable impact. As one author states, "a well-constructed targeting test is that an online actor can only be found to have targeted a country if he has engaged in positive conduct towards it."[47] The mind-set of the website owner is less important here than the foreseeable risk of cross-border harm made possible by the use of his or her website. The analysis thus turns upon an objective evaluation of the site's structural details, weighted against the interests of the public of the forum. Uses of this targeting test have been seen in the field of intellectual property disputes. Following the leading *Normalu* case rendered by the *Cour d'Appel de Paris*, French courts require a substantial link to hale a foreign defendant on the basis of website effects.[48] This standard is met when the site displays characteristics which make it possible to cause harm in the selected forum, irrespective of any clear intent by its owner.[49] Similarly, §204(2) and (3) of the ALI Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes in the field of intellectual property make use of a "directing" standard. As explained in the accompanying comment, "[t]he question is whether it is reasonable to conclude from the defendant's behaviour that defendant sought to enjoy the benefits of engaging with the forum:" this leads to an objective assessment of the

[44] M. FAGIN (note 17), at 435.

[45] *Pammer / Hotel Alpenhof* (note 34), at para. 75. This interpretation is shared by V. PIRONON, (note 15), at 918, 920-921.

[46] United States Court of Appeals, Fourth Circuit, 13 December 2002., *Young v. New Haven Advocate*, 315 F.3d 256 (C.A.4 (Va.), 2002.), p. 262-263.

[47] G. SMITH, Here, there or everywhere? Cross-border liability on the Internet, *Computer and Telecommunications Law Review*, 2007/13(2), p. 42.

[48] Cour d'Appel de Paris, 4ème Chambre A, 26 April 2006, *SA Normalu c. SARL Acet*, Juris-Data num. 2006-302856.

[49] See for example Cour d'Appel de Paris, 11ème Chambre, Section B, 14 February 2008, *Unibet Ltd. c. Assoc. Real Madrid*, available at <http://www.legalis.net/breves-article.php3?id_article=2815> and Ordonnance du Tribunal de Grande Instance de Paris, 3ème Chambre, 2ème Section, 14 December 2007, *Kenzo c. Ebay Inc.*, available at <http://www.legalis.net/breves-article.php3?id_article=2121>. Noting the same objective requirement in this case law, see V. PIRONON (note 15), at 921-922.

website's impact, seen through the lenses of both its content and its activity.[50] Following this school of thought, WIPO promulgated the 2001 Joint Recommendation on the protection of marks on the Internet, in which the wrongful use of a sign on the network can only be considered as occurring in a given jurisdiction if it results in a commercial impact in that place. Again, objective criteria are used to ascertain if this is the case, without regard for the website owner's intention.[51] In the following considerations, this variation of the targeting test will be called the "objective targeting requirement."

In short, the broad term "targeting test" can refer to one of two methodologies. The subjective targeting requirement leads to a consideration of the intent of the owner of a website, in order to determine if he or she was willing to establish contact with a given jurisdiction. On the other hand, the objective targeting requirement merely observes the owner's conduct through the factual characteristics of his or her website: it aims to evaluate if this website was structured in such a way that it was capable of creating impact in a given jurisdiction.[52] Once identified, these two strands still need to be weighed against each other, as only one can form part of this article's proposition.

2. Proposal for an Objective Targeting Requirement

The subjective targeting requirement is, as previously indicated, the most widely used strand. It allows courts to properly take account of a website operator's intent and is the most effective in preventing exorbitant grounds of jurisdiction. However, it is flawed in two respects. Firstly, the court is faced with a difficult task when ascertaining a party's subjective intention; this can lead to broad generalisations and to arbitrary conclusions. Secondly, the weight given to the defendant's intent tends to overshadow the very real occurrence of harm to the victim in the examined jurisdiction. Use of this doctrine thus leads to an inconsistent, defendant-focused practice.

A look at the American case law is quite instructive in this regard, with the *Young v. New Haven Advocate* case providing a good example.[53] The case concerned a slew of articles, published on the websites of two Connecticut

[50] American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes As Adopted and Promulgated by The American Law Institute at Washington, D.C. on 14 May 2007, § 204 (2) and (3), comment c). This view is confirmed by one of the reporters of the project, see F. DESSEMONTET, A European Point of View on the ALI Principles – Intellectual Property: Principles Governing Juridisdiction, Choice of Law, and Judgments in Transnational Disputes, *Brooklyn Journal of International Law* 30/2005, p. 863 ("[…] the infringement happens where the market is impacted. A substantial impact must be the test, not an intentional targeting.").

[51] WIPO, Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, Articles 2 and 3 and their respective explanatory notes.

[52] Making the same distinction, V. PIRONON (note 15), at 920-923.

[53] *Young v. New Haven Advocate* (note 46).

journals, discussing the poor living conditions of one prison located in Virginia. Those were written in the context of an agreement made between the two States on prisoner transfers. One of the pieces mentioned the warden of the prison by name, and alleged that he displayed Confederate Civil War memorabilia in his office, a claim that contained hints of racism.[54] When the aforementioned warden brought an action in defamation before his home courts in Virginia; the Connecticut-based newspapers objected to a lack of jurisdiction. The Court of Appeals of the Fourth Circuit, applying an "express targeting" threshold, agreed and held that the newspapers did not direct their activities in the state of Virginia. It considered that the "focal point" of the articles was a local debate about the Connecticut prison transfer policy; although mention was made of the Virginian prison, this was done only in passing. The articles were thus focused on informing locals in Connecticut and were not intended towards a Virginian audience. In short, the newspapers "did not post materials on the Internet with the manifest intent of targeting Virginia readers."[55] Solely fixated on elucidating the defendant's intent, this reasoning overlooks that the websites were freely accessible in Virginia, which was the place where the victim lived, worked and enjoyed his reputation.[56] As such, an analysis of the reputational harm suffered at that place was absent.[57] The same short-sightedness is repeated in the case law following *Young*, for example in *Best Van Lines v. Walker*[58] the Court of Appeals of the Second Circuit denied jurisdiction in New York over the owner of the website MovingScam.com, an Iowa-based non-profit venture that offers advice on dishonest business practices perpetrated by moving companies. The defamation claim, made by one such company based in New York, was founded on the publication of a scathing review of their services on the website. The court held that MovingScam.com was intended to be read on a national scale, and thus did not specifically target a New York audience.[59] Evidently, it is difficult to reconcile this unilateral interpretation of the defendant's subjective intent with the fact that the website was read all over the United States including a New York audience and that it published a news story which objectively catered to a New York local interest.

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[54] *Id.*, at 279.

[55] *Id.*, at 264.

[56] Compare with United States District Court, W.D. Virginia, Big Stone Gap Division, 10.08.01, *Young v. New Haven Advocate*, 184 F.Supp.2d 498 (W.D.Va. 2001), in which the lower court, using a more traditional effects doctrine, found jurisdiction because the brunt of the harm would have been suffered in Virginia.

[57] The Court of Appeals did, however, correctly note that the defendant's newspapers were not distributed in Virginia, and that their websites only contained local news and advertisements.

[58] United States Court of Appeals, 26.06.07, *Best Van Lines Inc. v. Walker*, 490 F.3d 290 (4th Cir. 2007).

[59] *Id.*, at 251-252. It is to be noted that, because the decision rested on §302(a)(1) of the New York long-arm statute, as opposed to the constitutional due process requirement, the court markedly refused to acknowledge any interplay with earlier due process cases, including *Young v. New Haven Advocate* (see p. 253). The resemblance in methodology, though, is self-evident.

Two minor, yet instructive French cases also illustrate this point. In *Sté Novo Nordisk c. Sté Sonofi Aventis*, a PowerPoint presentation, which was freely accessible on the website of a Danish pharmaceutical firm and which directly disparaged a French competitor, was held by the *Cour d'Appel de Versailles* to not target France enough to warrant the acquisition of jurisdiction. As the document was called "Stock Exchange Announcement", the court held that it was only intended to be read by stockholders and not by potential clients. Since the claimant was not quoted in the Paris stock exchange, the document was deemed not to target anyone in France.[60] In *République du Chili c. Florence et Clara G.*, a 2009 intellectual property case rendered by the *Cour d'Appel de Paris*, the heirs of Chilean artist Hernan Gazmuri brought an action before their home courts against a state-run Chilean museum.[61] The claim was founded on the unauthorized use of some of painter's artwork on the museum's website, which offered biographical information in Spanish about the country's artists.[62] The court held that the subject-matter was bound to interest any art aficionado, whatever his or her geographical location, without regard for language. The page was thus targeted towards an international public, which included France; this was enough to justify the jurisdiction of the French courts. Both of these cases show in their own way the pitfalls that await a subjective targeting requirement. In the first case, the intent of the defendant was unilaterally deduced by the court using nothing more than the title of a single document found on its website. In the second case, a broad generalization of the public sought by the museum's website eclipsed any analysis of the website's factual characteristics. Such results give weight to the arguments generally raised against the targeting test, as they are inconsistent, unpredictable and solely focused on the defendant's innermost thoughts.[63]

For these reasons, an objective targeting requirement is to be preferred. By focusing on the structure of the defendant's website and on his or her activity, rather than on an intention, it is possible to arrive at more adequate results. For example, contrast the preceding examples with another French case, rendered in 2008 by the *Cour d'Appel de Paris*, *Sté Unibet c. Assoc. Real de Madrid*.[64] The facts saw six online betting companies - although most were English, one of them based in Antigua - were brought before the French courts by four football stars

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[60] Cour d'Appel de Versailles, 12ème chambre, 26 June 2008, *Sté Novo Nordisk c. Sté Sanofi-Aventis*, available at <http://www.legalis.net/breves-article.php3?id_article=2847>. This judgment was reversed on other grounds by Cour de Cassation, 1ère chambre civile, 6 January 2010, *Sté Sanofi Aventis c. Sté Novo Nordisk*, available at <http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2833>, but confirmed on remand in Cour d'Appel de Versailles, 12ème chambre, 21 October 2010, Sté *Novo Nordisk c. Sté Sanofi Aventis*, No. 10/0303.

[61] Cour d'Appel de Paris, 1ère chambre, 9 September 2009, *République du Chili c. Florence et Clara G.*, available at <http://www.legalis.net/spip.php?page=jurisprudence-decision &id_article=2730>.

[62] That is still the case today, see <http://www.artistasplasticoschilenos.cl>.

[63] See above, at notes 35-37 and accompanying text.

[64] Cour d'Appel de Paris, 11ème Chambre, Section B, 14.02.08, *Unibet Ltd. c. Assoc. Real Madrid*, available at <http://www.legalis.net/breves-article.php3?id_article=2815>.

related to the famous Spanish club. The claim was founded on the unauthorized use of their personal image on the online betting websites operated by the defendants. In order to deny jurisdiction, the court took into account a detailed nexus of facts pertaining to the defendant's websites and business at large. Namely, that they either did not allow bets on French matches, or only to a very limited degree; that the websites were not available in French; that the percentage of bets actually effectuated from France, as compared to other countries, was under 1%; and that the funds used for the betting process were not retained in France. Taken together, these elements indicated that there was no targeting towards the forum, and that no real harm had been suffered there. In this case, a more principled approach to the targeting test was taken; one founded on measurable criteria and with regard to the possible harm suffered, rather than a divination of the website owner's sole intent.

At this juncture, an objection can be made: an objective targeting requirement might reveal itself as ill-suited to defamation and personality torts more generally. The examples provided thus far in favour of this test all derive from other, more business-oriented fields of law. In that particular context, as shown by the *Unibet* case and by both sets of principles dealing with intellectual property, the idea of "commercial impact" is the centrepiece upon which the whole of the targeting enquiry may rest. However, reputational torts are more complex as they do not rely on a measureable economic variable. One could argue that a more subjective type of test is required in order to fit the more malleable nature of speech-related torts. This objection is not entirely persuasive for two reasons. Firstly, it does not take into account that, at present, the vast majority of opinion-centred websites do have some sort of commercial component; this is the case either directly (for example, through the use of paid subscriptions)[65] or indirectly (through advertising revenue or personal information collection).[66] An analogy with the methodology used in the cases described above thus still holds true in these situations. Secondly, this objection ignores that an objective sort of targeting test can be specifically tailored to suit the peculiarities of personality torts. This was the point of Advocate General C. VILLALÒN's opinion preceding the ECJ judgment in the *eDate* case. In his proposition, which sought to apply a targeting test to defamation, the Advocate General went at great lengths to distance himself from a subjective targeting requirement, even citing the *Young v. New Haven Advocate* judgment as an example not to be followed.[67] Accordingly, he urged for a test based on the "objective relevance" of the website, which aimed to determine if the media defendant could "reasonably foresee that the information published in its electronic edition is «newsworthy» in a specific territory, thereby encouraging readers in that territory to access it".[68] While ultimately not followed by the court, his proposition shows that intent should not necessarily be the guiding light in a personality tort-related targeting test.

Taking all of this into account, the proposed targeting test should turn upon an objective requirement. Its aim should be to assess the defendant's conduct

[65] See below, section IV.D.1.

[66] See below, section IV.D.2.

[67] *eDate* opinion (note 8), at note 45 and accompanying text.

[68] *Id.*, at para. 63.

through the factual characteristics of his or her website, and to determine if the reputational harm suffered in the chosen forum was reasonably foreseeable.[69] As for the burden of proof, it should naturally shift to the defendant, as he or she will be the one with access to the website data.[70] It is to be further clarified that the targeting test is a unilateral process – as it only seeks to characterize the link between the offending website and the forum; it cannot and should not be used to determine which State is the most substantially affected by the defendant's conduct.

Now that the definition is set, a list of the relevant criteria and of their respective weight remains to be established. On that note, two specific areas of difficulty have been helpfully pointed out by the preceding discussion. The first is the existence of nonprofit websites, which will render the more commercial-minded criteria ineffective. The second is the specific nature of defamation, which will lead the proposed test to include criteria such as the extent of the defendant's reputation in the chosen forum and the "newsworthiness" of the defamatory material to the public of that same forum.

B. Structure of the Proposed Test

The proposed targeting test consists of three sets of criteria. The first set includes "general" criteria, which are useful in all situations. The second set concentrates on "commercial" criteria, used to ascertain the targeting of websites aimed at generating revenue. The third set further adds criteria relevant to personality torts in particular. Between these sets, there is no fixed hierarchy, as the relevance of each will vary upon the facts of the case. The following descriptions will, however, provide extensive guidelines on each single criterion depending on the facts at hand.[71] This list is not exhaustive; however, in order to preserve the test's foreseeability, additional criteria should only be examined in exceptional circumstances, in which these supplementary elements occupy a major part of the factual case.

C. General Criteria

Criteria described as general may be used against all kinds of websites, whether commercially minded or not. They include the access numbers of the examined website ("page views"), its language, its presence (or lack thereof) in search engines, its choice of Top Level Domain, its use of geolocation technologies and its general structure.

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[69] *Contra*: D.J.B. SVANTESSON (note 25), at 458-460 (arguing for a model of targeting that measures both the intent of the content provider and the probability of the content being accessed in the forum).

[70] V. PIRONON (note 15), at 926-927.

[71] Generally in accordance with the proposed criteria, see V. PIRONON (note 15), at 924-926.

1. Page Views

The first criterion encompasses the "page view" sheet of the offending web document; that is, analytical data of the number of times it has been accessed from both the forum state and from other countries.[72] This is the closest thing a website can have to an actual metric of its multistate distribution; if precise enough, it can depict a fairly dependable picture of the geographical location of its readership. In some cases, these numbers alone may be sufficient to resolve the targeting enquiry. In *Dow Jones v. Jameel*,[73] which was admittedly not decided under a targeting test, but under the usually claimant-friendly English rules,[74] an action in defamation was brought in England by a Saudi businessman against the American news corporation operating the Wall Street Journal's online edition. Central to the court's rejection of the claim as an abuse of process was the fact that the defendant managed to prove that the offending web page, which cited the claimant as a possible funding source for terrorist group Al Qaeda, had only been accessed by five subscribers in the forum, three of which belonged to the businessman's legal advisory team.[75] As the *Jameel* case illustrates, when the "page views" emanating from the forum state are non-existent, or alternatively widely abundant, strong guidance can be found for the outcome of a targeting test. Outside of these clear-cut situations, this data can also be useful, as it shows which jurisdictions regularly and usually access the website's content.

This, however, assumes that the statistical data is both correct and available. While paper-based publication statistics are usually reliable because they are based upon the physicality of the act of publication, website usage statistics are diverse in both reliability and implementation.[76] It is the website owner's choice of geolocation technology and of website analytics tools that will dictate, on a case-by-case

[72] "Page views" refer to the number of times a single page has been accessed by a user. This is the preferred metric as compared to "hits", which rely on the number of times any document has been accessed on the corresponding server. For example, a web page containing an image, when accessed by a user, will generate one page view but two hits. See Google's own definition at <http://support.google.com/analytics/bin/answer.py?hl=en&answer=1006243>. For an overview of the methods used to count page views in the context of web analytics, see B. CLIFTON, *Advanced Web Metrics with Google Analytics*, Indianapolis 2012, p. 24-27.

[73] Court of Appeal, Civil Appeals Division, 3 February 2005, *Dow Jones v. Jameel*, [2005] EWCA Civ 75.

[74] While deciding the case on the ground of abuse of process, the court held that the same facts, if applied to a purely jurisdictional analysis, would have led to a setting aside of the application, as "the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort." (*Id*., at 70).

[75] *Id*., at 68-69.

[76] See B. CLIFTON (note 72), at 27-52. The author shows that, through a combination of implementation issues, diverging technologies, and privacy law variations, analytic data of the visitors of a website is a relative, rather than an absolute metric. For example, two different analytical tools, when used on the very same page, often give contradictory results.

basis, the real value of these numbers.[77] In the *Jameel* case discussed above, the Wall Street Journal website relied on a paid subscription system, which allowed Dow Jones to identify both the quantity and the location of those who accessed the article.[78] This will not always be the case, as sometimes this statistical data may only provide a vague picture of the countries in which the document was accessed, in which case this criterion should not be in itself determinative.[79] More rarely, the data will be unavailable;[80] in that case, the targeting analysis will depend upon the other criteria described below. Finally, it must be stressed that the analysis of this criterion should not be done in a vacuum. As news travel fast around the Internet, sometimes a website can be subject to a major influx of visitors hailing from a wide variety of countries due to the posting of a link in a popular news portal. This calls, rather than a quick conclusion made on these numbers alone, for a balanced analysis of whether this spike was truly unforeseen; this weighting can be helped by the use of the website's past statistical data and by a comparison with the other criterion of the targeting test.

2. Language

An examination of the website's language(s) of choice in the targeting analysis is rather self-evident. If it is written in the primary language of the forum State, the targeting requirement will more likely to be met. On the other hand, if the site's language is foreign to the forum, then the opposite conclusion should be drawn. In cases of defamation, where the material needs to be understood by the public in order to create harm, this criterion will be of enhanced importance. That being said, account must be taken of the fact that some languages are spoken by a variety of countries and regions. English, in particular, is troublesome: any website written in English has the potential to impact a wide variety of jurisdictions, including some countries where it is not primarily spoken due to its large penetration. This issue also exists on a smaller scale, as a website written in French and mostly read in France can also be read in Quebec. In those cases the language analysis should be cautiously contrasted with the other characteristics of the case.[81] On the other hand, if the language used is not widely spoken and requires understanding of a specific script, such as East Asian logograms, then this criterion will be determinative. Also decisive will be the case in which the examined website allows the user to change

[77] *Id*., at p. 56-57. In order to determine user location, analytic tools rely on so-called geolocation technologies. Both can vary in price and accuracy. Google Analytics, which is a free product of website analytics, uses an in-house database. However, while "[d]ata can be accurate as a 25-mile (40 km) radius, sometimes location details are not available."

[78] *Dow Jones v. Jameel*., at 17.

[79] For more information on the availability and reliability on geolocation, see the discussion below about that criterion.

[80] See *High Court of Justice, Queen's Bench Division*, 12 May 2006, *Al Amoudi v. Brisard*, [2006] EWHC 1062 (QB), para. 17, in which the departure of the defendant's webmaster before the proceedings made it unable to recover the access documents.

[81] C. CARON (note 15), at 28.

its content into several languages. As its owner, by doing so, explicitly reached for a broader audience, he or she should be prepared to cause an impact in the corresponding areas of the world.[82]

In his landmark article, Professor GEIST posited that language was not an appropriate criterion because the rise of online automatic translating services would render it meaningless. "[A] Greek website, he gave as an example, "which might otherwise be regarded as targeting Greece, could be instantly converted to English, and therefore rendered accessible to a wider geographic audience."[83] Indeed, current translation technologies, such as Google Translate,[84] allow for an extended, and perhaps unforeseen, second-hand readership.[85] However, this objection can be overcome by proper examination of the party using the aforementioned services. If it is the website owner who adds an automatic translation service to his or her website, such as the Google Website Translator toolkit,[86] this indicates that targeting in relation to these languages must naturally follow. However, if the translation occurs by third-parties, for example a visitor entering the website into a third-party service in order to understand it, then it should not be taken into account in the analysis; it would be too severe to hold content providers liable for acts upon which they have no control.

3. Search Engine Ranking and Visibility

As the Internet is such a large mass of informational data, a website needs some sort of visibility in order to be read by any given public. This can be achieved through search engines, such as Google[87], Yahoo![88] and Bing,[89] which allow users to find websites catering to their interests. It is thus suggested that the ranking position of the examined website on these search engines and the publicity stemming from it can provide an insight on the site's foreseeable impact in the forum. As the proposed test is focused on personality torts, one will simply need to enter the name of the claimant in a few of these search engines to determine the

[82] *Pammer / Hotel Alpenhof* (note 34), at para. 84; see also V. PIRONON (note 15), at 924-925.

[83] M.A. GEIST (note 14), at 1384-1385.

[84] Available at <http://translate.google.com/>.

[85] Admittedly, the quality of the translation itself is still questionable today. This begs the question of what level of understanding of an automatically translated text would be required in order for defamatory harm to occur. In the proposed hypothesis, though, this will not be examined.

[86] The Google Website Translator toolkit is a free pack that allows any webmaster to add automatic translation services to their site. It functions as a drop-down toolbar added to the page, allowing the user to select one of 60 different languages. It can be found at the following address: <http://translate.google.com/manager/website/?hl=en>.

[87] Available at <http://www.google.com>.

[88] Available at <http://www.yahoo.com>.

[89] Available at <http://www.bing.com>.

likelihood of that site being shown in relation to that person.[90] From there, a few different situations may arise. If the examined website appears as a sponsored link, this indicates that its owner has spent funds to buy advertising space on these engines; consequently a strong case for targeting ought to be made.[91] The same conclusion might be drawn if the website consistently appears on top of the search, or at least on the first results page. Another clear-cut case, though working towards the opposite conclusion, would be one where the website does not appear at all in the results; the same is true if the defendant manages to prove that he or she voluntarily excluded the site from search indexing.[92] However, if the website appears in a position somewhere in the middle, then this criterion will be weaker in stature and should not bear as much importance upon the general targeting analysis; this will show, nonetheless, that there was at least a potential of impact. Further conclusions can also be brought about by the use of the regional and linguistic settings of the search engines: for example, a website may appear in a search made through the Australia-oriented Google, but not in the same search effectuated by the UK-oriented one.[93]

If the given case is sufficiently newsworthy, some difficulty might be found in the form of "white noise". These are search results pointing to articles or resources which report on the concerned litigation. For example, a search containing "Lennox Lewis" and "Don King" will display articles reporting on the English litigation mentioned above.[94] As these results did not exist at the time of the offense, these should not be taken into account, and caution should thus be used when approaching these cases.

4. Choice of Top Level Domain

The website's choice of a top level domain, *i.e.* the end section of the right-side of its address,[95] can sometimes inform about its foreseeable geographical impact.

[90] A search, last effectuated on the 19 April 2013, about media magnet Kate Middleton through Google UK <http://www.google.co.uk> shows a few online versions of well-known tabloids on its first page, such as the Daily Mirror <http://www.mirror.co.uk/> and the Telegraph <http://www.telegraph.co.uk/>. It also displays some web-only news websites such as the Huffington Post <http://www.huffingtonpost.co.uk>.

[91] Reaching the same conclusion in this hypothesis, see *Pammer / Hotel Alpenhof* (note 34), at para. 93.

[92] This can be done through the use of a file, robots.txt, telling search engine robots to ignore the server on which it is present. See <http://www.robotstxt.org/robotstxt.html>.

[93] That is the case of the Daily Beast <http://www.thedailybeast.com>, an American news site which appears through Google Australia <http://www.google.com.au> with the same search query as in note 90, but which was not listed on the UK results.

[94] See for example <http://itlaw.wikia.com/wiki/Lewis_v._King>.

[95] The Top Level Domain is the highest level domain name used in the Domain Name System (DNS), and is the last part of a domain name. For example, in "http://www.yahoo.com", the TLD is the ".com" string. The attribution and maintenance of TLDs is operated by the Internet Assigned Numbers Authority <http://www.iana.org>, a subset of the Internet Association for Assigned Names and Numbers

When a country code top level domain (abbreviated to ccTLD) is used, such as ".fr" for France, ".co.uk" for England, or ".co.jp" for Japan, then a case for targeting towards the designated country can be made. This is doubly so for websites which cater to a variety of countries and tailor their content to match geographical differences by the use of multiple ccTLDs.[96] Sometimes a ccTLD is chosen because of its consonance or its thematic value.[97] An example would be the ccTLD associated with the Tuvalu islands, ".tv". Due to its close relationship with the word "television", it has often been adopted by media websites bearing no link with this region.[98] More recently, the famous media portal Youtube has been using the Belgian ccTLD, ".be" for its shortened URL, <http://youtu.be>. Again, being an aesthetic choice made to preserve the "Youtube" brand name even across the TLD itself, it should not be relevant for targeting purposes. These particular situations should, nonetheless, be easily identified and understood.

What, then, of the generic top level domains (abbreviated with gTLD), such as ".com", ".net" or ".edu", which are geographically neutral? According to the ECJ, use of these denotes the "international character" of the related website.[99] This line of reasoning should not be followed, as the choice of gTLD can instead be motivated by budgetary and availability considerations.[100] It is submitted that gTLDs, at least in their present form, should have no bearing upon the targeting analysis. Some complications on this front will arise by the arrival of new custom-made, privately owned gTLDs, scheduled to appear later this year.[101] Some strings

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<http://www.icann.org>. See J. POSTEL, Domain Name System Structure and Delegation, *Request for Comments 1591*, available at <http://tools.ietf.org/html/rfc1591>. For a complete list of currently active TLDs, see the Root Zone Database at <http://www.iana.org/domains/root/db>.

[96] *Pammer / Hotel Alpenhof* (note 34), at para. 83. This is the case of The Huffington Post, a well known American news site (see note 90). Besides a general edition, written in English and found at <http://www.huffingtonpost.com>, it operates a UK edition catering to local interests at <http://www.huffingtonpost.co.uk> and a French edition written in French at <http://www.huffingtonpost.fr>. The TLD is used to differentiate each geographically specific version of the website.

[97] The policy behind the attribution of ccTLDs is left in the hands of the organisations chosen by the countries. Some require a link between the registrants and their ccTLD, but others require no such link and thus allow the use of their ccTLD by geographically unrelated websites. See J.A. MUIR / P.C. VAN OORSCHOT, Internet Geolocation: Evasion and Counterevasion, *ACM Computing Surveys* 2009/42, Article 4, para.2.5.

[98] As is the case of the website of the MTV television channel, found at <http://www.mtv.tv> and the online video service Blip! TV, found at <http://blip.tv>.

[99] *Pammer / Hotel Alpenhof* (note 34), at para. 83.

[100] C. MANARA, Vendre en ligne dans un pays étranger sans y être poursuivi, *Dalloz* 2001/01, p. 5.

[101] In 2012, ICANN and IANA launched an application process by which any entity, whether private or public, could submit its own gTDL string and become its sole owner. Roughly 2,000 applications have been submitted, and those that will pass the screening procedure will become part of the infrastructure of the Internet. See ICANN, New gTLD Basics, available at <http://archive.icann.org/en/topics/new-gtlds/basics-new-extensions-

will retain geographical neutrality, such as ".cloud" or ".blog", but others, like ".paris" or ".helsinki", will influence the targeting enquiry. Given the wide variety of these new gTLDs, it is submitted that conclusions should be reached on a case-by-case basis.[102]

5. Use of Geolocation Technologies

a) Definition

Conventional wisdom states that once a document, article or a resource has been uploaded on the Internet, the networks' inherent lack of borders allows its access to users around the globe. Thus, online content providers, for whom physical means of publication control are not available, have no way of restricting the geographical distribution of their material. This long-standing school of thought, which has its roots in early cyberspace literature,[103] has been followed by some courts,[104] most

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21jul11-en.pdf>. For a list of the current applications, see <https://gtldresult.icann.org/application-result/applicationstatus>.

[102] For a critical view of the new gTLD procedure, see M. OWEN/ L. SYMONS, Many new domain names, many new headaches?, *Computer and Telecommunications Law Review* 2012/18(8), p. 246 *et seq*.

[103] Early literature about the Internet focused on the borderless nature of the network, and on what sort of regulation – if any – would fit this space. Seeing the Internet as a distinct regulatory space, see J.P. BARLOW, A Declaration of the Independence of Cyberspace, <https://projects.eff.org/~barlow/Declaration-Final.html>; D.R. JOHNSON/ D. POST, Law and Borders – The Rise of Law in Cyberspace, *Stanford Law Review* 1996/48, p. 1371 and following text ("The Net enables transactions between people who do not know, and in many cases cannot know, each other's physical location. Location remains vitally important, but only location within a virtual space consisting of the «addresses» of the machines between which messages and information are routed. The system is indifferent to the physical location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction"); from the same author, Against "Against Cyberanarchy", *Berkeley Technology Law Journal* 2002/17, p. 1365 *et seq*. *Contra* J.L. GOLDSMITH, Against Cybernarchy, *University of Chicago Law Review* 1998/65, p. 1199 *et seq*. and more generally J.L. GOLDSMITH/ T. WU (note 25). Anticipating changes to the Internet's infrastructure through the use of regulatory code, see L. LESSIG, *Code and Other Laws in Cyberspace*, New York 1999, and specifically on the subject of geolocation, see, from the same author, The Zones of Cyberspace, *Stanford Law Review* 1996/48, p. 1403 *et seq*.

[104] United States District Court, E.D. Pennsylvania, 11 June 1996, *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (U.S.Pa.,1997), p. 86 ("Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience."); United States Court of Appeals, Fourth Circuit, 4 April 2002., *ALS Scan Inc. v. Digital Service Consultants Inc.*, 293 F.3d 707 (C.A.4 (Md.),2002), p. 712 ("[…] the Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction").

notably by the ECJ in its *eDate* decision.[105] As Thomas THIEDE pointed out in his own contribution to this Yearbook,[106] this view is misguided in light of the current widespread usage of geolocation technologies. Geolocation allows website owners to identify the location of their visitors and then to act upon the collected information.[107] Practical uses of these technologies can be divided into four subsets: statistical, positive, negative and fraud prevention.[108] Statistical geolocation, which is the accumulation of the geographical data of all visiting users for statistical or marketing purposes, has already been touched upon in this article.[109] Positive geolocation is the real-time use of this data to change the information displayed on the web page depending on the country of the visitor. This is deployed to serve relevant advertising, to change the website's language to match the users', or to offer topical content. For example, typing <http://www.google.com> into any browser will instantly display a geographically relevant variant of the search engine; typing <http://www.wsj.com> will similarly offer a regional edition of the Wall Street Journal based on the user's location. Negative geolocation allows for the exclusion of visitors hailing from specified unwanted locations. This is already widely used by media websites to avoid copyright infringement: the video platform Hulu[110] is restricted to United States users, and anyone outside of that area will be blocked from its content; YouTube also allows for regional filtering as some videos will be only available in selected countries. Finally, geolocation can aid commercial websites to identify fraud, for example credit card fraud.[111]

Evidence of the first three of these uses can bear some weight on the targeting enquiry. Statistical geolocation data, as mentioned above, provides the website owner information on what parts of the world regularly access his or her content. Deployment of positive geolocation is also indicative, because it shows

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[105] *eDate* (note 8), at 45: "the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control."

[106] T. THIEDE, A Topless Duchess and Caricatures of the Prophet Mohammed**,** in this *Yearbook*. Also in this direction, J. VON HEIN (note 40).

[107] For recent treatises on geolocation technologies and their impact on jurisdictional considerations, see K.F. KING, Personal Jurisdiction, Internet Commerce, and Privacy, the Pervasive Legal Consequences of Modern Geolocation Technologies, *Albany Law Journal of Science and Technology* 2011/21, p. 61 *et seq.*; D.J.B. SVANTESSON (note 25) and T.E. WANDELL, Geolocation and Jurisdiction: From Purposeful Availment to Avoidance and Targeting on the Internet, *Journal of Technology Law & Policy* 2011/16, p. 275 *et seq*. In addition, two recent studies have considered the accuracy of these technologies from a technical standpoint: J.A. MUIR/ P.C. VAN OORSCHOT (note 97); Y. SHAVITT/ N. ZILBERMAN, A study of Geolocation Databases, arXiv:1005.5674.

[108] K.F. KING (note 107), at 73-78; J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at para. 1.

[109] See the above discussion on the "page view" criterion.

[110] Available at <http://www.hulu.com>.

[111] J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at para. 1.

that the owner uses technology to reach out towards a certain public depending on its location. As for negative geolocation, it provides the means of controlling which parts of the world are able to receive the content. As such, the proposed targeting test should consider the possibilities offered by geolocation technologies.[112] Yet to what extent? A first reaction would be to expect all content providers to filter every jurisdiction in which they wish to avoid being sued, in essence creating a sort of hard-line rule which would consider every unfiltered jurisdiction as "targeted" by default.[113] Another possibility would be to gauge the effort of geolocation provided by the defendant, and to consider whether his or her use of these technologies was sufficient in relation to the case at hand.[114] Deciding which attitude is the most appropriate necessitates a more thorough examination of the geolocation technologies themselves, especially in relation to cost, availability and accuracy. In the following paragraphs, three such tools will be discussed.

b) Assessment of Current Geolocation Technologies

A first way to ascertain a user's geographical location is through "non-technical" or "self-reported" means.[115] These are the simplest forms of geolocation, as they rely on the information entered on the website rather than an automated identifying process. In cases of commercial websites, the credit card information entered contains a billing address, which may be used to ascertain the buyer's location. If a product is ordered, then the shipping address may serve the same purpose. More generally, a website owner may choose to implement a "splash page" urging the user to choose his or her country of origin before accessing content.[116] Some websites even require users to enter their detailed personal information, for example

[112] J.L. GOLDSMITH/ T. WU (note 25), at 159-160; H. MUIR WATT (note 40) at 687-690 ("[...] because internet technology now makes «zoning» possible, no compelling reason exists to alter the «targeting» / «effects» test which justifies prescriptive jurisdiction in the real world. When deliberate or targeted, obnoxious consequences felt within the forum State can hardly be challenged as a valid basis for restrictive regulation."); T.E. WANDELL (note 107), at 304 ("The presumption of a borderless internet is an antiquated concept that ignores the current state of geolocation technology and hinders internet jurisdiction analysis. Geolocation provides a meaningful way to analyse jurisdiction by assigning geographic borders to a defendant's internet conduct.").

[113] M.H. GREENBERG, (note 40), at 1254-1255; J.R REIDENBERG, Technology and Internet Jurisdiction, *University of Pennsylvania Law Review* 2005/153, p. 1961-1962 ("[...] the technological choice either to filter or not to filter becomes a normative decision to «purposefully avail» of the user's forum state.").

[114] K.F. KING (note 107), at 96-103, D.J.B. SVANTESSON (note 25), at 443.

[115] M.A. GEIST (note 14), at 426-435.

[116] Splash pages are often used on the main websites of companies offering their services in a wide range of countries, *e.g.* <http://www.nintendo.com> or <http://www.samsonite.com>.

through a free subscription process, before opening up.[117] While these means of identification should not be dismissed outright, as they can sometimes prove useful, they contain flaws with regard to both reliability and availability. Billing and shipping addresses will usually be reliable data; however they will not identify the buyer's address at the moment of the order. They will also be of limited help in the field of personality offenses: credit card data will only matter in cases of websites offering paid subscriber content, and shipping addresses, due to the fact that online newspapers and opinion pieces are digital products, will usually be unavailable as no delivery will take place. As for "splash pages" and free subscription requirements, their reliability is highly suspect as the user can always lie his or her way out of the process. Without more refined methods of geolocation, identification data, therefore, remains incomplete at best.[118]

The second and most prevalent form of geolocation involves the user's IP (Internet Protocol) address, which is a numerical value assigned to every machine, computer, or server connected to the Internet.[119] It may be compared to a telephone number or a postal address. However, the use of IP addresses in the geolocation process is more complex. By themselves, they are of little value, as they are both indeterminate – due to the fact that they are assigned to organisations such as internet service providers rather than end-users – and volatile – as they are not permanently affixed to any given connection and are instead constantly reassigned by these service providers to different end-users.[120] This inadequacy led companies, collectively known as "geolocation database providers", to research and monitor IP addressing in order to build databases tables capable of linking an IP address to its current geographical attribution. Modern IP geolocation thus works like this: once a user accesses a given website, the IP address of his or her machine is forwarded to the database of the vendor chosen by the site's owner. After a comparison with the database's IP tables, the corresponding geographical location is sent back to the website for any statistical, positive or negative use.[121] Consequently, the overall

[117] The online edition of Swiss newspaper *Le Temps* (<http://www.letemps.ch/>) only allows access to its contents to registered users, who have entered their information through the registration process.

[118] J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at para. 2.6 (noting that even more technical means of self-reporting geolocation, such as the use of the user's browser information, can be falsified); M. TRIMBLE, The Future of Cybertravel: Legal Implications of the Evasion of Geolocation, *Fordham Intellectual Property, Media and Entertainment Law Journal* 2012/22, p. 592-594. See also D.J.B. SVANTESSON (note 25), at 434, who recognises that in the field of defamation offenses, bad faith on the part of users will severely weaken the strength of non-technical means of identification.

[119] An IP address presents itself as a series of four numbers ranging from 1 to 255. For example, 162.23.39.73, which refers to one of the servers used by the Swiss government's official website <http://www.admin.ch>. One may use a *whois* query to find the general allocation of any IP, see <http://whois.net>.

[120] J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at paras 2.1-2-3 (noting that the use of public *whois* IP databases offer poor results); M. TRIMBLE, (note 118), at 594-595.

[121] For more details on the IP-based geolocation process, see K.F. KING (note 107), at 67-69; M.A. GEIST (note 14), at 1396-1398; D.J.B. SVANTESSON (note 25), at 401-414; T.E. WANDELL (note 107), at 291-293.

cost, availability and reliability of the technology vary depending on the chosen database provider.

Until the end of 2011, "top shelf" services such as Quova, Geobytes and Akamai offered precise geo-identification packages, some including premade scripts enabling the website to change according to the country of the user, for a "per query" fee which could reach the thousands, or even tens of thousands of dollars per year.[122] Prices recently seem to have fallen somewhat, with the current standard being at one cent per query.[123] Other, more modest services offer geolocation for an even lower price.[124] Finally, website owners with a limited budget can opt for a range of free services like the one included in the Google Analytics toolset.[125] Most geolocation vendors, in addition to their paid services, also allow for free use of their databases under limitative conditions.[126] Nevertheless, lower-end solutions necessitate technical knowledge and additional costs in order to be implemented.[127] As for reliability, while variations do occur depending the chosen vendor, IP-based geolocation is usually able to correctly identify the location of the user at the moment of the query, down to the city.[128] However, two factors mitigate this claim. The first is the inherent technical complexity of IP identification; due to the indeterminate nature of IPs, sometimes the estimated location may be off – as much as a 1,000 kilometre radius from the exact location.[129] The second is the relative ease of "cybertravel", in other words the elusion of geolocation. This can be

[122] K.F. KING (note 107), at 72; Y. SHAVITT/ N. ZILBERMAN (note 107), at 2-3; T.E. WANDELL (note 107), at pp. 298-300.

[123] See the current prices offered by leading vendors Neustar (<http://www.neustar.biz/enterprise/digital-marketing/localized-web-content-packages>) and Geobytes (<http://www.geobytes.com/Pricing.htm>). In her article published in December 2011, T.E. WANDELL (see preceding note) estimated the monthly fees paid by websites in order to use the services offered by Quova, one of the leading vendors at the time. For a highly visited website, such as <http://www.barnesandnobles.com>, which receives some 24 million queries per month, the fee amounted to $146,400 per month. A less visited, yet still active commercial website such as <http://www.ebooks.com>, which receives approximately 10,000 queries per month, paid $1,200. For a popular NPO such as the Red Cross, whose website is accessed by 1.3 millions of users per month, the fee was around $7,800. Using the current prices proposed by Neustar, which has in the meantime bought Quova out, one would arrive at fees of respectively $24,000, $10 and $1,200 per month for the same websites.

[124] *E.g.*, the IPLigence service offers their premium localisation database at a rate of $299 including one year of updates. See <http://www.ipligence.com/products>.

[125] See above, note 77.

[126] This is the case of both Neustar and Geobytes, which offer free geolocation for a limited number of queries. In addition, Geobytes allows free use of a tool that permitting a website to modify its contents to suit the country of the user. This service, however, entails the displaying of advertisements for their products.

[127] See the documentation of the two free services mentioned in the preceding note, available at <https://ipintelligence.neustar.biz/portal/#documentation> and <http://www.geobytes.com/GeoDirection.htm>.

[128] D.J.B. SVANTESSON (note 25), at 402-405.

[129] Y. SHAVITT/ N. ZILBERMAN (note 107), at 10-12.

achieved through the use of proxy servers or VPN networks, which 'lend' their IPs to any connected machine, allowing them to fool location services.[130] It must be stressed that cybertravel is not always done for the express purpose of avoiding geolocation: for example, the University of Geneva allows its members to connect to its internal network through VPN for research purposes, effectively distributing Swiss IPs to every affiliated machine irrespective of its real location.[131] As these few imperfections, IP geolocation is far from foolproof.[132] Nevertheless, it is considered to be sufficiently reliable to be of use in a jurisdictional analysis, as its inadequacies can be taken into account by the court seized.[133]

To help frame the context surrounding the third geolocation tool discussed here, a few words need to be devoted to the new challenges brought about by the changing landscape of the Internet. The arrival of portable computers and smartphones, coupled with the wider availability of Wi-Fi and data cellular networks, allow users to stay connected at all times and in many different places. The traditional image of a person operating from behind his or her desktop computer at home or at work is becoming increasingly obsolete, as modern day users read their news, watch online videos, install apps and order goods or services while commuting to work or sitting down at a café. According to statistical data reported by the International Telecommunications Union, the yearly worldwide growth of mobile broadband is as high as 40%, making it "the most dynamic ICT market".[134] What does this paradigm shift mean for traditional IP-based geolocation? It tends to increase its complexity, both in a technical sense – as mobile internet connections only provide the IP of the mobile carrier[135] – and in a relational sense – as geolocation results increasingly show passing visitors and travelling users.[136] In order to confront this new challenge, a new set of geolocation tools,

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[130] J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at paras 3.3.2-3.3.3; D.J.B. SVANTESSON (note 25), at 407-411; M. TRIMBLE, (note 118), at 599-605.

[131] See <https://catalogue-si.unige.ch/49>.

[132] Y. SHAVITT/ N. ZILBERMAN (note 107), at 13 "[...] the vast majority of location information replies are correct. However, in some cases there are errors in the databases in the range of thousands of kilometres and countries apart. The use of geolocation database should therefore be careful and its information can not be considered as ground truth."

[133] K.F. KING (note 107), at 71-72; D.J.B. SVANTESSON (note 25), at 411-414; J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at para. 6; T.E. WANDELL (note 107), at 300-301.

[134] ITU, *ICT Facts and Figures: The World in 2013*, available at <http://www.itu.int/ITU-D/ict/facts/material/ICTFactsFigures2013.pdf>, p. 6.

[135] The author, who is stationed in Geneva, used Geobytes's free IP geolocation lookup tool, found at <http://www.geobytes.com/iplocator.htm>, to check his location through his mobile phone connection. The results placed him in Zurich, which is the location of the headquarters of his carrier.

[136] J.A. MUIR/ P.C. VAN OORSCHOT (note 97), at para. 6, citing a quote attributed to Andy CHAMPAGNE, Director of Network Analytics for Akamai, one of the leading geolocation vendors: "This service [geolocation] isn't meant [for] people who are trying to be evasive. It's meant for the 99 percent of the general public who are just at home surfing." While used in another context by the authors, the quote does seem to beg the question: what, then, if the general public is no longer surfing "at home"?

collectively referred to as "client-side geolocation", have emerged.[137] The first, simplest and most effective of these tools simply queries the GPS chip carried by the device, which will then return accurate geographical information. If the device is not equipped with a GPS, or if the user has disabled it, then its position can be still be ascertained. This is done by measuring the device's response time to nearby cellular or Wi-Fi signals, which then enables the triangulation of its current location. Finally, other factors, such as its Bluetooth MAC address,[138] or even its IP address help pinpoint the exact location of the user. This method of geolocation is widely deployed in mobile applications, as it is both free and easy to implement in that programming environment.[139] Applications which display touristic points of interests based on the user's location, or which allow the uploading of pictures which are then automatically placed in a map of the world provide examples of this technology. As for internet websites, implementation of this geolocation method is made possible by a web-specific form of the technology, which has been made freely available by the World Wide Web consortium (W3C).[140]

The strengths of client-side geolocation are, as pointed out above, its relative ease of implementation and the low costs involved. When location is acquired through the GPS chip, results are also quite accurate, even as far as the street address. If the GPS data is unavailable, results will still be somewhat precise, though that will depend on the vicinity of Wi-Fi or cellular signals. Does this mean that location identification troubles on the Internet are relegated to the history books? This is doubtful. Due to privacy concerns, client-side geolocation is bound to the positive assent of the device's owner. Mobile applications which rely on geolocation must specify that they do so before being downloaded and used. Furthermore, users always have the option of disabling location services altogether.[141] The W3Cs website geolocation tool shares the same weakness, as it asks the user if he or she wishes to be localised before functioning. It also carries another flaw, as it is only compatible with relatively recent versions of internet browsers, creating wide gaps in its reach.[142] It is thus suggested that, while client-

[137] K.F. KING (note 107), at 66-67; D.J.B. SVANTESSON (note 25), at 400-401. For more on this, see D.K.N. DOTY/ E. WILDE, Privacy Issues and the W3C Geolocation API, *UC Berkeley School of Information Report* 2010/038.

[138] A MAC address is an identification number used to identify networking hardware.

[139] In the Windows Phone 8 application library, geolocation is a standard feature offered to developers. This is done through a simple, standardised query, see <http://msdn.microsoft.com/en-us/library/windows/apps/windows.devices.geolocation.aspx>.

[140] The latest specification document of this application program interface can be found at <http://www.w3.org/TR/geolocation-API>.

[141] This can be done through the settings menu available in the mobile phone's operating system.

[142] Statistics about browser usage in 2012 show that more than 14% of all web-traffic is done with obsolete software, such as Internet Explorer 8.0, which does not work with the geolocation application developed by the W3C. See StatCounter Global stats, available at <http://gs.statcounter.com/#browser_version-ww-monthly-201209-201302-bar>. Recently,

side geolocation is both economical and powerful, it is best suited to mobile applications which give users incentive towards agreed identification. That will be the case when this identification is a core part of the service offered, as in mapping or social software. It is less adequate in the realm of informational websites; indeed, its adoption in this context has been, to our knowledge, non-existent.

In summary, all of the current means of geolocation have their own strengths and weaknesses. Client-side geolocation is reliable and cost free, but is ill-suited to web-based personality torts. Self-reported geolocation is easy to implement, but its reliability is doubtful. Finally, IP-based geolocation stands out as the most useful model, especially now that its cost is starting to decrease. However, it can be eluded in many ways, sometimes unintentionally so, and it is still demanding to implement. It is thus apparent that geolocation technologies are, even today, subject to various hindrances and limitations, which must be considered in the drafting of the proposed targeting model.

c) Geolocation and the Targeting Test

This discussion now allows for a critical assessment of the two policy options mentioned above. The first one, which would seek to impose a hard-line requirement of geolocation and filtering upon website owners, would undoubtedly subject them to a burden, either technical or financial. Such a burden would be understandably adequate if professional media companies were the sole publishers on the Internet. However, that is not the case, as already indicated in this contribution; lesser entities, such as NGOs or bloggers of all ages and backgrounds also act as publishers on the network. It is thus necessary to pose the question: is it reasonable from a policy standpoint to ask of all website owners, regardless of their financial means and of their technical knowledge, to filter every jurisdiction in which they wish to avoid contact? Should we even expect every publisher on the Internet to possess knowledge or an awareness of all the differences in substantive law which may lead one to filter particular locations? It is submitted that this requirement would be too harsh when applied to the smaller publishers found on the Internet; accordingly, this approach should be rejected.[143]

The proposed targeting test should instead follow the second policy option and take into account the geolocation possibilities that were reasonably available to the website owner at the time of the offence.[144] Big-time publishers, which already spend funds to deploy either positive or negative geolocation schemes, have the means of assessing the risks of geographical exposure and of filtering unwanted

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Microsoft has been actively campaigning for the retirement of Internet Explorer 6, an ancient piece of software which is still used by 6% of the Internet, mostly in China. Their countdown to its elimination from the web can be found at <http://www.ie6countdown.com/>.

[143] K.F. KING (note 107), at 93-96. Discussing the issue of the cost(s) of a filtering-oriented regulatory scheme, see also H. MUIR WATT (note 40), at 692-695; and M. FAGIN (note 17), at 443-447.

[144] This proposal in inspired by the model developed by K.F. KING (note 107), at 96-103.

jurisdictions. Thus, they should be held to high standards: if they do not prevent access to their content to visitors located in the forum state, or if they add positive geolocation to their site to cater to that place, then a clear case for targeting is possible. On the other hand, if the jurisdiction examined is adequately filtered, then targeting will be rejected; this should be the case even if a few users located in the forum state manage to slip through the cracks and nonetheless access the website. In order to foster implementation of these filtering schemes, professional media companies should not be held liable for the still existing failings of current technology. As for smaller publishers, they should be held to a lower standard of scrutiny and should not be found as "targeting" every unfiltered jurisdiction. In these cases, the test should take account of the website owner's financial and technical ability, and accordingly determine if his or her use of geolocation was adequate at the time of the offense. For example, if the defendant is a fairly popular personal blogger, deployment of high-end IP-based geolocation will not be required; however, due to the popularity of the website, use of less onerous methods, such as a low-end statistical determination of the location of its regular readers, should be expected.

This proposed approach to geolocation is, admittedly, nothing new. It has seen judicial use in the landmark *Yahoo!* case rendered in 2000 by the French *Cour d'Appel de Paris*.[145] The dispute concerned the display of Nazi memorabilia on the US-oriented auction website operated by Yahoo!, the well-known Californian content provider. Since the site could be accessed from France, where display of Nazi paraphernalia is forbidden, two French NGOs seized their local courts in order to force Yahoo! to comply with French law. In finding a base for jurisdiction, the court, by the way of an *astreinte*, ordered Yahoo! to filter French users so as to prevent them from accessing the auction pages containing the Nazi items. However, it did not do so before making sure that these geolocation measures were effective and that their deployment would not impose too much of burden on the defendant. That is why it ordered three experts on the structure of the network (Vinton CERF, Ben LAURIE and François WALLON) to report on the accuracy and feasibility of such a filtering scheme. As the experts' paper indicated that a filtering accuracy of 90% could be achieved with a combination of IP-based and self-reported geolocation,[146] and as Yahoo! already deployed IP-based geolocation to

[145] *Tribunal de Grande Instance de Paris*, 20 November 2000, *LICRA et UEJF c. Yahoo! Inc. et Yahoo! France*, available at <http://www.lapres.net/ya2011.html>. For a more thorough discussion of this case and its impact on internet jurisdiction, see J.L. GOLDSMITH/ T. WU (note 25), at 1-10; M.H. GREENBERG (note 40); D.A. LAPRES, L'exorbitante affaire Yahoo!, *Journal du droit international* 2002/4, p. 975 *et seq*.

[146] This point, however, was contested by the experts. In the report itself, Vinton CERF drafted a minority opinion stating that self-reporting geolocation, such as splash pages, could easily be bypassed by lying users. And, one day after the hearing, Ben LAURIE published on his website an similar apology in which he stated that the methods his panel recommended could be "be trivially circumvented" and in which he criticized the French court's effort to curb speech on the network. See B. LAURIE, An Expert's Apology, available at <http://www.apache-ssl.org/apology.html>.

serve regionally targeted advertising,[147] it was held that this burden was both reasonable and appropriate. This example demonstrates that geolocation should not be treated as a binary, "filter or not" obligation, but rather as an evaluation of the defendant's reasonable efforts of using such technology.[148]

d) Technology Neutrality

One could criticise that a criterion focused on geolocation lacks "technology neutrality". This term refers to approaches or tests which do not rest on technical concerns to be effective, and which are not affected or otherwise outdated by changes in technology. Proponents of this concept reject criteria, which are regarded as too strongly linked with the core tenets of current technology because of their high risk of future irrelevancy.[149] From that standpoint, it must be conceded that geolocation technologies are very much a product of the current framework of the Internet, and as such are bound to its constantly evolving nature. Indeed, some aspects of geolocation are already changing due to the arrival of a new IP addressing system and it is possible that future developments may further impact its use.[150] Should a judicial examination of geolocation thus be considered as unworkable because of this instability? Shouldn't we reject any test that is too dependent on the whims of technology? The answer may first be found in the solutions advanced by scholars in favour of this technology neutrality. Professor GEIST, who strongly advocates the use of "guidelines that do not depend upon a specific development or state of technology, but rather are based on core principles that can be adapted to changing technologies",[151] nonetheless employs various means of geolocation, including high-end, IP-based methods, to structure his proposition of targeting test.[152] Cruz VILLALÒN, the Advocate General in the *eDate* case, also shares this contradictory attitude. In his opinion, he asserts the necessity of taking

[147] See *LICRA c. Yahoo!* : "il convient de relever par ailleurs, que YAHOO Inc. pratique déjà l'identification géographique des internautes français ou opérant à partir du territoire français qui visitent son site d'enchères puisqu'elle procède systématiquement à un affichage de bandeaux publicitaires en langue française à destination de ces internautes qu'elle a donc les moyens de repérer; que YAHOO Inc. ne saurait soutenir valablement qu'il s'airait (sic) en l'espèce de la mise en œuvre d'une «technologie grossière» sans aucune fiabilité, sauf à considérer que YAHOO Inc. a décidé de dépenser de l'argent en pure perte ou de tromper ses annonceurs sur la qualité des services et prestations qu'elle s'est engagée à leur offrir. ce qui ne paraît pas être le cas en l'espèce; […]"

[148] See also H. MUIR WATT (note 40) at 687-688.

[149] A.M. MATWYSHYN, Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy, *Northwestern University Law Review* 2004/98, p. 509-512.

[150] The Internet is currently changing its framework to welcome a new IP addressing system, called "IPv6", as the old one's capacity was beginning to dry up. See http://www.worldipv6launch.org/.

[151] M.A. GEIST (note 14), at 1359. The discrepancy here mentioned is also identified in A.M. MATWYSHYN (note 149), at 517.

[152] M.A. GEIST (note 14), at 1393 *et seq*.

"into account the requirement of technological neutrality;"[153] however, his solution still rests on technologically-dependant elements such as a website's top-level domain or its access numbers. To be fair to these authors, it is exceedingly difficult to find a point of analysis which is completely devoid of technical concerns: access numbers are generated through statistical geolocation methods; the choice of language, currency, payment and delivery options can also be modified through geolocation depending on the country of the user; top-level domains are also a technical concern etc. Therefore, it is submitted that in order to create an adequate jurisdictional test, absolute compliance with technological neutrality cannot be achieved.[154] As such, geolocation should be considered and accounted for. This will have the consequence of forcing practitioners to get in touch with the technical aspects of the Internet and to keep up to date with its developments. Nonetheless, it will have the benefit of enabling a legal analysis correspond to the network's characteristics and potential, and of encouraging content providers to embrace that potential by deploying technical means of jurisdictional avoidance. And if any doubt about the certainty of geolocation arises during a given set of proceedings, the judge always has the possibility of relying on third-party expert analysis, as shown in the *Yahoo!* case discussed above.

6. Nature of the Examined Website

The last proposed general criterion is a consideration of the content present on the defendant's website. As mentioned above, it is not suggested to conduct an in-depth, subjective analysis of the public intentionally sought by defendant. This criterion should thus be understood as a more modest glance at the striking features of the site. For example, an international news portal such as CNN.com[155] is, by design, oriented towards a transnational audience. In contrast, the online edition of a local newspaper such as *Le Nouvelliste*[156] is less susceptible to be read outside of its area of coverage. Other elements can help in this analysis: are the topics covered by the website generally local or international in character? Does the website link to other local websites, or are its partners geographically diverse? Does it permit the user to consult regional news through a menu, and if so, which regions are available?

Admittedly, this criterion will only be of use when these structural features are salient. For less clearly oriented websites, such an analysis should be undertaken with caution, as it can lead to the sort of subjective enquiry that the proposed

[153] *eDate* opinion, at para. 54.

[154] That is the case, at least within the constraints of current jurisdictional law. Other, more ambitious proposals that do not rest on a determination of the place of the harm for internet torts, can more easily distance themselves from technological concerns. See for example A.M. MATWYSHYN (note 149), who argues for a self-declaratory regime for internet content providers.

[155] Available at <http://www.cnn.com>.

[156] Available at <http://www.lenouvelliste.ch>. *Le Nouvelliste* is a Swiss newspaper centred on the interests of the *Valais* canton.

targeting test tries to avoid. If properly deployed, this criterion will usually help in consolidating the other parts of the targeting test into a coherent whole.

D. Commercial Criteria

The second subset of criteria focuses on commercial effects. It is evident that a website designed to attract revenue from the forum is poised to elicit a response from that place, and is thus objectively capable of creating an impact there. This commercial positioning can be assessed in three ways: (1) the possibility or lack thereof of entering into contractual relationships, (2) the presence of advertisements, and (3) the activities conducted by the defendant off the Internet. This section will also discuss the criterion of the interactivity of the examined website, which has been used by American courts. However, this last element will ultimately be excluded from the proposed model.

1. Contracts

If a content provider uses his or her website to contract with customers located in the forum, then a case for targeting can be made. The rationale behind the criterion is rather self-evident, as it shows that the defendant went out of its way to engage in commercial relationships with contractual partners situated in the forum state.[157] Evidence of this conduct can take two forms. First, an offer can be directly present through the use of an electronic order form. Second, the information present on the website can be sufficient to be considered as an indirect offer, for example through the display of precise contact information or through the availability of printable order forms. It will not be sufficient, however, to merely point out the existence of these offers: they have to be valid and answerable as regards to the examined forum state. To check if that is the case, several secondary factors can be taken into account: territorial disclaimers made by the content provider stating which jurisdictions are targeted by their activity; the range of delivery and payment options permitted by the website; the currency used in the order forms etc. Moreover, if it is shown that the defendant has knowingly contracted with customers situated in the forum state in the past, then a strong point will be made in favour of targeting.[158]

Since press outlets are normally the perpetrators of personality torts, this question will frequently turn on the presence of a paid subscriber system, also known as a "paywall". When a press website locks its content using a paywall, as is the case for online edition of the Times newspaper,[159] then it will suffice to show

[157] *Pammer / Hotel Alpenhof* (note 34), at paras 80-81; see also Art. 3 para. (1), sub (a) and (b) of the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs on the Internet (note 51), and § 204 of the ALI Principles on Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (note 50), and in particular comment c).

[158] V. PIRONON (note 15), at 926.

[159] Available at <http://www.thetimes.co.uk>.

that residents of the forum are able to subscribe. The same considerations should apply for softer models of paywalls, which allow access to a few articles before the site is restricted.[160]

2. Display of Paid Advertisements

Another way of monetising the existence of a website on the Internet is through the use of advertisements. So-called "free" access websites usually are not, as they are funded by the display of banners, interstitials and other advertisements, which, when viewed by the user, generate revenue for their owners. In truth, the internet advertising industry, which is led by Google, Yahoo!, AOL and Microsoft, is one of the most significant parts of the monetary value generated by the network. In 2012, its estimated combined revenue was around $23.9 billion. It is thus an attractive proposition for any website owner to present freely accessible, interesting or provocative content that may lead to substantial traffic – and thus substantial servings of advertisements.[161] As revenue can be generated in this way from users present in the forum state, the proposed targeting test should react accordingly. If the website under examination uses means of geolocation to serve advertisements relevant to the local interests of its visitors, as it was the case in the Yahoo! litigation,[162] then the case for targeting will be easier.[163] If, on the other hand, the advertisements are purely local in character – even when accessed by geographically diverse users – then the opposite inference, though not quite as determinative, may be made.

3. Conduct of Offline Commercial Activity

If the examined website is only a part of the defendant's commercial strategy, then account should be taken of any offline activity directed at the forum. This leads to a traditional enquiry of the commercial contacts concluded by the defendant. Strong indicators of targeted commercial activity include the creation of branches or agencies, the appointment of an agent, the existence and volume of contracts made outside of the context of the website, or the presence of advertising that indicate that site's web address. More to the point of our topic, when a personality offence is perpetrated by the online edition of a physical publication, then attention should be given to that publication's general business conduct. If the defendant has already willingly distributed the publication in the forum, the targeting will be obvious. If it is not, however, this should not lead to the conclusion of a lack of

[160] See, for example, the model deployed by the New York Times, available at <http://www.nytimes.com>, which permits access to ten articles before asking for a paying subscription.

[161] M. AMMORI/ L. PELICAN, Media Diversity and Online Advertising, *Albany Law Review* 2012-2013/76, p. 688-689.

[162] See above, section IV.C.5.c).

[163] H. MUIR WATT (note 40), at 686, note 42.

targeting. As the publisher could have positioned his website in order to reach a wider audience, reliance on the absence of physical publication in the forum would be hasty and misleading. In those cases, more weight should be attached to the other criteria of the targeting test.

4. The Zippo Test – and Why Website Interactivity Should Not Be Considered

In 1997, a District Court in Pennsylvania crafted what would become known as the first internet-specific jurisdictional test. In *Zippo v. Zippo*,[164] the well-known Zippo lighter manufacturer filed a trademark claim before its home courts against Zippo.com, an internet paid news portal operated from Sunnyvale, California. The defendant argued that jurisdiction was inappropriate, because only 2% of its revenue was generated from Pennsylvania and because, apart from its website, it had no additional contacts with that state.[165] Refusing to accept jurisdiction purely on the ground that Zippo.com's website was accessible from Pennsylvania – as some other American courts had done in early internet cases[166] – the Court instead tried to ascertain the commercial activity deployed through that website. To do so, it used the metric of interactivity; in other words, the degree of communication offered to visiting users. On the one hand, a website which would do nothing more than display a message would be considered as "passive", and thus not capable of creating business contacts. On the other hand, a website that allowed for the direct ordering of goods or services would be "active", and thus amenable to jurisdiction wherever it allowed this contact with forum residents. Using this "sliding scale" of interactivity, the court found that Zippo.com's site was clearly active because it allowed for Pennsylvanian residents to register for their services.[167] The fact that some 2,000 users located in that jurisdiction did exactly that was also determinative. The court thus concluded that it had jurisdiction in the dispute over the Californian firm. Following this decision, the Zippo sliding scale has been adopted by a large number of American courts, effectively becoming the basic test for determining internet jurisdiction in the United States.[168] Criticism, however, has

[164] United States District Court, W.D. Pennsylvania, 16 January 1997, *Zippo Mfg. Co. v. Zippo Dot Com, Inc*., 952 F.Supp. 1119.

[165] *Id.*, at 1121-1122.

[166] United States District Court, D. Connecticut, 17 April 1996, *Inset Systems Inc. v. Instruction Set Inc.*, 937 F.Supp 161 (D. Conn., 1996); United States District Court, E.D. Missouri, Eastern Division, 19 August 1996, *Maritz Inc. v. Cybergold Inc.*, 947 F.Supp. 1328 (E.D.Mo.,1996).

[167] United States District Court, W.D. Pennsylvania, 16 January 1997, *Zippo Mfg. Co. v. Zippo Dot Com, Inc*., 952 F.Supp. 1119 (W.D.Pa.,1997.), p. 1123-1127.

[168] United States Court of Appeals, Ninth Circuit, 2 December 1997, *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414 (C.A.9 (Ariz.),1997); United States Court of Appeals, 17 September 1999, Fifth Circuit, *Mink v. AAAA Development LLC*, 190 F.3d 333 (C.A.5 (Tex.),1999); United States Court of Appeals, Tenth Circuit, 9 March 2000, *Intercon v. Bell Atlantic Internet Solutions Inc.*, 205 F.3d 1244 (C.A.10 (Okla.),2000.); United States Court

been strong from both scholars and courts, and in recent years it seems to have lost some of its appeal.[169] Most notably, the ECJ explicitly declined to adopt it when crafting its own targeting test in the consumer contracts *Pammer / Hotel Alpenhof* case.[170] In accordance with these critics, it is suggested that the Zippo test is unworkable, outdated and inadequate; consequently it should be excluded from the proposed model.

It is unworkable, because it only provides answers in the most obvious cases, *e.g.* websites falling into either the "passive" or "active" prong of its scale. So-called "interactive" sites, which occupy the middle of the scale, must be assessed "by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website."[171] In other words, the Zippo test does not provide much guidance in these cases, which are incidentally the most numerous and most difficult to categorise.[172] This weakness is amplified by the outdated nature of the interactivity criterion: today, all websites, even personal blogs which have no commercial intent whatsoever, allow for the some degree of interactivity, such as the posting of comments or the possibility of "liking" the page through social network websites. With purely passive websites becoming

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of Appeals, Third Circuit, 14 September 2006, *Spuglio v. Cabaret Lounge*, 344 Fed.Appx. 724 (C.A.3 (Pa.), 2009). In some opinions, however, the test applied under the Zippo moniker was closer in nature to the targeting test: see United States Court of Appeals, Ninth Circuit, 2 December 1997, *Cybersell, Inc v. Cybersell Inc.*, 130 F.3d 414 (C.A.9 (Ariz.), 1997); United States Court of Appeals, Fourth Circuit, 14 June 2002, *ALS Scan, Inc. v. Digital Service Consultants*, Inc., 293 F.3d 707 (C.A.4 (Md.), 2002); United States Court of Appeals, Third Circuit, 27 January 2003, *Toys "R" Us, Inc. v. Step Two*, S.A., 318 F.3d 446 (C.A.3 (N.J.), 2003). For a detailed look at lower court decisions using the Zippo test, see G.B. DELTA/ J.H. MATSUURA (note 14), at paras 3-42 to 3-51.

[169] United States District Court, W.D. Wisconsin, 8 January 2004, *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.,* 297 F.Supp.2d 1154 (W.D.Wis., 2004); United States Court of Appeals, Federal Circuit, 19 January 2005, *Trintec Industries, Inc. v. Pedre Promotional Products, Inc.*, 395 F.3d 1275 (C.A.Fed.,2005); Appellate Court of Illinois, Fifth District, 24 April 2007, *Howard v. Missouri Bone and Joint Center, Inc*., 373 Ill.App.3d 738 (Ill.App. 5 Dist., 2007); United States Court of Appeals, Seventh District, 14 September 2010, *Illinois v. Hemi Group L.L.C.*, 622 F.3d 754 C.A.7 (Ill.),2010); District Court of Appeal of Florida, Fourth District, 1 June 2011, *Caiazzo v. American Royal Arts Corp*., 73 So.3d 245 (Fla.App. 4 Dist., 2011). See also P.J. BORCHERS (note 22), at 478-481; M.A. GEIST (note 14), at 1360-1380; C.R. DUNHAM, Zippo-ing the Wrong Way: How the Internet has Misdirected the Federal Courts in their Personal Jurisdiction Analysis, *University of San Francisco Law Review* 2009/43, p. 559 *et seq.*; M. FAGIN (note 17), at 429-430; H.P. HESTERMEYER, (note 35), at 278-279; D. STEUER, The Shoe Fits and the Lighter is Out of Gas: The Continuing Utility of International Shoe and the Misuse and Ineffectiveness of Zippo, *University of Colorado Law Review* 2003/74, p. 319 *et seq.*; D.T. YOKOYAMA (note 14).

[170] *Pammer / Hotel Alpenhof* (note 34), at para. 79

[171] *Zippo v. Zippo* (note 167), at 1124.

[172] C.R. DUNHAM, (note 169), at 572; M.A. GEIST (note 14), at 1379; D.T. YOKOYAMA (note 14), at 1166-1167.

increasingly rare, it is difficult to see what the Zippo test can bring to a modern jurisdictional analysis.[173]

Thirdly, as the ECJ identified,[174] the idea of measuring interactivity to ascertain commercial positioning is in itself misguided. It is indifferent that a website technically offers interaction with internet users, as long as its owner, through his or her conduct, actually engages in business with a particular jurisdiction.[175] Indeed, practice under the Zippo sliding scale has led to questionable results. In *Quality Design v. Tuff Coat*,[176] the Louisianan Court of Appeal denied jurisdiction over a Colorado coating pigment manufacturer on the basis that its promotional website was passive in nature. However, the web page was an advertisement for their products, which displayed a toll-free number and detailed contact information. The court even noted that Louisianan corporations had made at least four orders in this manner.[177] This example shows that too much of a focus on interactivity can obscure the core question of whether defendant engaged in commercial activities directed towards the forum or not.[178] Finally, it is to be noted that, concerning personality harms, the Zippo test will reveal itself as particularly ineffective, as a passive news website can still be of a commercial nature if it uses advertisements to generate revenue.[179] For these reasons, it will be excluded from the proposed targeting test.

E. Criteria Specific to Defamation and Personality Torts

The third and final subset of criteria serves the purpose of adapting the proposed targeting test to better suit personality torts. Two elements will be addressed under this header: first, the extent of claimant's reputation in the chosen forum, and second the content of the tortious article.

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[173] M.A. GEIST (note 14), at 1379-1380.

[174] See (note 170).

[175] D. STEUER (note 169), at 354-357; D.T. YOKOYAMA (note 14), at 1160-1173; see also *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.* (note 169), at 1159-1161; *Howard v. Missouri Bone and Joint Center, Inc* (note 169), at 742-745; *Caiazzo v. American Royal Arts Corp* (note 169), at 225-256.

[176] Court of Appeal, First Circuit, 12 July 2006, *Quality Design and Const., Inc. v. Tuff Coat Mfg*., Inc., 939 So.2d 429 (La.App. 1 Cir., 2006).

[177] It can be argued that the taking of jurisdiction was not correct if the four orders were isolated or accidental occurrences. That may well be. However, the point remains that the issue cannot be decided on website interactivity alone.

[178] D. STEUER, (note 169), at 348-351.

[179] D. STEUER, (note 169), at 350-354. See also R.J. CONDLIN, (note 37), at 137-138 (arguing that interactivity has no bearing on the effect of a libellous website).

1. Extent of Claimant's Reputation

This criterion focuses on the relationship between the claimant and his or her forum of choice. As personality torts affect the victim's reputation wherever it exists, it follows that not all forums are to be treated equally.[180] With this idea in mind, two situations will be examined in the following paragraphs.

First, it is generally agreed that the courts of the place of the habitual residence of the victim have a strong claim for jurisdiction.[181] This is the place where the reputational damage is felt the most acutely, and where the court will be the most well situated to assess the impact caused by the harmful publication. In addition, this existing link between that forum and the claimant eases any suspicion of forum shopping. This rationale is conceptually sound; however, one must be wary of excessive reliance on it. In its *eDate* decision, the ECJ disturbed the traditional *Shevill* formula by creating a new, separate jurisdictional head situated at the place of the "centre of interests" of the victim, which it defined as usually encompassing the place of his or her habitual residence.[182] Since the courts designated by this new rule have jurisdiction with respect to all damages in cross-border claims, the location of this "centre of interests" is of a rather crucial character. It is submitted that this approach is far too simplistic, as it does not take into account the occurrence, or lack thereof, of any actual harm done to the victim's reputation in that place. In cases where the offending website does not cater to that forum, or is written in a foreign language, or is simply unavailable there due to the use of geolocation technologies, it will difficult to construe this "centre of interests" as the place where the harm occurred, let alone the brunt of it.[183] This consideration, aided by the rather indeterminate nature of the "centre of interests" notion,[184] leads to a rejection of the ECJs proposal.

It is suggested instead that the targeting test can adapt itself to reflect the strong links that exist between the victim and the courts of his or her habitual residence. When such proceedings are made, the forum at the habitual residence of

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[180] See *High Court of Australia*, 10 December 2002, *Dow Jones and Co. Inc., v. Gutnick*, [2002] HCA 56, at para. 39.

[181] P. BOUREL, Du rattachement de quelques délits spéciaux en droit international privé, *Recueil des Cours* vol. 214 (1989), p. 351-357, O. CACHARD (note 31), at 388-389; D. BUREAU / H. MUIR-WATT, *Droit International Privé*, Tome II, Paris 2010, p. 388-390; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, Paris 2010, p. 227-230 (see also her case notes in *Rev. crit. dr. int. pr*. 1983, p. 670 *et seq.* and *Rev. crit. dr. int. pr*. 1985, p. 141 *et seq.*); G. KAUFMANN-KOHLER (note 35), at 110-117; F. KNOEPFLER, Aspects de droit international privé, *Quelques facettes du droit de l'Internet* 2001/1, p. 89-90. These authors, however, tend to anchor the home state forum at the domicile of the afflicted party, qualified as the nexus of the harm. The habitual residence is to be preferred, as it has a closer connection to that person's everyday life.

[182] *eDate* (note 8), at paras 49-52.

[183] M. REYMOND (note 8), at 498-501.

[184] See A. DICKINSON (note 8), fifth point (considering that persons have multiple centres of interests that change over time); T. HARTLEY (note 8), at 198-199 (interpreting this notion as giving foreign claimants a centre of interests in the European Union, even if it is not their actual centre of interests).

the claimant should not automatically exercise its jurisdictional powers. Rather, it must only presume itself as being appropriate. And to defeat this presumption, the rest of the targeting test criteria must unequivocally point towards the opposite conclusion. This will be the case if only a handful of users accessed the website, or if the defendant actively tried to avoid contact with that jurisdiction by means of negative geolocation. By use of this method, situations where the home forum has not been subject to any direct harm will be identified and adequately resolved. This solution also has the advantage of recognizing the importance of the courts situated at the place of the habitual residence of the victim without resorting to a one-size-fits-all *forum actoris* construction.[185]

Second, if the victim brings the claim before a forum with which he or she has only occasional contacts, then another set of preoccupations will colour the targeting enquiry. This act could indicate the use of forum shopping, especially if the selected tribunal's conflict of law rules points to a favourable substantive law, or if proceedings are known to be costly in that particular jurisdiction. Nonetheless, one should not immediately regard these claims as frivolous. Publication of personality infringing material still carries a potential of harm, even where the victim is virtually unknown to the public. Even if he or she was unknown prior to the publication, harm is still possible as the material can in and of itself create a negative impression in the eyes of the public.[186] One other factor is that an increasing number of personalities enjoy the benefit of an international reputation, which can be harmed in a plurality of jurisdictions.[187] For these reasons, claims brought before foreign courts should not be rejected outright; they should instead start off with a negative impression that, in order to be substantiated or rejected, will require a thorough analysis of the other targeting criteria.

In summary, it is submitted that the targeting test's various elements, when combined to show the defendant's website objective reach, should be examined against the extent of the reputation carried by the victim in the forum. The overall analysis will thus be proportionately affected, going as far as a presumption in favour of the acceptance of jurisdiction when those links are at their strongest.[188]

2. Content of the Harmful Material

The final criterion of the proposed test is the content of the article or resource at the centre of the dispute. The idea here is to establish if its subject is bound to cater to

[185] See also O. CACHARD (note 31), at 390 (arguing that the *forum actoris* rule, when applied to the internet context does not safeguard foreseeability in regards to the substantive standards governing the acts of the website owner).

[186] Court of Appeal, Civil Appeals Division, 3 February 2005, *Dow Jones v. Jameel*, [2005] EWCA Civ 75, at para. 28 ("[…] imagine that an unknown American who was about to visit an English town was erroneously described in the town's local paper as a paedophile. Manifestly the law ought to afford him a cause of action in libel.").

[187] T. HARTLEY (note 40), at 30; U. KOHL (note 10), at 1056-1057; G.J.H. SMITH (note 17), at para. 6-042, D.J.B. SVANTESSON (note 25), at 345-346.

[188] For a similar analysis, see *eDate* opinion (note 8), at paras 59-60.

the tastes and interests of the public present in the forum. Advocate General Cruz VILLALÒN has already conceived useful guidelines in his opinion on the *eDate* case:

> "Certain information may be of interest in one territory but be completely devoid of interest in another. News about allegedly criminal activities carried out in Austria by an Austrian citizen who resides in Austria is clearly «newsworthy» in the territory of that State, even though the information may be published in an online newspaper whose publisher resides in the United Kingdom. When a media outlet uploads to the internet certain content which, by its nature, will have an unquestionable impact, in an information sense, in another Member State, the publisher may reasonably foresee that, where he has published information prejudicial to personality rights, he may possibly be sued in that State. Thus, the more newsworthy a particular news item is in one national territory, the greater the likelihood that infringements of rights committed there will, in principle, have a connection with the courts of that territory."[189]

In other words, if the content of the publication is of interest to the public in the forum, then the case for targeting will be stronger, and *vice-versa*. It must be stressed that this criterion should turn upon an objective newsworthiness standard with regard to the examined forum, and not on any intent on the part of the website owner; the *Young v. New Haven Advocate* decision - already touched upon in this article - illustrates that point quite clearly. From an objective standpoint, the articles published by the defendants in that case were clearly of interest to a Virginian audience, because they discussed the conduct of the warden of a Virginian prison in the course of his professional activity. Yet, through the use of a subjective standard, the court arrived at the conclusion that the newspapers were not targeted towards Virginia, their main focus being centred on the prison policy in Connecticut. This example highlights how essential the distinction will be between an objective and a subjective type of analysis, and how practitioners will need to be careful when applying this criterion.

V. Summary

The targeting test set out in this contribution may be summarized in the following manner:

1) A website may only be considered as "targeting" the forum if it was objectively capable of causing a foreseeable impact in that place at the moment of the alleged harm.
2) In order to measure if that is the case, the following criteria will be considered:
    a. General criteria

[189] *Id.*, at para. 64.

i. The language or languages displayed on the website.
ii. The presence and position of the website in search engines queried in relation with the dispute.
iii. The website's choice of top level domain(s).
iv. The number of times the website has been accessed from the forum.
v. The geolocation technologies already deployed on the website at the time of the alleged harm, or the geolocation technologies that would have been available to its owner at the time of the alleged harm.

b. Commercial criteria
i. The possibility for persons situated in the forum of entering into contracts with the website's owner.
ii. The use of paid advertisement on the website.
iii. The geographical reach of the business activities conducted offline by the website's owner.

c. Criteria specific to defamation and personality torts
i. The extent of the claimant's reputation in the forum.
ii. The content of the harmful material.

3) The burden of proof regarding these criteria, except those contained in section (c.), falls upon the website's owner.

VI. Conclusion

The proposed targeting test has several advantages. It avoids the overly broad jurisdictional ambit brought about by the accessibility doctrine, while still allowing for a due consideration of the harm done at the place of receipt of the communication, thanks to its objective focus on foreseeable impact. It is flexible enough to be able to adapt itself to different kinds of websites and publishers, yet, as the analysis of each criterion is accompanied by precise guidelines, it is sufficiently detailed in order to allow principled decisions.

Finally, it is conceded that the development of an adequate methodology of targeting, as welcome as it may be, is only one piece of the metaphorical puzzle of jurisdiction over personality offences made over the Internet. Further work will have to reassess the adequacy of the entire *Shevill* formula, and most notably as regards the ambit of the recoverable damages allowed before the courts of the place of a so "targeted" jurisdiction. Of some concern will also be the advent of mobile Internet, which will further erode any sense of "place" that could be identified on the network. Finally, and this will probably the most difficult issue left to tackle, it will be necessary to consider jurisdictional matters in conjunction with the conflict of law rule which would apply to personality torts – a quandary already disturbed by the ECJs findings in *eDate*.[190]

[190] M. REYMOND (note 8), at 503-506.

A TOPLESS DUCHESS AND CARICATURES OF THE PROPHET MOHAMMED

A FLEXIBLE CONFLICT OF LAWS RULE FOR CROSS-BORDER INFRINGEMENTS OF PRIVACY AND REPUTATION

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In an era of global news networks and internationally distributed media, personal information can be disseminated faster than ever beyond national borders. A prime example is the publication of topless pictures of Britain's future Queen Consort, HRH *Catherine*, Duchess of Cambridge[1] in (so far) France, Italy, Sweden, Denmark and Ireland. At the same time, potentially injurious media coverage may not always be unjustified. Comprehensive information and critical comment is considered essential to society. One example is the publication of mocking caricatures of the prophet Mohammed in the French satirical magazine *Charlie Hebdo*, which awakened strong emotions in Muslim countries.

However, all parties involved – the journalist, the media outlet, and the person subject to such media coverage – benefit from a degree of legal protection with regard to their respective rights. Within this framework, it is left to courts and legislators to balance the interests of the parties concerned. For this purpose many civilian jurisdictions in continental Europe rely on codified personality rights. Even in the common law, where such rights remain un-codified, similar protection of reputation and privacy is increasingly visible alongside the longstanding protection given by the law of defamation.

Due to substantial differences in national histories, cultures, values and legislative techniques, protection of privacy and reputation is treated rather divergently throughout Europe. In fact, with regard to the topless photos of the Duchess of Cambridge, the respective domestic provisions protecting privacy vary to some extent. Some countries, such as Germany and Switzerland, differentiate between more or less intensively protected spheres in which the freedom of information, press and opinion outweigh the right to privacy to a greater or lesser extent. Other countries, such as France, regulate the protection of privacy through special norms, while others, such as England and Wales, subject the protection to privacy to piecemeal solutions. To be sure, in all European Member States any protection has to cede vis-à-vis issues of significant, legitimate public interest. However, what constitutes a legitimate public interest is yet again determined differently, due to the substantial differences in national histories, cultures and values, and is frequently obscured by complicated distinctions between private individuals unknown to the public and public or political figures.

As a result, the issue of which law ought to be applied is often decisive for the claim and is of great importance when, for example, the subject of injurious media coverage resides or maintains a significant presence in a State other than that where coverage was disseminated. This is also true when such material was obtained in a State where neither the aggrieved party nor the publisher resides. In

[1] Formerly known as Catherine MIDDLETON.

essence, such a situation necessitates a coordination of the potentially applicable laws via private international law provisions. And although the European Union (EU) has unified conflict of law rules on non-contractual obligations in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 ("Rome II"), the legislator, presumably, capitulated to an influential media industry by excluding from its scope the infringement of privacy rights and torts to reputation, such as defamation. Despite a review clause contained in Art 30(2) Rome II Regulation, the aim of which is to reconsider the issue, no uniform conflict of laws rule has yet been agreed upon, leaving contrasting national provisions to continue to determine the applicable law, which in this respect is a very unsatisfactory status quo.

In this article the existing proposals for a unified European conflict of laws rule will be critically analysed. Having exposed the weakness of these approaches a path for reform is suggested.

I. Basics of Conflict of Laws

In cases where a publication is disseminated in several States, conflict of laws rules set out to achieve two goals: (1) the harmony of outcome in like cases; and (2) the use of the law of the jurisdiction with the closest connection.[2] For the latter, particularly in continental Europe and all other jurisdictions that base their private international law rules upon the *Saviginian* paradigm, the starting point is that the law of the country applies that is most closely connected to the legal relationship.

As for identifying the closest connection, it is the generally accepted view that this is based upon neutral criteria and ultimately the intention is to apply the legal order best suited to the conflicting interests of both parties. The particular strength of SAVIGNY'S paradigm of value neutralism is that private international law is utilised as a neutral mediator in international disputes where law, culture, and values differ. In a rather formal way it regulates and coordinates issues of the law applicable, while leaving diversity intact.

These considerations are the best example of legal principles derived from the logic of conflict of laws on a methodological level and overall are well established.

II. Lessons from Substantive Law

The considerations above are, however, only one part of the legal principles governing the methodology of this particular field of law. In addition, all concepts of private international law generally must be driven by the principles and values

[2] For the roots of this idea see F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, vol. VIII (1849), p. 28, 108, 120.

of substantive law; both sets of rules have to be put into context and should be coordinated as closely as possible.

Such an approach is constitutive, as substantive law and conflict rules are part of the same legal system which should not be contradictory in and of themselves, but should instead establish a coherent system of legal rules. Also, such consistency is required in connection with the infringement of privacy or reputation, particularly by the fundamental rights in the respective national legal systems, the Charter of Fundamental Rights (CFREU) and the European Convention on Human Rights (ECHR), all of which comprise the fundamental human rights to a person's reputation and privacy, on the one hand, and rights of freedom of expression and information, which extend to publications by the press, on the other hand.

A comparative legal study of a common core of principles of substantive law governing privacy and reputation need not be reproduced here.[3] Nevertheless, some distinct aspects must be emphasised as they have a corollary in private international law.

A. Balancing of Interests as a *Leitmotiv*

First, there is a close link between the right to privacy and reputation and the freedom of expression and information within the specific national, social and cultural framework to which the respective parties belong. All European Member States provide for a dynamic relationship between both fundamental rights. Indeed in most systems only a comprehensive balancing of the interests of both parties can determine whether there was a right to privacy or reputation at all and, if so, whether this right was infringed by the publication. Accordingly, no clear-cut rule favouring the press or, conversely, the aggrieved party can be found in any European legal system. Ultimately, a fair balancing of conflicting interests is always required in each individual case.

B. Foreseeable Attribution of Damage

The second aspect of our analysis relates to fundamental principles of tort law. Basically, it is understood in all European Member States that the main purpose of tort law is to fully compensate damage. The application of this basic principle is, however, limited, as any damage sustained can be compensated only when and if such damages can be sufficiently imputed to the tortfeasor. This extends to cases of infringement of privacy or reputation. If pictures of the Duchess relate exclusively to details of her private life and have the sole purpose of satisfying prurient interests in that respect, no substantial public interest is involved that might serve as a justification for their publication. In that case, there would be sufficient reasons for

[3] For comprehensive studies see G. BRÜGGEMEIER/ A. COLOMBI CIACCHI/ P. O'CALLAGHAN (eds), *Personality Rights in European Tort Law*, Cambridge 2010; H. KOZIOL/ A. WARZILEK (eds), *Protection of Personality Rights against Invasions by the Mass Media*, Wien/ New York 2005; Th. THIEDE, *Internationale Persönlichkeitsrechtsverletzungen*, Wien 2010.

holding the publisher liable. If, however, the photographs relate to the exercising of official functions by performing senior Royal duties, a substantial public interest would have existed and any damage would have to borne by the Duchess.[4]

It has to be emphasised that these grounds for imputation must be determinable by the journalist and the media outlet before publication. Or better stated, the citizen's ability to foresee the application of the laws of their State to their actions is a principle governing the written and unwritten constitutions of Europe. From this perspective it is obvious that the legislator can only impose obligations on their citizens as a class which is clearly defined with regard to their extent and likely effects. Only a rule knowable in advance gives citizens the option to adjust their conduct accordingly. Any unforeseeable application of a norm amounts to normative and official arbitrariness. The idea of a "chilling effect" as found in the jurisprudence of the European Court of Human Rights (ECtHR) evidences this point well: If, as emphasised several times by that court,[5] the potential deterrent effect of an overly strict liability rule risks resulting in the general omission of critical journalism, any such norm is incompatible with the ECHR. Likewise, any rule must be unacceptable if the media outlet could not anticipate its application.

C. Perception of the Public

Closely related to the justification of public interest is, thirdly, the rule that the tortfeasor and the aggrieved party are not the only interested parties. Public interest and (accordingly) the assessment of whether the privacy and reputation of a person is harmed depends, in most European legal systems, above all on the way in which the relevant national community evaluates the situation.[6] Concurrently, it is not the individual subjective view of the aggrieved party or the journalist or media outlet which needs to be taken into account to assess whether an infringement of privacy and reputation has occurred. The public interest as a justification rests on the view of the personally unrelated, reasonable, ordinary and fair-minded observer. Hence, it is the perspective of that public from the same cultural and social context that should count.

D. Indivisibility of Immaterial Harm

In sharp contrast to the question of how the wrongful breach is to be assessed, the calculation and compensability of damages are related to the aggrieved party alone. Most European legal systems agree that any non-pecuniary damages (that is, moral

[4] See *e.g.* ECtHR, 24 June 2004, *Caroline von Hannover/Germany* [2004] ECHR 294 (Application No. 59320/00).

[5] See *e.g.* ECtHR, 22 February1989, *Barfod/Denmark* [1989] ECHR 1 (Application No. 11508/85): "the Court cannot overlook […] the great importance of not discouraging members of the public, for fear of criminal and other sanctions, from voicing their opinions on issues of public concern."

[6] See P. LAGARDE, *Rev. crit. dr. int. pr.* 1996, p. 501: "Tout dépend évidemment du public atteint par les exemplaires diffusés."

damages or damages for pain and suffering) are granted as a relief for the psyche and the state of mind of the aggrieved party, as he or she is likely to use them to buy alternative comforts and pleasures. To quote a Spanish proverb: *los duelos con pan son menos* – bread reduces the pain of mourning. And, without a doubt, in cases of infringements of privacy and reputation, it is this non-pecuniary loss that is often at the heart of the aggrieved party's claim.

Regarding the question of divisibility of such non-pecuniary damages, logic normally dictates that such damages are indivisible, just as are the psyche and the state of mind of the aggrieved party for whose relief they are granted.[7]

E. Effects of the Extent of Distribution

Finally, the sheer extent of publication of a defamatory statement, which is often coupled with repetition of an accusation in front of a great number of people, can easily create a false picture of the aggrieved party. If a false statement is repeated often enough and remains undisputed, the credibility of this statement increases because of its replication within a society. As most people fear reprisal or social isolation, public opinion is gauged to adhering to societal standards. As the ability to speak openly and address societal issues differentiates between citizens, those whose opinions are publicly under-represented become less likely to speak out and the (only alleged) majority becomes the status quo ("spiral of silence"). The mass media has an enormous impact on how public opinion is portrayed and can dramatically impact upon an individual's perception about where public opinion lies. As a result, the objectivity of the public is easily lost. Only when the aggrieved party can generate a counterpart to such repetition can the possibility of balanced media coverage be secured. By pursuing his or her own individual interests the aggrieved party antagonises the momentum of the extent of publication.[8]

[7] The sad reality of arguments in this context forcing nonsensical legal analysis is a point that has not gone unnoticed. To quote the admonition by Weir in another context: "[…] the claimant is not half-mad because of what the first defendant did and half-mad because of what the second defendant did, he is as mad as he is."; see T. WEIR, The Maddening effect of consecutive torts, *Cambridge Law Journal (CLJ)* 2001, p. 238.

[8] See D.A. SCHEUFELE/ P. MOY, Twenty-five years of the spiral of silence: A conceptual review and empirical outlook, *International Journal of Public Opinion Research* 2000, p. 3-28; D. FUCHS/ J. GERHARDS/ F. NEIDHARDT, *Öffentliche Kommunikationsbereitschaft: Ein Test zentraler Bestandteile der Theorie der Schweigespirale* (1991).

III. Existing Proposals for a Unified European Conflict of Laws Rule

A. Mainstrat Study

As no political compromise was reached on the question of the law applicable to infringements of cross-border privacy and reputation, a revision clause was introduced in Art 30(2) Rome II Regulation requesting a study on the situation in the field. Against initial hopes, this study was not carried out by a public research institute but, instead, by the private consultancy firm Mainstrat. The study delivered a bewildering result.[9] The authors did not suggest a conflict of laws rule. Instead, they tried to invalidate the evident problem through reliance on statistics[10] and suggested the adoption of a directive incorporating a substantive regulation of the minimum essential aspects of the protection of privacy and reputation on the basis of the ECHR and the CFREU, that is a European private law unification of privacy and reputation. However, no proposal for a directive covering such minimum essential aspects was provided.

The study could arguably be endorsed for its stringent insistence that, where no substantial differences in law exist, a solution need not be achieved by a conflict of laws rule. However, a directive on the minimum essential aspects of privacy and reputation is in any case extremely unlikely for the time being. The Principles of European Tort Law (PETL), a broad-based comparative project to create the foundation for discussing a future harmonisation of the law of tort in the European Union conducted by the European Group on Tort Law (EGTL), mentions only human dignity as a protected interest in its Art 2:102. The commentary to the PETL refers to the respective ambiguity of personality rights and the PETL do not provide for any rule addressing infringements of privacy and reputation at all.[11] The subsequent research addressing a possible future unification of European private law by the Study Group on a European Civil Code also avoided any clear statement. According to Art 2:203(2) Draft Common Frame of Reference (DCFR) VI., loss caused to a person as a result of injury to that person's reputation is only legally relevant if national law so provides. Thus, any application of this article arguably presupposes a conflict of laws rule to determine the relevant national law.

In essence, no unification of tort law regarding privacy and reputation has yet been attempted, which would force the drafters of the suggested directive to start from scratch. Considering the often vague outlook of efforts on unification of European private law, it seems doubtful whether such a directive would ever be politically endorsed.

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[9] Comparative Study on the Situation in the 27 Member States as regards the Law applicable to Non-Contractual Obligations arising out of Infringements of Privacy and Rights relating to Personality (2009), available at <http://ec.europa.eu/justice/civil/document/ index_en.htm>.

[10] With a sample size of merely n=371.

[11] H. KOZIOL, Basic Norm, in EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law. Text and Commentary*, Wien/ New York 2005, p. 30 *et seq.*

B. Mosaic Assessment

In *Bier v Mines de potasse d'Alsace*[12] and *Shevill*,[13] the European Court of Justice (ECJ) held that a publisher could be sued at his or her place of establishment for all the harm caused by a publication or before the courts of each country where such publication was distributed and caused damage. However, in the latter case, the suit could be brought solely in respect of the damage caused within the respective court's territory. In light of those holdings, the European Commission also initially[14] favoured such a "mosaic assessment". Parallel to the ECJ's findings, the law at the place(s) of dissemination should be applied; however, the latter law(s) only have relevance concerning the infringement in the Member State of publication, whereas the law at the residence of the media outlet applies to the whole Union-wide publication. The term "mosaic assessment" depicts, where damage is sustained in several Member States, that the laws of all Member States concerned will have to be applied on a distributive basis as tiny pieces, thus together giving the full picture of the mosaic, which is full compensation.

Without explicit reference, this theory is arguably driven by prejudices against foreign law and is constructed along the following lines. The question of whether and when an infringement of personality rights existed or is justified depends largely on national culture, which can differ fundamentally even within Europe. A distributive application would then appear to fit perfectly. In the continued absence of a consensus of European values concerning privacy and reputation, it seems appropriate to leave enough room for the differences using a distributive application of local national laws.[15]

Nevertheless, the fragmentation of the applicable law as a result of the mosaic assessment is in stark contrast with the intellectual development of conflict of laws in Europe over the last 150 years. Starting with *von Savigny*, it became the unanimous consensus that, from a multitude of unambiguous national connections to a legal dispute, the law of the country that is most closely connected to the dispute should govern the whole case. As mentioned above, the particular strength of this approach is that conflict of laws is utilised as a neutral mediator in international disputes where law, culture and values differ. Resting on the differences between legal systems as an argument was the style of early 19th century German discussion, but is not a characteristic of any contemporary approach. Certainly, legal systems are different and the manner in which privacy and reputation are conceived and enshrined differs as well, but this does not mean that the legal order of every marginally affected State must be taken into account. The cultural dimen-

[12] ECJ, C-21/76, *Bier v Mines de Potasse d'Alsace*, [1976] *ECR* 1735.

[13] ECJ, C-68/93, *Fiona Shevill and Others v Presse Alliance SA*, [1995] *ECR* I-415.

[14] EUROPEAN COMMISSION, Proposal for a Regulation on the law applicable to Non-contractual obligation (Rome II) COM(2003) 427 final, p. 11: "The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as «Mosaikbetrachtung» in German law."

[15] See, for instance, OLG (Oberlandesgericht) Hamburg 8 December 1994, *Neue Juristische Wochenschrift –Rechtsprechungsreport (NJW-RR)* 1995, p. 792.

sion of personality rights is no excuse to circumvent the idea of the closest connection. Indeed, to allow such an approach is to rely on the historically out-dated principle of territoriality.

As a result, problems exist with a mosaic assessment when taking into account the non-pecuniary damages granted for infringement of privacy and defamatory statements. As mentioned at the outset, for this category of damages the situation in the substantive law of European States is clear: As non-pecuniary damages are granted for the relief of the unitary state of mind of the aggrieved party, they are also unitary and indivisible. Accordingly, in the context of conflict of laws, such damages differ proportionally depending on the number of times that a publication appears. Nevertheless, one degrading publication in multiple countries results in only one infringement of the feelings of the aggrieved party and, thus, in only one damages award. The psyche and the state of mind of the aggrieved party is relieved only once, not every time the same publication appears in a different country. Alternative comforts and pleasures for which non-pecuniary damages are granted are assessed only once and by one legal system.

Echoing such implausible fragmentation, one also has to doubt the general practicability of the concept in more realistic cases where a defamatory publication is distributed not only in two or three European Member States but many more. At first glance the ECJ's decision in *Shevill* may provide some help, since the judges held that the whole infringement could be compensated in the domicile of the media company. If the mosaic assessment is applied, contrary to the arguably good intentions of the ECJ, the court at the media outlet's domicile has to apply the laws of all the places where the publication was distributed depending on the respective infringement in that country. In other words, the judge at the domicile of the media outlet must apply all laws where the publication was disseminated to assess the damages granted to the aggrieved party. This includes determining the loss of reputation territorially, that is, to assess whether and to what extent the aggrieved party's standing was lowered and whether this was justified according to the Member State's law. He would then have to assess whether and to what extent a mental injury occurred in the respective Member State and how such distress is relieved there. Bearing in mind the differences in each jurisdiction and each protected domain due to cultural, political and socio-legal reasons as well as divergent codification techniques, such a Herculean task should not be left to judges. One can sincerely doubt whether practice could ever meet this standard of factual and legal accuracy.[16] In cases with a substantial circulation, the judge will not and essentially cannot, apply all respective laws. As a result, the judge, arguably, will estimate the wrongful conduct and damages as a whole and subsequently extrapolate both the local wrongful conduct and local damages according to the extent of dissemination in the respective countries. As a realistic alternative, parties may

[16] So far no European Member State court has employed the mosaic assessment in that regard. For experiences in the US see *e.g. Hartmann v. Time, Inc.*, 166 F.2d 127 (3rd Cir. 1948): "[…] we must treat […] the place where publication occurred as covering the United States and the civilized countries of the world" and the comment by W.L. PROSSER, Interstate Publication, *Mich. L. Rev.* 1993, p. 973: "That way madness lies" and LEARNED HAND, J. in *Mattox v. News Syndicate Co., Inc.*, 176 F.2d 897, 900 (2nd Cir. 1949): "[…] in application it would prove unmanageable."

bring (as the Duchess did)[17] their action solely in respect of the damage caused within the Member State's territory. Of course, in such a way the aggrieved party will either fall short of full compensation or has to pursue his or her claims in a number of courts throughout Europe.

One final criticism can be levelled against the proposed mosaic assessment in the everyday case, where the paparazzo, the journalist and the editor-in-chief jointly contribute to one wrongful publication. If one of the tortfeasors is held personally liable and seeks contribution from his or her accomplices, he will face significant problems. According to Art 20 Rome II Regulation, internal redress among multiple tortfeasors is governed by the law applicable to the original claim. As a result, the same multitude of laws that were applied to the publication must then be applied to the internal redress. One must bear in mind that such redress differs in all European Member States, ranging from proportional liability to the total exclusion of such claims. As a result, in lieu of one applicable law to the original claim, a coherent redress action between the tortfeasors seems impossible.

The conflict of laws based mosaic assessment cannot fulfil its own dogmatic standard for the assessment of wrongful conduct or damages. Provided the aggrieved party wants to be compensated for the full, internationally-distributed publication, either the judge at the domicile of the media outlet must depart from the dogmatically sound conflict of laws approach by "guessing" an appropriate injury and corresponding damages or the aggrieved party is left to sue in multiple countries or for only partial compensation. Finally, the hope of simple internal redress amongst multiple tortfeasors would in any case be entirely corrupted.

C. Alternative Application of Several Laws

1. By Choice of the Aggrieved Party

In response, some scholars[18] have argued for a general presumption in favour of allowing the aggrieved party a choice on the applicable between the law at the residence of the publisher and the law at one place of dissemination. The connecting factors proposed by the ECJ ought to be retained but the aggrieved party should choose only one of them, so only one law is applied.

To some extent this was recently accepted by the ECJ for online publications. In *eDate*, the court allowed the plaintiff three options for the competent court: (1) to bring an action for all the damage caused before courts of the Member State in which the publisher is established; (2) to bring an action before the courts of each Member State in which the content was physically distributed for the

[17] See Tribunal de grande instance Nanterre 18.09.2012, *Catherine Elizabeth Middleton et a. c/ Sas Mondadori Magazine France et a.*, *Légipresse* Octobre 2012, No. 298.

[18] See G. HOHLOCH, in *Erman, Bürgerliches Gesetzbuch*, vol. II (12th ed.), Köln 2008, Art. 40 EGBGB, para. 53; F. VISCHER in *Zürcher Kommentar*, IPRG (2nd ed.), Zürich 2004, Art. 139 IPRG, para. 12; A.F. SCHNITZER, Gegenentwurf für ein schweizerisches IPR-Gesetz, *Schweizerische Juristen-Zeitung* 1980, p. 314; K. SIEHR, *Das Internationale Privatrecht der Schweiz*, Zürich 2002, p. 378.

damage that occurred in the Member State of this court; and (3) only for online publications, before the courts of the Member State in which the centre of his or her interests is based, that is to say, often his or her habitual residence.[19] Parallel to the ECJ's findings and rendered as a conflict of laws rule, this would read as a choice for the aggrieved party between the mosaic assessment and his or her habitual residence.[20]

Both solutions may be welcomed. This is, partly, because the fragmentation of applicable laws which would result from a mosaic assessment is dismissed (at least in part) and also because only one Member State's law would be applied, which would ease the judge's burden, reflect the uniformity of the non-pecuniary damages correctly and allow for a simple internal redress among multiple tortfeasors.

Nevertheless, the substantive law concept of balancing the conflicting interests of tortfeasor and aggrieved party would be ignored, as both approaches take only the interests of one party into account – here, those of the allegedly aggrieved party. It seems excessive that only one party should have the opportunity to prefer his or her interests alone without any further justification.

2. By Means of Publication Technique

Finally, as the case of the Duchess clearly demonstrates, tying the aggrieved party's choice to a purely technical differentiation between physical publication and publication online, as suggested by the ECJ as a way to identify the competent court, is rather odd in the common scenario of distribution of the same content both in print and online. Pursuant to the *eDate* principle rendered as a conflict of laws rule, English law would be applied in the Duchess' claim to the whole damage sustained due to the online publication, whereas the judgment on the print product would be limited to the damage that occurred in the UK only. If the Duchess sought full compensation, she could file a claim in England for the online content, which is subject to English common law, and simultaneously in France for the print version. In less clear-cut cases, such as those involving the caricatures of the prophet Mohammed, this approach would obviously create the risk of irreconcilable judgments for virtually identical content.

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[19] ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*.

[20] The German *Bundesgerichtshof* referred whether Art 3(1) and (2) of Directive 2000/31/EC ("e-commerce Directive "), *OJ* 2000 L 178, p. 1 had the character of a conflict of laws rule requiring the exclusive application of the law in force in the Member State of origin or whether they operate as a corrective measure to the law declared to be applicable pursuant to the national conflict of laws rules. In a nutshell, the ECJ held that the liability standards applied to an electronic commerce service shall not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State of origin (para 68). In any case this ruling applies only to providers of an electronic commerce service in the sense of Art 3(1) of the Directive and is thus only of limited interest within the ambit of this article.

D. Identifying an Exclusive Connection

As shown above, a distributive or alternative application of a multitude of laws does not provide an adequate mechanism to deal with cross-border infringements of privacy and reputation. Instead, a viable solution to the shortcomings addressed could be the application of a single law identified by using the principle of closest connection and calculated by assessing factors relevant to the individual cases. Such factors include the following:

1. Habitual Residence of the Aggrieved Party

The draft of the European Group for Private International Law (EGPIL)[21], the preliminary draft proposal of the European Commission (2003)[22] and (to a lesser extent) the judgment of the ECJ in *eDate* and the recent Proposal of the European Parliament[23] have argued in general for the application of the law of the state of the habitual residence of the aggrieved party.

The application of that law is convenient at first glance. A general assumption that the result of an invasion of personality rights is generally within the contemplation of the public at the domicile of the aggrieved party is not misplaced. Additionally, four fundamental interests of the aggrieved party will be best encompassed and represented at his or her habitual residence. Firstly, the aggrieved party will be familiar with the legal order and rules (at least in layman's terms). Secondly, the aggrieved party has an interest in maintaining his or her good standing within his or her chosen social environment, which will be respected by applying the law of the habitual residence. The major focus of such actions is to remedy a loss of reputation, so it seems natural to focus on these legal, moral and cultural conceptions crystallised at the domicile of the aggrieved party. Application of the law of an aggrieved party's habitual residence would also be endorsed by the national society, as the nation's citizens would not be judged according to foreign standards. Thirdly, it is reasonable to assess the aggrieved party's non-pecuniary damages according to the standards at his or her habitual residence, because the restitution of harm will be carried out in this country. Hence, market prices there will be decisive in assessing the amount of damages, as alternative comforts and pleasures are likely to be bought at the aggrieved party's domicile. Fourthly and finally, in many cases it is a clear advantage that the law at the domicile of the aggrieved party is a connecting factor to only one law, correctly representing the uniformity of non-pecuniary damages.

There are also arguments against the use of habitual residence. Any application of such local law will not be suitable in cases where the aggrieved party has only a formal domicile in a certain country but is not socially integrated into the

[21] Available at <http://www.gedip-egpil.eu>.

[22] Art 7 COM 2003 427 final, 2003/0168 (COD).

[23] Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) 2009/2170 (INI)), p. 8.

local community. These concerns take on increased strength in the case of a public figure or celebrity, as such persons tend to have multiple domiciles in different States and – unsurprisingly, due to lifestyle or employment – alternate between them. The assumption that the interests of the aggrieved party are inseparably connected to his or her domicile simply does not reflect the itinerant lifestyles of persons of public interest.

Furthermore, the substantive law concept of balancing conflicting interests of both parties militates against a shift to a connecting factor which focuses on the aggrieved party alone. The application of the law at the domicile of the aggrieved party is not inherently more just than applying the law of the habitual residence of the relevant media outlet or, indeed, at other places of distribution. The interests of the media outlet are being considered only after the benefit of knowledge of the applicable law is given to the aggrieved party. The idea that a national society has a strong interest in applying its moral and legal rules to one of its citizens again betrays a single minded focus on the aggrieved party, even though the society in which the media outlet has its residence has the same interests.

These are not mere dogmatic objections. The sole application of the law of the habitual residence of the aggrieved party will lead to unreasonable difficulties for any media company with serious coverage of foreign affairs, because an overwhelming multitude of laws must be adhered to. The media company would consequently be obliged to undertake in-depth investigations into the law of the presumed effective state of habitual residence of each person on whom they wish to report. Besides the tremendous costs of research into foreign laws, such an approach would inevitably lead to situations where critical coverage (*e.g.* caricatures of the Prophet) would be impossible, such as where blasphemy is punished domestically. If such regimentation of the free press existed (effectively, as a tort action for blasphemy, heresy or apostasy) that restrictive law would be applied even where a media company respected all standards of journalism in the law at its domicile. As a result, the application of the law of the habitual residence of the aggrieved party would obviously pose a significant impediment to media freedom.[24]

2. Habitual Residence of the Publisher

The application of the law at the domicile of the media outlet obviously addresses the latter argument with regard to the restriction of media freedom. The law of the statutory seat, central administration or principal place of business of the media outlet will be clear to the company's journalists, photographers, and legal consultants. Thus, this connecting factor encompasses the need that liability – the grounds for the imputation of damage – must be determinable by the journalist and the media outlet before publication. As mentioned, any unforeseeable application of a norm amounts to normative and official arbitrariness, labelled in the area of media

[24] See Th. KADNER GRAZIANO, *Europäisches Internationales Deliktsrecht*, Tübingen 2003, p. 87; J. VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, p. 328 both with extensive further reference.

freedom as a "chilling effect" by the ECtHR. If, as emphasised several times by that court, the potential deterrent effect of an overly strict liability rule risks resulting in the general disappearance of critical journalism, any such norm is incompatible with the ECHR. Any rule whose application is unforeseeable must similarly be incompatible, as the media company could not anticipate its application. The same applies where there is a conflict of laws rule which renders a national rule applicable, but unforeseeably so. Where the unforeseeable rule is of a much more stringent standard than the corresponding rule in the foreseeable countries of distribution, legal certainty is violated.

Nevertheless, applying the law of the habitual residence of the aggrieved party and the law at the statutory seat of the media outlet are two sides of the same coin – the connection takes only the interests of one party into account. Of course, the aggrieved party's legitimate expectations focus on the protection provided by the law of the country where he participates in public discourse and, thereby, exposes his or her rights and interests to potential infringement. Beyond the need for foreseeable imputation of damage, there is no compelling argument for treating the aggrieved party's interests in being compensated, both in the estimation of his or her fellow compatriots and financially, inferior to other interests. It seems odd to subjugate the interests of the victims to those of the tortfeasor to the extent that the latter's standard determines even the entitlement to compensation.

IV. Centre of Gravity

The analysis above demonstrates that seeking to isolate one sole factor to govern the process of identifying the applicable law is a fruitless and ultimately unjust exercise; no single connecting factor can hope to produce justice in all situations. Instead, systems incorporating several connecting factors could be established, which in essence establish a centre of gravity and thereby the closest connection.

A. Methodologies

1. Deductive Reasoning and Subsidiary References

One starting point could be to simply formulate several conditions to be met in order to determine the law with the closest connection. Any rule can be analysed and restated as a compound conditional statement in the form "if X, then Y". The second part ("then Y"), commonly known as *apodosis*, is prescriptive and for our purpose evidently clear. It is the law with the closest connection and, thus, prescribes the one law applicable. The first part, ("if X"), the *protasis*, indicates the scope of the rule by designating the conditions under which the rule applies. A solution could be a *protasis* of several conditions to be met in order to specify one applicable law. Such a *protasis* would, in stages, exclude legal systems with only a minimal connection to the case or none at all.

2. A Flexible System

Concurrently, one may also argue for a more flexible approach. European legal systems rely on a comprehensive balancing of the interests of both parties in determining whether there was even a right to privacy or reputation at all and, if so, whether this right was infringed. Inevitably, such comprehensive balancing can apply to the corresponding conflict of laws rule. In other words, no clear-cut *protasis* would be formulated, but instead only a set of elements that would be taken into account when prescribing the *protasis.*

Such a methodology is not a revolutionary innovation to conflict of laws. In fact, this methodology was already present in the pre-Rome II regimes of a number of systems. For example, the UK position on the applicable law in this area can be found in the Private International Law (Miscellaneous Provisions) Act 1995. Sec. 11 states that: "Where elements of those events [torts] occur in different countries, the applicable law under the general rule is to be taken as being […] the law of the country in which the most significant element or elements of those events occurred."

3. Common Features

The guiding aim of both solutions is to apply the law with the closest connection to the case either by focusing on a set of fixed, clear-cut conditional connecting factors or by avoiding an overly rigid structure. Both systems are apt to better take into account the complementary features of additional connecting factors, thereby balancing the interests of all parties. Both approaches must explicitly identify all the relevant factors within such cases and, in the case of a flexible system, then weigh these elements according to their relevance. Ultimately, the law determined, that is the law with the closest connection, should govern the whole case at hand.

B. Elements

1. Perception of the Public

As demonstrated, the aim of applying only the one law with the closest connection to the whole case does not produce a compelling result when only the law at the domicile of the media outlet or the aggrieved party is automatically applied. However, the tortfeasor and aggrieved party are not the only interested parties. One key paradigm in substantive law provides that the assessment of whether or not the privacy and reputation of a person is harmed depends above all on the way in which the particular national community evaluates the situation. Accordingly, how the defamatory publication is perceived by the general public in the respective publication's state must also play a crucial role for the conflict of laws rule.

Reference to the place where such public considers a publication to have violated an individual's reputation or privacy seems a compelling starting point, as this does not favour the interest of any one party and cannot be easily manipulated by either party.

Nevertheless, the crux of the matter, *i.e.* to apply only one law, remains an issue if a publication was widely distributed. At least in the first world, the sheer number of potentially applicable laws from States where a publication was disseminated is likely to overburden any sizeable news provider. Hence, within either approach a further element must be introduced to isolate a single applicable law.

2. Foreseeability of the Applicable Law

A necessary condition of any conflict of laws rule ought to be that only those legal systems for which the application of their law could be foreseen by the defendant should be open for application. Just as substantive law requires foreseeable criteria to impute an infringement of privacy and reputation to the media outlet, the conflict of laws solution should require the additional element of foreseeability to justify the application of a distinct law providing for the latters' responsibility.

Two points may be raised against such foreseeability of the applicable law. Firstly, Member State's substantive privacy and defamation laws generally impose liability only for intended or foreseeable publication. As a result, it is arguable that foreseeability is not needed in conflict of laws. The fact that European legal systems provide for either an objective or subjective assessment of such foreseeability militates against such "subsequent" application. The tortfeasor's conduct will be assessed with reference to the objective ordinary person, which in this case is the typical occupational skills of journalists. The subjective standard is whether different conduct was to be expected from this given journalist in this given situation. Depending on the relevant standard in the State of publication, results regarding the imputation of liability may differ, thus interfering with the conflict of laws paradigm of reaching a harmony of outcomes in similar cases. Moreover, such an approach is impractical. It would involve initially applying a Member State's law only to subsequently discover that under said law the imputation of liability was ultimately unforeseeable. Unnecessary and at times tremendous costs could be saved and possible deficiencies of research into foreign laws could also be avoided.

Secondly, in the *eDate* judgment the ECJ rejected such an approach with regard to online publications. The court held that "content may be consulted […] irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control."[25] Respectfully, the court has digital feet of clay, as this statement ignores the technical reality of today's online media. Most networks, including all computers on the Internet, use the TCP/IP protocol as the standard for communicating on a network. In the TCP/IP protocol, the unique identifier for any computer is called its Internet Protocol address (IP address). Computers use this unique identifier to send data to other specific computers on a network. Just as any website has a unique IP address,[26] the user himself or herself provides his or her

[25] ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, para 45.

[26] For example, the ISP of the Swiss Institute for Comparative law (<www.isdc.ch>) has the IP address 80.83.47.148, and its server is hosted (with 13 others) at Travers, Switzerland.

own IP address when requesting the website's content. Of course, media outlets utilize the user's data. For instance, when visiting some websites most users will have noticed an advertisement on that page directly markets them or that a specific page or information therein is blocked. Such advertising or blocking is commonly known as geo-targeting and is done by analysing the location of the user's IP address or analysing the hops in a trace route of the user's IP address.[27] Of course, the information gathered will mostly point to the geographical location of the user's Internet Service Provider (ISP) only.[28] Nevertheless, as these providers typically exist on a national level, even the most rudimentary form of geo-targeting will be able to identify the user's country and could thereby allow or deny access accordingly.[29] Thus, it is possible to identify a specific address or exclude a specific national public to make the application of a Member State's law foreseeable.[30]

Of course, the term "foreseeable" then needs to be characterised within conflict of laws, an issue which cannot be addressed in detail here. Nevertheless, comparative studies reveal that both a majority of European legal systems and secondary EU law favour an objective approach together with an abstract assessment of behaviour.[31] Thus, the concept of autonomous characterisation employed by the ECJ, which provides that concepts in conflict of laws "must be given an autonomous meaning, derived from […] the general principles underlying the national systems as a whole,"[32] will in all likelihood result in the application of

[27] Plenty of more sophisticated tools are available, *e.g.* Google Analytics.

[28] The Internet Assigned Numbers Authority (IANA, see <http://www.iana.org/>) delegates allocations of IP address blocks to Regional Internet Registries (RIRs), for Europe to the Réseaux IP Européens Network Coordination Centre (RIPE NCC) (see <http://www.ripe.net/>), which subsequently distributes IP address blocks to Local Internet Registries (LIR). LIRs (*i.e.* Internet Service Providers, enterprises, or academic institutions) assign most parts of this block to its own customers.

RIPE provides a public database containing registration details of the IP addresses originally allocated to members by the RIPE NCC. The database provides information which organisations or individuals currently hold which Internet number resources, when the allocations were made and contact details, see <http://www.ripe.net/data-tools/db>.

[29] For all Internet Websites running on Apache HTTP Server (currently more than 50% of all Webservers worldwide, see <http://news.netcraft.com/archives/2013/06/06/june-2013-web-server-survey-3.html>) it is extremely easy to deny visitors from select countries to access a website with two easy commands ("deny, allow access") in the .htaccess-file. For instance, to block all traffic from Switzerland some 50 IP-ranges will be blocked, all easily to manage, see *e.g.* <http://www.ip2location.com/free/visitor-blocker>, <https://www.countryipblocks.net/country_selection.php>.

[30] It is submitted here that the bypassing of blocked content on a website with the help of proxy-servers or IP-spoofing would amount to *fraus legis* and should, thus, be unforeseeable.

[31] See P. WIDMER, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation, in P. WIDMER (ed.), *Unification of Tort Law: Fault*, Wien/ New York 2005, p. 347 *et seq.*, paras 39 *et seq.*; M. KELLNER, Comparative Report, in H. KOZIOL/ R. SCHULZE (eds), *Tort Law of the European Community*, Wien/ New York 2008, p. 564, No. 22/19.

[32] ECJ, case 29/76, *LTU Lufttransportunternehmen v. Eurocontrol* [1976] *ECR* 1541.

an objective standard. Thus, the question of whether the journalist was able to foresee the imputation of liability abroad will most certainly be assessed objectively, that is with regard to the typical occupational skills of the group of journalists.

Still, in the world of modern media it is clear that any test based on the foreseeable perception of the public will continue to result in multiple applicable laws, such as is the case for online publications. Finding only one applicable law must then involve assessing an additional suitable connecting factor to one of these systems.

3. Social Connections of the Aggrieved Party

Where the system in which the aggrieved party habitually resides is among the systems where the public foreseeably conceived the publication, it stands out as a suitable narrowing factor.

Firstly, a significant part of the aftermath of an infringement of privacy or reputation will occur within the social environment of the aggrieved party, wherever that may be. Because the major focus of the relevant action is to remedy the harm caused to the aggrieved party's reputation in the eyes of that person's contemporaries, it seems correct to focus on the place of domicile. Besides, this connecting factor serves as a simple proxy for the place where the party maintains his or her significant social connection. Such connection may also include the country in which the family of the aggrieved party lives or where the predominant numbers of business contacts exist.[33]

Secondly, so as to adequately respect the interests of the media outlet, attention must then be given to the aggrieved party's compensation. It seems right to assess the aggrieved party's non-pecuniary damages according to the standards at his or her habitual residence, because the restitution of harm will arguably be performed in this country. Hence, the market prices there will be decisive for the assessment of damages as alternative comforts and pleasures are likely to be bought at the aggrieved party's domicile.

Nevertheless, where changes of domicile are frequent or a person enjoys an international reputation, the assumption of a connection between the aggrieved party and a particular identifiable social environment either does not exist may be difficult to determine, or may be entirely arbitrary.

Moreover, any approach based on deductive reasoning, *i.e.* the staggered exclusion of legal systems is limited in cases where the all-important public was addressed by a defamatory statement in countries other than the country of the domicile of the aggrieved party.[34] Here, the domicile of the aggrieved party cannot

[33] For this approach see *e.g.* OGH (Austrian Supreme Court) 8 Ob 235/74, *Juristische Blätter* 1976, p. 103.

[34] See *e.g.* the case of Kurt Waldheim, United Nations Secretary-General (1972-1981) and President of Austria (1986-1992), who faced accusations in US-Media for his service as an intelligence officer in the Wehrmacht during World War II and was nevertheless elected to power at home. Throughout his term as Austrian president, Waldheim and his wife Elisabeth were officially deemed *personae non gratae* by the United

be applied as subsidiary connecting factor to single out one applicable law from the states of publication. Thus, it is not possible to formulate a *protasis* incorporating both conditions.

4. Extent of Publication

A suitable alternative approach would be to focus on the extent of distribution within the various systems.[35] The law of the system in which the most extensive distribution has taken place may be the most appropriate, as the aggrieved party will be able to serve both his or her own interests and also to satisfy a wider societal function. As mentioned at the outset, to avoid the persistence of a false picture of the aggrieved party due to repetition which would be the result of extensive circulation balanced media coverage can only be secured when the aggrieved party can generate a counterweight to such repetition. By pursuing his or her own interests in the State with the greatest distribution, this spiral of silence may be best avoided and the overall, international momentum of distribution reversed.

Again, in the *eDate* judgment the ECJ revealed a lacuna of judicial knowledge with regard to information technology when it indicated that the extent of distribution is technically impossible to quantify with regard to online content.[36] On the contrary, the geo-tagging tools described above show that there is sufficient information in the website server's access log to determine the locations with the greatest numbers of accessing users, as such data is essential to online marketing.

However, there are limits to this approach. If only a small number of defamatory publications reach a system where the aggrieved party had extremely significant social connections, the latter – arguably appropriate law – would not be applied. For instance, if the aggrieved party maintains significant business contacts in a certain system and only a very limited amount of coverage concerning the aggrieved party was distributed there, yet the parties significant business contacts received them, the non-application of this law could result in an inappropriate restriction in favour of the defendant.[37] Again, a *protasis* enclosing all conditions will fail.

C. Conclusion

Any clear-cut, conditional rule comes with such rigidity that it may do serious injustice in many particular cases. As a result, having identified the failings of

States. See J. VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, p. 335.

[35] See P. LAGARDE, (note 6), at 501.

[36] ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, para. 45.

[37] See OGH (Austrian Supreme Court) 8 Ob 235/74, *Juristische Blätter* 1976, p. 103; G. WAGNER, Ehrenschutz und Pressefreiheit im europäischen Zivilverfahrens- und Internationalen Privatrecht, *RabelsZ* 1998, p. 276.

overly rigid rule, a more adaptable solution for cross-border infringements to reputation and privacy is advocated. What follows is one suggestion for how such a flexible system based on the above analysis of all relevant elements might be arranged:

If the publication was viewed in multiple countries, the law of the country to which the publication has the closest connection shall be applied. In determining this closest connection, the utmost weight is given to a balanced and predictable solution because fairness and predictability are the fundamental principles of any legal system and essential for the legitimacy of the law.

Firstly, fairness normally results when applying the law of the country where the public perceived the publication, as this does not favour the interests of any one party and cannot be easily manipulated by either party. A flexible rule would thus read as follows.

> The more one of the states represents the public perceiving the publication or broadcast, the more this state's law should be applied.

Secondly, predictability of the application of these laws must be based on the test of whether an ordinary defendant media outlet could objectively foresee that the public in another state would perceive the publication. A second flexible rule would thus read as follows.

> The more the perception of a state's public was objectively foreseeable to the defendant media outlet, the more this state's law should be applied.

Thirdly, the aggrieved party's social connection would then be assessed, establishing the extent and type of harm suffered. This results in a third, consecutive yet flexible rule.

> The more one of the states where the public perceives the publication or broadcast foreseeably represents the social connections, especially the habitual residence of the aggrieved party, the more this state's law should be applied.

Finally, the nature and the quantity of the distribution of the publication within each legal system must be assessed. A final flexible rule could thus read as follows.

> The higher the extent of distribution of the publication was between of states where the public foreseeably perceived the publication, the more the more this state's law should be applied.

Of course such a rule could be rendered in the negative.

> The application of a national law has to be the more dismissed, the less this legal system represents the perception by the public of an infringing publication or broadcast, the less the application of this law was objectively foreseeable for the defendant media outlet, the less this system represents the social connection of aggrieved party and the less this publication or broadcast was distributed in this legal system.

Finally, with a view to the Rome II Regulation and with more weight on the perception of the public and the foreseeability for the defendant media outlet, another suitable phrasing could be the following.

> In the case of a non-contractual obligation arising out of violations of privacy or rights relating to personality, including defamation, the law of the state where the perception of the public of the infringing publication or broadcast was objectively foreseeable for the defendant shall be applied.
>
> If the publication or broadcast was perceived within multiple countries, the law of the country to which the publication or broadcast has the closest connection shall be applied. This closest connection is determined by weighing each of the following factors: the social connection of the aggrieved party to each country, especially the common habitual residence of the aggrieved party; and the nature and extent of distribution within each country.

V. Concluding Remarks

This analysis of cross-border invasions to privacy and honour discloses a pressing need for reform. The status quo is antiquated and the European legislator is called for reform. Pan-European media markets – even in the absence of the Internet – are an increasing feature of modern life. The easy availability of media on- and offline, distributed far beyond the national borders of a media outlet's home state, and an information-hungry public are apt to produce even more complicated cross-border infractions in the coming years.

In lieu of a European consensus on the legal protection accorded to reputation and privacy, these problems are best tackled by an explicitly flexible conflict of laws rule like the one suggested here. Only such a rule is adequately respectful of the importance of balancing journalism against privacy and reputation as well as the interests of both media outlets and the subjects of injurious media coverage.

Nonetheless, proponents of such flexible rules are at times confronted by a standard counter-argument of endangering legal certainty. Rather, quite the opposite seems to be correct. Predictability of the outcome of any rule can only be achieved when courts clearly consider and state the relevant factors and their weight in respective judgments. Only addressing and weighing the relevant elements – rather than manipulating law and facts to avoid inequitable results – renders decisions predictable.

In particular, from the perspective of conflict of laws these counter-arguments may also be ignored. A flexible system is especially appropriate for an area of law which was essentially always a flexible system. Conflict of laws never was and still is not governed by rigid rules, but instead strives for a flexible approach using the standard of the closest connection.

THE CHINESE PRIVATE INTERNATIONAL LAW ACTS: SOME SELECTED ISSUES

CREATION AND PERFECTION OF CHINA'S LAW APPLICABLE TO FOREIGN-RELATED CIVIL RELATIONS*

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I. Definition and Boundaries

The law applicable to foreign-related civil relations is a basic law that regulates foreign-related property relations and personal relations. It governs various foreign-related civil relations that arise from international civil interactions, including property, intellectual property, contracts, torts, marital and family matters, successions, *etc*., and mainly resolves issues of applicable law in the above-mentioned foreign-related civil relations.

The issue of applicable law in foreign-related civil relations requires the use of law application rules (also referred to as conflict of law rules, choice of law rules, conflicts rules or private international law rules) as provided in the Law Applicable to Foreign-Related Civil Relations in order to refer to and determine the substantive law of a particular country or region or the unified substantive law that should be applied, and in order to apply the appropriate determined law in the actual case, thus regulating the rights and obligations of the parties in foreign-related civil relations and resolving their disputes.

The rules on applicable law are an important component of a country's private international law and a most critical and central part of private international law. Of course, there are also a few jurisdictions and scholars who hold the view that the law applicable to foreign-related civil relations equals private international law. From an examination of the private international law rules of various countries, it is clear that private international law mainly regulates the civil legal status of foreigners, the law applicable to foreign-related civil relations and the resolution of international civil disputes. There are three main legislative models: the first prescribes rules specifically on the law applicable to foreign-related civil relations: see, for example, the 1978 *Federal Act on Private International Law* of Austria and the 2006 Act on the *General Rules of Application of Laws* of Japan. The second regulates the law applicable to foreign-related civil relations together with procedural issues in international civil litigation: see, for example, the *2007 Turkish Code on Private International Law and International Procedural Law*. The third regulates the law applicable to foreign-related civil relations, international civil litigation and international commercial arbitration issues all in one law: see, for example, the 1987 *Federal Act on Private International Law* of Switzerland.

II. Function and Significance

The rules on the law applicable to foreign-related civil relations are indispensable in a country's legal system, which has essential functions and significance for regulating foreign-related civil relations, protecting the parties' legal rights, resolving foreign-related civil disputes and building a functioning foreign-related civil legal order. China is constructing a China-featured socialist legal system. The rules on the law applicable to foreign-related civil relations are likewise an indispensable part of such a legal system.

First, the rules on the law applicable to foreign-related civil relations are needed to protect the legal rights of parties in foreign-related civil relations. The previous legal rules regarding the law applicable to foreign-related civil relations contained many defects and failed to comprehensively protect the legal rights of parties in foreign-related civil relations. For example, under the previous legal rules, there were provisions on the law applicable to immovable property, but no provision on the law applicable to movable property. There were provisions on the law applicable to marriages between Chinese nationals and foreigners, but no provision on the law applicable to marriages between two Chinese nationals in a foreign country or marriages between two foreigners in China. There were provisions on the law applicable to intestate successions, but no provision on the law applicable to testate successions. In some areas of civil law, although there is specialised legislation on property and tort law, it does not contain provisions on the law applicable to relevant foreign-related civil relations.

Second, the rules on the law applicable to foreign-related civil relations is needed for the timely and proper resolution of foreign-related civil disputes that are getting increasingly complex. In the recent decade, the amount of foreign-related civil disputes in China has soared. According to statistics, between 1979 and 2001, the number of foreign-related and Hong Kong/Macau/Taiwan-related civil and commercial cases that Chinese courts on all levels accepted was 23,340 in total. Between 2001 and 2005, the number of only foreign-related commercial and maritime cases accepted by Chinese courts on all levels was 63,765 in total. In 2009 alone, Chinese courts adjudicated, at the first instance level, 11,470 foreign-related civil cases; 6,631 Hong Kong-related cases; 3,953 Taiwan-related cases and 329 Macau-related cases.[1]An important step in resolving foreign-related civil disputes is the determination of applicable substantive law, which requires sophisticated and systematic rules on the law applicable to foreign-related civil relations.

Third, the rules on the law applicable to foreign-related civil relations are needed to promote the smooth development of foreign-related civil relations. As China opens up to the world, foreign-related civil relations arising from foreign-related interactions develop rapidly, and there is an urgent need to match this with foreign-related civil legal protection. Since China's previous legal rules regarding the law applicable to foreign-related civil relations were scattered in different civil laws and regulations, they could not address the applicable law issues in foreign-related civil relations outside the scope of those laws and regulations. At the same time, scattered legislation inevitably fails to generally and comprehensively regulate certain common issues of applicable law for foreign-related civil relations. Therefore, creating new rules on the law applicable to foreign-related civil relations is beneficial to promoting the smooth development of foreign-related civil relations.

Finally, creating new rules on the law applicable to foreign-related civil relations is necessary to achieve the goal of establishing the China-featured socialist legal system. The Report of the Seventeenth National Congress of the Communist Party of China, in its conclusions on China's progresses in

[1] See People's Courts' Annual Work Report (2009), *People's Courts Publisher* (2010), at 18-19.

constructing a democracy and a legal system in the past five years, specifically pointed out that the "China-featured socialist legal system has been basically established and the fundamental policy of rule of law has been implemented in practice." On the one hand, this conclusion confirmed China's great achievements in establishing its legal system; on the other hand, it points to the task of further strengthening and perfecting the China-featured socialist legal system. At the very beginning of the Eleventh National People's Congress (hereinafter "NPC"), Chairman WU BANGGUO clearly remarked that the establishment of the China-featured socialist legal system by 2010 and its continuous improvement should be ensured.[2] Creating China's *Law Applicable to Foreign-Related Civil Relations* is part of this task. This is an important component of China's private international law and an indispensable cornerstone of the China-featured socialist legal system. It is also an important step toward the establishment of the China-featured socialist legal system during the tenure of the Eleventh NPC.

III. A Brief Introduction to the Relevant Legislation of Foreign Countries

In the 20th century, rules on applicable law for foreign-related civil relations in foreign countries experienced rapid development, with a clear trend of codification. According to statistics, more than 40 countries or regions in the world promulgated codes of private international law or specialized statutes on applicable law for foreign-related civil relations. At the same time, the unification movement on applicable law for foreign-related civil relations blossomed.

A. Domestic Legislation of Various Countries

In Europe, Austria's *Federal Act on Private International Law*, promulgated in 1978, was one of the first post-war enactments in the area of private international law. Turkey promulgated the *International Private and Procedural Law* in 1982 and 2007. The *Federal Act on Private International Law* promulgated by Switzerland in 1987 has 200 provisions and is the domestic private international law code that has the most provisions in the world. Germany made substantial amendments to its private international law provisions in the 1896 *German Civil Code* in 1986 and 1993 respectively. Italy promulgated the *Italian Statute on Private International Law* in 1995. The *Civil Code of the Russian Federation* effective as of 2002 has a fourth chapter that specifically addresses private international law. Romania, Belarus and Belgium, *etc*., also promulgated their own private international laws.

In Asia, a relatively early code of private international law was the 1898 *Act on Application of Laws* of Japan; starting in the 1940s, Japan amended it seven

[2] See, the Speech of Mr LI JIANGUO on the forum on the China-featured socialist legal system, *Legal Daily*, 30 August 2010.

times and named it *General Rules of Application of Laws* during the most recent amendment in 2006. Thailand promulgated the *Conflict of Laws Act* in 1938. South Korea promulgated the *Regulation on Foreign Private Law* in 1962 and the *2011 Amended Private International Law* in 2001. North Korea promulgated the *Act on Foreign-related Civil Relations* in 1995. Kuwait promulgated the Regulation on Foreign Relations in 1961 with an amendment in 1980. Arab countries such as North Yemen and South Yemen also provided for private international law rules in their respective civil codes.

In the Americas, the United States' two Restatements of Conflict of Laws in 1934 and 1971 can be regarded as a summary of private international law rules in its common law, while the State of Louisiana promulgated its *Conflicts Codification* in 1991. The province of Quebec in Canada promulgated a new civil code in 1991 with a tenth chapter on private international law. Venezuela had a draft private international law in 1912 and finally promulgated the *Venezuela Private International Law* in 1998. Argentina had a draft private international law in 1974. In 1984, Peru promulgated its new civil code, whose tenth chapter deals with private international law.

B. International Unified Legislation

The Hague Conference on Private International Law is an inter-governmental organisation that specialises in the work of gradually unifying various countries' private international laws. It currently has 72 members (71Member States and 1 Regional Economic Integration Organisation). From the first conference in 1893 to the seventh conference in 1951, seven private international law conventions had been elaborated on marriage, divorce, custody, *etc*. Since 1951, the Hague Conference has held 14 conferences and has adopted 38 private international law conventions that deal with the sale of goods, agency, trust, traffic accidents, product liability, marital assets, adoption, maintenance, successions, negotiable instruments, *etc*. Since officially becoming a Member State of the organisation, China has become a party to three Hague Conventions, namely the 1965 *Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "1965 Service Convention")[3], the 1970 *Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters* (the "1970 Evidence Convention")[4] and the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the "1993 Intercountry Adoption Convention")[5].

The European Union is very active in promoting the harmonization and unification of the private international law of its 27 Member States. Its predecessor, the European Communities, mainly engaged in unification activities by making treaties, promulgating orders and making rules, with the 1968 *Convention on Mutual Recognition of Companies and Corporate Bodies* and 1980 *Convention on*

[3] On 2 March 1990.

[4] On 7 March 1997.

[5] On 27 April 2005.

Law Applicable to Contractual Obligations as relatively notable examples. Currently, the European Union also adopts regulations to unify the private international law of its Member States, with the 2005 *Regulation on the Law Applicable to Contractual Obligations (Rome I)* and the 2007 *Regulation on the Law Applicable to Non-Contractual Obligations (Rome II)* as relatively notable examples.

The Organisation of American States has made persistent and effective efforts to unify the private international law of its 35 Member States. Since holding the first private international law conference in Panama in 1975 and reaching six private international law treaties on agency, negotiable instruments, *etc*., it has held seven conferences and made more than 20 private international law treaties concerning general rules of private international law, residence of natural persons, trading companies, discovery of foreign law, adoption of minors, international contracts, child trafficking, negotiable instruments, *etc*., providing a series of rules for the unification of private international law in the Americas and marking a unique uniform private international law of the Organisation of American States.

IV. Evolution of China's Private International Law

A. Multiple Stages

The history of China's private international law can roughly be divided into two stages. The establishment of the People's Republic of China (hereinafter "PRC") can serve as the first benchmark and divides the history into the pre-1949 stage and the post-1949 stage. The post-1949 period can be further divided into two stages, namely the pre-"Reforming and Opening" stage and the post "Reforming and Opening" stage.

China is one of the countries that first promulgated a specific statute on the law applicable to foreign-related civil relations. As early as in 1918, the Beiyang Government promulgated the Regulation on Law Application[6]. In 1927, the Nanjing Kuomintang Government temporarily allowed the use of that Regulation, which was one of the world's earliest specific regulations on private international law.

In the first three decades after the new PRC's establishment in 1949, China's foreign-related civil interactions were basically suspended for well-known reasons. Coupled with the legal nihilism, there was no place in China's then-legal system for rules on the law applicable to foreign-related civil relations, which was thus almost non-existent.

Since the Reforming and Opening-up of China, coupled with the progress and development of China's construction of the socialist legal system overall, the rules on the law applicable to foreign-related civil relations gradually drew people's attention. Many laws and regulations then-promulgated governed issues of applicable law in the relevant foreign-related civil relations: for example, the *Foreign-related Economic Contract Law*, the *Succession Law*, the *General*

[6] This regulation includes 7 chapters and 27 articles.

Principles of Civil Law, the *Adoption Law*, the *Maritime Law*, the *Negotiable Instruments Law*, the *Civil Aviation Law*, the *Contract Law*, *etc*. In particular, the *General Principles of Civil Law* devoted a specific chapter (Chapter Eight) to regulating the issue of law applicable to foreign-related civil relations with nine articles. In addition, many judicial interpretations of the Supreme People's Court on specific applicable law issues in adjudicating foreign-related civil cases contained relevant provisions.

Objectively speaking, before the promulgation of the *Law Applicable to Foreign-Related Civil Relations* of the PRC, China's pertinent legislation was based on practical needs and basic national realities and incorporated some of the most recent practical experiences in global private international law, as well as some legislative innovations. In terms of the legislative model, China adopted specific chapters with relevant provisions on the law applicable to foreign-related civil relations. In addition, the rules on the law applicable to foreign-related civil relations had both general and specific provisions. The specific provisions covered a wide range of issues, including those relating to nationality and residence, capacity and civil conduct, statutory limitations, property rights, contract, tort, negotiable instruments, maritime matters, marriage, adoption, custody, maintenance, successions, *etc*. Although those specific provisions are scattered in many laws, regulations and judicial interpretations, generally speaking they performed unique functions in their respective areas and provided important assistance in regulating international civil legal relations, resolving international civil disputes, constructing a functioning international civil legal order, and promoting China's Reforming and Opening-up.

B. Major Features and Experiences

1. Hand-in-Hand with Reforming and Opening-Up

China's rules on the law applicable to foreign-related civil relations emerged and rapidly developed after China adopted the policy of Reforming and Opening-up. It was born with the Reforming and Opening-up of China, and grew thereafter. Now when we look back, China's Reforming and Opening-up, with its difficulties and set-backs, has always progressed steadily and made great achievements. Every progression in the construction of China's legal system benefited from the increased Reforms and Opening-up. Coupled with the progress and development of Reforming and Opening-up and the construction of its legal system, China's foreign-related civil legal system has also advanced and progressed with the times. During the more than thirty years, China has promulgated many laws and regulations with private international law provisions. They were based on China's achievements and practice and on learning from China's own experiences. They paid attention to incorporating successful experiences of other countries' private international law legislations and international legislations. They did not inflexibly transplant experiences of foreign or international legislations, and they boldly explored and innovated while maintaining clear Chinese features.

2. *"Wading Across the River by Feeling the Stones beneath"*

"Wading across the river by feeling the stones beneath" is a vivid description of learning from experiences and exploring boldly in practice, and is one of the three experiences in China's Reforming and Opening-up, namely the "Cat Theory" (a cat, no matter black or white, is a good cat as long as it catches mice), the Feeling the Stones Theory and the No-Arguing Theory (do not waste time in arguing whether something belongs to socialism or capitalism). In the central working conference in December 1980, CHEN YUN stated, "We have to reform, but our steps must be steady. We must learn from the experiences timely, that is to say, «cross the river as we feel the stones beneath».".[7] DENG XIAOPING fully agreed with the theory of "crossing the river by feeling the stones beneath" proposed by CHEN YUN. DENG XIAOPING later proposed "to try determinedly and explore boldly" and "boldly fight for a new path", both of which reflected such thinking. "Crossing the river by feeling the stones beneath" played an important role in guiding the bold liberation of thoughts and actively and firmly promoting the Reforming and Opening-up.

China's rules on the law applicable to foreign-related civil relations also followed the route of "crossing the river by feeling the stones beneath" and reflect practical and pragmatic features. For example, the ideal model for China's legislation on private international law is to promulgate a code, but it is not the case in reality. China's private international law legislation did not emerge as a code but was scattered in various laws. Structurally speaking, China's private international law has multiple levels. It is based on relevant provisions in the Constitution of the PRC, structured along the lines of the NPC and its Standing Committee's legislation, supported by legislation of the State Council and its ministries and committees and domestic legislation by the authorised provinces, cities and autonomous regions. Such a multi-layered legislative structure is a reflection of the incremental development of China's Reform and Opening-up. On the one hand, China did not have sufficient experience in legislating on private international law and could not promulgate a comprehensive code of private international law from the beginning; on the other hand, drafting a code of private international law is time-consuming while the Reform and Opening-up required an accelerated progress of legislation. In such a situation, it was only feasible to start from practice and "cross the river by feeling the stones", accumulating experience during practice and regulating relevant private international law issues in various relevant laws. Such a route for legislation determined the scattered feature of China's private international law.

3. *Incorporating Advanced Experience of Foreign Countries*

In the western world, private international law has been developing as a school of thought for more than 600 years and the history of adopting legislation in this area goes back more than 200 years. But China's legislation of private international law, launched after the Reforming and Opening-up, was painting on a blank sheet, thus

[7] *Works of Chen Yun*, vol. 3, at 279.

from the start, it paid much attention to research on comparative private international law, focused on learning advanced experiences of other countries and adopted bold transplantation. On the one hand, China's private international law scholars translated all foreign private international law codes that were available and relevant international conventions, particularly providing timely and accurate reports on representative legislation from foreign countries and relevant international conventions and thoroughly researching new developments and new trends, which provided abundant reference materials for the legislative authority. On the other hand, the legislative authority also paid attention to research abroad, consciously learned from the advanced experience in private international law of foreign countries and international organisations and adopted certain wide-spread principles and rules that also suited China, including, for example, party autonomy and the most significant relationship principles in the area of contract. Of course, the modernisation of China's private international law was also enhanced by China actively joining international organisations that engage in unified legislation of private international law, participating in their work of unifying private international law and joining or reaching a series of private international law conventions.

4. Practice Goes First, Legislation Follows

Since China's Law Applicable to Foreign-Related Civil Relations is based on the practice of China's Reform and Opening-up, what we saw was often practice first, particularly judicial practice, then conclusions and lessons from practical experiences, followed by legislation confirming the rules. From the perspective of legal sources, China's rules on the law applicable to foreign-related civil relations can be divided into two categories, namely legal rules and judicial interpretation. Legal rules mainly include relevant rules in the legislation of the NPC and its Standing Committee. At the same time, many relevant rules exist in judicial interpretation, which are summaries of judicial practice and also serve as the basis for legislation. They are based on legislation but go beyond legislation, providing specification and supplements to defects.

Specifically, the various judicial interpretations on specific legal issues that the Supreme People's Court adopted in judicial practice had a number of rules regarding the law applicable to foreign-related civil relations. Among the relatively important ones are the *1985 Opinion on Several Issues in Implementing the Succession Law of PRC*, the *1987 Answers to Several Questions in Applying the Foreign-related Economic Contract Law*, the *1988 Temporary Opinion on Several Issues in Implementing the General Principles of Civil Law of PRC*, the *1992 Opinion on Applying Civil Procedure Law of PRC*, the *2007 Rules on Several Issues concerning Law Application in Judging Foreign-related Civil and Commercial Contract Dispute Cases*, the 2012 Opinions on Several Matters relating to the Implementation of the *Law Applicable to Foreign-related Civil Relations* of the PRC (part one)[8] *etc*. The Supreme People's Court's various judicial

[8] It was adopted by the SPC on 10 December 2012 and came into effect on 7 January 2013, including 21 Articles.

interpretations are not only adopted to address the new situations and new issues in judicial practice, but also are mostly summaries of judicial practice, which are very practical, targeted and operable. In the situation where China's legislation was not sophisticated, those judicial interpretations not only provided guidance for the courts in handling foreign-related civil and commercial cases, but also provided experience for the development and perfection of China's rules on the law applicable to foreign-related civil relations, and thus can be regarded as creatively supplementing and perfecting China's system on law application for foreign-related civil relations from the judicial interpretation perspective.

5. Model Legislation Promotes Official Legislation

The support from unofficial legislative efforts during the evolution of China's private international law must be credited. The prominent example is the China Private International Law Society's (the "Society") Model Law for Private International Law of the PRC (hereinafter the "Model Law").[9]

Since World War II, there has been significant development in the area of private international law, as various countries adopted their private international law codes and codification in this area developed rapidly. Comparatively, China's private international law has always been unsophisticated and imperfect, far behind the needs of the Reforming and Opening-up and future development. In order to promote codification of China's private international law, the Society decided at its annual conference in 1993 to draft the *Model Law* and establish the drafting group with Professor HAN DEPEI as its promoter. After 7 years of persistent research and revision, as well as several amendments, the sixth draft was finalised and published as the *2000 Model Law* by the Law Publisher.

The *Model Law* is China's first model law drafted by an academic organisation and was the product of the Society's collective wisdom. The *Model Law* has five chapters: General Rules, Jurisdiction, Law Application, Judicial Assistance, and Miscellaneous. There are 166 articles in total, each with proper explanatory notes. The important features of the *Model Law* include: first, its code format, which is line with global trends in private international law; second, its relatively comprehensive coverage with rules that are relatively proper and reasonable; and, third, its forward-looking vision in its guiding thoughts of legislation.

After the *Model Law* was published, it received attention from the international society, and was translated into English, Japanese, *etc.* and published in the Yearbook of Private International Law with positive responses. More importantly, using the form of unofficial legislation, the *Model Law* effectively promoted the progress of official legislation. For example, the *Civil Law of PRC* (draft) that was submitted to the NPC Standing Committee on December 23, 2002 based its Chapter Nine, "Law application for foreign-related civil relations", on the *Model Law* with various articles copying the *Model Law*'s articles. Therefore, we can say

[9] For Chinese and English texts and notes of the Model Law, please see CHINA PRIVATE INTERNATIONAL LAW SOCIETY, *PRC's Private International Law Model Law*, Law Publisher (2000).

without exaggeration that the *Model Law* was a milestone in the history of China's private international law.

C. Major Shortcomings and Defects

Although China's rules on the law applicable to foreign-related civil relations has had significant achievements after the Reforming and Opening-up, we should also recognise that for a long period of time before the promulgation of the *Law Applicable to Foreign-Related Civil Relations*, China's legal rules in this area had the following shortcomings and defects.

First, the legal rules were not systematic and scattered in different civil laws and regulations. They were not only spread out and hard to integrate, but also inconvenient to consolidate and difficult to unify in terms of certain common issues, such as qualification (or classification) and ascertainment of foreign law. Sometimes even though there were such rules, they were unnecessarily repeated. For example, Article 142 of the *General Principles of Civil Law*, Article 95 of the *Negotiable Instruments Law*, and Article 268 of the *Maritime Law* all provided that if an international convention that China has concluded or acceded to provides differently from Chinese law, the international convention shall prevail, and if neither Chinese law nor an international convention that China has concluded or acceded to addresses an issue, international custom may be applied.

Second, the legal rules in this area were not comprehensive. Since the legal rules were scattered in different civil laws and regulations, they were only targeting the law applicable to specific civil relations governed by relevant laws and regulations. Thus, they could not go beyond the scope of application of those laws and regulations to address the law applicable to issues in other foreign-related civil relations. Rather, they could only govern within the scope of application of those laws and regulations. At the same time, in some civil areas, such as the area of non-contractual obligations, China did not have systematic specific legislation; therefore, in those areas there could not be comprehensive rules on the law applicable to foreign-related civil relations. Or, in some areas, although there was specific legislation, such as in the Property Law, there were no provisions on the law applicable to relevant foreign-related civil relations. In addition, scattered legislation inevitably made it impossible to provide comprehensive rules on certain common issues in this area.

Third, the legal rules were not specific. Even though some rules on the law applicable to foreign-related civil relations addressed civil relations on general levels, they did not provide for many specific issues. For example, there were provisions on the law applicable to capacity for civil conduct, but no provision on the law applicable to capacity for civil rights. There were provisions on the law applicable to immovable property, but no provisions on the law applicable to movable property. There were provisions on the law applicable to marriages between a Chinese and foreigner, but no provisions on the law applicable to marriages between two Chinese in a foreign country or marriages between two foreigners in China; there were provisions on the law applicable to successions by law, but no provisions on the law applicable to successions under will.

Fourth, the rules on the law applicable to foreign-related civil relations were not clear. Some of the rules were neither precise, nor thorough or rigorous; they easily caused confusion and misunderstandings. The rule on the law applicable to contracts is a typical example. As early as 1985, China's *Foreign-related Economic Contract Law* Article 5(1) provided, "[p]arties to contracts can choose the law that applies to the resolution of contractual disputes." This provision apparently adopted the wide-spread principle of party autonomy. According to this principle, contractual parties can choose the law that applies to the contract or, in other words, the contract's governing law. But according to universal understanding, the contract's governing law chosen by the contractual parties not only serves as the basis for resolving contractual disputes, but also as the basis for contract formation, interpretation, performance, termination, as well as determining the contract's effectiveness. Apparently, the expression, "the law that applies to the resolution of contractual disputes," was not thorough enough. Many scholars pointed this out shortly after the promulgation of the *Foreign-related Economic Contract Law*.[10] Regrettably, by then, China's legislation authority did not recognise the problem. Later, in the *General Principles of Civil Law* promulgated in 1986, Article 145(1) still provided that "parties to foreign-related contracts can choose the law that applies to the resolution of contractual disputes." Article 269 of the *Maritime Law*, promulgated in 1992, changed the expression and provided that "contractual parties can choose the law that applies to the contract", which constituted progress. But Article 126 of the unified *Contract Law*, promulgated in 1999, which replaced the *Foreign-related Economic Contract Law*, went back to the expression of Article 145 of the *General Principles of Civil Law*.

Fifth, some of the rules on the law applicable to foreign-related civil relations were not appropriate and could lead to inappropriate results. For example, the public order reservation provision in the *General Principles of Civil Law* not only included foreign laws but also international customs, such as those whose application could be excluded by the public order reservation. Such practice is not only unique in the world, but also theoretically self-conflicting. International customs in the civil and commercial area are actually international commercial customs, which are rules of international commercial behaviour based on consistent practice in a long history of international commercial activity and do not involve the social public interest of a country. They generally only apply by parties' choice and would not lead to situations that impair a country's social public interest.

To summarise, generally speaking, in the three decades since the Reforming and Opening-up, China made significant achievements in the area of private international law: a preliminary system was established, which had high-level general rules, as well as specific rules on applicable law, and involved every major area of foreign-related civil relations. However, the system was far behind in terms of the needs for Reform and Opening-up in the new era and was far from being a comprehensive and perfect system. The prominent deficiencies of the previous system are reflected in the five "nots" mentioned above. In order to resolve these deficiencies, the single most important, fundamental and practical way was to

[10] See HAN DEPEI, Doubts after Reading "Foreign-related Economic Contract Law", in *Works of Han Depei (I)*, Wuhan University Publisher (2007), at 217-220.

promulgate a unified *Law Applicable to Foreign-Related Civil Relations of the PRC*, which makes systematic, comprehensive, specific, clear and appropriate provisions for common issues of applicable law for foreign-related civil relations, as well as issues that urgently need regulation in practice.

V. Birth of China's Law Applicable to Foreign-Related Civil Relations

A. Background and Process

Promulgating a specific, unified, systematic and perfect *Law Applicable to Foreign-Related Civil Relations of the PRC* has not only been the universal goal of China's private international law scholars, but more importantly, the requirement of the time when China's Reform and Opening-up is expanding. It is also a necessary element for the China-featured socialist legal system.

Since the 21st century, China's legislative authority obviously accelerated the steps of promulgating a specific, unified, systematic and perfect *Law Applicable to Foreign-Related Civil Relations of the PRC*. In February 2002, during the process of preparing for relevant legislation, Professor HAN DEPEI, then president of China Society of Private International Law, submitted a proposal on promulgating the *Law on Foreign-related Civil Relations of the PRC* on the basis of the Model Law, with several explanations. In April, three experts, namely FEI ZONGYI, LIU HUISHAN and ZHANG SHANGJIN, submitted their proposed draft of a *Law on Foreign-related Civil and Commercial Relations* to the NPC Legislative Committee.[11]Later, some other academic institutions and individuals also drafted their proposed drafts. The NPC Legislative Committee produced the *Civil Law of PRC (Internal Draft), which includes one part on law application for foreign-related civil relations* on the basis of those proposals. In September 2002, the Civil Law Office of the NPC Legislative Work Committee invited some Chinese private international law scholars to a conference on the Civil Code in Beijing, primarily asking for comments on the *Part on law application for foreign-related civil relations of the Civil Law (Internal Draft)*. By this time, Chinese private international law scholars reached a consensus, which was to borrow a boat, "Civil Code", to go to sea, namely, to make a specific, unified, systematic and perfect law on foreign-related civil relations and did not expect to promulgate a code of private international law similar to the Model Law.

On December 23, 2002, China's legislative working departments submitted for review the *Civil Law (Draft) of the PRC* to the NPC Standing Committee. This was an important opportunity to make a specific, unified, and systematic law on

[11] Other suggested names of the law included "Law on Law Application for Foreign-Related Civil Relations" and "Law on Law Application in Foreign-Related Civil and Commercial Relations." The proposed draft noted, "[t]his proposed draft is completed on the basis of the China Private International Law Society's *Law on Foreign-related Civil and Commercial Relations of PRC (Expert Proposed Draft)*."

foreign-related civil relations for China since the draft had a specific part, namely Part Nine on "Law application for foreign-related civil relations", which foreshadowed the promulgation of a specific and specialised law in this area. From my perspective, the *Civil Law (Draft)* submitted to the NPC Standing Committee in 2002 was not a draft civil code, but rather, a compilation of civil law rules, since the time for China to promulgate a civil code was not ripe, and we did not have the capacity. The end result was to separately draft contract law, property law, tort law, *etc.*, including, of course, rules on the law applicable to foreign-related civil relations. In fact, after China's legislative authority completed the task of promulgating Contract Law, Property Law and Tort Liability Law, the promulgation of the *Law Applicable to Foreign-Related Civil Relations* was put on the agenda.[12]

After completing the *Model Law*, the Society had always been focusing on promoting the promulgation of a law applicable to foreign-related civil relations. In April 2008, the NPC Legislative Work Committee held a conference in Beijing on further perfecting the system of law applicable to foreign-related civil relations, inviting experts from both academia and foreign-related judicial practice to discuss major cases, new developments in foreign countries, problems to be resolved, opinions regarding the revision and supplements to the draft *Law Applicable to Foreign-Related Civil Relations*, *etc*. The conference was actually the advance calling for promulgating the *Law Applicable to Foreign-Related Civil Relations* after the *Civil Law (Draft)* was published in December 2002.

In July 2008, considering the need and urgency for the legislative work in this area, the Society held a small-scale advanced conference on law applicable to foreign-related civil relations at the Wuhan University Institute of International Law. The Society discussed the Proposed *Draft Law Applicable to Foreign-Related Civil Relations* that the Society had drafted on the basis of the Model Law (hereinafter the "Wuhan Proposed Draft").The Wuhan Proposed Draft had chapters on general rules, civil entities, property rights, debt rights, intellectual property rights, marriage and family, successions and miscellaneous matters: there were 95 articles in total. The Society engaged in thorough discussions of the Wuhan Proposed Draft in its 2008 annual conference.

In the latter half of 2009, upon the suggestion of the NPC Legislative Work Committee, the Society revised the July 2008 Wuhan Proposed Draft, and formed a proposed draft with 90 articles for discussion at the Society's 2009 annual conference in Hangzhou (hereinafter the "Hangzhou Proposed Draft").This annual conference thoroughly discussed the Hangzhou Proposed Draft and made many suggestions for revision. After the Hangzhou annual conference, the Society revised the Hangzhou Proposed Draft according to those suggestions, and prepared the Society's *Draft of the Law Applicable to Foreign-Related Civil Relations* for the Beijing Conference (hereinafter the "Beijing Proposed Draft"), which was submitted in early January 2010 to the Conference on Legislative Proposals for the

[12] On 15 November 2008, the *NPC Standing Committee's Public Report* published the *Legislation Agenda on the Eleventh NPC Standing Committee (64 pieces in total)*. In the projects on "drafts of laws that shall be submitted for review within the tenure (49 pieces)", the "civil and commercial category" had six pieces, one of them being "Law on Law Applicable to Foreign-Related Civil Relations", whose submitting or drafting department is the NPC Legislative Work Committee.

Law applicable to foreign-related civil relations co-hosted by the Society and the Chinese University of Law & Political Science in Beijing. The Beijing Proposed Draft still had eight chapters. The most significant change was the reduced number of articles from 90 to 76. It also made substantial structural changes, putting the two chapters on Marriage and Family and Successions in between the original Chapter 2 on Civil Entities and the original Chapter 3on Property Rights, and putting the Chapter on Intellectual Property Rights in between the Chapters on Property Rights and Debt Rights. In late January, the Society and the Chinese University of Law & Political Science's Colleges of International Law and International Education held a Conference on Legislative Proposals for the Law applicable to foreign-related civil relations again in Sanya, Hainan, discussing the Sanya Proposed Draft revised on the basis of the Beijing Proposed Draft. The Sanya Proposed Draft made further structural changes. In line with existing structures of China's civil law legislation, the Sanya Proposed Draft did not provide for a chapter on debt rights, but instead had three separate chapters on "contract", "tort" and "other civil relations". The Sanya Proposed Draft had ten chapters and 80 articles in total. During the Sanya conference, after thorough discussions, the experts reached a proposal based on a general consensus. It is noteworthy that consensus was reached on issues that used to cause disagreements, including legislative structure, taking habitual residence as principal connecting factor for personal law, applicable law in matters of intellectual property, and differential treatment in statutory successions. During the Spring Festival that followed, the experts present at the conference each completed an assigned part of synthesising the articles and providing explanatory notes. Finally, on 1 March 2010, the Society's proposed draft named the *Law on Law Applicable to Foreign-Related Civil Relations* was formally submitted to the NPC Legislative Work Committee.

In May 2010, in order to support the NPC Legislative Work Committee's legislative research work and study the people's courts' application of law in foreign-related civil judicial practice, the No.4 Civil Division of the Supreme People's Court hosted judges who are involved in foreign civil cases in some courts and relevant experts in a conference. The conference focused on discussing the relationship among relevant rules in current laws, relevant judicial interpretations and the new *Law Applicable to Foreign-Related Civil Relations*, as well as the judicial practice's expectations of the new law. The judges and experts all agreed that it is advisable to put all the rules on applicable law for foreign-related civil relations in one unified *Law Applicable to Foreign-Related Civil Relations*.

The NPC Legislative Work Committee completed its *Law Applicable to Foreign-Related Civil Relations (Draft)* in early 2010.[13] From late June to early

[13] This proposed draft was the formal proposed draft of the China Society of Private International Law and a collective product of the China Society of Private International Law. During the drafting period of the proposed draft, we received strong support from the Wuhan University Institute of International Law and the International Law College at China University of Political Science and Law. Director: HUANG JIN. Contributors: LIU HUISHAN, HUANG JIN, XIAO YONGPING, GUOYUJUN, SONG LIANBIN, HE QISHENG, ZOU GUOYONG, QIAO XIONGBING, ZHAO XIANGLIN, LIU RENSHAN, XIANG ZAISHENG, DU HUANFANG, DU TAO, SONG XIAO, AND XU QINGKUN. Key Participants: FEI ZONGYI, LI SHUANGYUAN, LIU HUISHAN, ZHAO XIANGLIN, HUANG JIN, XIAO YONGPING, GUOYUJUN, SONG LIANBIN, HE

July 2010, the NPC Legislative Work Committee organised experts from both academia and practice to hold a conference in Beijing on how to revise the NPC Legislative Committee's *Law Applicable to Foreign-Related Civil Relations(Draft)*.The draft, dated 28 June 2010, had eight chapters on general rules, civil entities, marriage and family, successions, property rights, debt rights, intellectual property rights, as well as a chapter on miscellaneous issues: there were 60 articles in total. The experts attending the conference discussed the draft, article by article, and proposed many valuable suggestions for revision.

On 17 August 2010, the NPC Legal Committee reviewed the draft. Between the 23rd and 28thday of the same month, during the Sixteenth Conference of the Eleventh NPC Standing Committee, the NPC Legal Committee submitted the *Law Applicable to Foreign-Related Civil Relations of the PRC (Draft for 2nd Round Review)* for review. The *Draft for 2nd Round Review* was already revised, now with eight chapters, 54 articles, and the same structure as the *June 28 Draft*. The Legal Committee pointed out, in its report of 23 August,

> "[a]ccording to the Eleventh NPC Standing Committee's legislative agenda and this year's plan of legislative work, the Legislative Committee busily worked on the basis of the *Civil Code Draft Law on Law application for foreign-related civil relations Chapter*, carefully studied relevant rules of China, Germany, Switzerland, Japan, *etc.* and conventional legal documents promulgated by the European Union, Hague Conference on Private International Law, *etc*., visited Hong Kong and Macau to solicit opinions on the issues of law application in Hong Kong/Macau-related civil relations, and conferences attended by the NPC Foreign Affairs Committee, Supreme People's Court, the State Council's Legal Office, Ministry of Foreign Affairs, Ministry of Commerce and some private international law experts. After carefully learning opinions from all parties and persistent research and revisions, we come up with this *Draft Law on Law application for foreign-related civil relations*. The general idea of drafting the *Law on Law application for foreign-related civil relations* was to start from the actual situations of our nation, cope the needs of stable reform and development, and focus on resolving the law application issue on which foreign civil disputes often arise and all parties have generally consistent opinions. The Law incorporates the rules and practice of our nation that have long been effective, at the same time reflects the international wide-spread practice and new developments, and further perfects our nation's legal system on law application for foreign-related civil relations.

QISHENG, ZOU GUOYONG, QIAO XIONGBING, XU XIANG, XUAN ZENGYI, DU XINLI, JIANG RUJIAO, QI XIANGQUAN, ZENG TAO, SHEN JUAN, XU JUNKE, SONG XIUMEI, LIU RENSHAN, XIANG ZAISHENG, DU HUANFANG, DU TAO, SONG XIAO, XU QINGKUN and XIAO KAI.

> The Law should be succinct and to-the-point, and easy to comprehend."[14]

On the last day of the Sixteenth Conference of the Eleventh NPC Standing Committee, the Draft was published in full on the NPC's official website in order to solicit comments from the public. People in various industries of society could directly log on to the NPC Website (<www.npc.ogv.cn>) to comment or mail their comments to the NPC Legislative Committee before30 September 2010.

Two months later, the Seventeenth Conference of the Eleventh NPC Standing Committee was held between 25 and 28 October. The *Law Applicable to Foreign-Related Civil Relations (Draft for 3rd Round Review)*, formed the basis for widely solicited comments and was submitted to the NPC Standing Committee for its review. On the 25th, the NPC Standing Committee reviewed the *Draft for 3rd Round Review* in separate groups and provided some suggestions for revision. In particular, the Committee members believed that the Draft was relatively ripe, and suggested to have it submitted to a vote of this Conference after further revisions. On the 26th, the Legal Committee studied the Standing Committee members' review opinions, one by one, and reviewed the draft again. On the 28th, the Standing Committee, after reviewing, passed the *Law Applicable to Foreign-Related Civil Relations of the PRC* with an overwhelming majority. On the same date, the law was promulgated by President HU JINTAO of the PRC by way of Presidential Order No. 36. The Law has eight chapters, on general rules, civil entities, marriage and family, successions, property rights, debt rights, intellectual property rights, as well as a chapter on miscellaneous issues: there are 52 articles in total. It came into effect on 1 April 2011.

B. Comments on the New Law

The *Law Applicable to Foreign-Related Civil Relations of the PRC* passed by the Seventeenth Conference of the Eleventh NPC Standing Committee was a milestone in China's history of foreign-related legislation and has significant implications.

First, its promulgation put an end to China's history of no specific, unified rules on the law applicable to foreign-related civil relations. The New People's Republic has been established for more than 60 years and did not have a specific legislation on private international law. This did not fit China's status as one of the world's largest countries and could not satisfy the needs of China's peaceful development. The Law took shape based on China's actual situation, coped with China's need to open itself up to the world and the Chinese people's need to engage in further foreign-related interactions. It reflects China's experience during the 30 years since the Reform and Opening-up, incorporates internationally widespread practices, and focuses on the issues of applicable law that most often arise in foreign-related civil disputes. The opinions of all parties are relatively consistent. In addition to general rules, the Law also provides systematic provisions on law applicable to entities in foreign-related civil relations, marriage and

[14] There were two revised drafts with different structures, namely, that of 10 June 2010 revised draft (56 articles) and that of 28 June 2010 revised draft (60 articles).

family, succession, property rights and intellectual property rights. It is a new fruit of China's legal system and promotes the establishment of the China-featured socialist legal system.

Moreover, the Law provides innovations to China's legal system. During the legislative process, the Law, on the one hand, learned from the 30 years of experience after the Reform and Opening-up in areas of foreign-related civil legislation, judicial practice and law enforcement, incorporating rules and practices that had long been effective; on the other hand, the Law learned from successful experiences of private international law rules of various countries and international conventions, considered wide-spread practice and fruits of new developments, and made innovations to the legal system based on China's domestic situation and needs. The innovations are reflected mainly in the following points:

(1) Structurally, the Law places the "laws on persons", namely the three chapters on civil entities, marriage and family and successions before the laws on property and debt, which demonstrates that the law is oriented toward strengthening people's status and rights and perfects the structure of the legislation;

(2) The Law adopts the most significant relationship principle as a "saving clause" for law applicable to foreign-related civil relations that are not specifically addressed by the Law, thus avoiding a gap in the web of law applicable to foreign-related civil relations;[15]

(3) The Law uses the law of the habitual residence as the personal law, supplemented by the *lex patriae*. Generally speaking, civil law countries adopt the law of the country of nationality as the personal law, while common law countries adopt the law of domicile as the personal law. In order to reconcile the conflicts between the two systems on personal law, The Hague Conference on Private International Law often uses, in its conventions, the law of habitual residence as the personal law. This is one of the reasons for which many Hague private international law conventions are so successful. China boldly adopts the law of habitual residence as the personal law in its domestic legislation. This is unique and will have significant implications globally;

(4) The Law expanded the scope of party autonomy. Considering that parties have the right to dispose of their civil rights and following the international trend of expanding the scope of this right, the Law provides that parties can choose the law applicable to certain issues in the areas of marriage and family, succession, property rights, debt rights and intellectual property rights;

(5) The Law for the first time provides that China's mandatory rules on relevant foreign-related civil relations directly apply.[16] This is selective incorporation

[15] Available at <http://www.npc.gov.cn/np/flcazqyj/2010-08/28/content_1592751.htmhttp://baike.baidu.com/view/4289520.htm.> (9 January 2011).

[16] Article 2(2) of the Law provides, "[f]or law application issues in foreign-related civil relations that are not addressed by this Law or other laws, the law that has the most significant relationship with the foreign-related civil relations shall apply."

of the "law of direct application" theory based on China's Reform and Opening-up;

(6) On the issue of movable property, the Law allows parties to agree on an applicable law firstly.[17]This is an innovative provision based on considerations that movable property can be of various types and that the change in movable property rights is often connected to commercial transactions, which may have different transactional conditions; and,

(7) The Law adopts the internationally advanced principle of "the law of the place where protection is requested" for issues of intellectual property, which benefits the use and protection of intellectual property and benefits the handling of confirmation, transfer and tort disputes that often arise in the area of intellectual property.

Furthermore, the Law is a people-oriented and accessible law and a law that reflects confidence and open-mindedness, which demonstrates to the world a positive image of a China further to its opening-up. The Law contains parallel conflict rules, maintains the balance of foreign and domestic law, equally protects the legal interests of both domestic and foreign parties, promotes harmonious international civil relations, and aims to resolve foreign-related civil disputes in a manner that is more fair, equitable and reasonable. The Law reflects China's interest in protecting less advantaged parties in various areas including adoption, maintenance, custody, consumer contracts, employment contracts, product liability, *etc*. The Law's provisions avoid obscure terminology and jargon, and aim to be as succinct, clear and easy to understand as possible, making them very accessible.

Of course, the Law is not perfect and still has some controversial points, some defects and some regrets.

(1) The Law still does not contain real integrated, systematic, comprehensive and sophisticated rules on law applicable to foreign-related civil relations, as it has neither included rules on applicable law for Maritime Law, Civil Aviation and Negotiable Instruments, nor has it included some of the sophisticated rules in judicial interpretations.

(2) On addressing the relationship between new law and old law, although the Law has Article 2 that provides that "if other laws have special rules on law application for foreign-related civil relations, those special rules shall prevail" and the provision of Article 51,[18] it does not specify the relationship between the Law and the rules on applicable law in laws other than *Maritime Law*, *Civil Aviation Law*, *Negotiable Instruments Law*, Articles 146 and 147 of the *General Principles of Civil Law* and Article 36 of the *Succession Law*. If we interpret their relationship according to Article 2, then the improvements made by the new Law would be meaningless. For example, the *General Principles of Civil Law* Article 150 provides, "[t]he

[17] Article 4 of the Law provides, "[i]f the law of PRC has mandatory rules on foreign-related civil relations, the mandatory rules directly apply."

[18] See HAN DEPEI, Recent Developments in Private International Law, in *Works of Han Depei (I)*, Wuhan University Publisher (2007), at 38-56.

application of foreign law or international custom under this chapter must not contradict the social public interest of PRC." The new Law Article 5 provides, "[i]f application of foreign law would damage the social public interest of PRC, the law of PRC applies." The biggest difference between the two provisions is that the former excludes the application of international customs on the basis of the public order principle while the latter does not. The two have different provisions and there is a conflict: should the new law or the old law prevail? If interpreted according to Article 2 of the new Law, the old law prevails, and there would be no need for the new Law to make a new provision on the public order issue.

(3) The Law does not provide for some issues that should have been addressed, such as boundaries of foreign-related civil relations, law evasion, preliminary questions, application of international conventions and customs, determination of connecting factors, interpretation of governing law, *etc.*

(4) Some parts of the structure are inappropriate. For example, the chapter on intellectual property should not have been placed after the chapter on debt rights, but between the chapters on property rights and debt rights. In addition, placing the law applicable to arbitration agreements in the chapter on civil entities is also inappropriate. Moreover, the order of articles within a chapter is also problematic, and there is room for adjustment.

(5) Some of the Law's provisions can be further shortened and clarified. For example, Article 3 of the Law provides that, "parties can expressly choose the applicable law in foreign-related civil relations if permitted by the law", which is a redundant provision. If the law has provided that parties can expressly choose applicable laws in certain specific foreign-related civil relations, then why do we need a provision like this?

VI. Conclusion

In conclusion, the creation and perfection of China's *Law Applicable to Foreign-Related Civil Relations* is an incremental process. It is a process where theory copes with practice, a process where legal cultures of the east and the west meet, a transforming process where the past transforms into the present, a balancing process between the current and the future, a gaming process between the conservative and the innovative, all of which together form an epitome of China's modern legislation. During this process, China's private international law rules endured difficulties, but also walked with confidence, always aiming at the light. As China's new *Law Applicable to Foreign-Related Civil Relations* took effect on 1 April 2011, China's creation and perfection of its private international law embarked on a new journey, which represents not only the end of an era, but also, more importantly, the start of a brand-new one.

LEGISLATION AND PRACTICE ON PROOF OF FOREIGN LAW IN CHINA

Yujun GUO*

I. Introduction

In recent years, the number of foreign-related cases treated by Chinese People's Courts has increased.[1] According to the statistics, the foreign-related civil and

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[1] In 2009, Chinese People's courts seized 31,546 foreign-related cases, including cases involving foreign countries, Hong Kong, Macau, and Taiwan. Cases of execution of foreign judgments increased by 9.41% compared to the corresponding period of the last year. Cases involving foreign countries amounted to 15, 943, and had increased by 22.9% compared to the corresponding period of the last year; cases involving Hong Kong amounted to 9,950, and had decreased by 4.72% compared to the corresponding period of the last year; cases involving Macau amounted to 449, and had increased by 10.59% compared to the corresponding period of the last year; cases involving Taiwan amounted to 5,204, and had increased by 3.81% compared to the corresponding period of the last year. Among these cases, litigated cases accounted for 90.6%; cases of execution of foreign judgments accounted for 9.4%. The cases that were mainly civil and commercial in nature accounted for 92.48% of litigation cases: see Instruction VII of National Court of Justice Statistics Bulletin (2009).

In 2010, Chinese People's courts seized 33,333 foreign-related cases, including cases involving foreign countries, Hong Kong, Macau, and Taiwan. Cases of execution of

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commercial cases before the Chinese People's Court have the following characteristics:[2]

(1) in terms of the nature of the cases, foreign-related contract cases, maritime cases and intellectual property cases account for a large proportion, followed by the foreign-related marriage and family cases;

(2) in terms of the application of law, in the majority of cases, Chinese law has been chosen, and only in a minority of cases have foreign law or international conventions been chosen;

(3) in terms of the choice of law approaches, the principle of the closest connection and the principle of party autonomy are applied in many cases;[3]

(4) in terms of the parties to the disputes, most are Chinese parties against foreign parties and parties from Mainland China against parties from other jurisdictions. Inter-regional cases account for a considerable proportion of cases while foreign cases in which both parties are foreign or Chinese nationals account for a small proportion;

(5) in terms of the geographical distribution of the disputes, the courts of Shanghai, Beijing, Jiangsu, Guangdong, have heard a relatively large number of foreign-related cases and have extensive experience.[4]

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foreign judgments increased by 5.66 % compared to the corresponding period of the last year. Cases involving foreign countries amounted to 17,020, and had increased by 6.17% compared to the corresponding period of the last year; cases involving Hong Kong amounted to 11,066, and had increased by 8.21% compared to the corresponding period of the last year; cases involving Macau amounted to 594, and had increased by 28.85% compared to the corresponding period of the last year; cases involving Taiwan amounted to 4,635, and had decreased by 11.1% compared to the corresponding period of the last year. Among these cases, litigated cases accounted for 94.37%; cases of execution of foreign judgments accounted for 5.63%. The cases that were mainly civil and commercial ones accounted for 91.50% of litigation cases: see Instruction VII of National Court of Justice Statistics Bulletin (2010).

[2] J. HUANG/ Q. LI/ H. DU, Review of Judicial Practice in the Chinese Private International Law in 2004, *Chinese Yearbook of Private International Law and Comparative Law*, vol. 2005, Beijing 2006, p. 96 *et seq.*; J. HUANG/ H. DU, Review of Judicial Practice in the Chinese Private International Law in 2003, *Chinese Yearbook of Private International Law and Comparative Law*, vol. 2004, Beijing 2005, p. 134 *et seq*.

[3] In a survey of 1000 foreign-related cases, extra-territorial laws were applied in 130 cases. International conventions and international customs were applied in 90 out of the 130 cases. 40 out of the 130 cases applied the law of Hong Kong or Macao. Applicable law in 22 cases was chosen by the parties; applicable law in 8 cases was determined by the judges' application of the closest connection principle; and applicable law in 10 cases was decided by the judges' application of the traditional conflict rules. See J. XU, On the Doctrine of "Will and Responsibility" in Proof of Extra-Territory Law: A Perspective from Chinese Foreign-related Legal Practice in Civil and Commercial Matters, *Law Review* 2010, vol. 1, p. 79.

[4] For example, in Guangdong Province, cases involving Hong Kong, Macau and Taiwan amounted to 4,005 in 2004. Among these, 3,463 cases were settled; the number of

According to the sample survey by Chinese scholars of foreign-related civil and commercial cases in recent years, there is a small proportion of Chinese cases requiring the application of foreign law, [5] and there are some difficulties related to the ascertainment and application of foreign law in judicial practice. Proof and application of foreign law is a challenging endeavour. In past years, one of the most difficult and prominent problems is that because of the lack of clear and specific Chinese legislation in this regard, as well as the difficulty in ascertaining and applying foreign law itself, there has been a certain degree of confusion or inconsistency in practice. Some judges have attempted to avoid the application of foreign law.

This article proceeds in three parts. Part I explores the judicial interpretation, legislation and judicial practice relating to the ascertainment of foreign law in China. Part II discusses the practice of using bilateral treaties to access foreign law in China. Part III provides some conclusions.

II. Provisions on the Ascertainment and Application of Foreign Law in China

Before 2010, there was no explicit legislation for the ascertainment and application of foreign law in China, but according to the provision of Article 193 of the Supreme People's Court "Proposal (Trial Implementation) on the Implementation of «General Principles of Civil Law of the PRC»" (hereinafter, the "Proposal"):

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cases accepted and settled ranked first place in China. According to statistics, in 2004, Chinese courts decided 7,631 foreign-related cases (including cases concerning Hong Kong, Macau and Taiwan). Among these cases, the courts of Guangdong Province had settled 3,463 cases, accounting for 45%. See *Notable Achievements of Guangdong in Foreign Civil and Commercial Trial Practice,* Chinese Foreign Commercial Trial Website, available at <http://www.ccmt.org.cn/ss/news/show.php?cId=5974>.

[5] According to the sample survey by the scholar, 6% in 2003, 5.5% in 2002, 6% in 2001: see the relevant content of Review of Judicial Practice in the Chinese Private International Law in 2003, Review of Judicial Practice in the Chinese Private International Law in 2002, Review of Judicial Practice in the Chinese Private International Law in 2001, *Chinese Yearbook of Private International Law and Comparative Law*, vol. 2004, 2003, Beijing. However according to the foreign trial judges' data, the proportion of cases requiring the application of foreign law is lower: for example, from 2002 to 2005, Shanghai First Intermediate Peoples' Courts settled 496 commercial cases involving foreign countries, Hong Kong, Macau and Taiwan; there were 4 cases that applied foreign law or the law of the Hong Kong Special Administrative Region and among these, 2 cases applied the law of the Hong Kong Special Administrative Region, 1 case applied American law, 1 case applied Singapore law, and the foreign country's law only accounted for less than 1% of these cases. See Analysis of Ascertainment and Proof of Foreign Law in Trial Practice, available at <http://www.a-court.gov.cn/infoplat/platformData/infoplat/pub/no1court_2802/docs/200609/d_456015.html>.

> "When the applicable law is foreign law, the following means may be used to ascertain the foreign law: (1) the parties; (2) the Central Authorities of the contracting countries who have judicial assistance treaties with China; (3) the Chinese embassy in the foreign country; (4) the foreign embassy in China; (5) the Chinese and foreign experts of law. If, however, the foreign law cannot be ascertained through the above means, Chinese law shall be applied."

This provision was helpful in practice. But it seems that it did not meet the needs of Chinese courts applying foreign law because it only stipulated the methods of ascertaining foreign law and called for the application of Chinese law when the designated foreign law could not be ascertained. Other issues regarding the ascertainment and application of foreign law were not mentioned, for example: whether the judges have a duty to ascertain the foreign law and whether the above-mentioned means are exclusive. Moreover, there was no mention of the criteria for interpreting foreign law or for concluding that the foreign law cannot be ascertained, *etc*. The legal uncertainties led to difficulties and a certain degree of confusion in judicial practice.

In 2007, the Supreme People's Court passed another judicial interpretation, entitled "The Provisions on the Application of Laws for Hearing Foreign-related Civil and Commercial Contractual Disputes" (the "Provisions"), and in which there are two provisions dealing with the ascertainment of foreign law in foreign-related civil or commercial contractual disputes.[6] It made some progress in this area of law.

The Act of the People's Republic of China on the Law Applicable to Civil Relationships with Foreign Contacts (the "New Chinese Act") was adopted and promulgated by the Standing Committee of the 11th National People's Congress at the Committee's 17th session on 28 October 2010; it entered into force on 1 April 2011. In the New Chinese Act, Article 10,[7] as the last general provision, prescribes the ascertainment of foreign law and law applicable in case the designated foreign law cannot be ascertained. It is a milestone in providing guidance regarding the ascertainment of foreign law, though it still requires some clarification. In order to promote the enactment of the New Chinese Act, a new judicial interpretation was passed on 10 December 2012 by the Supreme People's Court. Articles 17 and 18 of Interpretation I on the Application of the Act of the People's Republic of China on the Law Applicable to Civil Relationships with Foreign Contacts (enacted 7 January 2013, hereinafter, "Interpretation I") provides further detailed rules.

[6] Article 9 and Article 10.

[7] Article 10 [Ascertainment of Foreign Law]: "The foreign law applicable to a civil relationship with foreign contacts is to be ascertained by the People's Court, arbitral institutions or administrative authorities. If the parties choose to apply a foreign law, they should produce the content of that law. If the foreign law cannot be ascertained or if it contains no governing provision, the law of the People's Republic of China applies."

A. Nature of the Application of Conflict Rules

There are different opinions in Chinese theory and practice on the question of whether judges are required to apply the foreign law designated by the conflict rules even if the parties do not plead the application of foreign law.

Some scholars believe that Article 178(2) of the Proposal has obviously stipulated that the People's Court should determine the applicable substantive law according to Chapter VIII of the General Principles of Civil Law in a foreign-related civil dispute. According to the above stipulation, judges are obliged to determine the law applicable to foreign-related cases according to the Chinese conflict rules. Once the conflict rules indicate the application of a foreign law, the judges are obliged to apply the designated foreign law. The Proposal also underlines that it would be improper to adopt the approach of some Common Law countries and make the application of foreign law dependent on the parties' pleadings. Some scholars believe that with respect to the application of conflict rules, Chinese courts are obliged to apply these rules; otherwise, a larger number of international civil and commercial cases will be treated as internal cases. Other scholars hold that China should appropriately follow the Common Law approach, but should impose some restrictions.

In practice, some judges maintain that it should be mandatory for Chinese courts to apply the foreign law indicated by the conflict rules. Where a foreign law should be applied based on the conflict rules, the judges have the duty or obligation to apply the designated law and inform the parties, regardless of whether or not the parties have pleaded for the application of that law. The mandatory application of the conflict rules also exists in practice. However, some of the judges directly apply Chinese law to the dispute, neglecting the foreign factor if parties do not plead foreign law. Some judges find this to be erroneous and review these cases on second instance or in trial supervision proceedings. Pursuant to the conflict rules, if the foreign law is applicable and does not violate the public interests and mandatory rules in China, even if both parties do not plead it, the judges are obliged to apply the foreign law indicated by the conflict rules.[8] Therefore, when foreign law is to be applied, the judges have a duty to play a positive role in ascertaining the foreign law.

B. Duty to Ascertain the Foreign Law

Based on the approaches mentioned above, the Proposal stipulates the means of ascertaining foreign law, but it does not clearly stipulate that judges have the duty to ascertain foreign law. Some scholars hold that this indirectly indicates that judges have a duty to ascertain the foreign law. Compared with the repealed "Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law" (No. 27 [1987], issued on 19 October 1987, hereinafter the "Response"), the Proposal lacks information as to the

[8] X. ZHENG/ L. ZHANG, A study on the System of Ascertainment and Proof of Extra-territorial Law in Chinese Mainland, Chinese Foreign Commercial and Marine Trial Website, available at <http://www.ccmt.org.cn/ss/explore/exploreDetial.php?sId=811>.

procedure to follow where the People's Court cannot ascertain the content of foreign law. Some scholars believe that this is deliberate. In reality, the practice is confused and inconsistent. Some judges directly apply Chinese law as long as the parties do not provide the content of the relevant foreign law;[9] some judges use other approaches, such as expert witnesses,[10] *etc.*, to ascertain the content of the relevant foreign law. The lack of clear provisions may lead to different results as to the applicable law, as well as the contradiction of outcomes of similar foreign cases.

Most scholars believe that, regarding the duty to ascertain foreign law, the trend in national legislation is to adopt the mixed model.[11] The "Model Law of Private International Law of the People's Republic of China"[12] (hereinafter, the "Model Law") and the "People's Republic of China Civil Code (Draft)"[13] (hereinafter, the "Civil Code Draft") also adopt the mixed model. The Model Law takes the approach that the foreign law shall be proved by the parties and ascertained by the judges subsidiarily. On the contrary, the Civil Code Draft relies mainly on the judges and only subsidiarily on the parties.

In practice, most judges hold that the content of designated foreign law should mainly be provided by the parties, but when the parties are unable to prove the content of foreign law, the judges are responsible for ascertaining foreign law.

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[9] See *Bank of China (Hong Kong) vs. Guangdong Zhanjiang Second Light Industry Corporation*, Luo Fa, Zhanjiang People's Government, Guangdong High People's court (2004) (Serial number of the case: Min Si Zhong Zi No. 26).

[10] See *Shanghai Branch of the Netherlands Commercial Bank vs. SIP Shell Gas Co. Ltd.*, about disputes regarding contracts of surety, Jiangsu High People's court (2000), (Serial number of the case: Su Jing Chu Zi No.1).

[11] Y. GUO, Recent Theories and Practice on Proof of Foreign Law in China, *International Law Review of Wuhan University* 2007, vol. 2, p. 6.

[12] Article 12 of the Model Law of Private International Law of People's Republic of China stipulates, "[w]here a court, an arbitral tribunal or an international administrative body of the P. R. China handles an international civil and commercial matter, it may request a party to produce or prove the foreign law which shall be applied under this law, or it may ascertain its contents *ex officio*. In case that it is proven that the ascertainment is impossible or there is no appropriate rule of l aw after ascertainment, the Chinese law analogous to that foreign law shall be applied."

[13] The People's Republic of China Civil Code Draft, Section IX "Application of law in civil relations with foreigners", Article VII stipulated, "[a]ccording to this law, if the applicable law is foreign law, Chinese People's Court, arbitration institute or administrative institution has the duty to ascertain this law, or it could be (1) provided by the parties; (2) provided by the Chinese embassy or consular in the foreign country; (3) provided by the foreign embassy or consular in China; (4) provided by the central authorities of the contracting countries who has judicial assistance treaties with China; (5) provided by the Chinese and foreign experts of law. If, however, the foreign law cannot be ascertained through the above channels, Chinese law shall be applied. If the court, arbitration institution or administrative institutions fail to ascertain the foreign law, and the embassy, central authorities and expert of law are not able to provide the foreign law, it may apply the law which is similar to that foreign law or the law with the closest connection with the parties or the relevant Chinese law. The interpretation of foreign law should be made according to the law and interpretation rules of the country that it belongs to."

For example, the Wuhan Maritime Court of the People's Republic of China did not treat the proof of foreign law simply as a matter of fact to be proved by the parties. It held that when the content of foreign law is to be established, the legal materials provided by the parties should be highly respected on one hand, and the positive investigation carried out by the judges should also be essentially considered on the other hand. In addition, a legal opinion from a famous scholar of the relevant country was requested when the parties provided the foreign law.[14]

As for the proof of laws of Hong Kong or Macao, the Guangdong High People's Court adopted the following method, which was shaped by practice: when the applicable law in the case is the law of Hong Kong or Macao, the party should furnish and prove the relevant laws, and if it is too difficult for the party to prove the relevant laws, he can ask the court to investigate the law *ex officio*.[15] However, some judges claim that the obligation of proof of foreign law should only be borne by the parties, and they follow this in practice. In the cases studied, courts of different levels usually adopt the first and the fifth means stipulated in the Proposal when they face the problem of proof of foreign law.

According to one scholar's survey data, 88% of the surveyed judges use parties to ascertain the content of the relevant foreign law.[16] The reason why other methods are not commonly used may be that it is not easy, effective or efficient for the Chinese embassies and consulates abroad, the foreign consulates and embassies in China and the Central Authority of the countries who have concluded mutual legal assistance agreements with China, to ascertain the relevant law, and it is time-consuming and costly.

Compared to other means, the first and fifth stipulated in the Proposal are more practical in accurately establishing the applicable foreign law. These means make it easier for the parties, the legal experts delegated by the parties and the court to devote themselves to the understanding of the facts of the case, which in turns facilitates the correct investigation of the foreign law. With developments in the legal practice, some courts authorise a foreign law firm to provide legal opinions to prove the relevant foreign law. This could be considered one of the five methods stipulated in the Proposal: the Chinese and foreign legal experts method,[17] though some scholars question whether the legal opinion of a foreign law firm constitutes an "expert opinion". The author believes that the word "expert" should

[14] Standardize the Management, Do Active Exploration, and Strive to Do a Well Job in the Foreign-Related Maritime Trial, see China's Foreign-Related Commercial Trial Network, available at <http://www.ccmt.org.cn/ss/news/show.php?cId=6360>.

[15] K. TAO, Hong Kong, Macao and Taiwan Related Commercial Case Trials in Guangdong Courts: the Practice, Exploration and Prospects, in *Papers of Luo Jia-Yangcheng Legal Forum*, Wuhan 2006, p. 140.

[16] Q. MA, On the Improvement of Chinese Legislation on Proof of Foreign Law: A Perspective from Legal Practice, *Journal of Nanyang Normal College* 2011, vol. 7, p. 11.

[17] See *COSCO v. Ryoshin Lease International (Panama) S.A*, second instance decision of Beijing Higher People's Court (2001) (Serial number of the case: Gaojingzhongzi No. 191) and first instance decision of Beijing Second Intermediate People's Court (1999) (Serial number of the case: Erzhongjingchuzi No. 1795). See Also L. ZHANG, Explore and Analyze the Legislative and Judicial Issues of the Ascertainment of Foreign Law, *Application of Law* 2003, p. 98.

be broadly interpreted and should not be limited to the literal interpretation. From materials collected, it is clear that in practice, legal opinions from foreign law firms are much more common than those provided by Chinese legal experts and lawyers. The first Intermediate People's Court of Shanghai recently even allowed relevant foreign law to be ascertained from the courtroom via the Internet. In light of the questionable authority and reliability of information on the Internet, the court also invited expert witnesses to adduce evidence of the foreign law. The expert witnessed the whole inquiry process and provided an expert opinion. This example demonstrates the development of Chinese judicial practice in foreign-related civil and commercial matters; the means of proving foreign law have been continuously updated in practice.

A Supreme People's Court Meeting Summary discussed in particular the proof of foreign law in foreign-related commercial cases. According to the Meeting Summary, when the law applicable to a foreign-related commercial case is a foreign law, the parties should be in charge of providing or proving the content of the foreign law. The parties can provide the relevant legislation or case law of the foreign jurisdiction through legal experts, legal service agencies, industry self-regulatory organisations, international organisations and the Internet, *etc.*, or they can furnish the legal writings, materials of legal introduction and expert submissions, *etc.* When the parties are not able to provide proof of the foreign law, they can ask the court to investigate the foreign law *ex officio*. This demonstrates that foreign law can be established through several means and it is mainly proved by the parties, not the judges. Meanwhile the Meeting Summary specifically states that judges can assess whether "difficulties" exist according to the specific situation and whether the foreign law should be ascertained *ex officio*.[18]

However, whether the burden of proof of foreign law should be mainly attributed to the parties has remained controversial for a long time. Some foreign countries use different methods of proving foreign law for different cases, treating, for instance, civil and commercial cases differently.[19]

The distinction between these two types of cases is reasonable because the parties of the commercial cases usually have the capacity to prove the foreign law or can ask legal experts to adduce evidence as to the content of the foreign law.

In Chinese judicial practice, there are cases that show that when the applicable law is chosen by the parties, judges rely on the parties to prove the content of the foreign law. This practice is not occasional and has been adopted in the 2007 Provisions.[20] Article 9 of the 2007 Provisions provides that if the law chosen by the parties is foreign law, the parties should provide or prove the contents of the foreign law by themselves. In the absence of a choice of law by the parties, and where the court determines the law applicable by reference to the closest connection principle, the court may investigate the foreign law *ex officio* and may also ask the parties to provide or prove the designated foreign law. These are two different situations and party autonomy is the determining factor.

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[18] See the Supreme People's Court "Second National Marine Foreign Commercial Trials Meeting Summary" (2005), Article 51.

[19] Mexico, Switzerland and Russia.

[20] J. XU (note 3), at 77-78.

In the New Chinese Act, foreign law applicable to a civil relationship with foreign contacts is to be ascertained by the People's Courts, arbitral institutions or administrative authorities. The legislator takes the view that the relevant authorities should have the duty to ascertain the foreign law with one exception: when the parties choose to apply a foreign law, they should produce the content of that law. Obviously, the New Chinese Act follows the mixed model. However, it does not differentiate between civil and commercial cases. It uses the choice of parties as the precondition for the parties' duty to produce the foreign law. It seems a kind of adoption of the 2007 Provisions. Under the New Chinese Act, besides one article in the general provisions, the principle of party autonomy reigns.[21] That is to say, at least under fourteen provisions, parties to a dispute have to prove the designated foreign law by themselves. The New Chinese Act is more rational and practical. It contains a better balance between the burden of the judges and the parties.

C. Interpretation of Foreign Law

A few countries or regions provide that foreign law should be interpreted in accordance with the rules of construction of the relevant foreign law.[22] In China, the question of how to interpret foreign law has become a matter of concern in the field of private international law in recent years. Neither legislation, nor judicial interpretation explicitly referred to this problem; legal scholars paid little attention to it and conducted little research on the issue. Nevertheless, Article 7 of Chapter 9 in the Civil Code Draft stipulates that the interpretation of foreign laws shall be governed by the law and rules of interpretation of the country to which the foreign law belongs. Article 11 of the Model Law provides that the interpretation of an applicable law shall be governed by the law and rules of interpretation of the country to which the applicable law belongs.

Though the New Chinese Act does not contemplate this issue, the authoritative opinion in China is that when the applicable law is foreign law, the interpretation of the foreign law shall be governed by the law and rules of interpretation of the country to which the foreign law belongs.

D. How to Judge Failure to Prove Foreign Law

What is failure to prove foreign law?

In some countries, the laws of the forum can only be applied when the foreign law cannot be established within a reasonable period of time or after some effort.

In China, some argue that failure to prove foreign law is based on whether all approaches to its ascertainment have been used. The remedy only arises when all of the methods or approaches have been exhausted and the applicable foreign

[21] See Articles 3, 16, 17, 18, 24, 26, 37, 38, 41, 42, 44, 45, 47, 49, and 50.

[22] Tunisia, Czech and Slovakia, Italy, Portugal, Peru, and Macao Special Administrative Region of China.

law still cannot be proved. If all of the methods have not been exhausted, the court can neither conclude that there has been a failure to prove the content of the foreign law, nor substitute the foreign law with a subsidiary law. Another view is that the requirement to exhaust all five methods of proving foreign law enumerated in the Proposal before concluding that foreign law has been inadequately proven is a waste of time and legal resources.[23] With respect to the laws of Hong Kong and Macao, the method used in practice by the Guangdong Higher People's Court is to apply the law of Mainland China when the parties refuse or are unable to provide proof of the relevant law within a specified period of time and without reasonable excuse.[24]

The New Chinese Act does not impose any limitation on failure to prove foreign law. In the author's view, in order to prevent abuse, China should learn from the practices of other countries and stipulate a reasonable period of time or sufficient effort as conditions for finding that foreign law has been inadequately proven. Article 17 of Interpretation I clearly points out that first, if the applicable foreign law cannot be established through reasonable means such as by the parties, through methods prescribed by international treaties which have entered into force in China, and through Chinese or foreign legal experts, this may be considered as failure to prove foreign law; second, when the parties assume the burden of proof of foreign law, and without justification, they cannot produce the content of the foreign law in a reasonable time as designated by the courts, this may constitute failure to prove foreign law. It is the first provision of judicial interpretation on point and will be very helpful in practice. Furthermore, the current authoritative opinion is that Interpretation I does not require exhaustion of all the means before finding a failure to prove foreign law. It is an explicit response to the misunderstanding in judicial practice.[25]

E. Ascertainment of the Content of Foreign Law

So far, there is no explicit provision on the ascertainment of the content of foreign law in China, but some courts have developed their own methods in practice.

The practice of the Guangdong Higher People's Court in terms of the laws of Hong Kong and Macao provided by the parties is to organize the parties such that they exchange information on the laws that they have ascertained and inform each other of any objections within a reasonable period of time. If the parties do not disagree on the content of the applicable law, the court can make an affirmation. If the parties have objections, the court should ascertain the relevant foreign

[23] X. ZHENG/ L. ZHANG, A Study on China's Ascertainment System of Foreign Law, in China's Foreign-Related Commercial Trial Network, available at <http://www.ccmt.org.cn/ss/explore/exploreDetial.php?sId=811>.

[24] K. TAO (note 15), at 140.

[25] A judge in charge of Civil Division IV of the Supreme People's Court has made such an explanation to the provision of Interpretation I in the press conference of Interpretaion I, available at, <http://www.court.gov.cn/xwzx/jdjd/sdjd/201301/t20130106_181593.htm.>.

law through the process of cross-examination. After the content of foreign law is fully investigated and explained by the judges, if one party does not expressly accept, or opposes the content of the law provided by another party, or if the party, without justification, fails to appear in court, the court may confirm its holding. Even if there are no objections, if the court considers the content of law supplied by one party to be obviously inaccurate, the court should not confirm that party's view of the foreign law.[26] Article 52 of the Meeting Summary makes a similar statement, namely if there is no objection as to the content of foreign law provided by one party after cross-examination, the court shall confirm the content of the foreign law. If the party objects to a part of the foreign law supplied by the other party or the expert opinions provided by the two parties are different, the court shall confirm the content of relevant law by review. This provision is adopted by Article 10 of the 2007 Provisions.

One remarkable point is that even if the parties do not express their disagreement on the content of relevant laws, if the court considers the evidence on the content of foreign law to be obviously unreliable or ridiculous, it should not accept that evidence.[27]

The New Chinese Act does not provide detailed rules on how to ascertain the foreign law. Article 18 of Interpretation I provides that the courts should hear the parties' opinions on the content of the foreign law. If the parties have no objections to the content of the foreign law, the court may confirm the content of the foreign law; if the parties disagree with the content of the foreign law, the court shall confirm it by review. This is an accurate reflection of current judicial practice.

F. How to Determine the Applicable Law when Proof of Foreign Law has Failed

Article 193 of the Proposal specifies that if foreign law cannot be ascertained through the approaches described above, Chinese law applies. Application of Chinese law is consistent where foreign law is applicable but its content cannot be established.

Most countries, which have specific provisions on the ascertainment of foreign law,[28] stipulate that the *lex fori* applies if the foreign law cannot be proved. A few countries follow the rule that the law or legal principle analogous to applicable foreign law, the law designated by the supplementary connecting factors or the law of the most significant relationship applies if the foreign law cannot be established.[29] Article 12 of the Model Law (sixth edition) also broadens the approaches

[26] K. TAO (note 15), at 140.

[27] J.G. COLLIER, *Conflict of Laws*, 3rd ed., Cambridge 2001, p. 35.

[28] The countries that have specific provisions on the ascertainment of foreign law include Russia, Slovenia, Mongolia, Kazakhstan, Azerbaijan, Lithuania, Tunisia, Belarus, Romania, Thailand, United Arab Emirates, Turkey, Senegal, Hungary, France, Italy, Austria, Switzerland, Liechtenstein, and Poland.

[29] Such as Portugal, Macao Special Administrative Region and Germany. See also Article 14 of 1995 Italian Reform Act on Private International Law.

to deal with the problem. It stipulates that in case ascertainment is impossible or there are no pertinent rules of law after investigation, the law analogous to the foreign law or the law of China applies.[30] Provisions of the Civil Code Draft are more flexible. In addition to applying the law analogous to the foreign law or the law of China, the Provisions of the Civil Code Draft stipulate that the law which has the most significant relationship with the case shall also be applied. Article 9 of the 2007 Provisions provides that the court "may" apply Chinese law in case the applicable foreign law cannot be established. The New Chinese Act does not follow this practice.

The New Chinese Act takes the approach of directly applying the law of the forum in case of failure to prove foreign law. This may result in judges taking a negative or inactive attitude to the investigation of foreign law in order to escape its application.

In the New Chinese Act, once the parties fail to prove the foreign law, there is no clear provision as to who bears the burden of proving the content of foreign law chosen by the parties. It is not clear whether judges take the responsibility to investigate the content of the chosen foreign law, or whether judges directly apply Chinese law.

In three judgments of People's courts rendered after the entry into force of the New Chinese Act, three solutions were adopted when applying Article 10 of the Act. In one judgment, it was held that where parties cannot ascertain the applicable foreign law of their choice, and the judges cannot establish the designated foreign law, Chinese law applies. That is to say, once the parties demonstrate that they cannot prove the content of the selected foreign law, the judges should investigate the content of the applicable foreign law *ex officio*.[31] In another judgment, it was held that once the parties demonstrate that they cannot provide the content of the chosen foreign law, judges shall apply Chinese law directly.[32] It seems that Chinese judges take the attitude that the parties shall bear the consequences of failure to prove foreign law. In a third judgment, it was not clear who bears the burden of proving foreign law, but it was held that where applicable foreign law cannot be ascertained, Chinese law should be applied.[33] In fact, the latter two judgments have the same effect or result that the parties shall assume the

[30] CHINA SOCIETY OF PRIVATE INTERNATIONAL LAW, *Model Law on Private International Law of People's Republic of China (sixth draft)*, Beijing 2000, p. 6.

[31] A civil judgment (No. 26514 [2010], First, Civil Division I, Civil, Pudong) issued by the People's Court of Pudong District, Shanghai Municipality, concerning the disputes over a labour contract between XX Corporation and ChenXX, XX Co., Ltd. (China), XX Comprehensive Technology Co., Ltd. (China).

[32] A commercial judgment (No. 76 [2010], First, Foreign, Commercial, Shaoxing) issued by the People's Court of Shaoxing, Zhejiang Province, concerning the disputes over a loan contact between International Finance Corporation and Zhejiang Glass Co., Ltd., Feng Guangcheng.

[33] A civil judgment (No. 205 [2011], Final, Civil Division IV, Maritime, HPC, Shanghai) issued by the Higher People's Court of Shanghai, concerning the disputes over a contact of carriage of goods by sea between CMACGM.S.A. and Shanghai Lizhi International Logistics Co., Ltd.

burden of proof of foreign law chosen by them and once the designated law cannot be established, Chinese law applies.

In our view, the solution adopted in the second judgment is compatible with legislative goals. It is clear that, if the judges bear the burden of ascertaining the content of the foreign law once the parties fail to prove the content of the foreign law that they have chosen, this may lead to parties being inactive and relying excessively on judges. This goes against the purpose of differentiating between two different situations in Article 10. It would be more appropriate to presume that once the parties demonstrate a failure to prove the content of the foreign law that they have chosen, they must assume responsibility for this failure. Article 17 (2) of Interpretation I states that if, according to Article 10 (1) of the New Chinese Act, where the parties assume the burden of proof of foreign law, and they cannot produce the content of the foreign law in a reasonable time as designated by the courts without justification, then this may constitutes failure to prove foreign law. That is to say, Interpretation I follows the approach taken in the second judgment and is of great importance to removing inconsistency in this area.

G. Remedies for Errors in the Application of Foreign Law

According to the civil procedure law of China, as well as relevant judicial practice, it is presumed that if there are errors in the application of foreign law, the parties can appeal and the judges can review the error. In practice, some superior courts have only reviewed errors in the application of the conflict rules by inferior courts.[34]

III. Use of Bilateral Treaties to Access Foreign Law in China

Since 1987, more than 100 bilateral treaties in criminal matters, civil and commercial matters, civil or commercial and criminal matters, extradition and transfer of sentenced persons, *etc.*, have been concluded between China and other countries. By January 2010**, t**here were 36 bilateral treaties[35] between China and other countries[36] on mutual judicial assistance,[37] in which there is at least one article dealing with the exchange of legal information.

[34] *Weibang Furniture Company Limited in Shun De City vs. Panda Company Limited*, about the delinquent loans disputes, China Supreme Peoples' Court (2004) (Serial number of the case: Ming Si Ti Zi No. 4).

[35] The titles of these agreements are characterised by using different words, such as agreements in civil matters, agreements in civil and commercial matters, agreements in civil and criminal matters, or agreements in civil, commercial and criminal matters.

[36] The contracting states include France, Poland, Belgium, Mongolia, Romania, Russia, Belarus, Spain, Turkey, Ukraine, Cuba, Italy, Egypt, Bulgaria, Thailand, Kazakhstan, Kirghizia, Uzbekistan, Tajikistan, Singapore, Morocco, Vietnam, Laos, Cyprus,

A. Provisions in the Bilateral Treaties

In general, bilateral treaties can be categorised into two groups:

First, the mutual judicial assistance agreements provide generally that the contracting parties shall provide legal information or materials and information on their legal practice, as well as other necessary information.[38] For example, Article 29 of the agreement with Bulgaria provides that the Central Authority of the Contracting Parties shall, upon request, inform each other of laws and regulations in their respective states as well as of their application in judicial practice. It seems that most of the bilateral agreements in recent years use this model.

Second, the mutual judicial assistance agreements have further provisions, especially the following:

1. The Contracting Parties shall provide legislation or precedent necessary for the lawsuits: see for example, Article 15 of the agreement with Italy (1991).

2. The courts of the Contracting Parties may obtain the necessary legal information through mutual assistance by the Central Authority: see for example, the agreements with Belgium, Spain, Morocco, South Korea and Argentina. Article 14(2) of the agreement with Belgium (1988)[39] provides that courts of Contracting Parties may ask for the necessary information through the Central Authorities of the Contracting Parties where court proceedings in one Contracting Party must apply the laws of the other Contracting Party.

3. Article 28 of the Agreement on Mutual Judicial Assistance in Civil and Commercial Matters between China and France (1987) has a particular provision on the means of proving [foreign] law.[40] It provides that the contents of the laws, regulations, customary law, or judicial practice of one Contracting Party may be ascertained through a certificate provided by the diplomatic or consulate agencies, other qualified or competent agencies or individuals of the related Contracting Party, to the courts of the other Contracting Party. This is the only bilateral agreement which explicitly refers to the means of proving foreign law.

4. A request for legal information shall state the requesting authority and nature of the case: see for example, the agreements with Egypt, Singapore, Cyprus,

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South Korea, North Korea, Peru, Tunisia, the United Arab Emirates, Hungary, Brazil, Algeria, Lithuania, Kuwait, Greece and Argentina.

[37] 17 of the 36 agreements relate to civil and commercial matters, 19 of the 36 agreements deal with civil or commercial and criminal matters.

[38] See the agreements with Poland, Mongolia, Romania, Russia, Belarus, Ukraine, Cuba, Bulgaria, Thailand, Kazakhstan, Kyrgyz Republic, Uzbekistan, Tajikistan, Laos, North Korea, Peru, Tunisia, Kuwait, Brazil, the United Arab Emirates, Turkey, Greece and Algeria. However, among these agreements, some of them use two Articles to deal with the exchange of legal information: first in the Article regarding the scope of judicial assistance and then in other provisions: see the agreements with Spain, Italy, Singapore, Tunisia and Argentina. Others only have one article, usually in the general provisions or in other provisions: see the agreements with the United Arab Emirates, Kuwait, Cuba, Turkey, Poland, Mongolia, Hungary and Morocco.

[39] Not entered into force yet.

[40] Art. 28 *Modes de preuve du droit*.

and Hungary. In the agreements with Vietnam and Lithuania, a request for legal information shall make out the requesting authority and the purpose of the request.

5. Article 14(3) of the agreement with Belgium clearly states that the request may be refused on grounds that it will affect the interests of the required state or may be contrary to the sovereignty or security of the requested party.

6. Article 14(4) of the agreement with Belgium also provides that the reply should be made as urgently as possible without costs and the requesting authority is not bound by the information provided to it under the bilateral treaty.

It seems that the earlier bilateral agreements have more detailed provisions on exchange of legal information.

B. Bilateral Treaties in Practice

In judicial practice, few cases use the means provided by bilateral treaties to access foreign law. The main reason may be that the "Central Authority Channel" is usually time-consuming. In a survey with relevant questions in this regard, many judges responded that foreign law is not easily accessible through embassies / consulate agencies and judicial assistance.[41]

IV. Conclusions

Proof of foreign law is the prerequisite for the application of foreign law. It has a direct impact on the trial result. It needs much attention. Article 10 of the New Chinese Act is the first Chinese legislation on proof of foreign law. Articles 17 and 18 of Interpretation I provide further clarification to enhance good practices in this area. These provisions reflect judicial practice in the past years. The author agrees with the mixed model that requires judges to apply the conflict of law rules on their own initiative and investigate foreign law *ex officio* except where foreign law is chosen by the parties.[42] The provision in the New Chinese Act and Interpretation I may resolve most problems in practice. However, these provisions need to be tested in practice. This area of law deserves more attention and research.

[41] Q. MA (note 16), at 11.

[42] Chinese scholars appreciate the approach taken by the New Chinese Act. See F. XIAO, On Chinese Legislation on Proof of Foreign Law, *International Law Review of Wuhan University* 2011, vol. 1, p. 338-339.

MANDATORY RULES IN PRIVATE INTERNATIONAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA

Yong GAN*

I. Introduction

Mandatory rules[1] in Private International Law, also known as *lois de police*,[2] *lois d'application immediate*,[3] intervention laws (*Eingriffsnormen*),[4] peremptory rules,[5]

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[1] T.C. HARTLEY, Mandatory Rules in International Contracts: The Common Law Approach, *Recueil des Cours* 1998, p. 345-349.

[2] A.V.M. STRUYCKEN, Co-ordination and Co-operation in Respectful Disagreement: General Course on Private International Law, *Recueil des Cours* 2009, p. 33-44, p. 406.

[3] F. VISCHER, General Course on Private International Law, *Recueil des Cours* 1993, p. 153.

[4] J. KROPHOLLER, *Internationales Privatrecht*, Tübingen 1990, p. 17, quoted by F. VISCHER (note 3), at 154.

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have gained increasing attention both in theory and practice of private international law.

Generally speaking, mandatory rules are those rules, which are either imperative or prohibitive in nature. They can broadly be defined as the rules of law, which cannot be "excluded, altered, or limited" by stipulation of the parties.[6] Specifically, mandatory rules can be classified into two categories: domestically mandatory rules, which refer to "[r]ules which cannot be excluded by a contractual provision in a domestic setting, but which are subject to the normal rules of private international law" and internationally mandatory rules, referring to the rules of law which must be applied irrespective of the applicable law designated by the normal rules of private international law.[7] The latter are the so-called mandatory rules in private international law, which are also the subject matter of this article.

Since Phocion FRANCESCAKIS developed the concept in his 1958 published thesis based on his observation of the practice of French courts, a widespread awareness was aroused that some laws of the forum state can claim immediate application regardless of conflict rules.[8] Later, it was acknowledged that this notion, though not in the exact terminology as was used thereafter, had been mentioned and referred to much earlier by many famous jurists like Friedrich Carl von SAVINGY, Wilhelm WENGLER, Henri BATIFFOL, *etc*.[9] Moreover, as early as 1929, this notion had found its expression in the decision of the Permanent Court of International Justice in *France v. Kingdom of the Serbs, Croats and Slovenes*.[10] In this decision, the court stated as follows:

> "… [I]t should however be observed that it may happen that the law which many held by the court to be applicable to the obligations in the case, may in particular territory be rendered inoperative by a municipal law of this territory – that is to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law."[11]

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[5] F. MOSCONI, Exceptions to the Operation of Choice of Law Rules, *Recueil des Cours* 1990, p.129 *et seq*.

[6] T.C. HARTLEY (note 1), at 345.

[7] T.C. HARTLEY (note 1), at 348. Some scholars disagree with this distinction, "the distinction made between rules of mandatory application, albeit allowing the concurrent application for foreign compatible rules, and rules whose application is mandatory and absolute, not allowing any possible concurrent foreign rules… seems of minor importance. They are not «two different types of mandatory norms», but « norms of the same nature, albeit of different scope »." F. MOSCONI (note 5), at 141-142.

[8] Ph. FRANCESCAKIS, Lois d'application immédiate et droit du travail, *Rev. crit. dr. int. pr*. 1974/63, p. 273 and 695, quoted by F. VISCHER (note 3), at 153.

[9] A.V.M. STRUYCKEN (note 2), at 407.

[10] Payment of Various Serbian Loans Issued in France (*Fr. v. Yugo*.), 1929 P.C.I.J. (ser. A) No. 20 (July 12).

[11] PCIJ, 12 July 1929, *Recueil des arrêts*, series A. No. 20/21, p. 40-41, para. 88.

It should be noted that a the well-known regional instrument, the EC Convention on the Law Applicable to the Contractual Obligations of 1980 (hereinafter referred to as the "Rome Convention"),[12] later adopted as the Regulation on the Law Applicable to Contractual Obligations (hereinafter referred to as the "Rome I Regulation"),[13] provisions regarding internationally mandatory rules are provided for in Articles 7 and 9 respectively, with some differences, with respect to the mandatory rules of third countries. In these two instruments, mandatory rules are referred to as "mandatory provisions" at Article 7, as well as "overriding mandatory provisions" at Article 9.[14] By contrast, domestically mandatory rules are provided for at Article 3 (3) of the Rome Convention and Article 6 of the Rome Regulation.[15]

Moreover, many domestic laws such as the Swiss Private International Law Act,[16] Article 1192(2) of the Civil Code of the Russian Federation,[17] Article 20 of Belgian PIL Act of July 2004,[18] as well as international instruments such as the Hague Convention of 1985 on the Law Applicable to Trusts and on their Recognition,[19] the Hague Convention of 1978 on the Law Applicable to Agency,[20] the Inter-American Convention on the Law Applicable to International Contracts,[21] *etc.* all include provisions with respect to international mandatory rules.

It is against this background of the increasing acceptance of the internationally mandatory rules in domestic private international law, enactments and related

[12] 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), *OJ* C 334 of 30 December 2005, p. 1.

[13] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligation (Rome I), *OJ* L 177 of 4 July 2008, p. 6.

[14] Article 9 of Rome I Regulation, Article 7 of Rome Convention.

[15] Article 6 of Rome I Regulation, Article 3(3) of Rome Convention.

[16] Article 19 of Swiss Statute of Private International Law.

[17] Article 1192 (2) of Civil Code of Russian Federation.

[18] Article 20 of Belgian PIL Act.

[19] Article 16 of the Convention provides:

"The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws. If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State, which have the same character as mentioned in the preceding paragraph. Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this Article."

[20] Article 16 of the Convention provides:

"In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules."

[21] Article 11 of the Convention provides:

"Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties."

international instruments, that the concept was also accepted and included in the Act of People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships (hereinafter referred to as the Act).[22] Article 4 of the Act provides:

> "Where the law of People's Republic of China contains imperative provisions with respect to foreign-related civil relationships, such imperative provisions shall be directly applied."

However, this provision leaves several issues unresolved, such as the question of what rules count as imperative provisions, and whether the mandatory rules of the country of the *lex causae* and those of third countries should be considered, and if so, how?

This article explores in its second part the scholarship regarding mandatory rules in Chinese private international law over the past decades, focusing on the rationale for gradual acceptance of internationally mandatory rules in China through scholars' efforts; in the third part, several typical cases relating to internationally mandatory rules and adjudicated in Chinese courts, are introduced and analysed. With some commentary on the approach adopted by Chinese courts to the institution, the Article concludes, in the fourth part, that internationally mandatory rules should be subject to further development and perfection.

II. Theory of Internationally Mandatory Rules in China

A. Terminology

In terms of terminology relating to mandatory rules in private international law, Chinese scholars have shown various predilections. Four terms have been used by scholars who borrowed from English, French and German legal literature referring to mandatory rules, *i.e.* internationally mandatory rules,[23] *lois d'application immediate*,[24] *lois de police*,[25] *Eingriffsnormen* (intervention law).[26] The variation in

[22] The Act of PRC on the Law Applicable to Foreign-Related Civil Relationships was passed on 28 October 2010, and took effect on 1 April 2011.

[23] TAO DU, *Guoji Jingji Maoyi Zhong De Guojisifa Wenti* [Private International Law Problems in International Business], Wuhan 2005, p. 102.

[24] DEIPEI HAN, Wanjin Guoji Sifa De Fazhan Qushi (The Trends of Development of Private International Law in Recent Decades), in *Zhongguo Goujifa Niankan* (Chinese Yearbook of International Law), Beijing 1998, p. 14-15; Donggen Xu, Lun Falv Zhijie Shiyong Lilun Ji Qi Dui Dangdai Guojisifa De Yingxiang (The Theory of the Law of Direct Application and Its Impact on the Modern Private International Law), *Zhongguo Goujifa Niankan* (Chinese Yearbook of International Law), Beijing 1994, p. 71.

[25] HAOPEI LI, Jing Ca Fa (*lois de police*), *Zhongguo Dabaike Quanshu Faxue Juan* (China's Encyclopaedia, Volume for Science of Law), Beijing 1984, p. 332.

[26] T. DU (note 23), at 102.

terminology sometimes causes confusion, if not the impression that different topics are being discussed.[27] Admittedly, the differing terms have some nuances, but for the purpose of this Article, they stand for the same thing unless otherwise expressly stated.

B. Nature of Mandatory Rules in Chinese Private International Law

1. The Change of the Role of Public Law in Private International Law and its Impact

Traditionally, the distinction between public and private law has been deeply rooted in civil law countries.[28] Public law regulates the relationships between individuals and State or public bodies, while private law regulates the relationship between individuals. Private International Law, as part of private law, therefore, does not deal with public law relationships.[29]

However, after World War II, many western States abandoned *laissez-faire* policy and widened their interference with the economic and social life of individual citizens through legislation. An increasing number of so-called social welfare and economic laws and regulations have been enacted to deal with a wide range of issues relating to social public interests and the economic order of States.[30] As a result, in many fields involving important public interests, such as market control and national economy (such as anti-trust and export and import restrictions), protection of real property interests (prohibition of acquisition of land by foreigners), protection of currency (maintaining the balance of foreign exchange rates), control of securities markets (mergers and acquisitions, disclosure), and protection of the environment and labour (working time and minimum salaries), state regulations have dramatically expanded their influence and the significance of the distinction between public and private law has been, to some extent, reduced.[31]

With the borderline between private law and public law being blurred and difficult to define, the dichotomy of private and public law, despite the fact that it may be used as a helpful conceptual tool for analysis, cannot provide a solid basis for determining the scope of application of a specific conflict of laws rule.[32] That is to say, if a reference to foreign law is made by a conflict of laws rule, that reference does not necessarily exclude public law; instead, it could also include public

[27] See II.B.2.

[28] F. VISCHER (note 3), at 150.

[29] D. HAN (note 24), at 15; T. DU/ L. CHEN, *Guoji Sifa* (Private International Law), Shanghai 2004, p. 152 *et seq*.

[30] YONGPING XIAO/ YONGQING HU, Lun Zhijie Shiyong De Fa (On The Law Directly Applied), in F*azhi Yu Shehui Fazhan* (Law and Social Development), 1997/5, p. 46; YONGQING HU, Lun Gongfa Guifan Zai Guojisifa Shang De Diwei (The Status of Public Law Provisions in Private International Law), *Falv Kexue* (Science of Law), 1999/4, p. 90-93

[31] F. VISCHER (note 3), at 150-51.

[32] F. MOSCONI (note 5), at 129-130.

law if that law also plays a role in regulating the particular relationship at issue in the case.[33]

As a result, in 1975, the Institute of International Law pronounced in its Resolution of the Session of Wiesbaden that the principle of non-applicability of foreign public law is "based on no cogent theoretical or practical reason",[34] and "may entail results that are undesirable and inconsistent with contemporary needs for international co-operation".[35] The Resolution concludes that although foreign public law is less frequently applied, the character of public law attributed to a provision does not prevent it from being applied if it is designated by a conflict rule.[36]

The blurring borderline of public and private law, as well as the erosion of the principle of non-applicability of public law, contribute to the growing acceptance and application of international mandatory rules in private international law, including the application of both the international mandatory rule of the forum, and those of the *lex causae*, as well as those of third countries.

It should be noted that public law, if forming a part of the applicable law designated by a conflict rule, only insofar as it will affect the private law relationship, will be considered and given effect. In other words, when foreign public law is considered, it is not the criminal or administrative sanction imposed generally by that law that will be enforced by the forum. Instead, it is the effect of foreign public law on the private relationships between the parties concerned that will be considered and taken into account.[37] For example, when foreign anti-trust law is considered by a court, it is not the sanction imposed by that law that will be enforced by the forum; rather, the invalidating effect upon a contract in violation of that anti-trust law will be considered.[38]

However, in spite of a common theoretical foundation, the issues relating to mandatory rules of the forum and those relating to mandatory rules of the *lex causae*, as well as those of third States, are different.[39] Generally speaking, the mandatory rules of the forum enjoy the highest degree of legitimacy in regulating a foreign-related civil relationship, with those of the *lex causae* enjoying a lower

[33] Y. XIAO/ Y. HU (note 30), at 48-49.

[34] See Resolution of The Institute of International Law, Session of Wiesbaden, 1975, Article A.I, A.III, A.IV.

[35] See Resolution of The Institute of International Law, Session of Wiesbaden, 1975, Article A.I, A.III, A.IV.

[36] See Resolution of The Institute of International Law, Session of Wiesbaden, 1975, Article A.I, A.III, A.IV.

[37] F. VISCHER (note 3), at 151.

[38] *Ibid.*

[39] RENSHAN LIU, Zhijie Shiyong De Fa Zhi Lilun Yu Shijian Wenti, Jianping Zhongguo <Shewai Minshi Guanxi Falv Shiyong Fa> Di 4 Tiao (The Issues Regarding The Theory and Practice of Directly Applicable Law, with Comments on Article 4 of The Act on Law Applicable to Foreign-Related Civil Relationships), in *Zhongguo Guojifa Niankan* (Chinese Book of International Law), Beijing 2011, p. 410.

degree of legitimacy. Whether those of a third State should play a role in regulation still remains a highly debatable issue.[40]

2. The Methodology for the Application of Internationally Mandatory Rules

The theory concerning the application of international mandatory rules is, in some way, connected to the nature of these rules. Chinese scholars generally deemed internationally mandatory rules to be a combination of public law and private law.[41]

The methodological problem raised by international mandatory rules can be reduced to a question of how an internationally mandatory rule will be applied? In answering this question, some scholars worried, to some extent, about the meaning of "direct/immediate application". They questioned whether the terminology "the law of immediate/direct application" has correctly described the method in which internationally mandatory rules are applied, they claimed that the internationally mandatory rules do not actually apply directly/immediately. Instead, application of a specific internationally mandatory rule, even one with an express mandate regarding its scope of application, is determined based on a distinct private international law rule, one like Article 4 of the Act, or Article 19 of Swiss PIL Act, which constitutes a legal basis to apply internationally mandatory rules.[42] In this sense, a specific internationally mandatory rule is not applied directly, let alone an international mandatory rule of a third country. An internationally mandatory rule of a third country will be applied based on judicial discretion.[43]

It is widely accepted among Chinese scholars that an internationally mandatory rule combines a substantive rule, on the one hand, and a unilateral conflict rule, on the other, whether explicit or implied. The scope of application of such an international mandatory rule will be determined according to the unilateral conflict rule.[44]

With regard to the application of internationally mandatory rules of third countries and those of the *lex causae*, the first issue is why these international mandatory rules, rather than those of the forum should even be recognised by the forum State. Few Chinese scholars elaborate on this issue. They follow the theories adopted by foreign scholars and put forward four different reasons to support this.[45]

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[40] A. CHONG, The Public Policy and Mandatory Rules of The Third Countries in International Contracts, *J. Priv. Int'l L.* 2006/2, p. 27 *et seq*.; A. DICKINSON, Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?, *J. Priv. Int'l L.* 2007/3, p. 53 *et seq*.

[41] D. HAN (note 24), at 15; Y. XIAO/ Y. HU (note 30), at 48.

[42] SHISONG XIE, Lun Guojisifa Zhong De Zhijie Shiyong De Fa (The Law of Immediate Application in Private International Law), in *Zhongguo Guojifa Niankan* (Chinese Yearbook of International Law), Beijing 2011, p. 447-450.

[43] D. XU (note 24), at 78-81.

[44] YINXIA SU/ QING WANG, Zhijie Shiyong De Fa Yu Xiangguan Lifa De Wanshan (The Law of Immediate Application and Perfection of Relevant Legislation), in *Lilun Tansuo* (Theoretical Exploration) 2007, p. 135-138.

[45] D. XU (note 24), at 78-80; T. DU (note 23), at 106-107.

A theory known as "unitary connection" (*Einheitsanknüpfung*)[46] is used to explain why the international mandatory rule of the *lex causae* should be applied. The theory attributes two functions to the connecting factors contained in the related conflict rule: to designate the private law and to demonstrate the closeness between the legal relationship contained in the category of the conflict rule and the public law in that country.[47] The traditional objection to this theory, based on the divide between public and private law and the principle of non-applicability of public law, was overturned by the Resolution of the Institute of International Law in 1975.[48]

The reason why internationally mandatory rules of third states should also been applied is more complicated.[49] The opinions of scholars differ greatly, if not completely, on this issue.[50] To the extent that scholars agree that the international mandatory rules of third countries should be provided in PIL rules, they hold dramatically different views on how they should be provided therein or applied.[51] Few Chinese scholars discuss this issue in depth,[52] which is partly the reason for the lack of provisions on this issue in the new Act.[53] It suffices to say that the identical interests between third countries and the forum country, as well as the requirement for the equal treatment of international mandatory rules of third countries and those of the *lex causae* warrants the application of third countries' mandatory rules.[54] How they should be applied is discussed below.

C. The Identification of Internationally Mandatory Rules

One of most difficult issues in the theory and practice of internationally mandatory rules is the identification of an international mandatory rule. Chinese scholars pay a lot of attention to the identification of the mandatory rules of the forum, while giving little attention to those of the country of the *lex causae* (also called the second country), much less to those of third countries.

With regard to the determination of the forum's internationally mandatory rules, the distinction was first made between domestically and internationally mandatory rules. As an example, the provision with regard to the age required for an individual to be of full capacity is generally regarded as a domestically

[46] A.V.M. STRUYCKEN (note 2), at 424; F. VISCHER (note 3), at 179.

[47] D. XU (note 24), at 78-80.

[48] Resolution of The Institute of International Law, Session of Wiesbaden, 1975, Article A.I, A.III, A.IV.

[49] A.V.M. STRUYCKEN (note 2), at 419-423; F. VISCHER (note 3), at 165-169.

[50] A. CHONG (note 40), at 27 *et seq*; A. DICKINSON (note 40), at 53 *et seq*.

[51] *Ibid.*

[52] D. XU (note 24), at 78-80; T. DU (note 23), at 106-107.

[53] JIN HUANG (ed.), *Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyongfa Jianyigao Ji Shuoming* (Proposed Draft of the Law Applicable to Foreign-Related Civil Relations of the People's Republic of China and its Explanation), Beijing 2011, p. 51.

[54] T. DU (note 23), at 110.

mandatory rule. It does not exclude the designation of other country's rules through private international law.[55] Whereas internationally mandatory rules refer to those rules enacted specifically with a view to intervening in the economic order, such as the rules regarding export or import restrictions,[56] they exclude the supposedly applicable foreign law. However, it is worth mentioning that some scholars regard both types of mandatory rules as essentially the same, only with differences in terms of their scope of application. And internationally mandatory rules obviously claim a much wider scope of application than domestically mandatory rules.[57]

Scholars generally agree that those laws and regulations relating to anti-trust, import and export restrictions, exchange controls, embargoes, securities markets, and labour and environment protection are most likely to be considered internationally mandatory rules.

A debatable issue in determining internationally mandatory rules is whether some private law rules of a protective nature should be regarded as internationally mandatory rules. Provisions protecting the weaker party, like consumers and employees exemplify this type of rule. Some scholars maintain that provisions of protective substantive law cannot be regarded as internationally mandatory rules if special conflict rules have been used to protect a party to such civil relationships.[58] For example, in the Swiss Private International Law Act, Article 120 provides directly for the application of the law of the State where the consumer has his habitual residence. Therefore, by adopting a conflict rule referring to foreign law in regulating the relationship between consumers and producers, the substantive law of such a State protecting consumers cannot be regarded as an international mandatory rule. Some scholars go even further: in their view, to consider a protective substantive law as an internationally mandatory rule reflects a parochial attitude towards international transactions, forcing business to be carried out in the manner preferred by a State rather than in other ways.[59] Some scholars, however, argue that protective private laws also constitute internationally mandatory rules.[60] Chinese scholars mostly take the latter view;[61] however, this has not yet found support in judicial practice.

D. The Scope of Application of Internationally Mandatory Rules

Different methods are employed to determine the scope of application of various types of internationally mandatory rules. It has been argued that the application of internationally mandatory rules of the forum could be determined according the

[55] *Ibid.*, p. 104.

[56] *Ibid.*

[57] F. MOSCONI (note 5), at 142.

[58] F. VISCHER (note 3), at 158-159;

[59] *Ibid.*

[60] Y. XIAO (note 30), at 47; R. LIU (note 39), at 439.

[61] D. HAN (note 24), at 14; H. LI (note 25), at 332; R. LIU (note 39), at 439.

express legislative guide, or in the absence of such a guide, defined through the content and purpose of the mandatory rule.[62] To determine whether an internationally mandatory rule should be applied, the practice of the United States courts has been cited as instructive.

With respect to the scope of internationally mandatory rules of the *lex causae*, the prevailing view is that they may be applied even as a part of public law given that the appeal of the principle of non-applicability of public law is waning.[63] Yet the internationally mandatory rules of the *lex causae* are not necessarily always required for application insofar as the foreign law to which the mandatory rules belong has been designated by the conflicts rule. Its scope of application should be based on a special connection in line with the underlying policy.[64]

As for international mandatory rules of third countries, much more controversy has arisen as to whether they should be applied, and if so how since these two issues are intrinsically related.[65] On the issue of whether the mandatory rule of third countries should be applied, traditionally this question was answered in the negative based on the non-applicability of public law. Now the prevailing view is that this question should be answered in the affirmative.[66]

As to the question of how the mandatory rule of third countries should be applied, two main approaches were adopted. One is the approach adopted by Article 7 of the Rome Convention according to which a judge has discretion, based on the circumstances of the case and the closeness between the mandatory rules involved and the facts of a case, by considering the nature and purpose of the mandatory rules, to decide whether or not the mandatory rules should be applied.[67]

Another approach is that adopted in the Rome I Regulation, which does not include a general rule relating to internationally mandatory rules; rather, it provides specifically that if the mandatory rules of the *lex loci solutionis* invalidate a contract or violate a will, then that mandatory rule may be considered. To a certain extent, this introduces the mandatory rules of a third country or of third countries.[68]

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[62] R. LIU (note 39), at 439.

[63] D. XU (note 23), at 78.

[64] *Ibid.*, p. 79.

[65] A. CHONG (note 50), at 40-48, A. DICKINSON (note 50), at 86-88.

[66] D. XU (note 24), at 79.

[67] Article 7(1) of Rome Convention of 1980 provides:
"Under this provision, the third countries' internationally mandatory rule should be applied based on the discretion of the judge according to the circumstances of the case, second only the internationally mandatory rule of the country which has close relation with a case or a contract should be considered, and last, the considerations include the nature and purpose of the concerned rule of the law, and the consequences of its application or non-application."

[68] Article 9(3) of Rome I Regulation provides:
"Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

III. The Practice regarding Internationally Mandatory Rules in China

A. Evolution of Legislation

Before the adoption of the Act in 2010, no specific provision directly relating to international mandatory rules was included in the Chinese law. However, provisions relating to public policy and evasion of law exist in both the General Principles of Civil Law[69] and the judicial interpretation thereof.[70]

These two provisions have played an important role in implementing some international mandatory rules by replacing a provision regarding international mandatory rules, as provided for in Article 4 of the Act. Undoubtedly, some of those cases adjudicated under Article 150 of the General Principles of Civil Law,[71] or Article 194 of the Judicial Interpretation[72] will serve as concrete examples on how Chinese courts will deal with cases concerning international mandatory rules in the future.

It should be noted that, before the adoption of the Act, when Chinese courts handled cases involving international mandatory rules, these cases mainly involved international mandatory rules of the forum, *i.e*. of the PRC. No judgment has been delivered in China affirming the application of international mandatory rules of the *lex causae* or those of third countries despite the fact that relevant cases exist.[73]

It is worth mentioning that at the Annual Conference of China's Society of Private International Law in 2012, the Presiding Judge of the Fourth Civil Division of the Supreme People's Court, Judge Guixiang Liu, reported on the progress of judicial interpretation relating to the Act. In the draft interpretation of the Act, international mandatory rules were defined as "those rules concerning social and public interests or security, from which parties cannot derogate by stipulation, and which claim direct application without being referred to by conflict rules".[74] They are further categorised into "those concerning financial security for endangering foreign exchange, those concerning anti-suit, environmental security, food safety and public health, those concerning protection of consumers, employee, and those

[69] Article 150 of the General Principles provides:

"Foreign laws or international usages to be applied under the provisions of this section shall not violate the public interest of society of People's Republic of China."

[70] Article 194 of Opinions of the Supreme People's Court on the Implementation of General Principles of Civil law of People's Republic of China provides:

"Where the parties act with a view to evading the imperative or prohibitive laws of People's Republic of China, no effect will result that a foreign law is to be applied."

[71] See below, section III.B.1.2.

[72] See below, section III.B.1.

[73] See below, section III.C.

[74] Third Draft Interpretation of SPC concerning the Act on the Applicable Law of Foreign-related Civil Relationships of PRC, Article 6.

concerning internet security, as well as rules otherwise concerning social and public interest."[75]

B. Practice regarding Internationally Mandatory Rules of the Forum

Chinese courts have adjudicated many cases involving the international mandatory rules of the forum, although in the name public policy or evasion of law. These cases are mainly concerned with regulations regarding foreign exchange and regulations on the exemption of liability in maritime matters.

1. Cases Involving Internationally Mandatory Rules in Foreign Exchange Regulations

One type of case involving foreign exchange regulations is the case of the foreign guarantee. China is a country that imposes restrictions on foreign currency and foreign exchange. The restrictions, exemplified in legislation on foreign guarantee, generally require that, to the extent an institution within the territory of the PRC provides for a guarantee to foreign creditors, it shall obtain permission from authority before doing so.[76] A lot of controversy arose after the financial crisis hit Asia in 1998: many government-affiliated enterprises, set up in Hong Kong in the early 1990s, had borrowed money from financial institutions in Hong Kong and the repayment of the loans was generally guaranteed on the real estate they owned, as well as by letter of guarantee issued by local governments or their parent companies. Later, these borrowers defaulted on their loan repayments owed to foreign lenders and guaranteed by local governments of Mainland China. Lenders in Hong Kong then filed suit against them and obtained judgments against borrowers. Thereafter, they tried to recover damages from those guarantors in Mainland China through the appropriate courts.[77] As such, many cases on the execution of foreign guarantees were raised in Chinese courts.[78]

[75] *Id.*

[76] Article 19 of Regulation on Administration of Foreign Exchange of PRC, Measures Concerning Administration of Foreign Guarantee by Institutions Inside China, issued by People's Band of China; Article 6 of Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of Security Interest, issued by the Supreme People's Court in 2000.

[77] M. ZHANG, Shewai Danbao Guanxi Zhong Waiguofa Paichu De Fali Jichu He Shiyong Fanwei, Yi Guangzhou Diqu De Sifa Shijian Wei Yangben (Exclusion of Foreign Law in Foreign Guarantee, Its Legal Basis and Scope of Application: Based on Survey of Cases in Judicial Practice of Guangzhou District), available at <http://www.gzcourt.org.cn/fxtt/2012/06/29164151305.html>.

[78] *Ibid.* According to the survey conducted by a judge in Guangzhou City, south China's Guangdong Province, since 2004, 39 cases involving foreign guarantee have been heard at different levels of the people's courts in Guangzhou.

In *Bank of China (Hong Kong) Ltd. v. Zhongguo Guang'ao Development Group & Liu Tianmao*,[79] the Shangtou Intermediate People's Court found that the guaranty involved in the case was foreign in nature; the plaintiff who was the principal was an enterprise established in Hong Kong, the defendants who were the guarantors, were respectively a Mainland enterprise and an individual.[80] The court held that China is a country that imposes controls on foreign exchange and that only financial institutions and enterprises fulfilling related requirements of Regulations can provide for foreign guaranty, which is further subject to the permission of and registration with the authority of foreign control in China. With respect to foreign guaranty, since this issue concerns the economic security of the country and strict foreign exchange control is imposed, the stipulation by the parties for the law of Hong Kong was contrary to the public interest of our society, and was found to be void. On public policy grounds and pursuant to Article 150 of the General Principles of Civil Law, the law of the PRC was applied to the case.[81] Other cases followed this line of reasoning, including *Bank of China (Hong Kong) Ltd. V. Hong Kong Xinjiyuan Industrial Co. Ltd. & Foshan Dongjian Group*,[82] *Macao Dafeng Bank Ltd. v. Macao Guixing Zhiye Ltd. & Naihai Municipal People's Government & Street Office of Guicheng District of Nanhai, etc.*,[83] *Bank of Transportation Hong Kong Branch v. Hong Kong Weibaodeng Chemicals Ltd. & Guangdong Provincial Chemical Co. & Tan Liyi*,[84] *Huabi Futong Bank v. Guangdong Provincial Bureau*.[85]

In another case adjudicated by the Supreme People's Court, *Bank of China (Hong Kong) Ltd. v. Zhongguo Changcheng Industrial Company*,[86] the Bank of China and the Changcheng Company agreed in their contract of guarantee that the contract was subject to and interpreted according to the law of Hong Kong. According to the Law of Security Interests of the PRC, public bodies cannot provide for guarantee; under the related administrative regulations, foreign guarantee shall be subject to the procedure for permission and registration; judicial interpretation of the Supreme People's Court further provides that foreign guarantee without the permission and registration procedure is void.[87] The court held that these provisions constitute imperative and prohibitive rules; the Mainland company providing foreign guarantee failed to comply with the rules regarding procedures for permission and registration; therefore, the stipulation by the parties for the application of

[79] E. WANG (ed.), *Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyongfa Tiaowen Lijie Yu Shiyong* (Understanding and Application of the Provisions of The Act of P. R. China on the Law Applicable to Foreign-related Civil Relationships), Beijing 2011, p. 37-38.

[80] *Ibid.*, p. 37.

[81] *Ibid.*, p. 38.

[82] *Ibid.*, p. 38

[83] *Ibid.*, p. 38-39.

[84] *Ibid.*, p. 39-40.

[85] *Ibid.*, p. 40.

[86] (2001) Min Si Zhong Zhi Di 16 Hao (Civil Final Judgment No. 16). *Ibid.* p. 40-42.

[87] *Ibid*. p.41.

the law of Hong Kong was in violation of the imperative rules under Mainland law.[88] Under Article 194 of the Opinions of Implementation of the General Principles of Civil Law, where parties act in evasion of imperative or prohibitive rules of the law of the PRC, it will not result in the application of foreign law. Thus, the stipulation, by the parties in favour of the law of Hong Kong, was void and the imperative provisions of Mainland China were applied.[89]

It should be noted that neither the reasoning based on public policy (social public interest), nor that based on evasion of law is fair. Public policy generally shows "strong ethic associations",[90] and is more likely to operate in a negative way as an escape tool to exclude the normally applicable foreign law.[91] Furthermore, it is generally suggested that public policy should be applied restrictively because of its tendency to disrupt the whole conflict system if loosely applied.[92] To invoke public policy as reasoning for the enforcement of international mandatory rules frustrates these two considerations, even if it is admitted acceptable in case there is no provision directly providing for the application of international mandatory rules.

The reasoning based on evasion of law presents greater problems. It is admitted that the intention of the parties to evade an imperative or prohibitive law should be presented to prove evasion of law, but the intention is hard to prove, and usually the court skips this requirement, making its reasoning flawed.[93]

For these reasons, the inclusion in the new Act of a provision specifically relating to international mandatory rules is certainly a long-awaited and welcome addition for the theory as well as the practice of this institution.

2. A Case Involving Internationally Mandatory Rules in Maritime Law

In *Jiangsu Fabric Import & Export Group Company v. Beijing Huaxia Cargo Carriage Ltd. Shanghai Branch & Huaxia Cargo Carriage Ltd.*,[94] the parties chose the Carriage of Goods by Sea Act in 1936, and the Federal Bill of Lading Act as the governing law, according to which the carrier may, without physically presenting the straight bill of lading, deliver the goods to the receiver designated therein by the shipper.[95] The provision in the governing law is, however, contrary to Article 71 of the Maritime Law of the PRC under which the carrier must make

[88] *Ibid.*

[89] *Ibid.*

[90] A. CHONG (note 50), at 28.

[91] N. VOSER, Mandatory Rules Of Law as a Limitation on The Law Applicable in International Commercial Arbitration, *Am. Rev. Int'l Arb* 1996/7, p. 322.

[92] J. HUAN/ R. JIANG (eds), *Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyongfa Shiyi Yu Fenxi* (Understanding the Act of the PRC on the Law Applicable to Foreign-related Civil Relationships), Beijing 2011, p. 34.

[93] T. DU (note 23), at 107.

[94] (2003) Hu Hai Fa Shang Chu Zi Di 299 Hao.

[95] *Ibid.*

delivery upon presentation of a bill of lading.[96] In accordance with Article 44 of Maritime Law, "[a]ny stipulation in a contract for carriage of goods by sea or a bill of lading or any other similar document evidencing such contract that derogates from the provisions included in this Chapter shall be null and void."[97] Since Article 71 is a provision included in "this Chapter" referred to in Article 44, the court of second instance held that the law chosen by the parties permits the carrier to make delivery without presenting the bill of lading even where a straight bill of lading contravenes Article 71. Pursuant to Article 44 of the Maritime Law, the choice of American law was therefore held void.[98]

It should be noted that the view taken by the appeal court according to which Article 44 of the Maritime Law is deemed to be an international mandatory rule will not have binding force for other cases. At the National Conference of Maritime Adjudication held in July 2012, the presiding judge of the Fourth Civil Division of the Supreme People's Court, Judge Guixiang Liu, discussed this specific issue in his concluding speech. He remarked that the Fourth Chapter of the Maritime Law contains no international mandatory rules as provided for in Article 4 of the Act. He further commented that international mandatory rules in Article 4 only refer to those rules expressing national and public interests, public health interests, financial and economic security, as well as national security.[99]

C. Practice relating to Internationally Mandatory Rules of Other States

The practice of China's courts demonstrates a negative attitude towards the effect of international mandatory rules of other countries.[100] This negative attitude is exemplified in *Korean Hyundai Corporation Co. v. Fujian Xiameng Xiayou Container Manufacture Co. Ltd.*[101]

In this case, the seller, Korean Hyundai Co., entered into a contract with buyer, Xiameng Xiayou for the sale of materials for the fabrication of containers. The seller delivered the goods as provided for in the contract, and Xiayou Co. received the goods but failed to pay the price.[102] Xiayou Co. was a Sino-foreign

[96] Article 71 of Maritime Law of P.R.C provides: A bill of lading is a document which serves as an evidence of the contract for carriage of goods by sea and the taking over or loading of the goods by the carrier, and under which the carrier undertakes to deliver the goods against presenting the same. A provision in a bill of lading stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

[97] See Article 44 of Maritime Law of the PRC.

[98] *Ibid.*

[99] G. LIU, Concluding Speech at National Conference of Maritime Adjudication, 18 July 2012, Dalian. (The material has not been published on any official publication yet and provided by a judge from SPC privately).

[100] T. DU (note 23), at 110.

[101] (1999) Jing Zong Zi Di 97 Hao, The Supreme People's Court. Also see T. DU (note 23), at 110-111.

[102] *Ibid.*

venture enterprise established by Xiamen Vessel Industrial Co. and Korean Youren Co. It is the Korean Youren Co. that, during the management period of the venture enterprise, concluded the sale contract. In addition, Korean Hyundai Co. and Korean Youren Co. reached an agency agreement for export, which provided for the submission of disputes to arbitration by the Korean Commerce Arbitration Committee or to litigation in the Court of Seoul.[103] Korean Hyundai Co. ended up bringing suit against Xiayou Co. in the Fujian Provincial High People's Court, claiming the contract price and damages.

The court of first instance held that the contract was valid and that the defendant was obliged to pay the contract price and interest. On appeal, the defendant, Xiayou Co. claimed, *inter alia*, that the contract was not valid because the Korean Hyundai Co. concluded the contract with a view to circumventing the compulsory Korean law prohibiting the seller from providing for original materials to its overseas company.[104] The Supreme People's Court affirmed the decision of first instance without addressing the issue of whether intentionally evading Korean export restriction regulations should constitute a barrier to the validity of the contract, thereby missing the opportunity to take a position on the application of international mandatory rules of third countries.

IV. Conclusion

International mandatory rules have acquired increasing importance in the private international law practice around the world. This is clear from the increasing amount of national legislation,[105] as well as the number of international instruments[106] containing provisions relating to international mandatory rules. In embracing this institution, Chinese scholars spared no efforts and therefore undoubtedly played an irreplaceable role in the evolution of its theory. Admittedly, there are some drawbacks with the introduction of foreign scholarship, which pays more attention to the abstract problems such as the nature and theoretical foundation of mandatory rules, and less to practical issues such as how to identify them, and the criteria for their application. While a theoretical foundation is important for determining systematically rational solutions to practical issues, it is not enough to focus on theoretical issues and leave practical issues aside.

Chinese practice with respect to international mandatory rules of the forum can be said to be relatively abundant, even when no provision directly relating

[103] *Ibid.*

[104] *Ibid.*

[105] Until now, national legislation on internationally mandatory rules included those of Switzerland, Russia, Belgium and the Netherlands.

[106] International instruments including provisions regarding internationally mandatory rules are the Hague Convention of 1978 on Agency, the Hague Convention of 1985 on Trusts, the Inter-American Convention of 1994 on the Law Applicable to International Contracts and the Hague Convention of 2000 on the International Protection of Adults.

these rules was included in the statute in force. This relative abundance is partly attributed to the practical need for a State to regulate important social public interests, and partly to the development of private international law. With the inclusion of Article 4 in the new Act, more work must be done to perfect its application. Furthermore, the new Act leaves the question of third country's mandatory rules unanswered while the matching interests between China and other countries, as well as the need for international solidarity will grow as China increasingly becomes involved with the world. This issue, therefore, will definitely draw more attention in the future. Some scholars' work in collecting related cases is a good starting point.

CHANGES TO HABITUAL RESIDENCE IN CHINA'S *LEX PERSONALIS*

Qisheng HE*

I. Introduction

Habitual residence is an important concept concerning the daily, central place where a person lives. Habitual residence usually establishes the most significant relationship with a person's daily life, and with his/her legal acts. In the realm of the *lex personalis*, habitual residence was first established as a connecting factor in the Hague Convention of 1902 relating to the Settlement of Guardianship of Minors.[1] Since that time, habitual residence as a connecting factor has been adopted in many conventions of the Hague Conference on Private International Law, as evidenced by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations;[2] the Convention of 13 January 2000 on the International

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[1] See Art. 9 of the Convention of 1902 relating to the Settlement of Guardianship of Minors. The Convention was signed on 12 June 1902, and effective from 30 July 1904.

[2] See Arts. 3, 4, 5, 6 and 8.

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Protection of Adults;[3] the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;[4] and the Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children.[5] Habitual residence has been a favourite concept in Hague conventions.

In the European Union (EU), habitual residence has been widely adopted in regulations.[6] Examples include Council Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession;[7] Council Regulation (EU) No 1259/2010 of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation;[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);[9] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II);[10] and Council Regulation (EC) No 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.[11] In recent important EU regulations, habitual residence is, accordingly, a principal connecting factor in determining the applicable law.

Many scholars have published opinions in favour of habitual residence as a connecting factor of the *lex personalis*.[12] In China, adoption of habitual residence is deemed to be suitable in resolving the issues of the *lex personalis*,[13] whether in

[3] See Art. 15.

[4] See Arts. 4 and 8.

[5] See Arts. 2 and 3.

[6] See P. ROGERSON, Habitual Residence: The New Domicile?, *I.C.L.Q*. 2000/49, p. 84-107.

[7] See Arts. 21, 27, 28 and 36.

[8] See Arts. 5, 6, 7 and 8.

[9] See Arts. 4, 5, 6 and 7.

[10] See Arts. 4, 5, 10, 11, 12 and 23.

[11] *OJ* L 338 of 23 December 2003. For related discussions, see R. LAMONT, Habitual Residence and Brussels II*bis*: Developing Concepts for European Private International Family Law, *J. Priv. Int'l L.* 2007/3, p. 261.

[12] See J. FAWCETT/ J.M. CARRUTHERS, *Cheshire, North & Fawcett: Private International Law*, 14th ed., Oxford University Press 2008, p. 182; L. COLLINS, *et al.*, *Dicey & Morris on the Conflict of Laws (vol. 1)*, Sweet & Maxwell 2006, p. 173; P. STONE, The Concept of Habitual Residence in Private International Law, *Anglo-American Law Review* 2000/29, p. 342; P. ROGERSON (note 6), at 84-107; R. LAMONT (note 11), at 261.

[13] In conflict of laws, the *lex personalis* mainly deals with matters of status and capacity of a person. The use of "personal" choice-of-law rules aims to establish a link between a person and the law of a territory. See D.F. CAVERS, Habitual Residence: a Useful Concept?, *Am. U.L. Rev.* 1972/21, p. 475. To a greater or lesser extent, the *lex personalis* governs such matters as the essential validity of marriage; the effect of marriage on the property rights of husband and wife; jurisdiction in divorce and nullity of marriage; child

inter-regional or international conflict of laws.[14] In 2010, the National People's Congress of China (NPC) promulgated a new private international law - the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations (hereinafter the 2010 PIL Act).[15] In this new Act, habitual residence becomes a principal connecting factor instead of domicile, and to some extent, nationality. Those changes are important departures from and amendments to previous laws.

This article discusses those changes, analyses ways to define habitual residence according to current Chinese laws, and explores options for modification. The article consists of four parts. The first part contains introductory information. Part II focuses on the changes of the *lex personalis* prior to and subsequent to the 2010 PIL Act through a comparative analysis. Part III explores current standards in determining habitual residence and two proposals regarding a new definition of habitual residence that have been submitted to the Supreme People's Court of China (SPC). The SPC's latest definition of habitual residence, effective in January 2013, is reviewed, and Part IV provides some concluding observations and recommendations.

II. Changes in China's *lex personalis*

A. Habitual Residence prior to the 2010 PIL Act

Prior to the 2010 PIL Act, the *lex personalis* in China was provided in two Chinese laws: The General Principles of the Civil Law of the People's Republic of China

legitimacy; legitimation and adoption; wills of movables; intestate succession to movables; and inheritance by a dependant. See J. FAWCETT/ J.M. CARRUTHERS (note 12), at 154 *et seq*.

[14] X.L. DU, From Domicile and Nationality to Habitual Residence: a Study on Transform of Chinese Lex Personalis, *Tribune of Political Science and Law* 2011/3, p. 28-342; H.F. DU, On the Law of the Place of Habitual Residence and Its Application in China, *Journal of Political Science and Law* 2007/5, p. 82-85.

[15] Adopted at the 17th Session of the Standing Committee of the 11th NPC on October 28 and in force as of 1 April 2011. The official version is published in *Gazette of the Standing Committee of the NPC of China* 2010/7, p. 640-643. The 2010 PIL Act is an important follow-up to earlier legislative efforts in the areas of contract law (1999), property law (2007), and tort liability law (2009). For a detailed discussion, see Q.S. HE, The EU Choice of Law Communitarization and the Modernization of Chinese Private International Law, *RabelsZ* 2012/76, p. 47 *et seq*.

(the GPCL),[16] and the Negotiable Instruments Law of the People's Republic of China.[17]

In those two laws, the principal connecting factors of the *lex personalis* were nationality and domicile. For example, the 'statutory succession of an estate'[18] and the 'establishment, alteration or termination of a guardianship'[19] were governed by the law of domicile. In addition, the capacity of a debtor of negotiable instruments to enter into legal acts was governed by the law of nationality.[20]

Habitual residence was not a connecting factor in determining the *lex personalis* and was used as only one criterion to establish a person's domicile. In the Opinions of the SPC on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (1988) (the Opinions on the GPCL),[21] Art. 183 states that where the domicile of a party is unclear or cannot be determined, his/her habitual residence shall be his/her domicile.[22] With regard to a foreign legal person, where a party has two or more places of business, its place of business is the place that has the closest connection with the case; where a party has no place of business, the party's domicile or habitual residence prevails.[23]

In summary, habitual residence has not been established in formal laws enacted by China's legislature. Neither the GPCL nor the Negotiable Instruments Law has adopted habitual residence as a connecting factor. Habitual residence was mainly provided by judicial directives of the SPC, especially its Opinions on the GPCL. Even in the Opinions on the GPCL, habitual residence was not stipulated as a connecting factor. The role of habitual residence was principally to determine a natural person's domicile or a legal person's place of business. No conflict of laws rules adopted habitual residence as a connecting factor. This may be a reason why habitual residence is insufficiently developed as a concept in Chinese law.

B. Habitual Residence Subsequent to the 2010 PIL Act

In the 2010 PIL Act, habitual residence appears 42 times as a connecting factor. Of the 52 articles of the new law, habitual residence appears in 25 articles. The

[16] Adopted at the Fourth Session of the Sixth NPC, and promulgated by Order No. 37 of the President of the People's Republic of China on 12 April 1986, effective as of January 1, 1987. The official text is available in the *Gazette of the State Council of the People's Republic of China* 1986/12, p. 371-392.

[17] Adopted at the 13th Meeting of the Standing Committee of the Eighth NPC on 10 May 1995; revised at the 11th session of the Standing Committee of the 10th NPC of China on 28 August 2004.

[18] Art. 149 of the GPCL.

[19] Art. 190 of the Opinions on the GPCL.

[20] Art. 96 of the Negotiable Instruments Law of China.

[21] Deliberated and adopted by the Judicial Committee of the SPC on 26 January 1988.

[22] Art. 183 of the Opinions on the GPCL.

[23] Art. 185 of the Opinions on the GPCL.

concept of domicile is completely abandoned and is not even mentioned as a connecting factor in the 2010 PIL Act. Nationality is dealt with in ten articles but that concept is used only as an alternative or optional connecting factor.[24] Habitual residence replaces domicile and becomes one of the principal connecting factors in the new Act. As a connecting factor, habitual residence is evoked in four situations, as discussed below.[25]

First, in six articles, habitual residence is stipulated to be an exclusive connecting factor.[26] For example, Art. 13 provides that a declaration of disappearance or death is governed by the law of the natural person's habitual residence. In Art. 13, habitual residence is exclusive, without any supplementing connecting factor.

Second, in six articles, habitual residence is provided as a primary connecting factor.[27] For example, with respect to personal legal effects of marriage, Art. 23 stipulates that the personal relationships between husband and wife are governed by the law of their common habitual residence; in the absence of such common habitual residence, the law of their common nationality applies. In Art. 23, if a habitual residence is absent, then other connecting factors are listed in the Article as alternatives.

Third, as an alternative connecting factor, the new Act lists habitual residence in six articles.[28] For example, according to Art. 47, unjust enrichment or *negotiorum gestio* is governed by the law chosen by the parties. In the absence of such a choice, the law of the parties' common habitual residence applies; in the absence of common habitual residence, the governing law is the law of the place where the unjust enrichment or *negotiorum gestio* occurred.[29]

Fourth, in six articles, habitual residence is made available as an optional connecting factor.[30] For example, according to Art. 33, the effect of a testamentary disposition is governed by the law of the place where the testator habitually resided, or by the law of a testator's nationality, at the time of disposition or death. In Art. 33, habitual residence is only optional or parallel to other connecting factors.

In the 2010 PIL Act, the law of habitual residence is applied not only to capacity of natural and legal persons, declarations of disappearance or death as well as personality rights, but also to marriage, adoption, maintenance, guardianship and succession. Furthermore, the law of habitual residence has been extended to other fields.

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[24] See Arts. 21, 22, 23, 24, 25, 26, 29, 30, 32 and 33.

[25] Except for 24 articles in which habitual residence is provided as a connecting factor, Art. 20 provides that if the law of a natural person's habitual residence applies but the person's habitual residence cannot be ascertained, then the law of his or her current residence applies. For a detailed discussion, see Q.S. HE, Reconstruction of Lex Personalis in China, *I.C.L.Q.* 2013/62(1).

[26] See Arts. 11, 13, 15, 28(1)(2), 31 and 46.

[27] See Arts. 12, 21, 23, 25, 42 and 45.

[28] See Arts. 14, 24, 26, 28(3), 44 and 47.

[29] Art. 47 of the 2010 PIL Act.

[30] See Arts. 22, 29, 30, 32, 33 and 41.

In contracts, the law of a consumer's habitual residence governs disputes regarding consumer contracts.[31] In general, according to Art. 44, tort liability is governed by the law of the place where the tortious act occurred. Where the parties have a common habitual residence, the law of the parties' common habitual residence applies.[32] In specific torts, the law of the aggrieved party's habitual residence applies to infringement of personality rights via the internet as an exclusive applicable law[33] and to product liability as a primary applicable law.[34] Finally, in unjust enrichment or *negotiorum gestio*, when the parties fail to choose an applicable law, the law of the parties' common habitual residence applies.

In summary, habitual residence as a connecting factor applies to widely different fields and situations. With the new law, the connecting factor of the *lex personalis* in China has switched from nationality and domicile to habitual residence. The adoption and acceptance of habitual residence is likely to have some positive consequences in the future. However, habitual residence also has some disadvantages, including ambiguity of the concept, an issue that needs to be addressed further.

III. Definition of Habitual Residence

A. Previous Approaches

1. Chinese Citizens

In China, the domicile of a citizen is the place where his/her residence is registered; if the citizen's habitual residence is not the same as his/her domicile, the citizen's habitual residence is to be regarded as his/her domicile.[35]

Art. 9 of the Opinions on the GPCL further specifies that the place where a citizen has consecutively lived for more than one year after leaving the domicile is the citizen's habitual residence, except for the case where the citizen lives in a hospital for medical treatment. Before a citizen moves to another place from his/her registered residence and has not yet established a new habitual residence, the place where the person's residence is registered is still the person's domicile.[36]

[31] Art. 42 stipulates that a consumer contract is governed by the law of the place where the consumer has his habitual residence. Where the consumer chooses the law of the place of the supply of goods or services or the professional does not pursue his relevant business activities at the habitual residence of the consumer, the law of the place of the supply of goods or services shall apply.

[32] Art. 44 of the 2010 PIL Act.

[33] See Art. 46 of the 2010 PIL Act.

[34] See Art. 45 of the 2010 PIL Act.

[35] Art. 15 of the GPCL.

[36] Art. 9 of the Opinions on the GPCL.

Similar provisions are provided in the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China in 1992 (hereinafter "the 1992 Opinions").[37] Art. 4 of the 1992 Opinions stipulates that the domicile of a citizen refers to the place of his/her permanent residence, and the domicile of a legal person refers to the place of its main business or the place of its main office. In Art. 5, habitual residence of a citizen refers to the place where he/she has consecutively resided for more than one year after the citizen left his/her domicile, but before he/she initiates an action. One exception to that provision is where the citizen is hospitalised for medical treatment.[38]

2. Foreigners

In 2011, about 600,000 foreign citizens resided in China. They were mainly personnel of foreign enterprises, students and teachers from abroad, and their family members.[39] According to Art. 8 of the GPCL,[40] the previous "one-year appreciable period of time" also applied to a foreigner in determining whether he/she has a habitual residence in China.

In China, the residence permit for foreigners may only be issued to those individuals who plan to stay in China for a period of at least one year. A temporary residence permit for foreigners is issued to those persons who plan to stay in China for a period of less than one year.[41] The term of validity of the residence permit for foreigners is one to five years.[42] The longest term of validity of a travel permit for foreigners is one year, however, the permit is not to exceed the term of validity of a visitor's visa or residence certificate.[43]

A foreigner's permanent residence card is a valid ID certificate for a foreigner with permanent residence status in China and may be used independently.[44]

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[37] Adopted at the 528th meeting of the Judicial Committee of the SPC, and promulgated by Judicial Interpretation No. 22 [1992] of the SPC on 14 July 1992.

[38] Art. 5 of the 1992 Opinions.

[39] See H.N. YANG, Report of the State Council on the Administration of Entry-Exit, Residence, and Employment of Foreigners, Address to the 26th Session of the Standing Committee of the Eleventh National People's Congress on 25 April 2012, available at <http://www.npc.gov.cn/huiyi/cwh/1126/2012-04/26/content_1719377.htm> (27 October 2012).

[40] Art. 8 of the GPCL provides that the Chinese law applies to civil activities in China. The stipulations of the GPCL regarding citizens apply to foreigners and stateless persons in China, except as otherwise stipulated by law.

[41] See Art. 16 of the Detailed Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners, promulgated by the Order No. 575 of the State Council.

[42] Art. 18, *ibid*.

[43] Art. 35, *ibid*.

[44] Art. 3 of the Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China, approved by the State Council on 13 December

A foreigner's permanent residence card is valid for five or for ten years.[45] A foreigner who has been approved to permanently reside must stay in China for at least three cumulative months a year.[46] In addition, a foreigner, who has worked or studied in China for more than one year may purchase a commercial dwelling only for self-use or self-accommodation. A foreigner who has not yet worked or studied for more than one year in China may not purchase any dwelling. From these provisions, three conclusions may be drawn:

First, a foreigner who holds a residence permit or a permanent residence card usually has the right to stay in China for a period of one year or more. An application for a residence permit or for permanent residence may be based on the claim that the foreigner has an intention to settle in China.

Second, a foreigner who has been approved for permanent residence in China must stay for at least three cumulative, not consecutive, months a year. This requirement also means that the foreigner who holds a permanent residence card will have not only an intention to settle in China, but also proof of long residence in China.

Third, if a foreigner has purchased a dwelling in China, this usually means that the foreigner has worked or studied in China for more than one year. In such a case, according to Art. 9 of the Opinions on the GPCL, the foreigner may be considered to have established a habitual residence in China.

3. Review of One-Year Appreciable Period of Time

As stated above, whether for a Chinese citizen or for a foreigner, the decisive factor in establishing habitual residence in China is only that the person has consecutively resided in a place for over one year; the duration is counted from the time when he/she left the previously established domicile until the time when he/she initiates a lawsuit, except where the person is hospitalised.[47] Therefore, Chinese courts tend to consider only the one-year appreciable period of time, and do not consider any intention to settle. However, some disadvantages exist if only the one-year appreciable period of time is used to determine habitual residence, as exemplified in *Xie Mingzhi v. Wang Shuisheng*.[48]

In October 1992, Wang Qingfu, a Taiwanese man, arrived on the Chinese Mainland to visit his relatives. During his visit, he lived in Wang Shuisheng's home and asked his host to guard his money and other personal property. Wang Qingfu died on 8 February 1993. Following his death, XieMingzhi, a son of Wang Qingfu's sister who lived in Guiyang city, Guizhou Province, claimed inheritance

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2003, and promulgated by Order No. 74 of the Ministry of Public Security and the Ministry of Foreign Affairs on 15 August 2004.

[45] Art. 21, *ibid*.

[46] Art. 20, *ibid*.

[47] Art. 9 of the Opinions on the GPCL; Art. 5 of the 1992 Opinions**.**

[48] See H.K. YANG, The Case of *XieMingzhi v. Wang Shuisheng* over the Inheritance Disputes of Taiwai Citizen, *China Law* 1996/6, p. 32-33.

of Wang Qingfu's property, and brought a lawsuit against Wang Shuisheng before the People's Court of Hejiang County, Sichuan Province.[49]

In that case, Wang Qingfu's place of domicile was in Taiwan. He visited the Chinese Mainland from October 1992 to February 1993, *i.e.* for less than 6 months. His resident period on the Chinese Mainland was, thus, less than the one-year appreciable period of time. Therefore, the Court held that it could not claim jurisdiction based on habitual residence.[50]

In my opinion, although Wang Qingfu had been on Mainland China for less than six months, he had not chosen to return to Taiwan during his illness. Therefore, he might have been considered to have abandoned his domicile in Taiwan. Because he had not established a domicile on Mainland China, his habitual residence might have been considered to be in Mainland China. At least, his apparent wish was to reside on the Mainland rather than in Taiwan while he was ill. Therefore, it was arguably questionable for the court to consider only the criterion of the one-year appreciable period of time in establishing habitual residence.

B. Draft Suggestions

After the promulgation of the 2010 PIL Act, many scholars suggested that the SPC issue its interpretation of the concept of habitual residence in order to ensure uniform implementation of the new Act. Before the SPC promulgated its new judicial interpretation on 28 December 2012,[51] two major proposals regarding the definition of habitual residence were submitted to the SPC; they are discussed below.[52]

1. Proposal I

Habitual residence in the 2010 PIL Act refers to the last place where a natural person has consecutively lived for over one year after leaving his/her domicile,

[49] According to Art. 34(3) of the Civil Procedure Law in 1991, a lawsuit concerning an inheritance is subject to the jurisdiction of the court located in the place where the decedent had his domicile upon his death, or where the principal portion of his estate was located. The 1992 Opinions further stipulates that a civil lawsuit brought against a citizen falls within the jurisdiction of the court located in the place where the defendant has his domicile; if the defendant's domicile is different from his habitual residence, the lawsuit is within the jurisdiction of the court located in the place of the defendant's habitual residence. See Article 22 of the 1992 Opinions.

[50] In this case, the Court finally exercised its jurisdiction because some of Wang Qingfu's estate was located on the Chinese Mainland.

[51] See *infra* note 74.

[52] See Implementation of the Law of the People's Republic of China on Application of Law for Foreign-related Civil Relations and Its Draft Judicial Interpretation, addressed by Liu Guixiang, a chief judge of the SPC Fourth Civil Tribunal, at the 2012 Annual Conference of China Society of Private International Law held in Dalian on 22-23 September 2012.

except where the natural person seeks medical treatment abroad, studies abroad or is dispatched to work abroad.

Proposal I adopts the definition of habitual residence in the Opinions on the GPCL and the 1992 Opinions, but excludes three situations, *i.e.* medical treatment abroad, study abroad and work abroad. This proposal is consistent with the traditional concept of habitual residence and avoids some of the disadvantages of adopting habitual residence as a connecting factor.

The potential disadvantages of adopting habitual residence as a connecting factor are illustrated in the following example:[53] Assume that A is a Chinese oil engineer working in Sudan on a two-year contract. According to the 2010 PIL Act, A's legal capacity with regard to his/her rights and obligations are governed by the laws of Sudan.[54] A's capacity to enter into legal acts,[55] the contents of A's personality rights,[56] and the declaration of A's disappearance or of A's death will also be governed by the laws of Sudan.[57] If A dies intestate while habitually residing in Sudan, the rights of succession to his moveable property will be governed by the laws of Sudan.[58]

Arguably, the exclusive use of habitual residence may cut "the links between many temporary expatriates and their homeland," isolating them and their dependants from the home country's law and courts despite their close connection with their home country.[59] This situation provides the reason for Proposal I's exclusion of the three aforementioned situations. However, some disadvantages also exist if Proposal I is adopted.

First, Proposal I does not clarify how to determine habitual residence in those three situations, nor does it clarify which law will be applied. Therefore, some gaps in the law will remain for Chinese courts to decide in the realm of the *lex personalis*.

Second, the following wording is not clear: "except for the case where the natural person seeks medical treatment abroad, studies abroad and is dispatched to work abroad". It is unclear what time periods apply in the definition of habitual residence; nor is it clear how Chinese courts are going to determine whether habitual residence exists at the place where the person seeks medical treatment, studies, or works.

Third, if a person works or studies abroad in one place for over one year, that place is generally considered to be his/her habitual residence. The reason is that he/she has lived there not only for a long time, but also may have the intention to settle there. Even if the period of residence is less than one year, a court may

[53] For more discussion, see Q.S. He (note 25).

[54] See Art. 11 of the 2010 Chinese PIL.

[55] See Art. 12, *ibid.*

[56] See Art. 15, *ibid.*

[57] See Art. 13, *ibid.*

[58] See Art. 31, *ibid.*

[59] The Law Commission and the Scottish Law Commission, *Private International Law: the Law of Domicile*, Law Com. No. 168, Scot. Law Com. No. 107, November 1987, p. 10.

determine the person's habitual residence according to his/her intention to settle. Therefore, a complete exclusion of study and work periods abroad is unreasonable.

For example, A, a Chinese Ph.D. candidate, has studied at Stanford University in California for two years; he needs at least another two or three years of study to obtain his Ph.D. degree. During his first year at Stanford, he marries a local U.S. citizen. At the end of their first year of marriage, he has a dispute with his wife about their personal relationship. According to the 2010 PIL Act, the personal relationships of husband and wife are governed by the law of their common habitual residence.[60] In that case, A's habitual residence is in California rather than in China. Therefore, the exclusion of situations of study abroad in Proposal I is unreasonable.

2. Proposal II

The habitual residence of a natural person in the 2010 PIL Act refers to one of the following situations:

(1) The country of the natural person's nationality is his/her habitual residence. In cases where the natural person has no nationality, the country where he/she resides is his/her habitual residence. In cases where the natural person has more than one nationality, the person's habitual residence is the country of nationality with which the dispute is more closely connected.

(2) When a natural person leaves his/her country of nationality and resides in another country, the country where he/she resides is his/her habitual residence.

(3) When a natural person, other than diplomatic personnel, consecutively lives in a country other than his/her country of nationality for over two years, and when the dispute arises there, that country is the natural person's habitual residence.

In Proposal II, nationality is the key criterion in determining habitual residence. According to this Proposal, in most situations, the *lex personalis* is to be the law of nationality. This provision is consistent with traditional provisions in the GPCL and with other laws of China. However, some disadvantages are associated with Proposal II.

Adoption of habitual residence as a connecting factor of the *lex personalis* is a novel provision that differs from traditional Chinese laws. Therefore, if nationality is adopted to determine habitual residence as Proposal II recommends, the *lex personalis* in China will return to its traditional stance. In contrast to nationality, habitual residence has the following advantages:[61] first, tens of millions of Chinese businessmen, students and tourists work, study and travel abroad. Sometimes, the nationality of a natural person does not have a close relationship to

[60] Art. 23 of the 2010 PIL Act.

[61] For more information, see Q.S. He (note 25).

his/her daily life, yet habitual residence equates the habitual centre of a natural person's interests.[62]

Second, nationality may sacrifice a person's personal freedom to adopt a legal system of his/her own choice because "it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life."[63]

Third, habitual residence may be used to resolve the conflicts of a person's multiple nationalities.[64] In the Convention of 15 June 1955 relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile, habitual residence was adopted in order to "establish common provisions concerning the regulation of conflicts between national law and the law of domicile."[65] In China, according to the Opinions on the GPCL, if a foreigner has dual or multiple nationalities, the law of the foreigner's nationality is the law of the country of his/her domicile or of the country with which he/she has the closest connection.[66] In case the domicile of a person is unclear or cannot be ascertained, his/her habitual residence is regarded as the domicile.[67] Therefore, habitual residence is an important factor in ascertaining the law of a person's nationality and the law of domicile.

Fourth, habitual residence as a connecting factor in the *lex personalis* has now been increasingly adopted by international conventions and national laws.[68] As discussed in the introduction to this article, as well as in established Chinese legislation, the advantages of the 2010 PIL Act will be eliminated if nationality is adopted as the main factor in determining habitual residence.

If Proposal II is adopted as a future SPC judicial interpretation, the following situations will arise: the 2010 PIL Act will use the term 'habitual residence' to define the concept of nationality;[69] and then in subsequent SPC judicial interpretations, the term 'nationality' will be used to define the concept of habitual residence. Neither of these consequences is desirable because they do not address the issue of definition.

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[62] J. FAWCETT/ J.M. CARRUTHERS (note 12), at 154.

[63] A.E. ANTON, *Private International Law (A treatise from the stand-point of Scots law)*, 2nd ed., 1990, p.123.

[64] See X.L. DU (note 14), at 31; H.F. DU (note 14), at 83.

[65] See the Preface in the Convention of 15 June 1955 relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile.

[66] See Art. 182 of the Opinions on the GPCL.

[67] See Art. 183, *ibid.*

[68] See P. STONE (note 12), at 342.

[69] In the 2010 PIL Act, Art. 19 provides that if the law of a natural person's nationality is applied, and the person has more than one nationality, the law of nationality where the person's habitual residence is located applies. If the person has no habitual residence in any of his or her countries of nationality, the law of the country of nationality to which he/she is most closely connected applies. If a natural person has no nationality, or if his/her nationality cannot be ascertained, the law of his/her habitual residence applies. See Art. 19 of the 2010 PIL Act.

Two years as the appreciable period of time is too long. An appreciable period of time is subject to different provisions or practices in different countries. In Australia, in one case, habitual residence was acquired after less than three months' residence;[70] in another case, three weeks was not sufficient.[71] In the United Kingdom, the requisite period is not a fixed one. In some circumstances, the appreciable period is short, with just a month being adequate.[72] Even within one country, courts in different jurisdictions may have different standards.[73] However, the author of this paper has not found that any country use two years to establish habitual residence. Two years is not only too long, but is also inconsistent with the 'one-year appreciable period of time' in current Chinese law.

C. Review of Latest Definition of Habitual Residence by the SPC

On 28 December 2012, the SPC promulgated its Interpretation concerning Some Issues of Application of the Act of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relations (the 2013 PIL Interpretation).[74] The interpretation came into force on 7 January 2013. In accordance with Art. 15 of the 2013 PIL Interpretation, habitual residence in the 2010 PIL Act refers to the central place where a natural person lives and where he/she has consecutively lived for over one year. The year is counted from the time that the foreign-related civil relationship arose, was altered or ended, except where the natural person seeks medical treatment abroad, is assigned to work abroad or travels abroad on business.

In Art. 15 of the 2013 PIL Interpretation, three criteria have been established to determine habitual residence:

- the one-year appreciable period of time;
- the central place of one's life;
- the exceptions for medical treatment abroad, assigned service abroad and business travel abroad.

The one-year appreciable period of time remains consistent with the provisions in Art. 9 of the Opinions on the GPCL and in Art. 5 of the 1992 Opinions. The requirement regarding the central place of one's life authorises a court to determine the person's habitual residence.

The SPC held that, so far, no definition of habitual residence has been provided in international conventions. In domestic laws, few countries have sought to define the term. Only some general and abstract definitions of habitual residence are stipulated in German and Swiss laws, in which habitual residence has been

[70] See *V v B* (*A Minor*) (*Abduction)* [1991] FCR 451, [1991] 1 FLR 266.

[71] See *Re A* (*Abduction: Habitual Residence*) [1998] 1 FLR 497.

[72] See J. FAWCETT/ J.M. CARRUTHERS (note 12), at 188.

[73] See J. FAWCETT/ J.M. CARRUTHERS (note 12), at 187-189; L. COLLINS, *et al.* (note 12), at 169-170.

[74] The 2013 Interpretation was adopted at the 1563rd meeting of the Judicial Committee of the SPC on 10 December 2012. Fasi (2012) No. 24.

defined as the central place of one's life.[75] In the SPC's opinions, where a natural person seeks medical treatment abroad or is dispatched to work abroad or travel abroad on business, the place where he lives is not the central place of his life, and thus not his habitual residence. That is the reason why the 2013 PIL Interpretation excludes the previously stated three situations.[76] However, some issues or defects still exist in the new Chinese definition.

First, Art. 15 of the 2013 PIL Interpretation does not adequately define habitual residence in the three exceptional situations, nor does it provide guidance as to which law will be applied. Therefore, gaps in the law with respect to habitual residence still remain.

Second, according to the SPC opinion, the one-year appreciable period of time should be calculated from the time of the establishment, alteration or termination of a civil legal relationship.[77] However, the meaning of the time of establishment, alteration or termination of a civil relationship is unclear. Therefore, Chinese courts are still left without guidelines as to how to calculate the one-year period.

For example, A allowed a Korean company to use his image in the company's advertisement on 12 December 2009. At that time, A had lived in Korea for 10 years. On 12 January 2011, A moved to China, where he has since resided. On 12 March 2012, a dispute regarding the use of A's image arises between A and the Korean company. A sues in a Chinese court on 12 April 2012. According to Art. 15 of the 2010 PIL Act, the law of the right holder's habitual residence governs personality rights. However, Art. 15 of the 2013 PIL Interpretation provides neither guidance for determining habitual residence, nor indications as to how to calculate the one-year period. If the appreciable period of time is calculated from 12 December 2009 when the civil relationship was established between A and the company, both Korea and China will be A's habitual residence. If the one-year period is counted from 12 March 2012, China will be A's habitual residence. However, Chinese law may not have any relationship with the current dispute. Moreover, the date, 12 March 2012, is not the time of establishment, alteration or termination of their civil relationship.

Third, in some special situations, the one-year period is too long. In *Xie Mingzhi v. Wang Shuisheng*,[78] Wang Qingfu died and left some money and property in Mainland China. If the case had occurred in 2012, according to Art. 31 of the 2010 PIL Act, legal succession to Wang's estate in the Mainland would be governed by the law of the place where the deceased habitually resided at the time of his death.[79] However, because Wang Qingfu was in Mainland China for less than 6 months, *i.e.* less than the one-year appreciable period of time, according to Art. 15 of the 2013 PIL Act, Mainland China would not be Wang's habitual residence. Therefore, in a similar case today, a Mainland court would have to apply Taiwan's

[75] See the SPC Fourth Civil Tribunal Response to Reporters' Questions concerning the 2013 PIL Interpretation, available at the SPC's website: <http://www.court.gov.cn/xwzx/jdjd/sdjd/201301/t20130106_181593.htm>, (9 January 2013).

[76] *Ibid*.

[77] *Ibid*.

[78] See *supra* note 48 and the accompany text.

[79] Art. 31 of the 2010 PIL Act.

law rather than Mainland China's law to distribute the estate among the deceased's Mainland successors. Such a situation seems unreasonable.

D. The Way Forward

As discussed above, habitual residence remains an ambiguous concept. A judge or court needs to balance specific factors, criteria or circumstances in order to establish a given person's habitual residence. Currently, most countries adopt a flexible approach to define habitual residence. Judges in those countries have broad and discretionary authority in determining habitual residence.

In the United Kingdom, the definition of habitual residence is thought to be a question of fact, to be decided by reference to all of the circumstances of any particular case.[80] In *Nessa v Chief Adjudication Officer*,[81] Lord Slynn took the following factors, among others, into account in determining habitual residence: accompanying possessions, doing everything necessary to establish residence before coming, the right of abode, seeking to bring along family, having durable ties with the new country of residence or intended residence, and other factors. In Australia, the Court of Appeal has pointed out that habitual residence is primarily a question of fact which should be decided by reference to the circumstances in each particular case.[82] A similar situation exists in New Zealand.[83]

In the EU, the determination of a person's habitual residence must take heed of "the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence."[84] Furthermore, the person's intentions may be considered in determining whether he/she possesses a habitual residence.[85]

As discussed above, the Hague conventions have widely adopted habitual residence as a connecting factor in determining applicable laws, but the Hague Conference has never defined habitual residence,[86]"[t]he aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. In those contexts, the expression is not to be

[80] *Mark v. Mark* [2005] UKHL 42, at 36; [2006] 1 AC 98; *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, at 578 (per Lord Brandon).

[81] [1999] 1 WLR 1937 (HL).

[82] *Re M. (Minors) (Residence Order: Jurisdiction)* [1931] 1 Federal Law Reports (Australia) 495 (CA).

[83] See *Sk v KP* [2005] 3 NZLR 590, CA; *Punter v Secretary of Justice* [2004] 2 NZLR 28, CA.

[84] No. 9 of Resolution (72) 1 of the Committee of Ministers of the Council of Europe on the Standardisation of the Legal Concepts of "Domicile" and "Residence," adopted by the Committee of Ministers on 18 January 1972 at the 206th meeting of the Ministers' Deputies.

[85] No. 10, *ibid*.

[86] See L.I. De Winter, Domicile or Nationality? The Present State of Affairs, *Recueil des Cours* vol. 128 (1969), p. 428.

treated as a term of art but according to the ordinary and natural meaning of the two words it contains."[87]

In nearly all countries, no fixed appreciable period of time exists in determining whether habitual residence has been established.[88] Much depends on the circumstances of the particular case. Length of residence should not be the sole determining factor. In establishing habitual residence, factors such as a person's family situation, the reasons which led him/her to move, the length and continuity of residence, the consideration of stable employment, and the person's intention to settle as it appears from all the circumstances should also be considered.[89]

To a large extent, most countries leave the concept of habitual residence to be decided by a judge, rather than providing a strict or rigid definition. As already stated, prior to the 2010 PIL Act, the domicile and nationality concepts were the main connecting factors in the *lex personalis*. Habitual residence is used to determine a person's domicile. In Chinese courts, transnational cases involving habitual residence, especially those cases related to private international law, are scarce.

Therefore, Chinese courts will need to establish the criteria to be applied in judging and establishing habitual residence, notably with regard to the appreciable period of time and the intention to settle. But the SPC should not hastily draft or publish rules regarding habitual residence. Rather, the SPC should authorise Chinese judges to have discretionary powers in determining habitual residence based on a comprehensive evaluation of the particulars of any given case. After several years of experience with the complex concept of habitual residence, the SPC may attempt to summarise a governing rule.

IV. Conclusions

With the promulgation of the 2010 PIL Act, connecting factors in China's *lex personalis* have undergone fundamental changes. The concept of domicile has been completely abandoned. Nationality now plays a minor role in determining the *lex personalis*. By contrast, habitual residence now plays a dominant role in applying the *lex personalis* and has become a primary connecting factor in determining the *lex personalis*.

Since the 2010 PIL Act came into force on 1 April 2011, the definition of habitual residence has been an important issue in implementing the new Act. Recently, two proposals have been put forward for discussion. Proposal I keeps one year as an appreciable period of time, as does the Opinions on the GPCL, but excludes three situations, *i.e.* medical treatment abroad, study abroad and work abroad. Proposal II adopts nationality as a key factor to determine habitual

[87] L. COLLINS *et al.* (note 12), at 168.

[88] See J. FAWCETT/ J.M. CARRUTHERS (note 12), at 187-189; L. COLLINS *et al.* (note 12), at 169-171.

[89] See ECJ, Case C-90/97, *Swaddling v. Adjudication Officer*, *ECR* [1999] I-1075; ECJ, Case 76/76, *Di Paolo v. Office National de l'Emploi*, *ECR* [1977], 315.

residence, and matters linked to the *lex personalis* would, thus, return to China's earlier law of nationality.

In the realm of choice of laws in China, habitual residence was mainly used to determine domicile prior to 2010. Few transnational cases relevant to habitual residence in China have been published so far. The SPC's efforts to define habitual residence are encumbered by the lack of relevant cases and related experiences.

Currently, most countries adopt a flexible method to comprehensively consider habitual residence cases; few countries have stipulated a fixed appreciable period of time. However, in its 2013 PIL Interpretation, the SPC still provides for three factors in determining habitual residence: the one-year appreciable period of time, the central place of a natural person and three exceptions. Some gaps and problems still exist in the SPC latest definition of habitual residence. In this author's opinion, Chinese courts ought to have discretionary authority to define habitual residence according to the circumstances of each case. After Chinese courts have accumulated significant experience in this regard, it might make good sense for the SPC to define habitual residence.

THE CODIFICATION OF CONFLICT OF LAWS IN CHINA: WHAT HAS/HASN'T YET BEEN DONE FOR CROSS-BORDER TORTS?

Guangjian TU*

I. Introduction

On 28 October 2010, the Law on the Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China (LAL) was adopted by the Standing Committee of the National People's Congress (NPC) and it entered into force on 1 April 2011.[1] This law is the culmination of efforts made by many concerned parties over the past decade and the first legislation ever in the history of China systematically dealing with conflict of laws issues.[2] Like the codification of

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[1] See Article 52 of the LAL. The original Chinese version of this law can be found at the website of the NPC *i.e.*, <http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content_1602433.htm>. No official English version of this law has been published so far, but an online English version can be found at <http://asadip.files.wordpress.com/2010/11/law-of-the-application-of-law-for-foreign-of-china-2010.pdf>.

[2] Before the LAL, one could mainly find conflict of laws rules in the 1986 General Principles on Civil Law (GPCL) at Chapter 8 and the "Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles on Civil Law" (1988 Interpretation on GPCL) at Part 7. Conflict of laws rules were not set out coherently in these laws. One could also find some sporadic conflict of laws rules in other special laws such as Chinese Maritime Law and Chinese Civil Aviation Law and various Interpretations of the Supreme People's Court (SPC). See J. HUANG, *Private International Law*, Beijing 2007, p. 313 *et seq.*; W. ZHU, China's Codification of the Conflict of Laws: Publication of a Draft Text, *Journal of Private International Law* 2007/3, p. 284. Unless otherwise indicated, all Chinese legal instruments mentioned in this Article can be found at <http://www.lawinfochina.com/>.

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conflict of laws in many other jurisdictions, the Chinese exercise has also produced a comprehensive rule-based system for conflict of laws issues.[3] The new Chinese conflicts code comprises a general part dealing with general themes of conflict of laws and several specific parts designing choice of law rules for specific areas, namely civil parties, marriage and family relations, successions, property, obligations and intellectual property (IP) rights.[4] This short piece focuses on those conflict rules related to cross-border torts. In the new Chinese code, there are general choice of law rules for most torts and specific choice of law rules for special torts, which will be examined one by one in the following sections. By presenting and commenting on these rules, this article will demonstrate how the choice of law rules for torts have evolved in China, what has been done for cross-border torts in the new law and what improvements might still be needed.

II. General Choice of Law Rules for Torts

In the new law, the general choice of law rules for torts can be found in Article 44, which says:

> "Liabilities arising out of tort shall be governed by the law of the place of tort; however, if the parties have their habitual residences in the same place, the law of their common habitual residence shall apply; where the tort has occurred, if the parties have chosen the governing law for their tort dispute, the law chosen shall apply."[5]

Compared to Article 146 of the GPCL that contains the old Chinese tort conflict rules and has been repealed with the coming into force of the LAL,[6] this new Article has abandoned the requirement of "double actionability".[7] In addition, it has put an end to the "common nationality" rule by introducing the "common habitual residence" rule to replace the "common domicile" rule.[8] These changes are sound because the abandonment of the "double actionability" requirement for tort conflicts is the modern trend.[9] While the connection by nationality could be

[3] See W. ZHU (note 2), at 283; A. FIORINI, The Codification of Private International Law: The Belgium Experience, *I.C.L.Q.* 2005/54, p. 499.

[4] There are altogether 52 Articles in the LAL. Choice of law rules are given for these areas one after another in the sequence enumerated from Chapter 2 through Chapter 7. Chapter 8 has two final clauses. See the LAL (note 1).

[5] See Article 44 of the LAL.

[6] See Article 51 of the LAL.

[7] See Paragraph 3 of Article 146 of the GPCL.

[8] See Article 44 of the LAL; Paragraph 2 of Article 146 of the GPCL.

[9] In Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter, "Rome II Regulation"), one cannot find this requirement either.

tenuous, the concept of domicile might be more difficult to determine than habitual residence.[10]

These general rules are supposedly applicable to all torts except those special torts for which some specific choice of law rules have been prescribed.[11] One can see that there are actually three independent but inter-connected general choice of law rules in Article 44. The hierarchical applicability of the three rules can be simply summarised as follows: first, if the question of choice of law regarding a tort arises after that tort has occurred, the parties can make a choice of the applicable law for the relevant tort; secondly, without the choice of the parties, whether the dispute arises before or after the occurrence of the tort, if the parties only have their habitual residence in the same place, the law of that place shall apply; thirdly, failing the parties' choice and the common habitual residence, the basic choice of law rule for tort applies *i.e.* the law of the place of the tort is the applicable one.[12] As mentioned, compared to the old rules in the GPCL, improvements have been made but there are still problems with these new rules.[13]

With regard to the doctrine of party autonomy, in recent years this doctrine has gradually been extended, for the purpose of legal certainty, from contract to other areas of private international law including tort and it has been accepted for choice of law respecting tort disputes in quite a few jurisdictions.[14] While it is good to see that the new Chinese law has been geared up to the modern trend, allowing parties to choose the governing law for their post-tort disputes,[15] one might wonder to what extent the freedom of the parties should be allowed in this area. By nature, contract law is supplementary to the parties' will/contract. It is, thus, seemingly natural for the parties to be allowed to choose any law to govern/supplement their contract/will so that the expectations of the parties can be met by the application of the chosen law.[16] By contrast, tort law is more "local and mandatory"; the parties' freedom should accordingly be more restricted at the conflicts level.[17] Whereas it is fine for the parties to choose any law, without much constraint, to govern their

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[10] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT, *Private International Law*, Oxford 2008, p. 154 *et seq*.

[11] See below Part III.

[12] See Article 44 of the LAL.

[13] See above notes 7-10 and accompanying text.

[14] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 837 *et seq*.

[15] See Article 14 of the Rome II Regulation: freely-negotiated choices of law made by the parties pre-tort are also allowed.

[16] See E.G. LORENZEN, Validity and Effects of Contracts in the Conflict of Laws, *Yale Law Journal* 1921/30, p. 573; F.K. JUENGER, Contract Choice of Law in the Americas, *American Journal of Comparative Law* 1997/45, p. 195; F.K. JUENGER, Appendix A: Letter from Friedrich Juenger to Harry C. Sigman, Esq., June 23, 1994, *Vanderbilt Journal of Transnational Law* 1995/28, p. 449; Prel. Doc. No. 22 B of March 2007, Feasibility Study on the Choice of Law in International Contracts-Overview and Analysis of Existing Instruments-Note, prepared by Thalia KRUGER for the Permanent Bureau (hereinafter referred to as KRUGER Note), p. 5-8 and 19, available at <http://www.hcch.net/index_en.php?act=text.display&tid=49>.

[17] See D. HAN, *Private International Law*, Beijing 2005, p. 205 *et seq*.

contract,[18] it might be wiser to confine the parties' choice to the laws of those jurisdictions with legitimate interests over the relevant tort *e.g.* the jurisdiction of one of the parties, the place of the tort or the forum.[19] Even if the parties are allowed to have a "wild" choice, the mandatory rules for the relevant tort in those interested jurisdictions might have to be taken into account in some way and to some extent.[20] In the LAL, however, one can find neither direct limitations on the parties' choice nor provisions directing Chinese courts to defer to mandatory rules of a foreign jurisdiction, no matter how strong the connection between the disputed tort and that foreign jurisdiction. There is, however, a provision providing for the application of local Chinese mandatory rules.[21]

According to Article 44 of the LAL, if the parties have a common habitual residence, the law of the place where the parties both have their habitual residence shall supersede the law of the place of the tort.[22] This exception to the basic rule may bring about reasonable results in many loss-allocation conflicts cases but it cannot necessarily be justified in some others especially in those conduct-regulating conflicts cases.[23] A typical example is where both parties from the same place have left their common habitual residence by chance and one has committed a tort that has injured the other in a foreign place. In this scenario, the law of their common habitual residence is suitable to govern their dispute if the dispute is mainly about damages arising from the tort, *i.e.* it is a question of loss-allocation between them, since they live in the same economic environment and the amount of damages awarded can reasonably be determined only according to their common local standard (law). Nevertheless, if the dispute is mainly about whether a tort has been committed, *i.e.* if it is a conduct-regulating question, the law of the place where the alleged tort has been committed is more suitable than that of their common habitual residence.[24]

For this exceptional rule to apply, the concept of habitual residence must be defined. In the LAL, there is, however, no definition for this key concept although

[18] *E.g.* see Article 3 of Regulation (EC) No 539/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[19] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 766.

[20] Under Rome II Regulation, although the parties' choice is not confined to the alternatives as suggested, there are quite a few limitations imposed on it, see G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 839 *et seq.*

[21] See Article 4 of the LAL, which says: "[i]f there are mandatory rules in Chinese law for a foreign-related civil legal relationship, the Chinese mandatory rules shall directly be applicable."

[22] See above note 12 and accompanying text.

[23] For the concepts of loss-allocation conflicts and conduct-regulating conflicts, see S.C. SYMEONIDES, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons, *Tulane Law Review* 2008/82, p. 1760 *et seq.*; S.C. SYMEONIDES, Rome II and Tort Conflicts: A Missed Opportunity, *American Journal of Comparative Law* 2008/56, p. 188 *et seq.*

[24] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 804 *et seq.*

it is crucial to and broadly employed by the whole law.[25] So far, no reliable legal authority has defined this concept for the purposes of choice of law in China. However, in the context of jurisdiction, the SPC once said that the place of habitual residence of a natural person meant the place where he had continuously resided for more than one year.[26] This definition might be carried over in practice for the application of the LAL until another authority provides a new definition of the concept of habitual residence. In addition, when the law of the parties' common habitual residence is applied, one probably would also have to consider, to some extent, the mandatory rules in the law of the place of tort being committed or the law of the place of damage being sustained. These rules may be required to be applied by the strong national interests of those concerned States either in regulating conduct or allocating loss[27] though the LAL does not give Chinese judges any discretion to do so.[28]

As to the basic rule, an immediate question with respect to its application is whether the place of the tort refers to the place where the tortious act is committed or the place where the damage arising from the tortious act is sustained. While Article 44 of the LAL does not provide an answer to this question, Paragraph 187 of the 1988 Interpretation on the GPCL stated that both of these places should be regarded as the place of the tort and where they are different from each other, the court seized of the case could choose between them at its discretion, normally the one whose law is more unfavourable to the tortfeasor.[29] It is the author's belief that this approach will continue to be adopted in practice.[30]

The next question then is how to identify the place of the tort in a real case. The place of where the tortious act is committed or where the damage arising from the tortious act is sustained may be obvious in easy cases such as traffic accident cases and personal physical injury cases. In difficult cases, it is, however, very hard to know exactly where the damage is sustained or where the tortious act is committed, *e.g.* where perishable foods have gradually rotted during truck transportation across jurisdictions because of the breakdown of the refrigeration mechanism at some unknown point.[31]

One further question might be asked: what if the tortious act is committed or the damage is sustained in more than one place? It seems that the laws of the different places where the tortious act is partly committed or where the damage is

[25] Actually in the LAL, personal law is the law of habitual residence and habitual residence is also the connecting factor for many other areas, *e.g.* see Articles 11, 12, 15, 41 and 42 of the LAL. This concept has been used in the specific choice of law rules for special torts too. To apply these specific rules, one also needs the concept to be defined. See below Part III.

[26] See Paragraph 5 of the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China.

[27] See S.C. SYMEONIDES (note 23), at 1747 and 1752 *et seq.*

[28] See above note 21 and accompanying text.

[29] See Paragraph 187 of the 1988 Interpretation on the GPCL.

[30] See The place of the damage has been chosen as the criterion for the basic rule in Article 4(1) of the Rome II Regulation.

[31] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 797.

partly sustained will have to be applied on a distributive basis.[32] To proceed along these lines is, however, obviously undesirable because there may be inconsistent judgments arising from the application of the different substantive laws to the different parts of the same case. While the parties might be able to choose the applicable law to make the resolution of their dispute simpler,[33] a general escape clause based on the closest connection test would be helpful, in particular where the doctrine of party autonomy is unworkable.[34]

In the LAL, although the closest connection test has been established as a fundamental principle,[35] there is, unfortunately, no general escape clause based on the test that can work as a safety-valve to avoid the possible arbitrary results of the rigid application of the above tort conflicts rules.[36] If there were a general escape clause, the application of the basic rule and the exceptional rule would be easier, especially in those complicated tort cases.[37]

III. Specific Choice of Law Rules for Special Torts

In a case regarding a special tort for which some specific choice of law rules have been prescribed, specific choice of law rules shall prevail over the general rules. In the LAL, specific choice of law rules have been provided for three different special torts, namely product liability, infringement of personality rights and infringement of Intellectual Property (IP) rights.

A. Rules for Product Liability Cases

Recent years have seen a fast growing number of product liability cases in Chinese courts.[38] In the international arena, product liability cases have long been viewed as special tort disputes to be dealt with by specific tort conflict rules.[39] To meet the practical demand and give Chinese judges a consistent approach for resolving

[32] *Ibid*.

[33] See above note 12 and accompanying text.

[34] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 797; above note 15 and accompanying text.

[35] See Article 2 of the LAL, which says: "… [i]f there is no choice of law rule for a foreign-related civil legal relationship in this law and in any other law, that foreign-related civil legal relationship shall be governed by the law of the place which has the closest connection with it."

[36] See Article 4(3) of the Rome II Regulation.

[37] For cases where this general escape clause could provide effective relief, see above notes 24, 34 and accompanying text.

[38] See W. ZHU (note 3), at 304 *et seq*.

[39] See the Hague Convention of 2 October 1973 on the Law Applicable to Product Liability (hereinafter, "Hague Product Liability Convention").

problems arising from product liability cases, specific choice of law rules are now included in Article 45 of the LAL, which states:

> "Product liability shall be governed by the law of the place where the person sustaining the damage has his habitual residence; however, if the person sustaining the damage chooses the law of the tortfeasor's principal business place or the place of the damage being sustained or the tortfeasor did not engage in any business activity related to the case in the place where the person sustaining the damage has his habitual residence, the law of the tortfeasor's principal business place or the place of the damage being sustained shall apply."[40]

There is, thus, no common habitual residence rule for product liability cases, which, in the author's view, is unfortunate.[41] It is the law of the place where the victim has his habitual residence that normally applies, regardless of where the damage is sustained or the product causing the damage is acquired.[42] This conflict rule obviously favours the weaker party, *i.e*. the victim, whose law is normally the applicable law. This approach seems reasonable because the victim supposedly needs to continue his life in the place where he has his habitual residence with the awarded damages, the amount of which could be reasonably determined only according to his local standard (law). Further protection can be discerned from the latter part of Article 45, *i.e.* the victim can unilaterally choose the law of the place of the tortfeasor's principal business or the law of the place where the damage was sustained if he finds that one of those laws could be more favourable to him in a particular case.[43]

Although it seems that the protection of the victim is limitless while the tortfeasor can only claim in his defence that he could not have reasonably foreseen his product entering the market of the victim's place of habitual residence,[44] the protection for the victim is limited where the tortfeasor can prove that he did not actually engage in any relevant business activity in that place.[45] In the latter situation, the applicable law will be the law of the tortfeasor's principal business place or the place of the damage sustained.[46] This rule is designed to protect the interests of the producer so that he is not unexpectedly subject to the law of a place where he has never set foot.[47] The difficulty in applying this rule is in the assessment of whether the tortfeasor has engaged in any relevant business activity in the place of the victim's habitual residence. Selling the product in that place is surely a relevant

[40] See Article 45 of the LAL. See Article 5 of the Rome II Regulation.

[41] See Article 5(1) of the Rome II Regulation.

[42] *Ibid*.

[43] See Article 5(1) of the Rome II Regulation.

[44] See Article 5(1) of the Rome II Regulation; Article 7 of the Hague Product Liability Convention.

[45] See Article 45 of the LAL.

[46] *Ibid*. See Article 5(1) of the Rome II Regulation.

[47] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 807. See Article 5(1) of the Rome II Regulation.

business activity, but how about advertising for the whole category of products or a similar product?[48] Another difficulty is the assessment of the law to be applied in a particular case: the law of the place of the tortfeasor's principal business or of the sustained damages. A more sensible and better choice between the laws could be made if there were a general clause which could direct the judges to apply the closest connection test.[49]

In addition, product liability is often related to rules of safety. When the applicable law in the case is a law other than that of the place where the tortious act is committed, the local safety standard in that place will probably have to be considered in order to strike a proper balance between the interests of the parties.[50] One, however, cannot see any provision adopting this idea in the LAL.

B. Rule for Infringement of Personality Rights

Cross-border infringement of personality rights has become much more frequent with the rapid development of modern technologies, especially the Internet. This reality calls for the urgent harmonisation of solutions to such cases across the globe.[51] Substantive laws in this respect are, however, quite different from country to country[52] and due to these divergences regarding personality rights, it is possible that an act is perfectly legal and protected according to the law in one country – for example, under the rules guaranteeing freedom of speech and the press which are even a constitutional concern in many countries – but could be a violation of personality rights, *i.e*. a form of defamation in another.[53] The sharp divergences of the laws and the importance of the concerned rights make harmonisation in this area rather difficult.[54]

To provide a solution for Chinese judges encountering this sort of case, a new specific choice of law rule for infringement of personality rights is now available in Article 46 of the LAL, which states:

[48] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT, *ibid*.

[49] See Article 5(2) of the Rome II Regulation.

[50] See Article 17 of the Rome II Regulation; G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 855.

[51] See A. WARSHAW, Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims, *Brooklyn Journal of International Law* 2006/32, p. 269 *et seq*.

[52] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 784 *et seq*.

[53] Generally see A. WARSHAW (note 51); R. GARNETT/ M. RICHARDSON, Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-border Libel Cases, *Journal of Private International Law* 2009/5, p. 471 *et seq*; G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 784 *et seq*.

[54] This can be evidenced by the legislative history of the Rome II Regulation, see G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 770 *et seq*.

> "The law of the victim's habitual residence shall be applicable to violation of his personality rights by internet or any other means including the rights of name, image, reputation and privacy."[55]

This rule is compatible with the rule in Article 15 of the LAL which states that the content of personality rights shall also be determined according to the law of the right holder's habitual residence.[56] One can see that both conflict rules favour the victim.[57] Difficulties, however, can be predicted for the application of these rules in practice. Suppose a victim has his habitual residence in a country whose substantive law on the protection of personality rights, *e.g.* reputation, is much more relaxed than that of China and he launches litigation in a Chinese court. The Chinese court will probably have to refuse the application of the law of his habitual residence designated by these rules if the Chinese court thinks its local standard on protection of reputation is so important that to do otherwise would offend local public policy as recognised by Article 5 of the LAL.[58] On the other hand, suppose a victim has his habitual residence in a country whose substantive law on the protection of personality rights is much stricter than that in China but he launches litigation in a Chinese court for whatever reasons. The Chinese court will probably also have to refuse, on public policy grounds, the application of the law of his habitual residence designated by the above rules if the Chinese court thinks its local standard on freedom of speech is too dear to be compromised.[59]

C. Rules for Infringement of IP Rights

Given the huge and continuously increasing volume of contemporary international trade related to IP, how to effectively protect cross-border private IP rights has become a topical issue. In China, the interaction between IP law and Private International Law has attracted much attention in the past years. As far as choice of law for the protection of cross-border IP rights is concerned, the applicable law for infringement of IP rights is one of the most important issues.[60]

Nevertheless, owing to the special nature and territoriality principle of IP rights, infringement of IP rights has to be distinguished from general torts and other special torts and it should normally be governed by the law of the country

[55] See Article 46 of the LAL.

[56] See Article 15 of the LAL.

[57] See the choice of law rules for defamation cases in English law, see G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 869 *et seq.*

[58] See Article 5 of the LAL, which states: "[i]f the application of foreign law will damage the public interests of the People's Republic of China, Chinese law shall apply".

[59] *Ibid.*

[60] With regard to choice of law for IP rights, generally speaking, there are three main aspects that need to be regulated *i.e.* matters pertaining to IP rights themselves such as the existence, initial ownership, scope, limitation, duration and transferability of IP rights, the exploitation of IP rights such as transfer and license and the infringement of IP rights.

where the protection is sought.[61] It has, however, been suggested that the consequences of IP infringement could be governed by the law chosen by the parties[62] and in a case of ubiquitous infringement, a law other than *lex loci protectionis* might be more suitable to resolve the problems for the whole case.[63]

The new Chinese choice of law rules for infringement of IP rights can be found in Article 50 of the LAL, which states:

> "Liability arising out of infringement of intellectual property rights shall be governed by the law of the place where the protection is claimed; after the infringement, the parties can choose the *lex fori* as the governing law for their dispute."[64]

As illustrated, the principle of territoriality has been followed to establish the basic rule. In contrast to other jurisdictions, where this principle must be strictly followed in cases of IP infringement,[65] Chinese law allows the parties to choose the applicable law after the infringement, but the choice is limited to the *lex fori*.[66] This approach can be helpful for ubiquitous infringement cases or in resolving the disputes regarding the consequences of infringement. It can, however, be counterproductive in cases that do not involve ubiquitous infringement and turn on the question of whether certain acts amount to infringement.[67] In addition, to effectively resolve disputes arising from ubiquitous infringement, the closest connection test could also have been introduced in this Article.[68]

IV. Conclusion

A systematic examination of conflict rules for cross-border torts in the new Chinese conflicts code demonstrates that the Chinese legislation has largely followed the European model, *i.e.* a few general rules are prescribed for general torts, plus a series of specific choice of law rules for special torts.

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[61] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 815 *et seq*.

[62] See Article 3: 605 of "Principles for Conflict of Laws in Intellectual Property" prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property and published on 1 September 2010 (hereinafter, CLIP Principles), which can be found at <http://www.ip.mpg.de/ww/de/pub/mikroseiten/cl_ip_eu/>.

[63] See Section 321 of "Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes" proposed by the American Law Institute (ALI Publishers, 2008) (hereinafter, the ALI Principles); Article 3: 603 of the CLIP Principles.

[64] See Article 50 of the LAL.

[65] See G.C. CHESHIRE/ P.M. NORTH/ J.J. FAWCETT (note 10), at 816 *et seq*.

[66] See Article 8(3) of the Rome II Regulation, which explicitly forbids the parties to make a choice of law for infringement of IP rights.

[67] See Section 302 of the ALI Principles; Article 3: 605 of the CLIP Principles.

[68] See Section 321 of the ALI Principles; Article 3: 603 of the CLIP Principles.

The number of special torts for which specific choice of law rules have been provided in the Chinese legislation is, however, not as high as in the European legislation.[69] In China, besides general tort conflict rules, specific choice of law rules are now available for cases of product liability, infringement of personality rights and infringement of IP rights. There are, however, no arrangements yet in the LAL for specific choice of law rules regarding other special torts such as unfair competition, environmental damage, industrial action and traffic accidents.[70]

As anticipated, in constructing the new rules, the modern trend in the world has generally been followed, which can be evidenced by the acceptance of party autonomy.[71] Unfortunately, the popular doctrine of the closest connection has, however, not yet been introduced in the new law to relax the rigidity of those tort conflict rules, though it has been established as a fundamental principle for the whole law.[72] In addition, there is generally a lack of consideration, in the new law, of the laws of other jurisdictions that might be interested in the application of their laws to the relevant tort actions.[73] It is to be hoped that these problems will be addressed in the forthcoming Interpretation of the SPC on the new law.[74]

[69] Generally see the Rome II Regulation.

[70] See Articles 6, 7 and 9 of the Rome II Regulation.

[71] See Q. HE, Recent Developments with Regard to Choice of Law in Tort in China, *YPIL* 2009, p. 234; above notes 5, 64 and accompanying text.

[72] See above notes 37, 49, 68 and accompanying text.

[73] See above notes 20, 27, 50 and accompanying text.

[74] In China, it is customary that after a new law is passed, the SPC will make an Interpretation on the implementation details for the new law; an Interpretation of the SPC can not only interpret but also sometimes "expand" the law it interprets to some degree. According to one Chief Judge from the SPC, namely Judge Guixiang Liu, the SPC is currently working on the Interpretation for the LAL and will publish it soon: see the speech given by Judge Guixiang Liu at the opening ceremony of the 2012 Chinese Annual Conference on Private International Law, held in Dalian on 21 September 2012.

THE APPLICABLE LAW TO RIGHTS *IN REM* UNDER THE ACT ON THE LAW APPLICABLE TO FOREIGN-RELATED CIVIL RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA

Wenwen LIANG*

I. Introduction

This article analyses the law applicable to rights *in rem* under the Act on the Law Applicable to Foreign-Related Civil Relations of the People's Republic of China (the "Act"). It introduces the background regarding rights *in rem* in substantive law and conflict of laws. Chinese law follows the civil law concept of rights *in rem*, or real rights, or more liberally, property rights, although property rights differ from those of common law countries. Before the adoption of the Rights *in Rem* Act and

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the Act, there were only substantive and conflicts rules on immovables and specific movables. As in most countries, the *lex situs* rule was used.

This article will provide an overview of the Act, including its purpose, principles and provisions on general problems. The most significant relationship principle and the party autonomy principle will be analysed in some detail since they underlie the choice of law rules on property rights to securities and movables respectively.

The article will comment on the rules regarding the law applicable to rights *in rem*, immovables, movables, movables in transit, securities and charges over rights. A general comment on the Chinese approach to the law applicable to rights *in rem* will be provided. The methodology mainly combines the black letter approach and the comparative law approach. The rules will be interpreted according to the literal wording and relevant rules in the current Chinese law. Review of other national laws will be made where necessary. For the sake of simplicity, references to Chinese law appear without designation. References to other national laws appear with the country name. Rights *in rem*, real rights, and property rights are used interchangeably.

II. Rights *in rem* in Substantive Law and Conflict of Laws prior to the Act

A. Rights *in rem* in Substantive Law

1. Prior to the Rights in Rem *Act*

Until the adoption of the Rights *in Rem* Act in 2007, the rules on rights *in rem* were incomplete and fragmented, mainly with respect to immovables. Under the General Principles of Civil Law, property ownership meant the owner's rights to lawfully possess, utilise, profit from and dispose of his property.[1] Ownership and usufruct of land was meanwhile governed by the Land Administration Act.[2] Contracting of rural land to farmers (usufruct) was governed by the Act on Land Contract in Rural Areas. The transfer of ownership of buildings and usufruct of land thereunder, as well as mortgage, in urban areas was governed by the Act on the Administration of the Urban Real Estate.

Security interests over both immovables and movables were governed by the Guaranty Act. With the exception of security interests over movables, general provisions on property rights to movables were essentially non-existent. There was only legislation with respect to specific movables: for example, the Maritime Act for the ownership of ships, [3] mortgage of ships, [4] and maritime liens; [5] the Civil

[1] Article 71 of the General Principles of Civil Law.

[2] Chapter 2.

[3] Chapter 2 Section 1.

[4] Chapter 2 Section 2.

Aviation Law for the ownership and mortgage rights over civil aircrafts,[6] the right of preemption over civil aircrafts,[7] and the lease of civil aircrafts.[8]

The term "property rights" is widely used in legislation such as that relating to trusts.[9] However, the term "rights *in rem*" is widely used in textbooks.[10] It is generally accepted that property rights in legislation literally refer to rights *in rem*, like in most civil law systems, over tangibles rather than intangibles, as opposed to the common law of property rights, which extend to both tangibles and intangibles. Property rights over intangibles are mainly governed by specific laws alongside the law on rights *in rem*, for example, Copyright law.[11]

2. The Rights in Rem *Act*

The Rights *in Rem* Act adopted in 2007 is a codification of relevant rules on rights *in rem* over immovables and movables, *i.e*. ownership, usufruct and security interest. Rights *in rem* under the Rights *in Rem* Act expressly follow the civil law approach; rights *in rem* are limited to tangibles.[12] Although official translations use the term "property rights", it is prudent to use rights *in rem* or real rights. Things are divided into immovables and movables. Intangibles may be the object of rights *in rem* under specific laws.[13] Rights *in rem* are the exclusive rights of direct control over a specific thing. Rights *in rem* cover ownership, usufruct and security interest.[14]

B. Conflict of Law Rules on Rights *in rem* prior to the Act

Until the adoption of the Act on the Law Applicable to Foreign-related Civil Relations, the rules on the law applicable to rights *in rem* only dealt with immovables and specific movables and was consistent with the substantive law provisions. The general approach was the *lex situs* rule both in legislation and academic writing.[15]

The ownership of immovable property was governed by the law of the place where the immovable is situated.[16] Land and fixtures thereon, as well as buildings

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[5] Chapter 2 Section 3.

[6] Chapter 3 Section 2.

[7] Chapter 3 Section 3.

[8] Chapter 3 Section 4.

[9] Article 2 of the Trust Act.

[10] To name a few, J. CUI, *Rights in Rem*, Beijing 2011; H. LIANG, *Rights in Rem*, Beijing 2005.

[11] Article 10.

[12] Article 2 of the Rights *in Rem* Act.

[13] Article 2 of the Rights *in Rem* Act.

[14] Article 2 of the Rights *in Rem* Act.

[15] D. HAN/ Y. XIAO (eds), *Private International Law*, Beijing 2007, p. 183 *et seq.*

[16] Article 144 of the General Principles of Civil Law.

and fixtures thereon are immovables. Ownership, sales, tenancy, mortgage and use of an immovable was governed by the law of the place where an immovable was situated.[17]

Rights *in rem* to ships and aircrafts were governed in principle by the law of the place of registration. The acquisition, transfer, extinction, or mortgage of the ownership of a ship was governed by the law of the flag State of the ship.[18] The acquisition, transfer or loss of ownership and the mortgage of a civil aircraft was governed by the law of the country of registration of the civil aircraft.[19] Priority of title to a ship or civil aircraft was governed by the law of the forum.[20]

III. The Act

A. Overview

The Act is intended to be part of the Civil Code, some parts of which have been passed, including contract, rights *in rem*, and tort. The Act is a codification of previous rules and judicial practices and incorporation of international developments. The Act is composed of eight chapters on general provisions, civil law subjects, marriage and family matters, succession, rights *in rem*, obligations, intellectual property rights, and ancillary provisions. The Act is solely on the law applicable to civil relations with a foreign element unlike the Swiss and Belgian Acts of Private International Law, which cover jurisdiction, recognition and enforcement of foreign judgments alongside applicable law. However, Chinese academics consider that Private International Law should cover jurisdiction, choice of law, recognition and enforcement of foreign judgments, status of foreigners, international civil procedure, international commercial arbitration, and uniform substantive law.[21]

The Act is intended to clarify the law applicable to civil relations with a foreign element, and to resolve civil law disputes and safeguard parties' lawful rights and interests.[22] The Act determines the law applicable to civil law relations with a foreign element unless otherwise provided in other laws,[23] but the Act prevails in

[17] Rule 186 of Supreme Court Opinion of Implementing the General Principles of Civil Law (Civil Law Opinion).

[18] Article 270 and 271 of the Maritime Act.

[19] Article 185 and 186 of the Civil Aviation Act.

[20] Article 272 of the Maritime Act, Article 187 of the Civil Aviation Act.

[21] D. HAN/ Y. XIAO (note 15), p. 9.

[22] Article 1 of the Act.

[23] Article 2 of the Act. This is confusing since the effect of the Act is unclear, see J. HUANG, The Making and Improving the Chinese Act on the Applicable Law to Foreign-Related Civil Relations, *Tribune of Political Science and Law* 2011.

matters of tort, marriage and succession.[24] Mandatory Chinese law applies directly regardless of the choice of law rules.[25] Chinese law is applicable if the application of foreign law will impair China's public interests.[26] Statutes of limitation are governed by the law applicable to the relevant civil relations.[27] Characterisation of the civil relation follows the law of the forum.[28] *Renvoi* is excluded.[29] It is up to the courts, arbitral tribunals or administrative entities to prove foreign law. If parties choose foreign law as the applicable law, the parties prove the foreign law.[30]

B. The Most Significant Relationship Principle

A hallmark of the Act is the sweeping use of the most significant relationship principle and the principle of party autonomy. The law with the most significant relationship with a civil relation applies if there is no choice of law rule in the Act or other acts. The most significant relationship principle is established as a bottom line principle.[31]

The most significant relationship is enshrined as a basic principle in the Act. It applies where there is no conflicts rule.[32] Specifically it applies in states with distinct legal systems: the law of the territorial unit which has the most significant relationship with the facts is designated.[33] It applies in double nationality situations;[34] it applies to securities;[35] and it applies where there is no choice of law in a contract.[36] Under other acts it applies with respect to maintenance obligations;[37] and it applies in case of a dual place of business.[38] There is neither general guidance on

[24] Article 51 of the Act, Article 146 and 147 of the General Provisions of Civil Law, and Article 36 of the Succession Act.

[25] Article 4 of the Act.

[26] Article 5 of the Act.

[27] Article 7 of the Act.

[28] Article 8 of the Act.

[29] Article 9 of the Act.

[30] Article 10 of the Act.

[31] Article 2 of the Act; W. XU, Comment on the Act of People's Republic of China on Application of Law in Civil Relations with Foreign Contacts – From the View of Limited Rationality and Discretionary Power, *Journal of Henan University of Economics and Law* 2012.

[32] Article 2 of the Act.

[33] Article 6 of the Act, Rule 192 of the Civil Law Opinion.

[34] Article 19 of the Act, Rule 182 of the Civil Law Opinion.

[35] Article 39 of the Act.

[36] Article 41 of the Act, Article 126 of the Contract Act, Article 269 of the Maritime Act, Article 188 of the Civil Aviation Act, Article 145 of the General Principles of Civil Law.

[37] Article 148 of the General Principles of Civil Law, Rule 189 of the Civil Law Opinion.

[38] Rule 185 of the Civil Law Opinion.

the jurisdiction with the most significant relationship nor relevant presumptions in the Act. Guidance on the test of the most significant relationship can only be found in maintenance obligations and contracts in previous laws and documents.

For the purpose of determining the most significant relationship with the maintenance obligee, the nationality and domicile of the obligee and obligor of maintenance obligations, as well as the *situs* of the property under the maintenance obligations are relevant factors.[39]

The most significant relationship test in contract cases is the characteristic performance.[40] A comprehensive consideration of all connecting factors is required in determining what constitutes the most significant relationship. Prudent consideration must be given to all factors and exercising jurisdiction is not a factor.[41] Specifically, the most significant relationship with a contract is examined under the test of the inherent characteristic of the contract. For international sales contracts, the place of characteristic performance is the place of domicile of the seller on conclusion of the contract. Where the buyer's place of domicile is the place of negotiation and conclusion of the contract or the buyer's place of domicile is the place of delivery, the place of characteristic performance is the buyer's place of domicile. For processing contracts, the place of characteristic performance is the processing party's domicile; for equipment supply contracts, it is the place of installation; for real estate sales, rent or mortgage contracts, it is the place of the real estate; for movable leasing contracts, it is the place of lessor's domicile; for contracts regarding charges over chattel, it is the place of chargee's domicile; for loan contracts, it is the place of the lender's domicile; for gift contracts, it is the place of the donor's domicile; for insurance contracts, it is the place of insurer's domicile; for financial leasing, it is the place of the lessee's domicile; for construction contracts, it is the place of the construction; for warehousing contracts, it is the place of the bailee's domicile; for surety contracts, it is the place of the guarantor's domicile; for the issuance, sale or transfer of bonds, it is the place of issue, the place of sale and the place of registration respectively; for auction contracts, it is the place of auction; for brokerage contracts, it is the place of the broker's domicile. If a contract apparently has a closer relationship with another country, the law of the other country applies.[42]

These standards in maintenance and contracts can offer little guidance in other areas of law. Countries adopting the most significant relationship principle tend to have a set of guidelines on what constitutes the most significant relationship. US courts have a general set of factors for determining the state with the most

[39] Civil Law Opinion Rule 189.

[40] Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters, No. [2007] 14 issued on 23 July 2007, Rule 5.

[41] See the Speech on Improving Adjudicating International Commercial and Maritime Cases to Provide Effective Judicial Safeguard of the Opening up Policy by Vice President Wan E'xiang at the 2nd National Meeting on Adjudicating International Commercial and Maritime Cases issued on 15 November 2005.

[42] Note 40.

significant relationship in individual cases.[43] The Belgian Private International Law Act (*Loi portant le Code de droit international privé*, the "Belgian Act") contains presumptions regarding the most significant relationship in specific provisions.[44] Testamentary disposition or revocation is presumed to be most closely connected with the state where the testator has his habitual residence at the time of disposition or revocation.[45] A quasi-contractual obligation is presumed to be most closely connected to the state where the facts giving rise to the obligation arose.[46] This may be inspiration for the Chinese legislator and courts in finding what constitutes the most significant relationship.

C. The Party Autonomy Principle

Party autonomy in the choice of law means that parties may expressly choose the law applicable to their civil relations with a foreign element according to the law.[47] Party autonomy is expressly singled out as a principle in the Chapter on General Provisions together with provisions in specific chapters.

In obligations, party autonomy applies as a primary rule in the law applicable to contracts,[48] arbitral agreements,[49] unjust enrichment and voluntary service,[50] and in the transfer or license of intellectual property rights.[51] Tort is governed by the law of the place of the tort or the common habitual residence of the parties. As a primary rule, parties can choose the applicable law after the tort has occurred.[52] Torts regarding intellectual property rights are governed by the law of the place where protection is sought. Parties may choose the law of the forum after the IP tort occurs.[53]

In family law matters, as a primary rule, parties can choose the law applicable to matrimonial property. The choice is among the law of the habitual residence or nationality of either party, or the place of the principal property.[54] In consensual divorces, as a primary rule, parties can choose the applicable law. Their choices are among the law of the place of the habitual residence or nationality of either party.[55]

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[43] AMERICAN LAW INSTITUTE, *Restatement of the Law — Conflict of Laws*, Westlaw 2012, para. 6.

[44] Article 84, 93 and 104.

[45] Article 84 of the Belgian Act.

[46] Article 104 of the Belgian Act.

[47] Article 3 of the Act.

[48] Article 41 of the Act.

[49] Article 18 of the Act.

[50] Article 47 of the Act.

[51] Article 49 of the Act.

[52] Article 44 of the Act.

[53] Article 50 of the Act.

[54] Article 24 of the Act.

[55] Article 26 of the Act.

In cases of express agency, party autonomy applies as a secondary rule.[56] As a secondary rule, parties can choose, between the law of the place of provision of products and the law of the place of provision of services, the law applicable to consumer contracts.[57]

With respect to rights *in rem* over movables, parties may choose the applicable law. If there is no such choice, then the applicable law is the law of the place of the movable at the time the legal facts arose.[58] Party autonomy applies as a primary rule with respect to the law applicable to trusts.[59]

The extension of party autonomy is said to be based on the freedom of parties to dispose of their civil law rights in marriage and family, successions, rights *in rem*, obligations, and intellectual property, and the international trends of the expansion of party autonomy in private international law.[60] The expansion of party autonomy is subject to a general public policy limitation. Public policy excludes the application of foreign law under the conflicts rule where the latter is likely to impair Chinese public policy.[61] Party autonomy in the choice of law for contracts derives from the freedom of contract in substantive contract law.[62] Such freedom is not in every branch of law; each branch has its own policies. For example, in property law, it is generally mandatory to ensure transaction security.[63] As such, property law allows no such freedom of contract.

The legislators expect party autonomy to be restricted through general public policy provisions. However, public policy should be invoked only in exceptional cases and kept within proper limits; otherwise conflict of laws is liable to be frustrated. Only where it will violate some fundamental principle of justice and good morals can a court reject the application of foreign law.[64] The protection of third parties and the security of transaction is a fundamental policy of property law, which prevails over the freedom of parties. There are abundant cases that are short of the criteria for the public policy reservation, but involve third parties needing protection against the choice of law by parties to a property transaction. To resort to public policy too often would diminish the value of public policy.

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[56] Article 16 of the Act.

[57] Article 42 of the Act.

[58] Article 37 of the Act.

[59] Article 17 of the Act.

[60] Report on the Act (Draft) and Main Issues, available at <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>; J. HUANG (note 23), p. 11.

[61] Report on the Act (Draft) and Main Issues, available at <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

[62] J.-P. NIBOYET, *La théorie de l'autonomie de la volonté, 16 Collected Courses*, Leyde 1972, p. 20-21.

[63] S. ERP, Comparative Property Law, in M. REIMANN/ R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative law*, Oxford 2006, p. 1044.

[64] L. COLLINS (ed.) *et al.*, *Dicey, Morris and Collins on the Conflict of Laws*, London 2006, para. 5-003.

IV. Conflicts of Law Rules on Rights *in rem* in the Act

A. General Comments

In the Act, there are separate regimes on the law applicable to immovables and movables: the *lex situs* applies to immovables, party autonomy applies to movables. This is unlike the uniform regime on the law applicable to both immovables and movables, as that adopted in Belgium.[65]

The law applicable to the distinction between an immovable and a movable is missing. As such, the issue of what constitutes an immovable or a movable is governed by Chinese law as an issue of characterisation.[66] This is necessary given the distinct regimes applicable to immovables and movables. The law applicable to the issue of what constitutes an immovable or movable can be found in the Model Law[67] with separate regimes for immovables and movables. The *lex situs* rule governs immovables[68] while movables may be governed by the *lex situs* or by party autonomy, depending on the rights involved.[69]

Thirdly there is no reference to specific aspects of rights *in rem*. It is normal to classify the categories of rights *in rem* in detail given the diversity of rights *in rem*. Classification is designed to facilitate characterisation issues.[70] In the Civil Law Opinion,[71] the ownership, sale, tenancy, mortgage and use of an immovable is governed by the law of the place where an immovable is situated. The Belgian Act provides that the applicable law governs the characterisation of immovables and movables; the existence, nature, content and scope of real and intellectual property rights; the holding of real rights; the disposition of real rights; the mode of constitution, modification, transmission and extinction of real rights; and, the effect against third parties.[72]

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[65] Article 87 of the Belgian Act.

[66] Article 8 of the Act.

[67] Article 76 of the Model Law, CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, *Model Law*, Beijing 1999 (Model Law).

[68] Article 77 of the Model Law.

[69] "The acquisition or loss of real rights over movables is governed by the law of the place where the movables are situated when the acquisition or loss occurs." See Model Law Article 79. The assignment of title in transactions involving tangible movables is governed by the law chosen by the parties. In the absence of such a choice, the *lex situs* at the time when the goods are under the buyer's control shall apply. Before the transfer of control to the buyer, the assignment of the title in the transaction is governed by the *lex situs*. See Model Law Article 80. The rationale is that in sales of tangible movables, transfer of title often gives rise to disputes due to differences in national substantive laws. The transfer by contract of real rights over movables leads to the approach that parties are allowed to choose the applicable law. See CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, *Model Law*, Beijing 1999, p. 129. The content and exercise of real rights to movables are governed by the *lex situs* subject to the *lex loci actus*. See Model Law Article 81.

[70] L. COLLINS (note 64), at paras 2-003 – 2-005.

[71] Rule 186.

[72] Article 94(1) of the Belgian Act.

There is no reference to tort in respect of rights *in rem*, which is provided in the substantive law of the Rights *in Rem* Act,[73] and the Tort Act. It is submitted that tortious acts in relation to rights *in rem* are governed by the choice of law rule for tort.[74] For example the Swiss Private International Law Act (*Loi fédérale du 18 décembre 1987 sur le droit international privé*, the Swiss Act) provides that claims in relation to real property arising from nuisance are governed by the rules on torts.[75]

B. Immovables

Article 36 of the Act provides that rights *in rem* to immovables are governed by the law of the place where the immovables are situated. This is consistent with the international approach, which is universally recognised,[76] since the *situs* of immovables is constant and reliable.

C. Movables

Article 37 is doomed to be challenged,[77] despite some support.[78] It provides that "parties can choose by agreement the law applicable to rights *in rem* over movables. In the absence of such a choice, the law of the location of a movable at the time of delivery in a sale applies." The rationale of the drafters was that given the diversity of movables and of the transactions relating to movables, parties are allowed the freedom to choose the law applicable to rights *in rem* over movables.[79] This proposition is problematic.

1. Comments

Article 37 establishes a single rule for rights *in rem* over movables which are diverse in respect of subject matter, form and creation, exercise and extinction. Rights *in rem* over movables can be ownership, usufruct and security interests. Ownership, usufruct and security interests differ from each other and may be

[73] Article 37 and 38.

[74] L. COLLINS (note 64), at paras 24-026 – 24-028.

[75] Article 99(2) and 138 of the Swiss Act. The author makes references to the translation by Umbricht Attorneys at Law, available at <www.umbricht.com>.

[76] Such as Article 77 of the Model Law, Article 99(1) of the Swiss Act, Article 87(1) of the Belgian Act.

[77] For example, X. SONG, Party Autonomy and Conflict of Laws on Rights *in Rem*, *Global Law Review* 2012.

[78] J. XU, Party Autonomy in the Act on the Applicable Law to Foreign-Related Civil Relations, *Law Review* 2012.

[79] Report on the Act (Draft) and Main Issues, available at <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

reasonably subject to different choice of law rules. In addition, ownership, usufruct and security interests may be created by agreement and by operation of law. Furthermore the creation, exercise and extinction of such rights may have specific characteristics and may be subject to different choice of law rules. There is no specification as to the scope of party autonomy in terms of specific issues with different characteristics. The second paragraph implies that party autonomy is limited to sales or consensual exchanges of rights *in rem* to movables, but it is far from clear.

2. Comparative Remarks on Party Autonomy in the Choice of Law on Property Rights in Movables

From a comparative law perspective, as a principle, real rights to movables are governed by the law of the place where the movables are located at the time of the relevant facts. This is almost universally accepted with exceptions in specific situations.[80]

Under Swiss law, the acquisition, as well as the loss of interest in movables is governed by the *lex situs* where the underlying facts occurred and the scope and exercise of real rights in movables is governed by the *lex situs*.[81] The parties may submit the issue of acquisition or loss of real rights in movable property to the law of the State of consignment or the State of destination or to the law governing the underlying legal transaction.[82] This provision follows the choice of law for goods in transit,[83] property arriving in Switzerland[84] and retention of title to property to be exported.[85] Party autonomy is limited to circumstances where the location of movables is uncertain. The law available for choice is limited. Party autonomy cannot be enforced against third parties. This is limited party autonomy in limited circumstances and with limited effect regarding real rights over movables.

To give another example, under the 2008 Dutch Property Law (Conflict of Laws) Act, if goods are to be delivered abroad under reservation of title, parties may choose the law of the country of destination from the outset to govern the effect of the title reservation provided that under that law, the title retention clause does not cease to be effective until the price has been fully paid and such choice is only effective if the goods are actually exported into that country.[86] This provision

[80] Such as Article 100 of the Swiss Act, Article 87 of the Belgian Act, and L. COLLINS (note 64), at paras 24-002 *et seq*.

[81] Article 100 of the Swiss Act.

[82] Article 104 of the Swiss Act; B. DUTOIT, *Droit international privé Suisse – Commentaire de la loi fédérale du 18 décembre 1987,* Bâle/ Genève/ Munich 1997, Article 104.

[83] Article 101 of the Swiss Act.

[84] Article 102 of the Swiss Act.

[85] Article 103 of the Swiss Act.

[86] Article 3 of the Dutch Property Law (Conflict of Laws) Act; J.V.D. WEIDE, Party Autonomy in Dutch International Property Law, in R. WESTRIK/ J.V.D. WEIDE (eds), *Party Autonomy in International Property Law*, Munich 2011, p. 51.

appears to allow party autonomy, which is however limited in a substantial way since the only available choice is the law of the country of destination. In fact, it is a concession of the Netherlands legislator to the law of the destination and it depends on the country of export to recognise the effect of the choice.[87] Since the otherwise applicable law to rights acquired before export (before the change of *situs*) under the *lex situs* rule should be Dutch law, the Dutch legislator gives up the application of Dutch law. The Dutch legislator intends to avail the law of Germany with a wider scope of title retention clauses for export transactions to Germany.[88]

Under US law, the local law of the state which, with respect to the particular issues of a case, has the most significant relationship to the parties, chattel and conveyance, governs the validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance,[89] as well as the validity and effect of a security interest in a chattel as between the immediate parties.[90] The test of the most significant relationship is a set of factors for the discretion of courts in individual cases.[91] Since party expectations are believed to be of the greatest significance in a consensual transfer of property, the law chosen by the parties is the law with the most significant relationship with a property dispute. Otherwise the law of the location of the chattel at the relevant time is considered to be the law with the most significant relationship.[92] Party autonomy here is only a presumption, which can be overturned under the most significant relationship test. The most significant relationship approach is also limited to the immediate parties to a consensual conveyance.[93]

To allow parties to choose the law applicable to property transactions is often limited to exceptional situations where the *lex situs* rule fails to operate, and it is limited in effect, as it is unenforceable against third parties. To allow unlimited party autonomy in the choice of law applicable to property rights is to disregard the mandatory nature of substantive property law. The diversity of property rights in movables and the expansion of party autonomy in substantive law would not justify the deviation from the *lex situs* rule with respect to movables.

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[87] J.V.D. WEIDE (note 86), at 56.

[88] J.V.D. WEIDE (note 86), at 51.

[89] AMERICAN LAW INSTITUTE (note 43), at para. 244.

[90] AMERICAN LAW INSTITUTE (note 43), at para. 251.

[91] "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." AMERICAN LAW INSTITUTE (note 43), at § 6.

[92] AMERICAN LAW INSTITUTE (note 43), at para. 244.

[93] AMERICAN LAW INSTITUTE (note 43), at para. 244 comment b.

D. Change in the Rights *in rem* over Movables in Transit

Parties may choose, by agreement, the law applicable to a change in the rights *in rem* over movables in transit. In the absence of such a choice, the law of the destination applies.[94] This again shows the support for party autonomy. Party autonomy is established as a primary rule. There is no limitation as to the law that can be chosen: it can be the law of destination, shipment or underlying facts. There is no limitation on the effect of the chosen law, which may be enforceable against third parties. This rule differs from many national rules on the law applicable to real rights over goods in transit. Normally, party autonomy is a secondary choice after the law of destination, shipment, or where the underlying facts occur. In the Model Law, real rights over movables in transit are governed by the law of the place of destination.[95] In Swiss law, the acquisition or loss of real rights over movables in transit based on a legal transaction is governed by the law of the State of destination,[96] and parties may submit the acquisition and loss of an interest in movable property to the law of the State of shipment or the State of destination or to the law applicable to the underlying legal transaction. The choice of law is not enforceable against a third party.[97] In Belgian law, the rights and the ownership over property in transit are governed by the law of the place of destination.[98]

E. Securities

Securities are governed by the law of the place where rights to securities can be enforced or the law of the place which has the closest connection with the securities.[99] There is no specification regarding the scope of securities rights. Given that relevant provisions are contained in the Chapter on Rights *in rem*, it can be inferred that the scope includes rights *in rem* to securities, ownership, usufruct and disposition of real rights to securities.

Under Chinese law, securities, in the liberal sense, cover title documents or documents of claim. Title documents cover bills of lading, warehouse receipts, negotiable instruments, shares and bonds. Securities in the literal sense cover financial instruments, *i.e.* equity and bonds. The Act introduces the terms "where right to securities can be enforced" and "the place which has the closest connection to securities" into Chinese law without any explanation. It may help to examine model laws or the law of other countries.

In the Model Law, securities are governed by the law designated by the securities. In the absence of such designation, the law of the place of the issuer's business applies.[100] English law follows the *lex situs* rule for securities and defines

[94] Article 38 of the Act.

[95] Article 89 of the Model Law.

[96] Article 101 of the Swiss Act.

[97] Article 104 of the Swiss Act.

[98] Article 88 of the Belgian Act.

[99] Article 39 of the Act.

[100] Article 83 of the Model Law.

the *situs* of securities. For bearer securities, the *situs* of securities is the location of the certificates;[101] for registered securities, the *situs* of securities is the place of incorporation of the issuer or the place of the register for securities transferred by registration.[102] Swiss law distinguishes title documents[103] and financial asset securities regarding which there are special rules for charges over securities.[104] Belgium adopts the place of the register or the place of the issuer's business for registered securities,[105] and the place of certificates for bearer securities.[106]

US law has more detailed categories: warehouse receipts, negotiable securities, and shares[107] are governed by separate conflict of law regimes. Warehouse receipts are governed by a set of complex rules;[108] property aspects of negotiable instruments (the validity and effect of the transfer as between persons who were not both parties to the transfer) are governed by the place of the certificates at the time of the relevant facts;[109] and shares are governed by the issuer's jurisdiction.[110]

In general, most countries subject the property rights to certificated securities to the *lex situs* rule.[111] The law applicable to the property rights in intermediated securities is divided: some countries allow party autonomy; others adopt the *lex situs* rule.[112]

The approach of Article 39 enjoys flexibility given the diversity of securities, but meanwhile suffers from the uncertainty of judicial discretion since there is little legislative guidance regarding the place of enforcement or the place with the closest connection. The standards in current Chinese law are regarding maintenance obligations and contracts, which can shed little light on securities matters.

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[101] L. COLLINS (note 64), at para. 22-040.

[102] L. COLLINS (note 64), at para. 22-044.

[103] Article 106 of the Swiss Act.

[104] Article 105 of the Swiss Act.

[105] Article 91(1) of the Belgian Act.

[106] Article 91(2) of the Belgian Act.

[107] US Uniform Commercial Code § 8 -102 (a) (15) "Security, except as otherwise provided in Section 8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer: (i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer; (ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and (iii) which: (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or (B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article."

[108] AMERICAN LAW INSTITUTE (note 43), at Topic 4, Chapter 8, Introductory Note, para. 1, Article 7 of the US Uniform Commercial Code.

[109] AMERICAN LAW INSTITUTE (note 43), at § 216.

[110] US Uniform Commercial Code § 8-110.

[111] C. BERNASCONI, The Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems, *HCCH Report 2000 November*, p. 3.

[112] R. GOODE/ H. KANDA/ K. KREUZER, *Hague Securities Convention Explanatory Report*, The Hague 2005, p. 17 *et seq.*

The approach of other countries may be used as a reference in assessing which law has the most significant relationship to a security at issue.

F. Charges over Rights

A charge over rights is governed by the law of the place where a charge is established. Under the Securities Interests Act, mortgage may be established over immovables, and charges may be established over tangible movables and exceptionally over intangible rights. As mentioned above, intangibles are generally not *rem* under the Rights *in Rem* Act but are subject to the part on security interests.[113] It is confusing that charges over rights are listed separately alongside immovables, movables and securities. Rights incorporated in certificates are securities and generally subject to the rule on securities. Charges over rights unincorporated in certificates are governed by the Rights *in Rem* Act and thus should be subject to Article 37 of the Act on movables if there is no special rule applicable under Article 40. A possible interpretation is that securities and rights are as important as property although not strictly as *rem*. A possible source of inspiration might be Article 105 of the Swiss Act although a different approach is taken.[114]

Since Article 36, 37 and 39 provide the law applicable to property rights without further classification of property rights, they are intended to cover all aspects of property rights, ownership, use, and security interests including charges over rights. Thus, Article 40 is a special rule although the rationale for it is unclear. A possible explanation for its existence is the requirement that publicity of charges over rights be visible to third parties. The concern for protecting third parties leads to the choice of the *lex situs* rule in contrast to the party autonomy approach to property rights over movables.

Under the Rights *in Rem* Act, rights over which there can be a charge include bills of exchange, cheques, promissory notes; bonds, certificates of deposit; warehouse receipts, bills of lading; shares of funds or transferable stock certificates; transferable proprietary rights in intellectual property rights and accounts receivable; and other property rights under other laws and administrative regulations.[115]

A charge is established by contract plus formalities. A charge over negotiable instruments, title instruments and bonds is established on the delivery of certificates in the case of bearer securities, or upon registration with competent authorities in the case of registered securities.[116] A charge over receivables is constituted upon registration with the credit reference centre.[117] A charge over shares and investment funds units is constituted upon registration with the compe-

[113] Article 223-229 of the Rights *in Rem* Act.

[114] Article 105 of the Swiss Act.

[115] Article 223.

[116] Article 224 of the Rights *in Rem* Act.

[117] Article 228 of the Rights *in Rem* Act.

tent authorities.[118] A charge over proprietary rights in intellectual property rights is constituted upon registration with competent authorities.[119]

Thus, under this rule, charges over rights incorporated in certificates which are bearer securities are governed by the law of the place where delivery takes place. Charges over rights incorporated in certificates, which are registered securities, are governed by the law of the place where the registrar is located, and charges over intangible rights are governed by the law of the place where the registrar is located.

V. Conclusion

The Act is a milestone in Chinese legislation in the area of private international law. It codifies the previous practices of China and incorporates the latest international developments. It makes bold advances in certain areas, such as the law applicable to rights *in rem*. A basic framework for the law applicable to rights *in rem* has been established. The framework suffers from overbroad categories, which should be detailed. The unlimited party autonomy approach to movables deserves reconsideration and it is recommended that it be interpreted in a limited manner by the courts. In our view, the place of enforcement of securities should be the place of certification, the place of registration, or the place of the intermediary depending on the type of instrument in question. The most significant relationship principle regarding securities may grant too much discretion to the courts and a test with concrete standards is recommended. The Act also omits some areas such as cultural property and assignment of debts, which may be incorporated given their importance in practice.

[118] Article 226 of the Rights *in Rem* Act.

[119] Article 227 of the Rights *in Rem* Act.

THE NEW CONFLICTS RULES FOR FAMILY AND INHERITANCE MATTERS IN CHINA

Weidong ZHU*

I. Introduction

On 28 October, 2010, the 17th session of the 11th Standing Committee of the National People's Congress (hereinafter referred to as "NPC") passed the Law on the Application of Laws of Foreign-related Civil Relationships of the People's Republic of China (hereinafter referred to as "CPIL") after numerous deliberations and readings, and the new law came into effect as of 1 April 2011. The major changes introduced in the new law lie in the conflict rules in family matters, such as marriage, adoption, guardianship, maintenance, successions, *etc*., which are stipulated in Chapter Three, entitled "Marriage and Family", and in Chapter Four, entitled "Successions".

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Compared to the previous stipulations relating to family matters scattered in the General Principles of the Civil Law of the People's Republic of China ("GPCL") of 1987, the Adoption Law as amended in 1998, the Successions Law of 1985, as well as the Opinions on the Implementation of the GPCL issued by the Supreme People's Court in January 1988 (hereinafter referred to as "the 1988 Opinion"), the new law creates a systematic and comprehensive legal framework on the laws applicable to family matters. Above all, the new law specifically designates the habitual residence as the connecting factor in many family matters and fully recognises the doctrine of party autonomy in matters relating to matrimonial property and divorce by agreement. Moreover, it recognises the *in favorem* principle with respect to the protection of the economically weak party, which is a great response to the legislative developments relating to family matters in other jurisdictions, as well as those stipulations embedded in international legal instruments.

Nevertheless, the new law still contains loopholes and deficiencies which will definitely cause confusion and create ambiguities for the judiciary and the parties. The author will analyse these shortcomings, commenting on the relevant stipulations and making suggestions in the conclusions. Taking into account the fact that there are increasingly many cases involving family matters between parties from China, Korea and Japan,[1] the author will also compare the relevant provisions of these countries where necessary.

II. Conflict Rules for Marriage

A. Essential Validity of Marriage

There was no distinction between the essential validity and the formal validity of a marriage in Chinese Private International Law until the newly promulgated CPIL. Article 147 of the GPCL, repealed by the new act, contained a simple rule according to which the marriage of a citizen of the People's Republic of China with a foreigner was governed by the law of the place where their marriage was celebrated (*lex loci celebrationis*). We can assume that marriage between foreigners was also governed by the *lex loci celebrationis* in China. Obviously, the repealed provision did not draw a distinction between essential and formal validity of marriage. It follows that they were both regulated by the law of the place of celebration, which has been supported by judicial practice in China.

The CPIL follows the international trend in designating different choice of law rules for the essential validity and the formal validity of marriage. Pursuant to Article 21 of the new act, a marriage is essentially valid if it complies with the law of the common habitual residence of both parties; in the absence of such a law, the

[1] There were 2,500 marriages between Chinese and Korean nationals in 2005. The number increased to 11,713 in 2010: see the opening speech made by KYUNG-HAN SOHN on the first International Symposium on New Chinese Private International Law held in the Supreme Court in Korea on 12 December 2011.

law of the common nationalities of both parties; and, absent such a law, the *lex loci celebrationis*, provided that the marriage is celebrated in the place where either party has his/her habitual residence or nationality. The subsidiary conflict rule in the new act is conditional and rigid in its application and it gives "habitual residence" priority over nationality and the place of celebration in that order. By contrast, in South Korea and Japan, "nationality" is given priority.[2] Such a conflict rule gives clear direction to the judges and will not give rise to the embarrassing situation of conflicting results by applying different laws alternatively. On the other hand, it will impede the realisation of the *in favorem* principle. As a result, the parties' expectation of a valid marriage will be frustrated.

Furthermore, it seems unnecessary and unreasonable to restrict the *lex loci celebrationis* to the law of the habitual residence or nationality of either party in the new act, and this will likely create a "gap" in terms of the governing law. Suppose, for example, that A is from country X and has his habitual residence in Country Y, and B is from country Z; they celebrate their marriage in country W while travelling there. Later, the essential validity of their marriage is disputed in a Chinese court. Under the current provision, there will be no law designated to determine such a question. Taking into account the frequent movement of people between different countries, such a scenario is very likely.

Due to the different conflicts rules on the essential validity of marriage in China, Korea and Japan, the "limping marriage" issue will easily arise when such an issue is debated in the courts of these countries.[3] For example, if A, a Japanese national, marries B, a Korean national, and they have a common habitual residence in China, the Chinese court will apply Chinese law when the validity of their marriage is disputed, as China is the law of their common habitual residence. The Japanese and Korean courts will apply the national laws of each party respectively, *i.e.*, Japanese law and Korean law. Unless there are similar substantive law provisions about the essential validity of marriage in the three countries, the limping marriage will be unavoidable.

It should be noted that the above newly enacted conflict rule is still subject to an exception contained in the Answers of the Ministry of Civil Affairs to Several Issues Concerning the Registration of Foreign Marriages, issued on 9 December 1983. China recognises the validity of marriages between two foreign citizens of the same nationality, celebrated before the consul of their home country either in

[2] K.H. SUK, Some Observations on the Chinese Private International Law Act: Korean Law Perspective, *ZChinR* 2011, p. 109.

[3] Both Korea and Japan subject the essential validity of a marriage to the national law of each of the parties: see Article 36 (1) of the Korean Private International Law (hereinafter referred as "KPIL"), Article 24 (1) of the Japanese Private International Law (hereinafter referred as "JPIL"). For the English translations of the Korean and Japanese private international laws, see K.H. SUK, The New Conflict of Laws Act of the Republic of Korea, *YPIL* 2003/1, p. 99-141; and K. ANDERSON/ Y. OKUDA, Translation of Japanese Private International Law: Act on the General Rules of Application of Laws, *APLPJ* 2006, p.138-160.

the foreign Embassy in China or the Consulate to China on the basis of bilateral treaties or reciprocity. This "consular marriage" is commonly adopted in practice.[4]

B. Formal Validity of Marriage

As mentioned above, in the previous legislation, both essential and formal validity of marriage are governed by the law of the place of celebration. The new act offers an alternative conflict rule for the formal validity of marriage and provides five different laws to test the formal validity of marriage, namely, the *lex loci celebrationis*, *lex patriae* or the law of habitual residence of either party. If the form of a marriage satisfies any one of the said laws, it will be held formally valid. This provision is entirely inspired by the Model Law of Private International Law of the People's Republic of China, prepared by the Chinese Society of Private International Law, which contained a similar choice of law rule for the formal validity of marriage.[5]

There is no doubt that such an alternative conflict rule for the formal validity of marriage will reduce, to the greatest extent, the possibility that a marriage will be held invalid just because of a defect in form, and the parties' expectation of a valid marriage will be better guaranteed. Nevertheless, a Korean private international scholar has observed that such connecting factors would in practice inevitably increase legal uncertainty and unpredictability.[6] A question still remains: is it practical to provide so many laws, including the law most favourable to the weaker party – as discussed below, from which the Chinese courts may select when they cannot even handle the simpler private international law cases satisfactorily?[7]

There is much convergence in the conflict rules of China, Korea and Japan with respect to the formal requirements of marriage, which are tested under the *lex loci celebrationis* or the national law of either of the parties.[8] Nevertheless, in light of the unilateral conflict rule adopted to assess the formal validity of marriages celebrated in Japan or Korea where one of the parties is either a Japanese national or a Korean national, the Chinese conflict rules appear more lenient.[9] Thus, the limping marriage will also easily arise in such a situation. For example, if a Chinese national and Korean national celebrate their marriage in Korea in accordance with Chinese law formalities, then the marriage is formally valid under Chinese law but not under Korean law. A Japanese court once seized with a case involving the formal validity of a marriage between a Japanese woman and her

[4] T.P. CHEN, Private International Law of the People's Republic of China: An Overview, *The American Journal of Comparative Law* 1987/35, p. 471.

[5] For more details, see Chinese Society of Private International Law, Model Law of Private International Law of the People's Republic of China, *YPIL* 2001/3, p. 349 *et seq.*

[6] K.H. SUK (note 2), at 108.

[7] *Ibid*; W.D. ZHU, China's Codification of the Conflict of Laws: Publication of a Draft Text, *Journal of Private International Law* 2007/3, p. 301.

[8] Article 36 (2) of the KPIL; Articles 24 (2) and (3) of the JPIL.

[9] Under such circumstances, Japanese law or Korean law will apply unilaterally. See Article 36 (2) of KPIL and Article 24 (3) of JPIL.

alleged spouse from Taiwan held that the marriage was formally invalid, as the marriage celebrated in Japan did not satisfy the formal requirements under Japanese law.[10]

Despite the new conflict rules for the validity of marriage, as well as for other family issues in China that we will discuss below, the Chinese courts will still have great difficulty determining the proper applicable law. For example, in individual cases, the court must determine not only the matter of form, but also where form ends and essential validity begins. This is the process of characterisation and it shall be carried out under the *lex fori* in terms of the new act.[11] Characterising such issues will be a formidable task for the Chinese courts and will cause much uncertainty in this area due to the lack of skills in dealing with conflicts cases.[12] So far, there are no reported cases in such matters since the enactment of the CPIL; therefore, much remains to be seen.

C. Personal Consequences of Marriage

There were neither conflict rules for the personal consequences of marriage before the promulgation of the new act in China, nor did the Chinese courts develop a well-established rule for such a matter. There are no reported cases directly pertaining to the personal consequences of marriage and in the few cases concerning such matters, the Chinese courts showed their vacillation between the *lex loci celebrationis* and the *lex fori.*

Article 23 of the CPIL brings an end to this situation, and provides that the personal relationship between spouses shall be governed by the law of their common habitual residence. In the absence of such a law, it shall be governed by the law of their common nationality. Such a rigid rule will inevitably result in a "gap". In modern society, it is not rare that the spouses share neither common habitual residence, nor common nationality. Which law then governs their personal relationship? In a well-drafted provision of the Model Law of the Private International Law in China, the common nationality, common habitual residence, common domicile, and place of celebration or forum are subsidiary connecting factors. This ensures that there is definitely a designated law for such matters.[13] It is, thus, very strange that the legislators did not adopt this provision of the Model Law.

The deficiency of the new provision is clear when compared with the corresponding conflict rules in South Korea and Japan. In both countries the general effects of marriage are governed by the common *lex patriae* of the spouse; in the

[10] For a brief introduction of the case, see Yokoyama JUN, "Family and Other Matters" in Private International Law in Japan, paper submitted to the first seminar on Private International Law in East Asia held in Hitotsubashi University on 3-4 December 2011.

[11] Article 8 of CPIL, which provides that "the foreign relationship shall be characterized according to the *lex fori*".

[12] W.D. ZHU (note 7), at 301.

[13] Article 133 of the Model Law of the Private International Law in China.

absence of such a law, they are governed by the law of the spouse's common habitual residence; in the absence of such a law, they are governed by the law of the place with which the spouses are most closely connected.[14] Accordingly, the gaps of the *lex causae* that arise under the Chinese conflict rules do not come up in Korea and Japan.

D. Proprietary Consequences of Marriage

Just as for the personal consequences of marriage, the law determining the proprietary consequences of marriage remained unsettled in the previous legislation. The judiciary also swayed between the *lex loci celebrationis* and the *lex fori* in deciding such issues. For example, if such an issue arose in divorce proceedings, the court would usually apply the *lex fori*, whereas in succession or maintenance matters, the court would apply the *lex loci celebrationis.*

According to Article 24 of the CPIL, the law applicable to the matrimonial property regime is the same as that governing the personal consequences of marriage contained in Article 23, provided that the spouses did not choose the applicable law.[15] Confusingly, the particularity of the choice of law relating to immovables did not come to the legislator's mind. It is a well-established rule that the *lex situs* will govern questions relating to immovables and this has been accepted in most jurisdictions. In addition, in many countries, matters relating to immovables remain subject to the exclusive jurisdiction of the forum where the immovables are located. The early draft of the act also provides that in the case of immovables, the *lex situs* shall apply.[16] The deletion of this provision from the new act will probably cause many uncertainties in the future. Suppose, for example, that A and B have a common habitual residence in China and an immovable in Utopia. When the dispute regarding their matrimonial property regime arises before a Chinese court, the Chinese court will definitely apply Chinese law and render a judgment accordingly. However, it is doubtful whether such a judgment will be recognised and enforced in Utopia.

As mentioned above, notwithstanding the objectively determined applicable law, the parties may choose the law applicable to their matrimonial property regime. In such a case their choice will be respected, but their choice is limited to the law of the habitual residence, the law of the nationality of either party and the law of the place where the majority of the property is located. Furthermore, under

[14] Article 37 of the KPIL and Article 25 of JPIL: see K.H. SUK, The New Conflict of Laws Act of the Republic of Korea, *YPIL* 2003/5, p. 99-141; K. TAHAKASHI, A Major Reform of Japanese Private International Law, *Journal of Private International Law* 2006/2, p. 311-338.

[15] Article 38 (1) of the KPIL and Article 26 (1) of the JPIL have identical provisions under which the law governing the general effects of marriage shall apply *mutatis mutandis* to the parties' matrimonial property regime. But the closest connection principle adopted in their legislations will likely allocate the *lex situs* to govern the matrimonial property regime in the case of immovable: see Yokoyama JUN (note 10).

[16] W.D. ZHU (note 7), at 300.

Article 3 of Chapter One of the CPIL,[17] their choice must be in writing. Limited party autonomy is also provided for in the Japanese PIL and the Korean PIL in terms of which the range of the laws that the spouses may choose is restricted to: the law of one of their nationalities; the law of one of their habitual residences; or the law where the immovable is located in the case of immovables.[18]

There are no provisions in the current CPIL on the applicable law relating to the effects of the matrimonial property regime on the relationships between the spouse(s) and third parties.[19] In principle, the spouses contracted for the community property system marriage under the amended Marriage Law of China and should be jointly liable to third party creditors unless they make other written arrangements regarding their matrimonial property.[20] If the spouses make these arrangements, they are both bound by such arrangements. However, such arrangements will not be binding on the *bona fide* third party unless he knows or should have known of the existence of such arrangements.[21] Therefore, where the spouses choose a foreign law to govern their matrimonial property, a *bona fide* third party may resort to Article 19 of the Marriage Law of China, as amended on 28 April 2001, as a defence against such an arrangement by the spouses.

III. Divorce

In divorce cases, particularly through litigation, the jurisdictional issues often intertwine with the applicable law. In many jurisdictions, it is just simply provided that the divorce shall be settled in accordance with the *lex fori,* so the determination of the jurisdiction will usually determine the law applicable to the divorce. In this part we will first examine the jurisdictional rules for divorce in China, as the divorce through litigation is also governed by the *lex fori* under the CPIL.

[17] Chapter One of the CPIL is entitled "General Provisions".

[18] Article 38 (2) of the KPIL; Article 26 (2) of the JPIL.

[19] Instead, both Articles 38 (3) and (4) of the KPIL, as well as Articles 26 (3) and (4) of the JPIL provide the protection of the *bona fide* third party which provide that the matrimonial property regime governed by a foreign law may not be enforceable against the *bona fide* third party insofar as it concerns juristic acts performed in Korea or in Japan, or property situated in Korea or in Japan. The Korean law or the Japanese law should apply to the relationship between the spouses and the third party where the applicable foreign law cannot be relied upon. If a matrimonial property contract is registered in Korea or in Japan, then it may be enforceable against the *bona fide* third party even if it is concluded under a foreign law.

[20] Article 18, Article 19 of the Marriage Law of China, as amended on 28 April 2001.

[21] *Ibid*, Article 19.

A. Jurisdiction in Divorce Cases

At present the jurisdictional rules for divorce litigation in China are stipulated in the Civil Procedure Act of the People's Republic of China of 1991 ("CCPA") and the Opinion on the Application of the Civil Procedure Act ("Opinion") issued by the Supreme People's Court on 14 July 1992.

Article 22 of the CCPA adopts the doctrine *actor sequitur forum rei*, providing that the people's court within whose jurisdiction the defendant has his domicile is competent to hear the case brought against the defendant; if the place of the defendant's domicile is different from that of his habitual residence, then the people's court of the place where the defendant resides shall have jurisdiction. Thus as a general rule, the divorce litigation should be filed in the people's court where the defendant is domiciled or resides. Article 23 of the CCPA makes an exception to such a rule, *i.e.*, where the litigation concerning personal status is brought against a person who has no residence or domicile within the territory of China, the people's court of the plaintiff's domicile or habitual residence may accept such a suit.

To make the jurisdictional rules for divorce litigation more specific, the Opinion makes the following supplements:

(1) the divorce litigation brought by the overseas Chinese (华侨, *huaqiao*) who celebrated the marriage at home but settled abroad, shall be heard in the people's court within whose jurisdiction the marriage was concluded or where either party had his last domicile, if the court of the country within which the overseas Chinese settles denies jurisdiction on grounds that such a litigation shall be heard in the court of the place where the marriage was celebrated;[22]

(2) the divorce litigation brought by the overseas Chinese who celebrated the marriage abroad and settled abroad shall be heard in the people's court within whose jurisdiction either party has his or her previous domicile or the last domicile, if the court of the country where the overseas Chinese settles declines jurisdiction on grounds that such a litigation shall be heard in the court of the country of the party's nationality;[23]

(3) in the case where one of the spouses lives in China while the other lives abroad, the people's court of the place where the party has his domicile shall always have jurisdiction to hear the divorce litigation no matter who brings it;[24]

(4) in the case where the spouse living abroad files for divorce in the foreign court while the spouse living at home files for divorce in China, the people's court shall have jurisdiction. If both spouses are abroad but do not settle there, the people's court of the place where either party has his domicile

[22] Article 13 of the Opinion.

[23] Article 14 of the Opinion.

[24] Article 15 of the Opinion.

shall have jurisdiction over the divorce litigation brought by either of the spouses.[25]

The above provisions, especially those in 3) and 4), will encourage parallel proceedings, contrary to the international trend, and such provisions have actually given rise to parallel proceedings in China.[26] For reasons of international comity, respect for the jurisdiction of the foreign courts and due deference to courts abroad with pending proceedings or final judgments over the same cause of action abroad, the provisions obviously need to be revised in the future.

B. Law Applicable to Divorce

With respect to the conflict rule for divorce, the repealed Article 147 of the GPCL simply provided that the divorce between a Chinese national and a foreigner should be governed by the law of the place where the court accepted the divorce petition. Perhaps in light of the difficulties of applying this provision in practice, Article 188 of the 1988 Opinions further stipulated that as for the divorce petitions accepted by the Chinese court, the divorce and the partition of the property following the divorce shall be subject to Chinese law. This is just a repetition of the *lex fori* rule, which did not provide many guidelines to the courts. There is no provision about divorce by agreement or the scope of the *lex fori* in the repealed laws. Many reported cases of the Chinese courts reveal that the *lex fori* would determine the admissibility of divorce, the grounds for divorce, the partition of property, as well as the maintenance or guardianship obligations relating to the child(ren) of the marriage.[27]

The new act retains the *lex fori* rule for divorce through litigation,[28] but does not provide for the scope of the *lex causae*. In this respect, the guidelines have to be found in the previously decided cases. Unlike the repealed laws, the new act expressly provides that the spouses can dissolve their marriage by agreement in writing. If so, the parties can choose either the law of one of the spouses' habitual residence or of his/her nationality. Where the spouses do not make such a choice, the law of the common habitual residence of the spouses shall be applicable; in the absence of such a law, the law of common citizenship shall be applicable; in the absence of such a law, the law of the place where the authority dealing with the divorce matters is located shall be applicable.[29]

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[25] Article 16 of the Opinion.

[26] Y.P. XIAO/ Z.X. HUO, Family Issues in China's Private International Law, *Journal of Cambridge Studies* 2009/4, p. 59-60.

[27] As for the independent claims for guardianship, Article 30 of the CPIL provides that they shall be governed by the law of the habitual residence or the *lex patriae* of any party, whichever is more favourable to the ward. Before the enactment of the CPIL, there was a conflicts rule of guardianship in the Opinion, in terms of which the formation, alteration, and termination of the guardianship were governed by the *lex patriae* of the ward. However, if the ward was domiciled in China, then the Chinese law applied to such issues.

[28] Article 27 of the CPIL.

[29] Article 26 of the CPIL.

Neither Korea nor Japan distinguishes between divorce by litigation and divorce by agreement in determining questions of applicable law; they simply provide that the law governing the general effects of marriage shall apply *mutatis mutandis* to divorce, with an exception that if one of the spouses is a Korean or Japanese national with his or her habitual residence in Korea or Japan then Korean law or Japanese law shall apply accordingly.[30] Considering the fact that the court in China, Korea and Japan may apply different laws to the same divorce petition, the harmonious judgment will not be assured. For example, in a divorce case between a Korean national having his habitual residence in Korea and a Chinese national, if the divorce petition is filed in the Korean court, then the court will apply Korean law; on the other hand, if it is entertained in the Chinese court, Chinese law will apply as the *lex fori*, and contradictory results may arise.

IV. Parent-Child Relationships

The CPIL does not distinguish between legitimacy and illegitimacy.[31] There is only a general provision about the personal and proprietary relationship between parent and child. Pursuant to this provision, the personal and proprietary relationship between parent and child is governed by the law of their common habitual residence. If there is no common habitual residence, the law of one party's habitual residence or the law of one party's nationality, whichever better protects the rights and interests of the weaker party, shall apply.[32] This provision clearly adopted the well-established principle of protecting the weaker party and provided six potential laws (the law of the habitual residence or the *lex patriae* of the mother, of the father, and of the child) where no common habitual residence exists. In such a case, the Chinese courts will have to conduct a comparative analysis of these laws to choose the more favourable law, and this will be a heavy burden for them.[33] It is doubtful whether such a highly flexible conflicts rule will be operational in China and whether the Chinese courts are capable of undertaking such a burdensome task.

It follows that the law designated in the above circumstances will determine the legitimacy of a child, the establishment of parent-child relationship, as well as the rights and obligations of the parent and child; however, this needs to be affirmed by the Chinese courts in the future.

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[30] Article 39 of the KPIL; Article 27 of the JPIL.

[31] But the KPIL and the JPIL have detailed provisions about the law applicable to the relationships between parents and legitimate children, the relationships between parents and illegitimate children, as well as the legitimation of illegitimate children: see Articles 40, 41 and 42 of the KPIL and Articles 28, 29, and 30 of the JPIL.

[32] Article 25 of the CPIL. Article 45 of the KPIL and Article 32 of the JPIL give priority over the law of the country where the parents and children have their common citizenship in deciding the relationship between parents and children. In other cases it shall be governed by the law of the child's habitual residence.

[33] K.H. SUK, Some Observations on the Chinese Private International Law Act: Korean Law Perspective, *ZChinR* 2011, p. 108.

V. Adoption

The number of Chinese children adopted by foreign families increases annually. According to the statistics from the China Centre for Children's Welfare and Adoption, the only authority in China responsible for intercountry adoption, more than 150,000 Chinese children have been adopted by foreign families since the Centre was established in 1996. About half of the adopted children were adopted by families from the United States.

In light of these facts, China is a State of origin rather than a receiving State, and the Chinese legislation seems to deal only with the adoption of Chinese children by foreign families. For example, the revised Adoption Act of China, which entered into force on 1 April 1999, makes the following detailed provisions with respect to adoption by foreign families in China:

"The adoption of a child by a foreign adopter in the People's Republic of China shall be subject to the examination and approval of the competent authorities of the adopter's resident country in accordance with the law of that country. The adopter shall submit documents certifying the adopter's age, marital status, profession, property, health and criminal record issued by the competent agencies in his home country. The above documents shall be authenticated by a foreign affairs institution of the adopter's home country or by an agency authorised by the said institution, and by the embassy or consulate of the People's Republic of China in that country. The adopter shall conclude a written agreement with the person who places the child for adoption and shall register such an adoption in person with a civil affairs department of the people's government at the provincial level."[34]

Furthermore, for the smooth implementation of the revised Adoption Act, the State Council issued the "Measure of the Registration for Foreigners to Adopt Children in the People's Republic of China" on 25 May 1999, Article 3 of which provides that for the adoption of children in China by foreigners, the adoption shall conform to both the relevant laws and regulations on adoption in China and in the adopter's home country.

The above provisions unambiguously demonstrate that both the *lex patriae* of the child and of the adopter shall be satisfied when a foreigner intends to adopt a child in China. But the laws are silent as to whether the adoption of a child in a foreign country by a Chinese adopter or the adoption outside of China shall be subject to the same rules.

Article 28 of the CPIL seems to provide some clarification to the above ambiguity, providing that the conditions and procedures of adoption shall apply both the laws of the habitual residence of the adopter and that of the child.[35] It is unclear why the law of habitual residence replaced the *lex patriae* in the adoption laws and whether such a conflicts rule applies to all the adoptions, regardless of whether they took place in China or abroad. Under the principle "the new law prevailing over the old one", it seems that the new conflicts rule shall govern such a matter,

[34] Article 21 (1) of the Adoption Act of China of 1999.

[35] While in Korea and in Japan, adoption is governed by the national law of the adoptive parents at the time of adoption. See Article 43 of the KPIL and Article 31 of the JPIL.

whereas under the principle "the particular law prevailing over the general one", it seems that the rule in the Adoption Act shall regulate adoption by foreigners in China. Since the Adoption Act is still in force, it remains to be seen how the contradiction between it and the new conflicts rule is settled.

Article 28 of CPIL also designates different laws for the effects and revocation of adoption. The effects of adoption are governed by the law of the habitual residence of the adopter at the time of adoption, while the revocation of adoption is governed by the law of the habitual residence of the adoptee at the time of adoption or the law of the forum. These provisions merit some comments here. Many domestic laws and international conventions recognise the principle of the best interest of the child and adopted the more favourable rule. It is very puzzling that the more favourable rule is not adopted here: the law designated by the above conflicts rules is not necessarily the law more favourable to the child. In particular, when the law of the habitual residence of the adoptee at the time of adoption and the law of forum have completely contrary provisions about the revocation of adoption, which choice shall the court make?

As mentioned above, under the Adoption Act, the adoption of a child in China by a foreigner shall take place in a civil affairs department of the people's government at the provincial level. As for the adoption application from the foreigners, it shall first be forwarded to the China Centre for Children's Welfare and Adoption. If the parties or one party involved in the adoptive relationship wishes that the adoption be notarised, it shall be done with a notary agency qualified to handle foreign-related notarisation and is designated by the administrative department of justice under the State Council. As for the disputes arising from the confirmation of the adoptive relationship or the revocation of adoption, they shall be settled under the jurisdictional rules in the Civil Procedure Act of China. Generally, such disputes shall be filed for determination in the courts of the place where the defendant has his domicile or habitual residence.

It must also be noted that the Standing Committee of the National People's Congress ratified the Hague Convention of 25 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption on 27 April 2005. The China Centre for Children's Welfare and Adoption is authorised by the Ministry of Civil Affairs to deal with adoption applications from other States Parties to the Convention.

VI. Maintenance and Guardianship

A. Maintenance

The repealed Article 148 of the GPCL adopted the principle of the closest connection in determining the law applicable to the maintenance obligation, providing that the maintenance obligation should be governed by the law of the country which has the closest connection with the maintenance creditor. The maintenance obligations referred to in Article 148 of the GPCL included those arising from a family relationship, parentage, marriage or affinity; and in deciding which country has the

closest connection with the maintenance creditor, the nationality or domicile of the parties and the location of the property plays an important role.[36] In China's judicial practice, such a conflicts rule in most cases only applies to the independent maintenance claims. With respect to maintenance claims related to the divorce procedure, the *lex fori*, namely the governing law of the divorce, may apply.

The CPIL abandoned the closest connection principle and adopted the principle of protecting the weaker party. Article 29 of the CPIL stipulates that maintenance shall be governed by the law of one party's habitual residence, or by the *lex patriae* of one party, or by the law of the place where the main property is located, whichever best protects the rights and interests of the maintenance creditor.[37] The question remains whether the Chinese court is capable of evaluating so many different laws and choosing the most favourable one to the maintenance creditor.

B. Guardianship

The GPCL was silent on the choice of law rules of guardianship, and there was only one stipulation from the Opinions of 1988 providing that the formation, alteration and termination of the guardianship shall be governed by the ward's *lex patriae*, unless the ward has his or her domicile in China. In that case, Chinese law would apply.[38] The CPIL abandoned the nationality and the domicile tests and adopted the principle of protecting the weaker party in deciding law governing guardianship matters. In the new act, the guardianship may be subject to the law of one party's habitual residence or the *lex patriae* of one party, whichever is better for protecting the rights and interests of the ward.[39]

[36] Article 189 of the Opinions of 1988.

[37] According to Article 43 of the JPIL, its provisions shall not apply to maintenance obligations arising from spousal, parental or any other family relationship because the choice of law rules for maintenance obligations are provided in a special statute that incorporated the Convention on the Law Applicable to Maintenance Obligations of 1973. Though Korea did accede to this Convention, its provisions on the choice of law rules for maintenance obligations were modelled on this Convention: see Article 46 of the KPIL.

[38] Article 190 of the Opinions of 1988. The KPIL and JPIL retained the *lex patriae* rule after various amendments, but the guardianship over a foreigner may be governed by the Korean law or Japanese law under some circumstances. See Article 48 of the KPIL and Article 35 of the JPIL.

[39] Article 30 of the CPIL.

VII. Inheritance

A. Inheritance

Both the Succession Law of China of 1985 and the GPCL of 1987 adopted the principle of scission with respect to succession.[40] Thus, succession relating to movables was governed by the law of the deceased's domicile at the time of his death and succession relating to immovable by the *lex situs*. The foregoing laws have no express provisions on testamentary succession, but in practice the conflicts rules on statutory succession are analogously applied to the testamentary succession.

The scission system is retained in the CPIL. Under Article 31 of the CPIL, statutory succession is governed by the law of the habitual residence of the deceased at the time of his death. In the case of immovables, the *lex situs* shall apply.[41] The distinction between movables and immovables is generally made in terms of the *lex situs*. If the property to be inherited is situated in China, the Chinese court will apply Chinese law. According to the Opinions of 1988, the land, the buildings attached to the land, the accessories to the land, as well as the fixed equipment of the buildings are all classified as immovables.[42]

It seems that there is no room for the parties to choose the law to govern the intestate succession under the current legal framework in China. There is also no express stipulation on the presumption of death in the current CPIL. It is uncertain what the Chinese courts will do in face of such an issue.

The choice of law rules on the matrimonial property regime and succession are not coordinated in the Chinese private international law. In deciding matters of succession, it seems that Chinese courts will first determine which property can be regarded as that of the deceased and can be distributed among the successors in accordance with the law applicable to the matrimonial property. The court must, in particular, determine whether the property in question is community property where only half can be distributed among successors, or whether the property in question is the individual property of the deceased, which can be distributed among the successors. Then the Chinese court will determine the distribution of the deceased's property under the *lex successionis*.[43]

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[40] Article 36 of the Succession Law and Article 149 of the GPCIL.

[41] As far as statutory succession is concerned, a great conflict existed between the CPIL on the one hand, and the KPIL and JPIL on the other. The latter follow the principle of unity by subjecting the succession to the *lex patriae* of the deceased at the time of his death: see Article 49 (1) of the KPIL and Article 36 of the JPIL. Furthermore, party autonomy in statutory succession is possible under Article 49 (2) of the KPIL, but impossible under the CPIL and the JPIL.

[42] Article 186 of the Opinions of 1988.

[43] There are two relevant cases that came before the Chinese courts: in one case, a Chinese national, who lived in Japan for nearly 2 years, died in an accident there in 1990. His family got over 700,000 yuan (RMB) from this accident. Later disputes arose between his wife, on one hand, and his parents and siblings on the other hand, as to the distribution of the insurance proceeds. The latter filed a petition in a court in Shanghai against the former.

Pursuant to Article 34 of the CPIL, the management of the estate shall be carried out under the law of the place where the estate is located. In the absence of heirs, succession of the property shall be determined according to the law of the place where the property is located at the time of the decedent's death.[44]

B. Wills

In light of Article 33 of the CPIL, the validity, as well as the effect of a will, is governed by the law of the habitual residence or the *lex patriae* of the decedent either at the time of the will's execution or at the time of the decedent's death.[45] It is submitted that such a law designated in this situation will determine issues, such as whether the testator has the capacity to make such a will, whether the content of the will is lawful, whether the testator made the will under duress, and whether a later will can amend or withdraw the earlier will.

As for the form of a will, Article 32 of the CPIL stipulates that a will shall be regarded as formally valid if it complies with one of the following laws: the law of the habitual residence or the *lex patriae* of the testator at the time the will is

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There was no disputing that the wife was entitled to half of the compensation because she and the deceased had concluded a community property marriage in China under Chinese law. The question was whether the insurance proceeds, the expected interest as well as the compensation for mental injury should have been included in the estate of the deceased or in the community property to be shared by the deceased's wife. His wife argued that the succession should be governed by the Japanese law being the law of the last domicile of the deceased according to the conflicts rule of the forum, in this case China. Under Japanese law, the wife and her daughter would be the first successors. Finally, the parties reached an agreement under Chinese law. For a detailed analysis of this case, see Y.P. XIAO/ Z.X. HUO, Family Issues in China's Private International Law, *Journal of Cambridge Studies* 2009/4, p. 67-69. The other case involved the inheritance of property left by an Italian who was domiciled in Nanchang, the provincial capital of Jiangxi Province, China. The Italian disposed, in his will which he had made in China, of all his property in China including some money in a Chinese bank account and a house located in Nanchang. According to the conflicts rule in China, the succession relating to the money in the account as well as the house was governed by the Chinese law. Under Chinese law, the deceased could only dispose of his own individual property. Therefore, the question was whether the property in China was the deceased's own individual property, in which case he could dispose of it at his will, or whether it was to be shared with his wife, in which case he could only dispose of half of the property. The deceased married in Italy; thus, the matrimonial property system was governed by Italian law according to the previous conflicts rule in China. Only after the issue was decided could the distribution of property follow. Because the successor designated in the will could not prove the content of Italian law, the Housing Management Authority in Nanchang would not transfer the house in question to him. For the report of the case, see *Jiangxi Legal Daily*, 15 August 2005.

[44] Article 35 of the CPIL.

[45] This provision is much broader than those in the KPIL and the JPIL under which the formation and effect of a will shall be governed by the testator's national law at the time of the execution of the will, and the revocation or withdrawal of a will shall be governed by the testator's national law at the time of revocation or withdrawal. See Articles 50 (1) and (2) of the KPIL and Articles 37 (1) and (2) of the JPIL.

executed or at the time of his death, or the law of the place where the will is executed.[46] Again, the provision does not take into account the special conflicts rule with regard to immovables. The laws in most jurisdictions provide that the form of a will disposing of immovables shall be governed by the *lex situs*.

VIII. Concluding Remarks

As mentioned above, the new CPIL contains comprehensive and systematic conflict rules concerning family and inheritance matters. In particular, it introduces flexible connecting factors, extends the party autonomy doctrine, and gives due consideration to the values of substantive law to protect the weaker party's interests.[47] This value-oriented legislation will, on the one hand, certainly bring more flexibility to the courts and more protection to weaker parties, but on the other hand, the certainty and predictability of the result cannot be assured. Furthermore, the new CPIL still leaves some family matters untouched, *i.e*., the protection of the third party in the matrimonial property arrangement, the legitimation of illegitimate children, the establishment of the parent-child relationship, *etc*. Finally, the selection of the more favourable law from so many laws designated by the alternative connecting factors will be an onerous or even impossible task for the Chinese courts considering their inability to deal with complicated cases with foreign elements. This, in turn, may result in the application of Chinese law in most cases, as is the current judicial practice in China.

It should also be noted that the new CPIL does not take heed of relevant legislation in neighbouring countries, particularly that of Korea and Japan. This will result in more conflicts instead of greater convergence in the conflict of laws. Considering the frequency of civil and commercial transactions in the region, many scholars in East Asia have realised the importance of harmonisation or unification of private international law in the region.[48] The ambiguities and uncertainties existing in the new CPIL will need to be clarified in the future by the Supreme People's Court which will certainly give consistent interpretation and clear guidelines for lower courts to follow in family and inheritance matters with a foreign element.

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[46] In this regard, the JPIL let the formalities of wills be governed by the Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions of 1961, which has been incorporated in Japanese domestic law; and the KPIL provided the choice of law rules in Article 50 (3) which are also modelled on this Convention.

[47] K.H. SUK, Some Observations on the Chinese Private International Law Act: Korean Law Perspective, *ZChinR* 2011, p. 107-110.

[48] W.D. ZHU, Unifying Private International Law in East Asia: Necessity, Possibility and Approach, *Asian Women Law* 2010/13, p. 211-237; KWANG HYUN SUK, Harmonization or Unification of Private International Law Rules in Northeast Asia: Korean Perspective, paper submitted to the international workshop on "Private International Law in the Context of Globalization: Opportunities and Challenges" held on October 22 and October 23, 2011 in Beijing, China. The author thanks Professor SUK for sharing this paper and his views.

NEWS FROM BRUSSELS

THE PROPOSAL FOR A COMMON EUROPEAN SALES LAW: A SNAPSHOT OF THE DEBATE

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I. Introduction

On 11 October 2011, the European Commission presented its proposal for a Common European Sales Law[1] (CESL). Since its presentation, this proposal has given rise to animated discussion among academics, practitioners and its designated users, *i.e.* businesses and consumers, covering both the very idea of having a Common European Sales Law and how it would work in practice. This is hardly surprising for two reasons. First, there is the rather innovative shape of the so-called optional instrument proposed, which offers an alternative set of contract law rules which may be opted in to in the case of cross-border business-to-consumer (B2C) and certain business-to-business (B2B) contracts for goods and related services. Second, there is the fact that some still regard it – even if the Commission is at pains to distance itself from this policy option[2] – as a first step towards a broader European Contract Law, if not a European Civil Code, a highly controversial idea, to say the least. This paper attempts to give an overview of and comment on certain of the chief issues that have been raised in the debate on the proposal. It is less concerned to enter into a general discussion of the usefulness of a contract law optional instrument and more with specific questions raised by the practical operation of the proposal presented by the Commission. The paper will therefore start by quickly recalling the genesis of the proposal, and then briefly take stock of the state of legislative debate before focusing on the questions of legal basis, the relationship with the Rome I Regulation[3] and the scope.

II. Background: the Debate on European Contract Law

A. Debate on European Contract Law prior to the Proposal for a Common European Sales Law

The Common European Sales Law is the first legislative proposal to come out of the European contract law debate which has been going on for about two decades now.[4] At its core is the question of the extent to which differences between

[1] Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635).

[2] Impact Assessment accompanying the document "Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law", Commission Staff Working document of 11 October 2011 (SEC(2011)1165), p. 25.

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, *OJ* L 177 of 4 July 2008, p. 6.

[4] See also M. KENNY/ L. GILLIES/ J. DEVENNEY, The EU optional instrument: Absorbing the private international law implications of a Common European Sales Law, *YPIL* 13 (2011), p. 320 *et seq.*; H. SCHULTE-NÖLKE, Vor- und Entstehungsgeschichte des Vorschlags für ein Gemeinsames Europäisches Kaufrecht, in H. SCHULTE-NÖLKE/ F. ZOLL/

Member States' national contract laws create problems for the internal market and how to address them.

The European Parliament was the first European institution to advocate a European contract law, in two resolutions of 1989[5] and 1994.[6] Taking a more cautious note, the 1999 Tampere European Council requested "an overall study […] on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings".[7]

The Commission intensified work with its first consultation paper of 2001[8] aimed at problem identification and a first discussion of possible options (ranging from doing nothing to adopting "new comprehensive legislation"). Whereas the European Parliament requested an action plan by way of follow-up,[9] the Council merely called for further analysis.[10] In its 2003 Action Plan,[11] the Commission then consulted on specific possible measures, including the preparation of a Common Frame of Reference which was to contain definitions, general principles and model rules and to be based on research financed under the 6th Framework Programme.[12] The Commission also launched reflections on "non-sector-specific measures such as an optional instrument". The Action Plan was welcomed by the European Parliament[13] (rather impatiently) and the Council[14] (more cautiously). The

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N. JANSEN/ R. SCHULZE (eds), *Der Entwurf für ein optionales europäisches Kaufrecht*, Munich 2012, p. 1-20.

[5] European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States (*OJ* C 158 of 26 June 1989, p. 400).

[6] European Parliament resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States (*OJ* C 205 of 27 May 1994, p. 518).

[7] Tampere European Council, 15-16 October 1999, Presidency Conclusions, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200r1.en9.htm>, paragraph 39.

[8] Communication from the Commission of 11 July 2001 on European Contract Law (COM(2001)0398).

[9] European Parliament resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States (*OJ* 140 E of 13 June 2002, p. 538).

[10] Draft Council report on the need to approximate Member States' legislation in civil matters of 18 October 2001 available at <http://register.consilium.europa.eu/pdf/en/01/st12/st12735.en01.pdf>.

[11] Communication from the Commission of 12 February 2003 entitled "A more coherent European Contract Law – An Action Plan" (COM(2003)0068).

[12] European Parliament and Council Decision 1513/2002/EC of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006) (*OJ* L 232 of 29 August 2002, p. 1–33).

[13] European Parliament resolution of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law - An action plan (*OJ* C 76 E of 25 March 2004, p. 95).

[14] Council Resolution on "A More Coherent European Contract Law" (*OJ* C 246 of 14 October 2003, p. 1).

Commission accompanied the subsequent preparation of the Draft Common Frame of Reference (DCFR) by a Communication in 2004[15] and progress reports in 2005[16] and 2007.[17] The process seemed to be positively received by the Council[18] and Parliament.[19] The final text of the Draft Common Frame of Reference was not presented until late 2008.

The idea of an optional instrument, however, did not come up for discussion again until Vice-President REDING took over the Justice portfolio in the Commission.[20] From that point on, work in the Commission work gathered pace: in April 2010, an expert group was entrusted with "assisting the Commission in the preparation of a Common Frame of Reference",[21] and a parallel stakeholder sounding board[22] was set up. The next round of consultations, based on the Green Paper of July 2010,[23] included, as one option, an optional instrument. As a result of the expert group's work, a feasibility study with a view to a future European contract law instrument was published in May 2011,[24] with questions for informal consultation. In its reaction to the 2010 Communication in its resolution of 8 June

[15] Communication from the Commission of 11 October 2004 entitled "European Contract Law and the revision of the *acquis*: the way forward" (COM(2004)0651).

[16] Report from the Commission of 23 September 2005 entitled "First Annual Progress Report on European Contract Law and the Acquis Review" (COM(2005)0456).

[17] Report from the Commission of 25 July 2007 entitled "Second Progress Report on the Common Frame of Reference" (COM(2007)447).

[18] Brussels European Council, 21-22 June 2007, Presidency Conclusions, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/94932.pdf>.

[19] European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law (*OJ* C 295 E of 4 December 2009, p. 3). See also the European Parliament resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward (*OJ* C 292 E of 1 December 2006, p. 109); European Parliament resolution of 7 September 2006 on European contract law (*OJ* C 305 E of 14 December 2006, p. 247); European Parliament resolution of 12 December 2007 on European contract law (*OJ* C 323 E of 18 December 2008, p. 364).

[20] The relevant services had been transferred within the Commission from DG SANCO to DG JUST, as the European Parliament had called for in its resolution of 3 September 2008 on the common frame of reference for European contract law (*OJ* C 295 E of 3 September 2008, p. 31, at para. 4).

[21] Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (*OJ* L 105 of 27 April 2010, p. 109), in particular Article 2.

[22] Information available at <http://ec.europa.eu/justice/contract/stakeholder-meeting/index_en.htm>.

[23] Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)0348).

[24] "A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European Contract Law for stakeholders' and legal practitioners' feedback," available at <http://ec.europa.eu/justice/contract/expert-group/index_en.htm>.

2011,[25] the European Parliament favoured "setting up an optional instrument (OI) by means of a regulation".

B. Deliberations since the Presentation of the Proposal

The deliberations of the two arms of the legislature are still at a relatively early stage. In Council, after a first progress report under Polish Presidency,[26] the orientation debate held at the end of the Danish presidency focused on "questions relating to the legal basis of and need for the proposed Common European Sales Law, its scope and whether to start work on model contracts". The Council agreed to start work on the Annex, *i.e.* the proposed rules as such,[27] which was taken up under the Cyprus Presidency and has continued under the Irish Presidency. It is worth noting that four reasoned opinions have been received[28] from Member States' parliaments, raising concerns of principle[29] (added value of the proposal; proportionality), procedure[30] (in particular as regards Protocol No 2 on subsidiarity[31]) and the legal basis.[32]

In the European Parliament, the lead Legal Affairs Committee emphasised the importance it attaches to the proposal by appointing two co-rapporteurs. It devoted 2012 to collecting the views of experts and stakeholders[33] on general issues and specific chapters of the Annex. The committee marked the first anniversary of the proposal by holding a conference with the participation of national parlia-

[25] European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (P7_TA(2011)0262).

[26] Justice and Home Affairs Council of 13-14 December 2011, Press Release, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126932.pdf>; Report from the Presidency on the state of play, available at <http://register.consilium.europa.eu/pdf/en/11/st18/st18353.en11.pdf>.

[27] Justice and Home Affairs Council of 7-8 June 2012, Press Release, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130761.pdf>.

[28] By the Austrian Federal Council, the Belgian Senate, the German Bundestag and the UK House of Commons. Available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20110635.do#dossier-COD20110284>.

[29] Reasoned opinion of the Austrian Federal Council (note 28), at 1; reasoned opinion of the Belgian Senate (note 28), at 7; reasoned opinion of the House of Commons (note 28), at 7 *et seq.*; reasoned opinion of the German Bundestag (note 28), at 7 *et seq.*

[30] Reasoned opinion of the Austrian Federal Council (note 28), at 3; reasoned opinion of the House of Commons (note 28), at 5 *et seq.*

[31] Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[32] Reasoned opinion of the Austrian Federal Council (note 28), at 2; reasoned opinion of the Belgian Senate (note 28), at 6; reasoned opinion of the German Bundestag (note 28), at 4 *et seq.*

[33] Hearing on 1 March 2012, Workshops on 31 May, 19 June and 11 July 2012. Documentation available at <http://www.europarl.europa.eu/committees/en/juri/events.html?id=hearings#menuzone>; <http://www.europarl.europa.eu/committees/en/juri/events.html?id=workshops#menuzone>.

ments.[34] After having summarised their thoughts on the issues they consider to be central to the debate in a working document of October 2012,[35] the co-rapporteurs presented their draft report in February 2013,[36] describing it – not surprisingly given the complexity of the matter – as a document which presents the main points of discussion "in amendment form".[37] It would go beyond the scope of this paper to analyse the draft report in detail. As this article focuses on selected issues concerning international private law and scope, suffice it to say that one of the main features of the draft report is the proposal that the Common European Sales Law should be limited to distance contracts, in particular online contracts.[38] The draft report further suggests clarifications as regards the relationship with the Rome I Regulation[39] as well as concerning the coverage of the text proposed.[40]

The Committee on Internal Market and Consumer Protection, associated under Rule 50 of the Parliament's Rules of Procedure and also working with two co-rapporteurs, started its work with a hearing focusing on consumer issues on 24 September 2012.[41] That committee's draft opinion[42] proposes some clarifications to the text; together with the opinion a number of individual amendments have already been tabled by the co-rapporteurs individually.[43]

The Committee on Economic and Monetary Affairs felt that early advice would be most effective and therefore adopted its opinion already on 9 October 2012.[44]

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[34] "The proposal for a Common European Sales Law: taking stock after a year". Documentation available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1781>.

[35] Working document of the Legal Affairs Committee's rapporteurs Luigi BERLINGUER and Klaus-Heiner LEHNE: PE497.786v01-00, available at <http://www.europarl.europa.eu/committees/en/juri/working-documents.html#menuzone>.

[36] Draft report, Committee on Legal Affairs, co-rapporteurs: Klaus-Heiner LEHNE and Luigi BERLINGUER, PE505.998v02-00, available at <http://www.europarl.europa.eu/committees/en/juri/draft-reports.html#menuzone >.

[37] Draft report (note 36), Explanatory statement, under I.

[38] Draft report (note 36), amendments 1, 7, 21, 55, 56, 203; explanatory statement, under point II.2.

[39] Draft report (note 36), amendments 2, 3, 6, 25, 67; explanatory statement, under point II.3.

[40] Draft report (note 36), amendments 13, 69, 70; explanatory statement, under point II.4.

[41] Documentation available at <http://www.europarl.europa.eu/committees/en/imco/events.html#menuzone>.

[42] Draft opinion, Committee on the Internal Market and Consumer Protection, rapporteurs for opinion: Evelyne GEBHARDT and Hans-Peter MAYER, PE 505.986v01-00, available at <http://www.europarl.europa.eu/committees/en/imco/draft-opinions.html#menuzone>.

[43] Amendments, PE 505.986v01-00, available at <http://www.europarl.europa.eu/committees/en/imco/amendments.html#menuzone>.

[44] Opinion of the Committee on Economic and Monetary Affairs on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales

III. Selected Issues Debated as Regards the Proposal for a Common European Sales Law

As mentioned above, the issues addressed in this paper have been chosen for their relevance to the practical functioning of the proposal.

A. The Legal Basis

The Commission based its proposal on Article 114 TFEU, *i.e.* the internal market legal basis, which triggers the application of the ordinary legislative procedure and thus the involvement of the European Parliament and the Council as co-legislators. A body of opinion[45] argues that the proposal does not qualify as a measure under Article 114 TFEU, that no other legal basis is available in the TFEU and that the proposed regulation therefore has to be based on Article 352 TFEU, requiring unanimity in Council and the consent of the European Parliament.

1. The Commission's Choice of Legal Basis

The Commission presents the proposal as an internal market measure, which "would remove obstacles to the exercise of fundamental freedoms which result from differences between national laws".[46] It further explains that the barriers formed by those differences "would be significantly reduced" by the proposed "single uniform set of contract law rules."[47]

According to the established case-law of the Court of Justice "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure".[48]

2. Article 114 TFEU as the Legal Basis

Article 114 TFEU provides the legal basis for "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member

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Law, rapporteur: Marianne THYSSEN, PE 491.011v02-00, available at <http://www.europarl.europa.eu/committees/en/econ/opinions.html#menuzone>.

[45] See for instance the reasoned opinion of the Austrian Federal Council (note 28), at p. 2; the reasoned opinion of the Belgian Senate (note 28), at 6; the reasoned opinion of the German Bundestag (note 28), at 4 *et seq.* For the controversy, see also C. WENDEHORST, in R. SCHULZE (ed.), *Common European Sales Law (CESL) – Commentary*, Baden-Baden/ München/ Oxford 2012, Article 1, para. 2.

[46] COM(2011)0635, Explanatory Memorandum, p. 9.

[47] COM(2011)0635, recital 6.

[48] See most recently Case C-411/06, *Commission v Parliament and Council*, [2009] *ECR* I-7585.

States which have as their object the establishment and the functioning of the internal market".

a) "Establishment and Functioning of the Internal Market"

In the judgment by which the Court of Justice annulled the tobacco advertising directive,[49] it held that "a measure adopted on the basis of Article 100a of the Treaty [now Article 114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and the functioning of the internal market".[50]

Having regard to the objectives of the proposal as enshrined therein, it would be fairly difficult to contest that the proposal aims at promoting cross-border transactions relating to the sale of goods and related services contracts; it can therefore clearly be categorised as a measure aimed at improving the functioning of the internal market.

b) "Measures for .... Approximation"

The issue seems to be whether the proposal is indeed aimed at an approximation of the legal orders of Member States.

First, it is important to note that – according to the jurisprudence of the Court – Article 114 TFEU confers on the EU legislature a discretion to choose the harmonisation technique most appropriate for achieving the desired result.[51] It has been posited that, if it proves popular, the CESL might in the long run – through "regulatory competition" – have a convergence effect on EU national contract laws since the Member States might feel obliged to align their legal orders with the CESL. This would enable the CESL to be categorised as an "intermediate step towards harmonisation".[52] This reasoning is not entirely convincing, mainly because it is based on forecasts as to the effect of the CESL which – albeit made by some – are not reflected in the actual objectives or content of the proposal itself.

Instead, regard must be had as to how the envisaged harmonisation technique is described in the proposal itself: according to recital 9, harmonisation of Member States' contract law is to be achieved "not by requiring amendments to the pre-existing rules of national contract law, but by creating within each Member State's national law a second contract law regime for contracts within the scope".

[49] Case C-376/98, *Germany v European Parliament and Council*, [2000] *ECR* I-8419.

[50] *Ibid.*, para. 84.

[51] Case C-66/04, *United Kingdom v Parliament and Council*, [2005] *ECR* I-10553, paras 45-46; Case C-217/04, *United Kingdom v Parliament and Council*, [2006] *ECR* I-3771, para. 43.

[52] G. LOW, A numbers game - the legal basis for an optional instrument in European contract law, *Maastricht European Private Law Institute, Working paper* 2012/2, p. 9; G. LOW, Unitas via Diversitas. Can the Common European Sales Law harmonize through diversity, 19 *MJ* 1(2012), p. 138 *et seq.*

c) Comparison with the European Cooperative Society

It has been argued[53] that since the proposal sets out to establish a set of rules which will exist alongside Member States' national contract laws, it exhibits clear parallels with the creation of "a new legal form in addition to the national forms" as the Court of Justice described the purpose of the regulation on the Statute for a European Cooperative Society in its judgment ruling on the proper legal basis for the regulation establishing that new legal form.[54] In that case the Court held[55] that the set of rules at issue could not be based on Article 95 EC (now Article 114 TFEU), but only on Article 308 EC (now Article 352 TFEU). It has been pointed out, however,[56] that the proposed Common European Sales Law is different from such European legal forms as the latter could not be established by Member States acting themselves in parallel, whereas the former could: the same result, *i.e.* the introduction of an alternative regime for contracts, could be achieved if Member States were to change their contract laws simultaneously and with the same content. Indeed, there is a strong argument to be made that the CESL is inherently different from European legal forms as it does not create a new European contract in addition to national contracts, but merely offers EU-wide harmonised contractual content. There are no features in this alternative regime (as for instance the transfer of seat of a cooperative to which the Court refers in the aforementioned judgment[57]) that could not be achieved by the Member States acting in parallel to each other. This supports the choice of Article 114 TFEU as legal basis.

Incidentally, it should not make any difference as far as the choice of legal basis is concerned whether the "approximation" is achieved by a regulation – as proposed – or by a directive. Although the comparison with a parallel enactment of an alternative set of contract-law rules might bring to mind the implementation of a Directive rather than the direct effect attaching to a Regulation, Article 114 TFEU does not differentiate between the types of measures taken. As the Commission plausibly explains in the explanatory memorandum,[58] a Directive, which would entail Member States' enjoying latitude in how they implemented it, would "not achieve the level of certainty and the necessary degree of uniformity to decrease the transaction costs". If a Directive were to work at all in order to tackle contract-law based barriers in the internal market, it could not leave any leeway to Member States for implementation, which seems to be contradictory to the nature of a Directive, which, according to Article 288, paragraph 2 TFEU, "shall leave to the national authorities the choice of form and methods".

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[53] P.-C. MÜLLER-GRAFF, Ein fakultatives europäisches Kaufrecht als Instrument der Marktordnung, in H. SCHULTE-NÖLKE/ F. ZOLL/ N. JANSEN/ R. SCHULZE (eds), *Der Entwurf für ein optionales europäisches Kaufrecht*, Munich 2012, p. 21-45, at 35.

[54] Case C-436/03, *Parliament v Council*, [2006] *ECR* I-3733, para. 40.

[55] *Ibid.*, paras 40-45.

[56] D. STAUDENMAYER, Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Kaufrecht, *NJW* 2011, p. 3495.

[57] Case C-436/03, *Parliament v Council*, [2006] *ECR* I-3733, para. 42.

[58] COM(2011)0635, Explanatory Memorandum, p. 10.

3. The Legal Basis in the Current Debate

The rapporteurs in the lead committee in the European Parliament (Legal Affairs) come to the conclusion in their working document that Article 114 TFEU is the appropriate legal basis for the proposal, comforted by the concurring position taken by the Legal Services of the three institutions.[59] The most recent statement by Council in this regard is that "a final position on the legal basis can be taken only once the final structure and scope of the proposal are clear," and that the legal basis discussion "should not present an obstacle to starting work on examination of the Annex".[60] It can therefore be assumed that the immediate legislative debate will no longer be focused on the proposed legal basis, although this question might resurface: whether possible changes, for instance to the scope, that might be effected in the course of the legislative procedure[61] might have repercussions on the legal basis will have to be appraised when and if such changes are proposed. The yardstick must be whether real problems in the internal market have been detected and whether the measures proposed are appropriate in order to resolve them.

In conclusion, Article 114 TFEU appears to be the appropriate legal basis for the proposal. However, this assumption might well be the subject of future debate as and when changes are proposed to the scope or content of the proposal.

B. The Choice of the Common European Sales Law and the Rome I Regulation

A crucial issue in the debate has become how the Common European Sales Law would be applied in practice. Since cross-border cases are involved, this is to be discussed against the background of the Rome I Regulation.

1. The Commission's Choices

Recital 10 in the preamble to the proposal states that "The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 364/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules […]." The Commission complements this statement in the explanatory memoran-

[59] See the Working document drawn up by the rapporteurs of the Committee on Legal Affairs (note 35), at 3.

[60] See the press release of the Justice and Home Affairs Council of 7-8 June 2012 (note 27), at 20.

[61] See point C. 2. a), *infra*.

dum[62] by stating that "The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal". The necessary determination of the applicable law – says the Commission – will be "done by the normal operation of the Rome I Regulation". Furthermore, the Commission explains that the proposal is intended to create "within each Member State's national law a *second contract law regime* for contracts within the scope" (emphasis added).[63]

Against the background of the Commission's reasoning, there is no evidence that the CESL is to operate on the same level as national laws;[64] it is rather conceived as "an EU-made alternative to domestic substantive law".[65] What does this mean in practice, for the operation of the Rome I Regulation?

2. How the Rome I Regulation Operates with Regard to the CESL

The Rome I Regulation applies to "situations involving a conflict of laws" (Article 1(1)) and, in principle, provides for recourse "to the law chosen by the parties" (Article 3(1)) or determination of the "law governing the contract" (Article 4).

[62] COM(2011)0635, Explanatory Memorandum, p. 6.

[63] COM(2011)0635, recital 9.

[64] The terms "28th regime" and "2nd regime" have been used to describe the interaction of an optional instrument with Member States' laws. As pointed out by E. LEIN, Issues of private international law, jurisdiction and enforcement of judgments linked with the adoption of an optional EU contract law regime, Note for the European Parliament, 13 October 2010, PE425.646, p. 6, 9, 10, 17, a "28th regime" is a "regime on the same level with national laws, applied via the European private international law framework" and a "2nd regime" as "an EU-made alternative to domestic substantive law" which "would not be directly subject to private international law rules and limitations but be embedded into the legal order of each Member State"; see also M. LEHMANN, Dogmatische Konstruktion der Einwahl in das EU-Kaufrecht (2., 28. oder integriertes Regime) und die praktischen Folgen, in M. GEBAUER (ed.), *Gemeinsames Europäisches Kaufrecht und kollisionsrechtliche Einbettung*, Munich 2013, p. 67-88, at 67 *et seq.*; G. RÜHL, The Common European Sales Law: 28th regime, 2nd regime or 1st regime?, *Maastricht European Private Law Institute, Working paper* 2012/5, p. 1 *et seq.*

[65] See note 64. See further M. BEHAR-TOUCHAIS, The functioning of the CESL within the framework of the Rome I Regulation, Note for the European Parliament, October 2012, PE.462.477, point 1.2.; M. HESSELINK, How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation, *European Review of Private Law* I-2012, p. 198; M. LEHMANN (note 64), at 72 *et seq.*; S. LEIBLE, Der räumlich-persönliche Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts, in O. REMIEN/ S. HERRLER/ P. LIMMER (eds), *Gemeinsames Europäisches Kaufrecht für die EU?*, Munich 2012, p. 21-34, at 22 *et seq.*; C. WENDEHORST (note 45), Article 3, para. 6 *et seq.*

a) Opt-in to the CESL as a Choice of Law?

At first, it should be considered whether the parties' decision in favour of the CESL under Article 8 of the proposed CESL Regulation[66] is a choice of law under Article 3 of the Rome I Regulation. This would only be the case if the regime under the CESL were to qualify as "law" within the meaning of that provision.

In this context, "law" is to be understood as the entirety of a particular legal system governing contractual obligations. For instance, Article 2 of the Rome I Regulation refers to "any law" that is to be applied "whether or not it is the law of a Member State". Article 22 equates a territorial unit having "its own rules of law in respect of contractual obligations" with a country. Recital 13 distinguishes "a non-State body of law" and "an international convention" from the normal application of the Rome I Regulation, since it clarifies that the possibility to refer to international agreements remains untouched.

Consequently, with the exception of the case where a Member State has within it a territorial unit having its own rules of law in respect of contractual obligations, the choice between two alternative sets of rules within one legal system would not qualify as a choice of law under the Rome I Regulation, since Rome I must be regarded as having legislated exhaustively on this question. Therefore, opting in to the CESL cannot be regarded as a choice of law.[67] The choice of the applicable law would be a first, separate step which, should it lead to the application of the law of a Member States, would then, in a second step, open the possibility to opt in to the CESL.[68] This would also be the case if the applicable law was not determined by choice, but under Article 4 of the Rome I Regulation.

b) Article 6 of the Rome I Regulation and the CESL

What of the limitations of the Rome I Regulation, in particular Article 6? The Commission states in the explanatory memorandum that the provision applies, but has "no practical importance".[69]

In general, it has to be noted that Article 6 only applies in B2C transactions if the trader either pursues his commercial or professional activity in the consumer's country, or has directed his activities to that country. In that event, the consumer is deemed to deserve specific protection; recital 24 of the Rome I

[66] Article 8(1) of the CESL Regulation: "The use of the Common European Sales Law requires an agreement of the parties to that effect".

[67] A different view is taken by M. KENNY/ L. GILLIES/ J. DEVENNEY (note 4), at 338, who come to the conclusion that "CESL may be selected by the parties as the applicable law *of a Member State*".

[68] M. BEHAR-TOUCHAIS (note 65), point 1.3.2 and 1.4. in detail; M. HESSELINK (note 65), at 200; G. RÜHL (note 64), at 8; M. LEHMANN (note 64), at 77 *et seq.*, referring in particular to consequences from the point of view of legal principle of the "2nd regime" being European law. Similarly M. STÜRNER, Die Bedeutung des acquis communautaire für das Einheitskaufrecht, in H. SCHULTE-NÖLKE/ F. ZOLL/ N. JANSEN/ R. SCHULZE (eds), (note 53), p. 47-84, at 67, for the solution envisaged by the Commission.

[69] COM(2011)0635, Explanatory Memorandum, p. 6.

Regulation states that there are concerns "to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques". All this is to be achieved under Article 6(1) by the application of the law of the consumer's habitual residence in the absence of a choice of law, and under Article 6(2) – under the same conditions as Article 6(1) ("passive" consumer) and in the case of a choice of law – by the application of those rules of the consumer's mandatory law that afford the consumer better protection than the trader's law. In practical terms, and bearing in mind that one of the fields of application envisaged by the CESL is online trade, Article 6(2) situations will tend to occur relatively frequently as the explicit choice of the CESL required under Article 8(2) of the proposed CESL regulation (*e.g.* by clicking on the so-called "blue button") will very often be accompanied by a choice of the trader's law in accordance with the latter's terms and conditions.

As for Article 6(1), in the absence of a choice of law and provided that the conditions set out therein are fulfilled, the consumer's law will apply, and if this is a law of a Member State, this will allow an agreement on the use of the Common European Sales Law once adopted.

As for Article 6(2), it should be emphasised, first of all, that this provision could not trigger a comparison between a Member State's national law and the CESL because – as has been shown – opting in to the CESL is not a choice of law for the purposes of the Rome I Regulation or of Article 6 thereof.[70] Secondly, it would need to be determined whether a comparison would have to be carried out in the case of an agreement on the use of the Common European Sales Law and if so, what would be the subject of such comparison.

Article 6(2) allows a choice of law even in Article 6(1) situations, and then stipulates: "*Such a choice* may not, however, *have the result* of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1" (emphasis added). According to its wording, the provision thus guards the consumer against the loss of protection afforded by the mandatory provisions of his own law as a result of a choice of law (Article 3 Rome I Regulation). However, as opting in to the CESL does not qualify as such a choice of law, there is very good reason to argue that opting in to the CESL simply does not fall within the scope of Article 6(2) of the Rome I Regulation and thus cannot trigger its protection mechanism.[71] The mere possibility of opting in to the CESL cannot be seen as triggering any consequences under Article 6(2) either, given that this same possibility would – after the adoption of the proposed regulation – exist in all Member States.[72]

[70] Such a comparison would be in order however if the CESL was to function as a 28th regime (note 64, *supra*), see E. LEIN (note 64), at 11; G. RÜHL (note 64), at 6 *et seq*.

[71] M. LEHMANN (note 64), at 79.

[72] E. LEIN (note 64), at 21; M. LEHMANN (note 64), at 81; S. LEIBLE (note 65), at 27 *et seq*.

It is also argued[73] that opting in to the CESL needs to be taken into account for the favourability test under Article 6(2) in that, if the parties have chosen the CESL, this test would compare the CESL regime chosen under the trader's law with the CESL regime under the consumer's law and would find no difference and thus have no practical effect.

The latter approach, pleading for an (in practice obsolete) comparison of the two regimes – the trader's and the consumer's –, might claim that it builds on a more complete perception of the facts of a case (taking into account both the choice of law in a first step and the opt-in to the CESL in a second step). However, Article 6(2), which contains a specific protection mechanism applicable in certain defined situations, does not seem to be open to a wide interpretation with the result that it appears preferable to remain close to its wording (which refers expressly to the "result" of a choice of law). Then there is also no room for reflections as to whether the comparison should not be carried out in any event between the CESL and the consumer's domestic law excluding the CESL.[74]

Finally, it has also been argued[75] that the Common European Sales Law operates in another way within the Article 6(2) test, *i.e.* by affecting the mandatory character of the protective provisions referred to in Article 6(2), since the possibility of opting in to the CESL would – it is claimed – put formerly mandatory provisions at the disposal of the parties. It must be recalled here, though, that the operation of derogating from a legal provision is to be distinguished from opting in to an alternative set of rules which, in common with any other comprehensive set of rules in the Member State concerned, would, in itself, embody mandatory and non-mandatory rules.

c) Article 9 of the Rome I Regulation and the CESL

In order to give a complete picture of the limitations contained in the Rome I Regulation that are relevant *vis-à-vis* the CESL, the relationship with Article 9 of Rome I should be examined.

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[73] See also the Commission, which expressly refers to the absence of "practical importance" (note 69). For an analogous approach, see M. HESSELINK (note 65), at 200.

[74] M. STÜRNER (note 68), at 66 considers this possibility. G. RÜHL (note 64), at 10 *et seq.*, focuses on the fact that "the law, that would apply in the absence of a choice on the basis of Article 6(1) Rome I-Regulation is clearly not the CESL but the national contract law of the state of the consumer's habitual residence". However, this reasoning does not take into account the fact that the possibility to opt into the CESL would exist also in the absence of a choice of law (insofar as no third country law is involved). See also C. WENDEHORST (note 45), Article 3, para. 11.

[75] UK Government, A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission, available at <https://consult.justice.gov.uk/digital-communications/common-european-sales-law>, p. 39, at point 125.

Article 9 gives effect to "overriding mandatory provisions" (Article 9(1))[76] of the forum (Article 9(2)) as well as, in certain circumstances, of the place of performance (Article 9(3)). If such overriding mandatory provisions were to prevail over the CESL if chosen as a second regime within the applicable law, their application would interfere with the intention of the CESL that it should apply as one single set of rules and thus facilitate transactions in the internal market. Discussion is going on as to what extent this is indeed the case with some claiming that the CESL would, within its scope, exclude the application of overriding mandatory rules.[77]

In general, Article 11 of the CESL Regulation states that "only the Common European Sales Law shall govern the matters addressed in its rules". Conversely, issues not addressed in the CESL would be governed by the applicable law determined by private international law.[78] The CESL proposal itself states in its recital 27 that it does not address a number of issues, *inter alia*, "the invalidity of a contract arising from [...] illegality or immorality".

It is important to note that there is a clear link between invalidity on grounds of illegality or immorality and "overriding mandatory provisions". However, a given prohibition in law, for instance a bar on certain conduct, may trigger the invalidity of a contract yet would not always qualify as an "overriding mandatory provision" within the meaning of Article 9 of the Rome I Regulation (an overriding mandatory provision might also take the shape of a prohibition, but would need to meet a higher threshold as regards the public interest protected). On the other hand, an "overriding mandatory provision" under Article 9 might entail sanctions other than invalidity and might even not be related to contract law (in the latter case it would however be outside the scope of the CESL in any event).

Against this background, it has been proposed,[79] in order to enhance the uniformity of application of the CESL rules, that illegality and immorality should be brought within the scope of the CESL (thereby limiting the operation of Article 9 of the Rome I Regulation).

Different approaches could be taken in this connection: one possibility could be to stipulate that any illegality or immorality sanctioned by invalidity by a Member State would lead to the same legal consequence under the CESL. This would make for greater unification as regards the legal consequences of illegality or immorality, but would also be impractical as it would mean that wherever a

[76] Article 9(1): "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope."

[77] M. LEHMANN (note 64), at 82. See also C. WENDEHORST (note 45), Article 3, para. 8 ("as far as the CESL (P) derogates from overriding mandatory rules of the gateway law, it also derogates from mandatory rules of the forum").

[78] COM(2011)0635, Explanatory Memorandum, p. 6; C. WENDEHORST (note 45), Article 11, para. 9.

[79] M. HESSELINK (note 65), at 203; M. BEHAR-TOUCHAIS (note 65), at point 1.3.3., proposes replacing the exclusion of invalidity due to "illegality or immorality" by the "exclusion of "invalidity of the sale of goods which are outside legal trade".

contract was invalid for illegality/immorality anywhere in the EU, that would also have to be the case under the CESL, which would be absurd.

As a second option, a provision making the infringement of fundamental principles subject to contractual invalidity could be introduced into the CESL with the aim of capturing "overriding mandatory provisions" within the meaning of Article 9 of the Rome I Regulation.[80] However, overriding mandatory provisions outside the realm of contract law,[81] and not carrying the sanction of contractual invalidity, would not be captured. Furthermore, such a provision would be subject to some uncertainty as it might be difficult to identify which provisions qualified.[82] Also, in the event that such a provision was introduced, it would be necessary to make it clear that the intention was to regulate invalidity for reasons of illegality and immorality exhaustively in the CESL – otherwise, it would remain possible to invoke invalidity on grounds of "simple" illegality and immorality under the applicable law of contracts, alongside the application of the CESL.

3. Practical Observations

It appears useful to conclude the discussion of the operation of the CESL against the background of the Rome I Regulation by making some practical observations:

It has been argued that indirect applicability, *i.e.* the application of the CESL in a second step, after the application of the relevant private international law rules, would be unnecessarily complicated and burdensome, and that, therefore, direct application (*i.e.* CESL as uniform law) would be preferable.[83] However, the success of such an approach would depend – even more than the one now chosen by the Commission – on having an appropriate definition of the conditions of direct application,[84] and it has also been argued that is not clear whether a uniform law approach would indeed be so much simpler.[85] Furthermore, direct application, which would entail the suppression of the operation of the existing rules of private international law, would constitute a much more radical interference with existing legal mechanisms. Whether that could be regarded as indispensable on the basis of a proportionality test, that is to say, that the action proposed could not be replaced by some alternative form of action which would be equally

[80] M. HESSELINK (note 65), at 203, with the drafting suggestion: "a contract is void to the extent that it infringes a principle recognised as fundamental in the European Union and nullity is required to give effect to that principle", as "a slightly modified version of Article II.-7.301 DCFR".

[81] See E. LEIN (note 64), at 22, who proposes to implement mandatory rules within the contractual sphere in the optional instrument itself, but acknowledges the continuing application of overriding mandatory rules outside the realm of contract law.

[82] Another drafting option could be to use some of the wording of Article 9 of the Rome I Regulation.

[83] E. LEIN (note 64), at 19 *et seq*., 29; M. LEHMANN (note 64), at 86 *et seq*.; G. RÜHL (note 64), at 12 *et seq*.

[84] E. LEIN (note 64), at 18.

[85] C. WENDEHORST (note 45), Article 3, para. 10.

effective having regard to the intended aim and less detrimental to another aim or interest protected by Union law,[86] would have to be closely analysed. Finally, it is an open question whether there is the political will for such a radical intervention, at least for the time being.

A second practical observation relates to whether the processes discussed above are reflected with sufficient clarity in the text of the proposal as it stands now. It seems to be the prevailing opinion that this is not the case[87] – and given the complexity of the issues and the importance to get them right in practice one cannot but agree. Suggestions have been put forward to include a clarifying provision, which would, for instance, exclude the application of any superior protection rules.[88] Whether it is necessary to go that far seems doubtful. It is also doubtful whether this would square with an optional instrument which is dependent on the parties' choice, given that such an addition (regardless of its true practical relevance, *i.e.* whether there are indeed very many superior protection rules) is likely to be understood as meaning that the level of protection of the CESL itself must be less than impressive. At first sight, it would seem sufficient to clarify the operation (or better: the non-operation) of Article 6 of the Rome I Regulation in the text of the Regulation, probably even only in a recital. This would help to clarify matters without overshooting the mark. It is interesting to note that the co-rapporteurs in the JURI committee in the European Parliament have made an attempt to clarify the issue, by proposing amendments both to the recitals and to the operative part.[89] The changes proposed appear to focus on clarifying what the Common European Sales Law is (*e.g.* by clearly juxtaposing a "first" and a "second regime"[90]) and how it operates.[91] It remains to be seen how these proposals will be taken up in the ongoing legislative procedure.

In general, whether the non-operation of Article 6(2) of the Rome I Regulation will be accepted in the political discussion will depend very much on whether its objectives – avoiding, in the interest of the (passive) consumer, a loss of the mandatory protection that he can expect in his own country – can be achieved in another way.[92] This would be the case if the CESL, in itself, offered a level of consumer protection such that additional protection for the consumer would not be necessary. The debate about the level of protection afforded to the consumer under the CESL cannot be addressed here for reasons of space, although it can be said that there seems to be a general recognition that the level of consumer protection afforded by the CESL is very high;[93] the only point of contro-

[86] See K. LENAERTS/ P. VAN NUFFEL, European Union Law, Sweet & Maxwell, London 2011, para. 7–037.

[87] Working document of the rapporteurs of the Committee on Legal Affairs (note 34), at 3; M. BEHAR-TOUCHAIS (note 65), at point 1.3.2.

[88] M. BEHAR-TOUCHAIS (note 65), at point 1.3.2.

[89] See note 39.

[90] Draft report (note 36), amendment 2.

[91] Draft report (note 36), amendments 25 and 67 which emphasise that the Common European Sales Law operates "within" the respective legal order of a Member State.

[92] M. HESSELINK (note 65), at 200.

[93] M. BEHAR-TOUCHAIS (note 65), Section 2.

versy appears to be how to evaluate the fact that not all the maximum levels of consumer protection achieved in the Member States are reflected in the CESL.

As for the operation of Article 9 of the Rome I Regulation, possible ways of modifying the proposal have been discussed. However, in order to introduce any provision that brings invalidity based on illegality or immorality within the scope of the proposal, it would be necessary for Member States to muster up the political will to agree to the EU-wide recognition of situations of illegality/immorality invalidating a contract. It is hard to predict how likely it is that such political will will emerge.

C. The Scope of the CESL Proposal

As regards its territorial scope, the Commission proposes that the Common European Sales Law should be used for cross-border transactions, and as regards its personal scope, for B2C transactions and for B2B transactions where at least one of the parties is a small or medium-sized enterprise (SME). The Regulation allows Member States to set aside these limitations by making CESL available also in purely domestic situations and for contracts concluded between traders neither of which is an SME (Article 13).

1. The Commission's Choices

The Commission explains its choices as regards the scope[94] in particular by referring to the principle of proportionality on the grounds that it found the "problems of additional transaction costs and legal complexity" to arise in cross-border situations[95] and that it does not see any "demonstrable need for action" as regards contracts concluded between private individuals (C2C) and B2B contracts where no SME is involved.

Consequently, as far as the personal scope as proposed by the Commission is concerned the definitions of "consumer" (Article 2(f) of the CESL Regulation), "trader" (Article 2(e)) and "SME" (Article 7(2)) are crucial, in the same way that the definition of "cross-border contracts" (Article 4 of the CESL Regulation) is critical for defining the territorial scope.

Lastly, the substantive scope of the CESL proposal is determined by Articles 5 and 6 of the CESL Regulation, which define the contracts for which the Common European Sales Law can be used – according to Article 5 these are sales contracts (point a), contracts for the supply of digital content (point b) and related service contracts (point c).

[94] COM(2011)0635, Explanatory Memorandum, p. 10.

[95] See also recital 13: "The Common European Sales Law should be available for cross-border contracts, because it is in that context that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships […]."

2. Changes under Debate

In the discussion as to whether the proposed scope is adequate for achieving the proposal's objective of boosting trade in the internal market, some issues are commonly identified as political choices, others as technical.

a) Modifying Political Choices

As for the political choices made, the aspects which come in for the most criticism – in particular by those who in general welcome the proposal – are the fact that the proposal is limited to cross-border contracts and to B2B contracts where one of the parties is an SME.

In general, as regards the general question whether B2B contracts should be kept within the scope at all, the argument has been made that CESL is an offer to parties and, as such, should be directed to all parties.[96] In any event, it appears to be very early in the legislative procedure to take a path which would exclude B2B contracts: business itself seems to see some merits in the proposal,[97] and because of the optional nature of the proposal there would be no harm done in keeping the door to B2B transactions open.

As regards the limitation to B2B contracts where one of the parties is an SME, it has been pointed out that the non-SME party will be in situation where it will have to determine whether the other party is an SME, which might lead to practical difficulties.[98] It is worth noting, also, that 90 % of the enterprises in Europe belong to this category, so the limitation would be of limited practical relevance anyway.[99]

As for the limitation to cross-border contracts, it is argued that nowadays it is increasingly hard to distinguish between cross-border and purely domestic contracts. Given increasing mobility and the fact that it might be incidental whether a transaction is cross-border or not, it should make no difference to the assessment and evaluation of a given transaction whether or not it is cross-border,

[96] Working document of the rapporteurs of the Committee on Legal Affairs (note 35), at 4.

[97] See, *e.g.*, press release of 14 October 2011 from the Federation of Small Businesses, available at <http://www.fsb.org.uk/News.aspx?loc=pressroom&rec=7344>.

[98] EUROPEAN LAW INSTITUTE, Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011)635 final, available at <http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf>, p. 18, points 8 and 9; C. WENDEHORST (note 45), Article 7, paras 22 *et seq.;* N. JANSEN, Revision des Verbraucher-acquis? Zwölf Thesen zum Kommissionsvorschlag eines Gemeinsamen Europäischen Kaufrechts und zur Zukunft des europäischen Vertragsrechts, electronic copy available at <http://ssrn.com/abstract=1997191>, p. 9.

[99] EUROPEAN LAW INSTITUTE (note 98), at 18, point 9; C. WENDEHORST (note 45), Article 3, para. 23.

in particular as regards the governing rules.[100] It is also argued that large enterprises might have an advantage under the current text as they could easily construct cross-border situations if they wanted to use the Common European Sales Law.[101] On a more technical note, shortcomings in terms of legal certainty have been detected in the proposed definition of "cross-border" contracts, which (presumably in order to avoid surprises on the part of the trader, who might simply be wrong about the habitual residence of the consumer) allows the consumer to choose the relevant addresses and thus to define the contract as "cross-border".[102] Again, there seems to be some merit in the reasoning that the offer should be as broad as possible. On the other hand, the inclusion of domestic contracts would interfere to a much greater degree with Member States' legal orders and, leaving aside their perceived lack of enthusiasm for the proposal in its current shape, if the CESL were extended so as not to cover only cross-border transactions, Member States would be likely to regard it as interfering with their prerogative to determine the content of the rules applicable to contractual transactions that are carried out without any international element exclusively within their territory.

The concern about proportionality appears to have more relevance in the latter context than it does, for instance, in connection with the limitation to contracts involving an SME. Yet, as the first step of the proportionality test would be to establish whether the measure is appropriate, *i.e.* capable of attaining its intended objective,[103] it might be argued that, as, for instance, the identification of the contracting party as an SME is not practicable, a proposal which requires such an exercise to be carried out in order to determine whether a given transaction falls within its substantive scope is simply not appropriate to achieve the aim of boosting trade in the internal market.[104]

One last question is worth mentioning in the context of a possible change in political choices concerning the scope: a possible limitation to online or distance transactions.[105] The Commission raised this question already in its 2010 Green Paper.[106] In its 2011 resolution the European Parliament did not feel the need for such a limitation, while acknowledging that "there could be merit in introducing other limits when applying the [optional instrument] in the first instance, and until sufficient experience of its application has been gathered".[107] In the discussion of the proposed Common European Sales Law, this question has been revisited, and

[100] Working document of the rapporteurs of the Committee on Legal Affairs (note 35), at 4.

[101] EUROPEAN LAW INSTITUTE (note 98), at 20, point 13; C. WENDEHORST (note 45), Article 4, para. 19.

[102] S. LEIBLE (note 64), at 30.

[103] See K. LENAERTS/ P. VAN NUFFEL (note 86), at para. 7–036.

[104] C. WENDEHORST (note 45), Article 3, para. 23.

[105] Working document of the rapporteurs of the Committee on Legal Affairs (note 35), at 4.

[106] COM(2010)0348, p. 12.

[107] European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (note 25), at para. 21.

even some otherwise sceptical voices seem to be able to find some merit in the Common European Sales Law provided that it was limited that way.[108] It has been pointed out that a substantive adaptation of the proposal, tailoring it more to the needs of online or distance trade would be necessary.[109] The draft report of the lead Legal Affairs Committee in the European Parliament has now launched the political discussion about taking such a turn, without, however, proposing a fully-fledged adaptation of the proposal to this newly shaped scope. The co-rapporteurs' suggestion to limit the scope is clearly driven by the motivation that this might be a way to broaden consensus on the proposal.[110] The draft report, at the same time, suggests a step-by-step approach, starting out from online trade as a pilot area, and asking the Commission to give particular consideration to a possible extension of the scope in its review to be undertaken after five years' application of the Regulation.

b) The Debate on Technical Improvements

Without touching upon the political choices made, a number of technical improvements are being proposed.

First, it is being discussed whether the personal scope would not need adjustment as regards the definition of "consumer" and the inclusion of non-profit making entities. Although the definition of "consumer" takes up elements frequently used throughout the *acquis*,[111] it is true that recital 17 of the Consumer Rights Directive,[112] according to which, in case of dual purpose contracts, the qualification as a consumer is not lost as long as the professional objective does not prevail, is not taken up in the proposal. It seems to be clear that a recital could not work in the same way in the proposed regulation as in a directive, however it might be useful to consider whether the underlying objective should not be reflected in the CESL proposal,[113] in line with the overall focus on consumer protection. The

[108] See UK Law Commission/Scottish Law Commission, An Optional Common European Sales Law: Advantages and Problems - Advice to the UK Government, available at <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf>, p. 30, para. 2.100.

[109] See already COM(2010)0348, p. 12. UK Law Commission/Scottish Law Commission (note 108), p. 30, para. 2.101.

[110] Draft report (note 36), see in particular under point II.2. of the explanatory statement.

[111] M. BEHAR-TOUCHAIS (note 65), at point 2.1.1.

[112] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (*OJ* L 304 of 22 November 2011, p. 64).

[113] M. STÜRNER (note 68), at 72; C. WENDEHORST (note 45), Article 2, para. 16, both with reference to the "negligible test" applied in the "Gruber" judgment (Case C-464/01 *Gruber* [2005] *ECR* I-439) which would lead to contrary results.

draft report presented to the Legal Affairs Committee indeed does suggest an adaptation of the consumer definition along these lines.[114]

As for the inclusion of non-profit making entities it has been – convincingly – argued[115] that this would enhance the practicability of the proposal since where the customer is not a natural person, the trader would have to investigate whether the former is not be a non-profit making entity since the CESL would not be available in that eventuality. It has been proposed to include non-profit making entities in the personal scope as potential sellers.

The area of technical improvements also includes the discussion of whether the exclusion of mixed-purpose contracts (Article 6(1)) and of contracts containing a credit element (Article 6(2)) should not be reconsidered. Concerns about legal certainty as well as the attractiveness of the instrument have been raised: if any alien element could exclude the availability of the CESL for a given contract, a business might be more reluctant to opt for the CESL as it might be revealed only at a later stage that the CESL was not available.[116] Along the same lines, the frequent credit element should also not exclude the possibility to opt for the CESL.[117] This is also one of the issues addressed by the co-rapporteurs in the Legal Affairs Committee, who propose a more inclusive application of CESL by extending it to certain cases of mixed-purpose and linked contracts.[118]

We shall have to wait and see how the discussion on both policy choices and technical proposals as regards the scope will develop further throughout the legislative procedure.

IV. Conclusion

As mentioned at the outset, this paper is intended to provide a snapshot of the current debate, identify trends and comment on some of the issues discussed. As has been shown, there appears to be room for technical changes to the CESL proposal, possibly also for some adjustment in the political choices made, in order to improve the proposal having regard to the objectives it aims at achieving.

As for the issues selected for presentation in this paper in detail, the discussion of the legal basis – where there are very good reasons to agree with the choice of Article 114 TFEU – is likely to be less in the focus of the further discussion, though it will certainly be one of the issues which will resurface – for instance should changes to the scope (or the content) of the proposal be undertaken.

As for the Rome I Regulation, it appears appropriate to clarify its relationship with the CESL proposal, in particular as regards the operation of Article 6 of

[114] Draft report (note 36), amendments 5, 30.

[115] EUROPEAN LAW INSTITUTE (note 98), at 19, points 10 and 11.

[116] EUROPEAN LAW INSTITUTE (note 98), at 21, point 17; C. WENDEHORST (note 45), Article 6, para. 12.

[117] EUROPEAN LAW INSTITUTE (note 98), at 22, point 20; N. JANSEN (note 98), at 10.

[118] Draft report (note 36), amendments 58 to 64.

the Regulation. As any clarification would be of a declaratory character, retracing the interrelationships as they operate anyway, a clarification in a recital might be sufficient.

As for the scope, the ongoing discussion as regards political choices will need further attention. A number of technical adaptations appear useful even against the background of the current choices made.

KEY POINTS ON THE DETERMINATION OF INTERNATIONAL JURISDICTION IN THE NEW EU REGULATION ON SUCCESSION AND WILLS

Maria ÁLVAREZ TORNÉ*

I. Introduction

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on succession was published in the OJEU on 27 July 2012.[1] Articles 83 and 84 state that the new instrument will apply on a general basis "to the succession of persons who die on or after 17 August 2015."

A general regulation has been adopted which will replace the domestic rules of the Member States on the matter despite the doubts about the project which arose in the course of the inter-institutional procedure. Denmark, the United Kingdom and Ireland have not participated in the adoption of the Regulation and are not bound by it.[2]

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[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ* L 201 of 27 July 2012, p. 107 *et seq.*

[2] See in this regard Recitals 82 and 83 of the Preamble. The United Kingdom and Ireland are able to accept the Regulation after its adoption.

Yearbook of Private International Law, Volume 14 (2012/2013), pp. 409-423

The importance of succession cases with cross-border elements and the need to adopt a regulation unifying private international law rules at the Community level had already been emphasised in the report of the *Deutsches Notarinstitut* requested by the European Commission and co-ordinated by Professors H. DÖRNER and P. LAGARDE.[3] This was a direct forerunner of the Green Book on Succession and Wills.[4] Legal literature and professionals working in the field had been highlighting the need for a Community measure designed to resolve, in a co-ordinated manner, the problems arising from the treatment of international succession matters on the basis of separate national rules of private international law. Reference may be specifically made in matters of international jurisdiction to difficulties such as lack of legal certainty, positive and negative conflicts of jurisdiction, contradictory responses to situations of international *lis pendens* and problems of the effect of foreign decisions.[5]

After the adoption in 2009 of the Proposal for a Community Regulation on succession,[6] the process prior to the adoption of the new measure made it possible to anticipate, to a certain extent, the form of the final text, which includes only some of the amendments and suggested improvements made with respect to previous documents.[7] In this contribution, we will specifically examine the provisions ultimately adopted in the Regulation on international jurisdiction.

[3] DEUTSCHES NOTARINSTITUT, *Les successions internationales dans l'UE: Perspectives pour une harmonisation*, Würzburg 2004.

[4] Green Book on Succession and Wills, Doc. COM(2005) 65 final.

[5] This is referred to in M. ÁLVAREZ TORNÉ, *La autoridad competente en materia de sucesiones internacionales: El nuevo Reglamento de la UE*, Madrid 2013.

[6] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and on the creation of a European certificate of succession, COM(2009) 154 final (the "2009 Proposal"). A general overview of the contents of the Proposal may be found in M. GUZMAN ZAPATER, Sobre el futuro de las sucesiones internacionales en la Unión Europea, *El Notario del Siglo,* XXI mayo-junio 2010, available online.

[7] It had already been suggested in legal literature that the final text would differ from the Proposal on a number of points, as noted by R. WAGNER, Der Kommissionsvorschlag vom 14.10.2009 zum internationalen Erbrecht: Stand und Perspektiven des Gesetzgebungsverfahrens, *DNotZ* 2010/7, p. 519. See also, on these differences, the preface of Prof. Dr. Alegría BORRÁS to the book M. ÁLVAREZ TORNÉ (note 5).

II. The Definition of "Court" in the New Regulation

Non-judicial authorities, particularly notaries,[8] play an important role, from a comparative law viewpoint, in the non-litigious resolution of international successions by way of various procedures in a number of Member States. Criteria for allocating international jurisdiction to non-judicial authorities, comparable to the criteria for the international jurisdiction of the courts, are not usually found in domestic law:[9] recourse is first made to other factors, such as the deceased's last domicile.[10]

The new Regulation, in line with previous documents, has opted to refer, in the chapter dedicated to jurisdiction, to "courts" in general terms, thereby diverging from the reference made in the 2009 Proposal to the intervention of non-judicial authorities "in case of need". Recitals 20 to 22 of the Regulation and Article 3.2 give a series of specifications regarding the concept of a "court" from which it is to be gathered that the new rules on international jurisdiction are also applicable to non-judicial authorities and legal professionals. However, this is subject to limitations, as it is stated that the term "courts" does not include non-judicial authorities or legal professionals who do not carry out judicial functions or act by delegation of powers or under the control of a judicial authority. This is also relevant in terms of the effect of the decisions taken by these authorities. The final paragraph of Article 3.2 provides that the Member States must inform the Commission as to the authorities and legal professionals that are to be subject to the rules on jurisdiction contained in the Regulation in accordance with Article 79; this information has to be published. It should also be noted that Article 2 of the Regulation provides, with respect to the powers of the Member States on succession matters, that

> "[t]his Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession."

A number of Member States provide for the intervention of non-judicial authorities to deal with non-contentious international succession.[11] It has been noted in this regard that in most Member States, notaries do not generally carry out judicial functions when they act in accordance with their domestic law to deal with

[8] On the role of notaries in succession matters see M. VERWILGHEN/ S. MAHIEU, *Régimes matrimoniaux, successions et liberalités dans les relations internationales et internes*, vol. I, Bruxelles 2003, p. 165.

[9] See, on the role of notaries in international successions prior to the application of the Regulation, R. CRONE, La compétence internationale du notaire en matière de règlement de successions, in H. BOSSE-PLATIÈRE, *et al.* (eds), *L'avenir européen du droit des successions internationales*, Paris 2011, p. 135 and A. BONOMI, Successions internationales: conflits des lois et de juridictions, *Recueil des Cours* vol. 350 (2011), p. 366.

[10] See G.A.L. DROZ, L'activité notariale internationale, *Recueil des Cours* vol. 280 (1999), p. 73.

[11] See L. GARB (ed.), *International Succession*, The Hague 2004; D. HAYTON, *European Succession Laws*, 2nd ed., Bristol 2002.

succession matters.[12] Other authorities that can be assimilated to courts in accordance with the Regulation include Nordic distributors, appointed by the court and notaries of the Austro-Hungarian tradition, who make compulsory interventions linked to court powers; notaries of Spain, France and Luxembourg, who make specific declarations regarding heirs and acceptance subject to the benefit of inventory; and Portuguese property registry officials, who prepare inventories in the context of disputed successions.[13]

By contrast, the Regulation does not specifically deal with the role of foreign consulates and it has been argued that it would be positive for consulates, because of their special characteristics in terms of identity, role and territorial scope, to assume certain powers such as the issuing of European certificates of succession.[14]

To all of this, Article 64 of the Regulation adds that certificates shall be issued by a court, as defined in Article 3.2 or another authority "which, under national law, has competence to deal with matters of succession." Recital 70 indicates that the Member States must provide the Commission with detailed information in this regard for publication purposes, thus widening the possibility of granting jurisdiction to non-judicial authorities otherwise excluded in general terms from the scope of the Regulation.

III. Unity of Forum and its Exceptions

Regulation 650/2012 is based on the general principle of unity of forum, which will thus also affect non-judicial authorities where they have jurisdiction under the terms of the Regulation. Both the general rule of Article 4 and some subsidiary rules of Article 10, which refers in paragraph 1 to jurisdiction "to rule on the succession as a whole", and Article 11 on the forum of necessity, are based on this principle. It may also be assumed that in cases where remission of jurisdiction and free choice operates, unity of forum will again be the rule.

Some domestic systems of private international law of the Member States adopt unity of forum while others have scission mechanisms. Unity of forum implies that international jurisdiction of one single authority encompasses movable and immovable property of the inheritance, which prevents the co-existence of multiple processes and brings about a quick and effective distribution of the estate while avoiding conflicting decisions.[15] It is important to note, in this regard, that the

[12] Referred to by A. FERNÁNDEZ-TRESGUERRES, Incidencia en el derecho patrimonial del futuro Reglamento comunitario sobre sucesiones mortis causa, *Noticias de la Unión Europea* 2012, p. 113.

[13] See, on this point, A. FERNÁNDEZ-TRESGUERRES (note 12), at 113.

[14] See A. FERNÁNDEZ-TRESGUERRES, Competencia en materia sucesoria de los cónsules, *Iuris & Lex* 31 August 2012, p. 18 *et seq.*

[15] See, based on an analysis of the interests at stake in the regulation of international jurisdiction, A. HELDRICH, Die Interessen bei der Regelung der internationalen

criteria chosen to determine jurisdiction based on unity of forum are proportionate and bring about sufficient proximity to the case in question so as to justify a single authority dealing with the succession as a whole.

The Community provision also sets out various exceptions to this general rule. On the one hand, Article 10 para. 2, providing for subsidiary jurisdiction, sets out a *forum rei sitae* under which a Member State may rule on succession property located in that State. On the other hand, Article 12 para. 1 provides for a limitation of proceedings concerning inheritance property located in a third state. This allows the competent authority, at the request of one of the parties, to decide not to rule on such property if it may be expected that the enforceability of decisions regarding that property is not guaranteed.[16] Article 12.2 refers in turn to the right of the parties to limit the scope of proceedings in conformity with the law of the Member State where authorities of that State are hearing the case.

It should be noted that the extension of international jurisdiction to property located outside the territory of the EU, in particular immovable property, may give rise to positive conflicts of jurisdiction with third states.[17] In particular, a division of a succession ordered by the authorities of a Member State would be difficult to enforce in a third state where property of the inheritance happens to be situated.[18]

IV. The Criteria for Allocating International Jurisdiction

A. The Last Habitual Residence of the Deceased as a General Criterion

Article 4 of the Regulation provides that

> "[t]he courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole."

Thus the deceased's last habitual residence is the criterion which makes it possible to allocate international jurisdiction to the authorities of a particular Member State to deal with the entire succession, both in contentious and non-contentious contexts. There may be doubt in this regard as to how territorial jurisdiction will be

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Zuständigkeit, in M. FERID, *Festschrift für Hans G. Ficker: Zum 70. Geburtstag am 20. Juli 1967*, Frankfurt/ Berlin 1967, p. 215.

[16] On the interest of this type of mechanism, see M. HELLNER, El futuro Reglamento de la UE sobre sucesiones. La relación con terceros estados, *Anuario español de Derecho internacional privado* 2010, p. 387 *et seq.*

[17] On this specific problem associated with unity of forum, see F. BOULANGER, *Droit international des successions: Nouvelles approches comparatives et jurisprudentielles*, Paris 2004, p. 22.

[18] See J. HARRIS, The proposed EU Regulation on Succession and Wills: Prospects and Challenges, *TLI* 2008, p. 221.

determined.[19] The advantages of this criterion include the ease in identifying the place in which the deceased had established his most durable family, social and property relations. Such proximity favours the distribution of estates and also the access to the competent authorities by interested parties. From the perspective of the principle of proximity[20] the allocation of jurisdiction to the authority most closely linked to the case will facilitate the administration of justice and make it possible to have reasonable access to the competent court without this being excessively burdensome for the defendant.[21]

Both the study prepared by Professors DÖRNER and LAGARDE in collaboration with the DNOTI and the study elaborated by the GEDIP[22] states that the general criterion for determining international jurisdiction in succession matters should be that of the deceased's last habitual residence.[23] This is a criterion widely used – together with the deceased's last domicile – in various domestic laws of the Member States.[24] Many contributions to the Green Book and documents published in the context of the inter-institutional procedure have supported this criterion as a means of allocating international jurisdiction, and its suitability was emphasised in the analyses of the Hague Conference on Private International Law regarding international jurisdiction in succession matters.[25] It should be noted, however, that

[19] On this aspect in relation to the Proposal, see H. DÖRNER, Der Entwurf einer europäischen Verordnung zum Internationalen Erb- und Erbverfahrensrecht – Überblick und ausgewählte Probleme, *ZEV* 2010, p. 224.

[20] For an examination of the principle of proximity, see P. LAGARDE, Le principe de proximité dans le Droit international privé contemporain, *Recueil des Cours* vol. 196 (1986), p. 132. In the specific context of succession, see M. RAIMON, *Le principe de l'unité du patrimoine en Droit international privé: Étude des nationalisations, des faillites et de successions internationales*, Paris 2002, p. 101.

[21] C. OTERO GARCÍ-CASTRILLÓN, En torno a los problemas de aplicación de las normas de competencia judicial: reflexiones sobre la admisibilidad del forum non conveniens en el Derecho español, *Anuario español de Derecho internacional privado* 2001, p. 429.

[22] See its contribution to the consultation process for the Green Book. The various responses sent may be viewed at <http://ec.europa.eu/justice/newsroom/civil/opinion>.

[23] This was also the view expressed in legal literature by, among others, M.-C. DE LAMBERTYE-AUTRAND, Quel droit européen en droit patrimonial de la famille? Le Livre vert sur les successions et les testaments, *Informations Sociales* 2006, p. 90; A. DAVÍ, Riflessioni sul futuro diritto internazionale private europeo delle succession, *Riv. dir. int.* 2005, p. 307 and W.H. RECHBERGER/ T. SCHUR, Eine internationale Zuständigkeitsordnung in Verlassenschaftssachen: Empfehlungen aus österreichischer Sicht, in B. JUD/ W.H. RECHBERGER/ G. REICHELT (eds), *Kollisionsrecht in der Europäischen Union: Neue Fragen des internationalen Privat – und Zivilverfahrensrechtes*, Wien 2008, p. 213.

[24] From the German perspective, see S. LORENZ, Erbrecht in Europa – Auf dem Weg zu kollisionsrechtlicher Rechtseinheit, *Zeitschrift für den deutsch-spanischen Rechtsverkehr* I/2012, p. 6.

[25] Underlined in the document, "Note on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death, drawn up by the Permanent Bureau, Preliminary Document Nº 14 of May 1992", *Actes et documents de la Dix-septième session* (1993), tome I, p. 223.

some writers have expressed doubts as to the place of the deceased's last habitual residence as a criterion of jurisdiction because of the legal uncertainty associated with the ease of changing one's residence.[26]

Resolution (72)1 on the standardisation of the legal concepts of domicile and residence of 18 January 1972 of the Council of Europe,[27] which has only recommendatory status,[28] was a first attempt to unify the legal concepts of domicile and habitual residence. The criterion of "habitual residence" has been used in a number of international provisions[29] but there is, at the moment, no single and binding definition in this respect at the international level.[30] Despite the fact that the commonly accepted notion of "habitual residence" is an indeterminate legal concept subject to interpretation,[31] it has been noted that it does not require intention and it is flexible though it offers less stability. It is a factor, which may be viewed as reasonable given the mobility of persons, a characteristic of a modern globalised society. The European Court of Justice has provided guidelines regarding an autonomous concept of habitual residence, defining it as the place in which the interested party was established with an intention of stability and the permanent or habitual centre of his interests.[32] The Discussion Paper of 30 June 2008, prepared by the group known as "PRM III/IV", which proposed the deceased's last habitual residence as the general criterion for allocating jurisdiction, suggested a definition of "habitual residence" in very similar terms, providing guidelines to determine the deceased's intention. The question of whether an express definition would be necessary in the Regulation was raised in the Discussion Paper, which

[26] On this critique, see E.-M. BAJONS, Internationale Zuständigkeit in grenzüberschreitenden Erbrechtsfällen innerhalb des europäischen Justizraums: Eine Abkehr von nationalen Grundwertungen durch freie Orts – und Rechtswahl?, in S. LORENZ (ed.), *Festschrift für Andreas Heldrich zum 70. Geburtstag*, München 2005, p. 500 *et seq*., in particular p. 505.

[27] Résolutions du Comité des Ministres: Résolution (72) relative à l'unification des concepts juridiques de "domicile" et de "résidence" (18 Janvier 1972), *Annuaire Européen* Vol. XX 1974, p. 320 *et seq.*

[28] Set out in D. BAETGE, *Der gewöhnliche Aufenthalt im Internationalen Privatrecht*, Tübingen 1994, p. 30.

[29] See, in this regard, D. MASMEJAN, *La localisation des personnes physiques en droit international privé: Étude compare des notions de domicile, de residence habituelle et d'établissement, en droit suisse, français, allemand, anglais, américain et dans les Conventions de la Haye*, Gèneve 1994, p. 83 et *seq.*

[30] See D. BAETGE, Auf dem Weg zu einem gemeinsamen europäischen Verständnis des gewöhnlichen Aufenthalts: Ein Beitrag zur Europäisierung des Internationalen Privat – und Verfahrensrechts, in D. BAETGE/ J. VON HEIN/ J. VON HINDEN, *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen 2008, p. 87 *et seq*.

[31] See D. BAETGE (note 30), at 87 *et seq.*

[32] Emphasised by the contribution of the Consiglio Nazionale del Notariato to the consultation for the Green Book, at p. 10.

provides a description and points to the abundant ECJ case law on the matter. This case law refers, however, frequently to particular contexts.[33]

The 2009 Proposal dispensed with a specific definition of "habitual residence".[34] Whether or not to include an express definition was a subject of debate before the adoption of the new Community instrument.[35] Finally Recital 23 of the new Regulation provides a series of guidelines consisting of assessing the presence of certain elements in each specific case. The Regulation also seeks to respond to the increasingly frequent situations in which it is particularly difficult to determine the deceased's last habitual residence and provides some guidelines in its Recital 24.

B. The Role of Party Autonomy in the Allocation of International Jurisdiction

The rules on party autonomy in the final text clearly differ from those followed prior to the adoption of the Regulation.[36] Article 5 of the Regulation contemplates the possibility for the interested parties to select the court or courts of a Member State to have exclusive jurisdiction over any succession matter. However, the choice of court is subject to the condition of the deceased having selected the law of that Member State to govern his succession in accordance with the power granted to him under Article 22. Section 2 of Article 5 sets out the formal conditions for such an agreement.

The text of the Regulation goes on to describe, in a rather complicated way,[37] how the intention of the parties – and indirectly that of the deceased – may affect the allocation of international jurisdiction. Article 6(b) provides that where the deceased has chosen the law applicable to the succession under Article 22, and the parties have chosen a forum under Article 5, the court, which in principle had jurisdiction under Articles 4 or 10, must decline jurisdiction.[38] Article 7(a) and (b)

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[33] See, for example, C. GONZÁLEZ BEILFUSS, Judgment of the CJEU (Third Chamber) of 2 April 2009, case C-523/07, "A", *Revista Jurídica de Catalunya* 2009, p. 1201 *et seq.*

[34] Arguing that the reference to the notion of "habitual residence" in the Proposal was excessively vague, see E. LEIN, Les compétences speciales, in A. BONOMI/ Ch. SCHMID (eds), *Successions internationales: Réflexions autour du futur règlement européen et de son impact pour la Suisse*, Gèneve 2010, p. 90.

[35] This was apparent at the conference on the planned regulation held in Prague in 2009, as noted in M. ÁLVAREZ TORNÉ, Jornadas sobre derecho de sucesiones y testamentos en el context europeo (Prague Conference Centre, 20 and 21 April 2009), *Revista Española de Derecho Internacional* 2009, p. 334.

[36] See M. ÁLVAREZ TORNÉ(note 5).

[37] On the questions raised by the functioning of the mechanisms of allocation of jurisdiction based on the choice of the parties in the Regulation, see L. KUNZ, Die neue Europäische Erbrechtsverordnung – ein Überblick (Teil I), *GPR* 2012/4, p. 209 *et seq*.

[38] Read this provision together with Article 15 of the Regulation on the court's verification of its jurisdiction of its own motion. Will an express submission agreement be

then provides in a rather repetitive manner that the courts of the Member State whose law has been chosen by the deceased by virtue of Article 22 will have jurisdiction to decide on the succession if "a court previously seized has declined jurisdiction in the same case pursuant to Article 6" or "the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State."

Article 7(c) also adds that the courts of the Member State whose law has been chosen by the deceased by virtue of Article 22 shall have jurisdiction to deal with the succession if "the parties to the proceedings have expressly accepted the jurisdiction of the court seized." The Community provision does not make clear how this "express" acceptance is to be recorded. In the absence of more specific provisions, this provision seems to refer to a mechanism which adopts elements of express or implied submission in which the parties in some way accept the jurisdiction of the court seized.

It should be noted that the choice of the relevant authority is conceived in the rules of the Regulation in a way that is dependent on the deceased's prior choice of the applicable law, as is emphasised in Recital 27. Perhaps a greater role could have been given to the choice of court by the parties with an interest in the inheritance without linking this question necessarily to the deceased's choice of applicable law. Some support has been given in legal literature to the option of the deceased being able to choose the authority to deal with his succession, particularly if he had made a *professio juris*.[39] However, we consider it positive that there is no provision for a *professio fori* made directly by the deceased.[40] In our opinion, the determination of jurisdiction in succession matters should be in line with the needs of those with an interest in the inheritance, above and beyond the interests of the deceased. On the other hand, we would submit that the regulation provided in this area also raises certain doubts with respect to the determination of the courts having territorial jurisdiction within the Member States.

With respect to the effects of the parties' will on jurisdiction, one should note that Article 8 of the Regulation provides that an authority which has opened succession proceedings of its own motion by virtue of Articles 4 or 10 shall close

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reviewable by the court of its own motion? The authority may be unaware of the existence of a choice-of-court agreement if the parties do not bring it to its attention.

[39] The commentary prepared by a working group of the MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, *RabelsZ* 2010/74) was in favour of the choice of competent authority by the deceased as a complement to the *professio juris*; expressing a similar view see A. BONOMI, Le choix de la loi applicable à la succession dans la proposition de règlement européen, in A. BONOMI/ Ch. SCHMID (note 34), at 49.

[40] In this respect Prof. LAGARDE stated at the conference on "Law of succession and wills in the European context" that the admissibility of a choice of court by the deceased would be difficult to justify, as recorded by M. ÁLVAREZ TORNÉ (note 35), at 334. Also advising against choice of court by the deceased, see C. BALDUS, ¿Hacia un nuevo Derecho sucesorio europeo?, *Anales de la Academia Matritense del Notariado* 2009, p. 431.

the proceedings if the parties have agreed to settle the succession out of court in the Member State whose law was chosen by the deceased under Article 22.

Finally, in this regard, reference should be made to Article 9 of the Regulation which deals with jurisdiction based on appearance and provides in paragraph 1 that

> "[w]here in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to article 7 it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court."

Paragraph 2 of this provision states that if any of the parties to the proceedings, who were not party to the agreement, challenge the jurisdiction of the court chosen, the court shall decline jurisdiction and jurisdiction shall then lie with the courts pursuant to Articles 4 or 10. This is a case of implied submission where, in the absence of any clarification in terms of the Regulation, there could in practice be problems of interpretation as to what is meant by appearance or challenge.

The terms of the Regulation (in particular Article 6) may also be interpreted to mean that the mechanisms allocating jurisdiction based on party autonomy always require one of the links with Community territory referred to in Articles 4 and 10 in order to come into operation; this understanding would appear reasonable in order to avoid allocations of jurisdiction to the court of a State (that of the nationality of the deceased) having only weak links to the case.

It should be noted that the mechanism of implied submission was not expressly mentioned in the Green Book, the 2009 Proposal, the Discussion Paper or the DNOTI report. It is submitted that in any event, the possibility could have been dealt with in clearer terms so as to favour legal certainty.

C. The Possibility of Remission of International Jurisdiction

Article 5 of the 2009 Proposal provided for a means of remission of a case to the courts best placed to deal with it. This mechanism, based on the controversial *forum non conveniens*, has given rise to objections in European legal literature[41] but had been used in other international texts. Article 6(a) of the Regulation provides that where the law chosen by the deceased to govern his succession, in accordance with Article 22, is the law of a Member State, the court which should in principle hear the case by virtue of Articles 4 or 10

> "may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the

[41] Stating for example that, despite the frequent reticence of countries of the civil law tradition to admit the doctrine of *forum non conveniens*, they do accept certain flexibility mechanisms: see H. GAUDEMET-TALLON, Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l'arc-en-ciel), *Recueil des Cours* vol. 312 (2005), p. 361 *et seq.*

> chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets."[42]

This should be seen as an exceptional procedure which can operate both in contentious and in non-contentious cases.

Article 7(a) goes on to provide, without going into further detail, that the courts of the Member State whose law was chosen by the deceased would have jurisdiction as a consequence of the decision of the court previously seized to decline jurisdiction. It may be observed in this regard that, instead of improving, in the final text, the regulation in terms of its conditions and time-limits for suspension of procedures and declining of jurisdiction by competent authorities, the wording of Art. 6(a) only refers to the possibility of the courts seized to decline their jurisdiction if the courts of the Member State of the chosen law are in a better position to rule on the succession. Practical circumstances such as the habitual residence of the parties and the location of the property are to be taken into account. However, the condition and effects of the remission of jurisdiction could have been better defined. The restriction to the Member State of the chosen law and the doubts concerning the determination of territorial competence may also be criticised. It might also have been appropriate to avoid subjecting necessarily this mechanism to the request of the parties.[43]

D. The Nature of Subsidiary Jurisdiction

Various formulae for defining subsidiary or residual jurisdiction were suggested prior to the adoption of the new Regulation. Different opinions were expressed in doctrinal sources.[44] Finally, Article 10(1) of the Regulation was drafted to provide

[42] Legal literature had supported the possibility of including a rule of this type in the Regulation: see, in this regard, M.-C. DE LAMBERTYE-AUTRAND (note 23), at 90 and U. HAAS, Der europäische Justizraum in "Erbsachen", in P. GOTTWALD (ed.), *Perspektiven der justiziellen Zusammenarbeit in Zivilsachen in der Europäischen Union*, Bielefeld 2004, p. 69. See also on the remission of international jurisdiction in the new Regulation, D. LEHMANN, Die EU-Erbrechtsverordnung zur Abwicklung grenzüberschreitender Nachlässe, *Deutsches Steuerrecht* 2012/41, p. 2088.

[43] There was also criticism of the remission of jurisdiction based on the text of the Proposal which, apart from its wording, put its own suitability in doubt as, for example, it would hinder the rapid determination of the competent forum: see R. GEIMER, Die geplante Europäische Erbrechtsverordnung: ein Überblick, in G. REICHELT/ W.H. RECHBERGER (note 23), at 12.

[44] Stressing the Community regulation's objective to provide a "closed system of allocation of jurisdiction" based on the text of the Proposal, see Th. RAUSCHER, Vorschlag vom 14.10.2009 für eine Verordnung des Europäischen Parlaments und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und öffentlichen Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses, KOM(2009) 154, in Th. RAUSCHER (ed.), *Europäisches Zivilprozess – und Kollisionsrecht EuZPR / EuIPR: Kommentar: Brüssel IIa-VO, EG-UntVO, EG-ErbVO-E, HUntStProt 2007*, München 2010, p. 821.

that if the deceased's last habitual residence at the time of his death is not in a Member State, the courts of a Member State in which inheritance property is situated have jurisdiction to rule on the succession as a whole, provided certain requirements are met: the deceased must have been a national of that Member State at the time of death or, failing this, he must have had his permanent residence in that Member State provided that at the moment the matter is submitted to the court, no more than five years have passed from the change of that habitual residence.

Section 2 of Article 10 of the Regulation provides that

> "[w]here no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets."

With respect to the rule contained in Article 10 reference should be made to Recital 30 of the Regulation which stresses the unifying intention behind the inclusion of this rule and avoids recourse to internal law to determine international jurisdiction.

It may be said that this rule, which would cover contentious and non-contentious situations, represents an improvement on the rule included in the 2009 Proposal since it requires a real link between the case in question and Community territory. The inclusion of Article 12 will also contribute to avoiding difficulties arising from the location of property in third states. Due to the lack of a definition of the concept of "assets of the estate", there could be positive conflicts of jurisdiction between the Member States although there is regulation of international *lis pendens.*[45]

E. *Forum necessitatis* in the New Regulation

The Regulation finally provides in Article 11 for jurisdiction based on *forum necessitatis* to avoid situations of lack of effective legal protection. Such a provision was neither included in the 2009 Proposal, nor in the Discussion Paper,[46] but had been called for in legal literature.[47] It seeks to provide an answer to those cases in which the lack of jurisdiction or the inactivity of authorities of a third state cre-

[45] Underlining this aspect and the problems of interpretation of the determination of the notion of assets of the estate, see M. HELLNER (note 16), at 384 and also A. BONOMI (note 9), at 389. See also on article 10 of the Regulation P.W. VOLLMER, Die neue europäische Erbrechtsverordnung – ein Überblick, *ZErb* 2012/9, p. 230.

[46] This possibility, which exists in some domestic legal systems and other international provisions, and which has finally been included, had been proposed for the Regulation on succession in some contributions to the consultation for the Green Book such as those made by the ULRIK HUBER INSTITUUT VOOR INTERNATIONAAL PRIVAATRECHT (UHI) and NOTARIAT I MOSBACH.

[47] Among others, H. GAUDEMET-TALLON, Les règles de compétence dans la proposition de règlement communautaire sur les successions, in G. KHAIRALLAH/ M. REVILLARD, *Perspectives du droit des successions européennes et internationales: Étude de la Proposition de Règlement du 14 octobre 2009*, Paris 2010, p. 133.

ates a negative conflict of jurisdiction,[48] particularly in cases of succession. This may give rise to a shortfall in the effective legal protection of the parties with an interest in the inheritance.[49]

Article 11 provides that in order for it to operate, no court of a Member State must have jurisdiction under the Regulation. Recourse to the forum of necessity must be exceptional if it is impossible or not reasonably possible for a succession case to be dealt with in a third state with which it is closely linked. This will avoid conflicts of jurisdiction, parallel proceedings, and obstacles to the subsequent effectiveness of decisions issued in a Member State.[50] The case must also, as is stressed in Recital 31, bear sufficient relation to the Member State whose courts are seized. From a joint reading of these provisions and from the provisions of the Regulation on jurisdiction as a whole, we can infer that the forum of necessity would also cover cases of non-disputed succession; the text of the provision in other languages shows that this would seem to be the Community legislator's intention.

F. Partial Jurisdiction for Declarations of Acceptance, Waiver or Limitation of Liability

Under Article 13 of the Regulation, courts of the Member State of habitual residence of a person who is entitled to make such declarations according to the law applicable to the succession have additional jurisdiction over aspects of acceptance, waiver and limitation of liability in the context of the succession. This requires the law of the Member State of that court to allow such declarations to be made before a court (within the meaning of the Regulation). This jurisdiction concurs with that of the other courts having jurisdiction in succession matters.

Recitals 32 and 33 provide more detail in this regard. The former clarifies that Article 13 should not preclude such declarations from being made "before other authorities in that Member State which are competent to receive declarations under national law", referring once again to the co-existence of the Regulation's rules on jurisdiction and those of domestic law. Recital 32 also states, seemingly with a view to avoid problems of lack of coordination, that

> "[p]ersons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession."

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[48] See L. CORBION, *Le déni de justice en droit international privé*, Aix-en-Provence 2004, p. 191 *et seq.*

[49] Legal literature had emphasised some time back in general terms that such cases, although infrequent, may occur and that the forum of necessity is a solution focused on preventing unjust results, this being stressed by J.D. GONZÁLEZ CAMPOS, Las relaciones entre forum y ius en el derecho internacional privado. Caracterización y dimensiones del problema, *ADI* 1977-1978, p. 122.

[50] On the importance of this aspect, see M. HELLNER (note 16), at 385.

It is doubtful whether this rule will have any real significance in practice given the characteristics of international successions cases.

G. The Adoption of Provisional and Protective Measures

Article 19 of the Regulation provides that the courts of a Member State may be required to issue the provisional or protective measures contemplated by the law of that State, even in cases where the courts of another Member State have jurisdiction to hear the matter on its merits. It has been remarked that the rule of Article 19 is based on Article 31 of the Brussels I Regulation – this was also the case of Article 13 of Regulation 4/2009 on maintenance – and has not included the details of Article 20 of the Brussels II*bis* Regulation, which would have been desirable given that, as has been emphasised in the legal literature, this is a more complete provision.[51]

H. Treatment of *lis pendens* and Related Actions

Article 17 of the Regulation is clearly inspired by Article 27 of the Brussels I Regulation. Based on an autonomous definition of *lis pendens* and related actions, it offers a response based on the chronological order of seizing courts of different Member States. It would have been appropriate to provide further details such as time-limits or possible exceptions to strict chronology.

It is also possible to infer an extension of the rule of Article 17 to non-contentious situations. Recital 36, which should have been included in the rule itself, clarifies this point in relation to the various possibilities of intervention by non-judicial authorities and situations assimilated to international *lis pendens* which may arise in practice (particularly in the case of amicable out-of-court settlements). However, it is submitted that the expected coordination among such non-contentious proceedings will be difficult to implement in practice as it relies heavily on the actions of the parties having an interest in the succession.

Article 18 of the Regulation contains provisions for international cases, referring to both the definition of such cases and the possibilities of staying proceedings and declining jurisdiction. It might have been useful to consider, with the necessary particulars, situations of *lis pendens* and related actions involving the authorities of third states.

[51] It has been argued that this is a "technically more perfect" rule: see, in this regard, A. FONT SEGURA, Valoración de las respuestas al Libro Verde sobre sucesiones y testamentos relativas a la competencia judicial, in R. VIÑAS/ G. GARRIGA SUAU (eds), *Perspectivas del Derecho sucesorio en Europa: Congreso organizado por la Universitat d'Andorra y el Departamento de Derecho y Economía Internacionales de la Universidad de Barcelona*, Madrid 2009, p. 79.

V. Final Considerations

The Regulation contains uniform rules on jurisdiction applicable in all Member States which are bound by the new instrument.

In this context, it can be inferred from the terms of the Regulation and in particular from Article 15, that if the courts of a Member State, as defined by the Regulation, do not have jurisdiction over a succession matter by virtue of the rules contained in the Community instrument, they must declare, of their own motion and without reference to domestic law, that they have no jurisdiction.[52]

However, the Regulation also adopts an autonomous concept of the questionable term "courts" to which international jurisdiction will be allocated to deal with successions in accordance with the terms of the instrument. This constitutes a first limitation on a possible total unification of international jurisdiction at the European level; in fact, the possible allocation of jurisdiction to non-judicial authorities and legal professionals, such as notaries, on grounds of domestic rules, which is allowed by the Regulation, may give rise to inconsistent results.

It should also be noted in this context that Article 75 of the Regulation, referring to relations with existing international conventions, while replacing conventions entered into exclusively by two or more Member States, also provides that the Regulation shall not affect the application of international conventions on succession to which one or more Member States are party at the time of the adoption of the European instrument.

Although the adoption of common rules of jurisdiction may be laudable, the final text presents various difficulties: it creates confusion on a number of points and gives rise to interpretation problems; and it has missed the opportunity to include certain improvements on previous proposals. The inclusion of criteria based on a defendant's domicile could also have been considered.

Before the new Regulation is applied in practice, all specialised forums of debate should be opened up in order to prepare for the application of the new rules. However, a number of questions will only be resolved by the interpretations given in due course by the Court of Justice of the European Union.

[52] See, on this point, S.M. Weber, *Das internationale Zivilprozessrecht erbrechtlicher Streitigkeiten*, München 2012, p. 111 *et seq*.

NATIONAL REPORTS

THE LIMITATION AND SCOPE OF THE ISRAELI COURT'S INTERNATIONAL JURISDICTION IN SUCCESSION MATTERS

Adi CHEN*

I. Introduction

This article examines the scope and limits of international jurisdiction in the Israeli courts with respect to the inheritance of foreign property belonging to individuals who were not Israeli residents at the time of their death. This study shows that under the existent law, international jurisdiction of the courts seems to extend to

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the entire estate of the foreign resident, even if only an insignificant part of the decedent's assets were situated in Israel. However, in practice, Israeli courts have limited their international jurisdiction in certain instances while relying upon additional general principles, independent and outside the realm of succession doctrines.

The international jurisdiction of the Israeli courts appears to be established in the very clear language of Article 136 of the Succession Law 1965 (hereinafter the "Succession Law" or the "Law"). Courts acquire international jurisdiction in matters of succession under one of two options: (i) the decedent was a *resident* of Israel at the time of his death; or (ii) the decedent *left property in Israel*. Neither courts nor scholars have questioned the Israeli courts' broad international jurisdiction in the former scenario. Accordingly, the scope of that jurisdiction extends worldwide to all of the assets of the decedent.

Article 136 of the Law uses identical language with respect to the second scenario, which applies when a non-resident decedent left property in Israel. The two scenarios set forth in Article 136 *prima facie* appear to be identical, extremely clear and easily understood. But the interpretation and application of the second one raises concerns; and it is questionable whether its technical implementation brings about reasonable results that reflect an appropriate legal purpose.

The Supreme Court of Israel has not yet had the opportunity to specifically rule on whether the international jurisdiction of the Israeli courts extends to property situated outside of Israel when the only jurisdictional nexus is that the decedent left some property in Israel. The existing Supreme Court decisions seem to support the view that the second scenario of Article 136 should be interpreted literally, in accordance with its plain meaning that grants international jurisdiction under such circumstances. However, the Supreme Court's statements on this point were all *obiter dicta* in relation to cases that addressed the first scenario (*i.e.* when the decedent was an Israeli resident at the time of his death). Therefore, such statements do not constitute binding precedent.

This issue has not yet been finally determined, and its legal status remains uncertain. In an appeal of a Family Court decision in the matter of *The Estate of A.Z.Tz.*,[1] the District Court of Tel-Aviv recently determined the existence of the second scenario and exercised international jurisdiction under the literal and plain meaning of Article 136 of the Law. In the majority opinion, given by Judges VARDI and LEVHAR-SHARON, with Judge SHNELLER dissenting, the second scenario of Article 136 grants the Israeli courts the necessary international jurisdiction to rule on the succession of any decedent who left assets in Israel.[2]

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[1] EF (T.A.) 109310/06 *Estate of A.Z.Tz. v. R.Tz*, available at <www.nevo.co.il> [hereinafter: *A.Z.Tz.*]. In that case, the decedent died in Ecuador, where he had lived for many years with his wife and two of his children. The decedent left extensive property in Ecuador, Israel and multiple other countries. The daughter of the decedent, an Israeli resident, applied for a succession order in Israel. The court dismissed the claim of the widow and the two sons who argued that the court was not competent to hear the claim by reason of Article 136 of the Israeli Succession Law, and that Israel was not the appropriate forum for the hearing.

[2] (T.A.) 1069/08 *The Estate of A.Z.Tz. v. R.Tz*, available at <www.nevo.co.il>. Under Israeli law, the jurisprudence of the District Court is binding upon the lower courts.

In the aforementioned decisions, both the Family Court and the District Court adopted a three-pronged approach to the determination of international jurisdiction: in the *first stage*, the court must address the normative question of whether its jurisdiction extends to property situated outside of Israel, or whether it is limited only to that part of the estate that is located within Israel. If the court rules in favour of international jurisdiction, it will proceed to the *second stage* in which it must consider whether it would be appropriate and proper to exercise that jurisdiction in accordance with doctrine and principles external to succession law, such as the doctrine of *forum non conveniens* and the principle of *comity*. In the *third stage*, after finding that the Israeli court is, indeed, the appropriate forum, the court must address whether the legal proceedings or remedies sought justify exercising international jurisdiction.

This article examines the determination of international jurisdiction, reviews the recent decisions of the Israeli District Court, and presents relevant conclusions and recommendations.

II. International Jurisdiction of the Israeli Courts in Matters of Succession – A Legal Analysis

The international jurisdiction of the Israeli courts in matters of succession is regulated by Chapter Seven of the Succession Law. Article 136 of the Law, entitled "Private International Law", states:

> "[t]he court in Israel has jurisdiction over matters of succession of every person whose residence, on the day of his death, was in Israel or who left property in Israel."

Article 136 clearly authorises the Israeli court to rule on matters of succession in regard to any person in either situation.

The *first situation*: at the time of death, the decedent was a resident of Israel. The expression "residence", as defined in Article 135 of the Succession Law, refers to the centre of an individual's life activities. The court has international jurisdiction under this alternative even if the decedent did not leave any property in Israel. The *second situation*: the decedent left property in Israel. The Law is silent with regard to the *scope or nature of the property*. The provision does not restrict the application of international jurisdiction to cases where the property concerned is minimal, and does not require any substantial link between the decedent and the State of Israel (*e.g.*, it would appear to apply even if the decedent merely left some clothing or a few dollars in a bank account in Israel).[3]

[3] The scope of international jurisdiction is derived from the word "estate" which appears in the law without any qualifications. See A.H. SHAKI, The Rules of Private International Law in the Succession Law, 5725-1965, *Tel-Aviv Law Review* 3 (1972) 51, at 59-60; M. SHAVA, The Relationship between International Jurisdiction and Local Jurisdiction in Succession Law, 5725-1965, *HaPraklit* 31 (1977) 226, note 3.

According to the Israeli rules of legal interpretation, the first stage is to read the provision according to its current language.[4] Indeed, one cannot attribute a meaning to the law that is inconsistent with its language. The identical language in the two alternatives of Article 136 of the Law shows that the intention of the legislator is to grant to the Israeli court, broad, general international jurisdiction over the decedent's *entire estate*. That jurisdiction is based on the fact that at the time of death, the decedent was either a resident of Israel, or some part of his property was situated in Israel. Thus, the legislator preferred the approach developed under Roman Law, based on the principle of Unitary Succession, as opposed to the Scission System, customary in England and the United States. Under the model of Unitary Succession, jurisdiction based on the place of residence is general and extends universally to all of the decedent's property. Jurisdiction conferred upon the court by virtue of the location of any portion of the decedent's estate is founded upon the same principle.[5]

III. International Jurisdiction as Reflected in the Supreme Court Decisions

According to the existing decisions of the Supreme Court, courts are competent to rule on matters of succession on the basis of either of the two alternatives mentioned in Article 136 of the Law, even when a non-resident decedent died abroad but left property in Israel, and even in the absence of any certainty that the resultant succession order would be enforceable and effective outside of Israel.

Accordingly, the lower courts followed that approach. Nevertheless, as this article demonstrates, when justification is not found for acquiring international jurisdiction, the lower courts exercise judicial discretion and under certain circumstances, choose either to decline jurisdiction or to limit its application to such property that is located in Israel. Using their inherent judicial discretion, they base their decisions on general doctrine external to succession law.

The scope of Article 136 of the Succession Law was first determined by the Supreme Court, sitting as the High Court of Justice, in the matter of *Hanzalis v. The Court of the Greek Orthodox Patriarchate*.[6] The Court ruled that a court in Israel was competent to issue a probate order with regard to a will that included property located in Jericho.[7] Although the *Hanzalis* decision related directly to the

[4] LCA 3899/04 *State of Israel v. Even Zohar*, available at <www.nevo.co.il>; A. BARAK, *Legislative Interpretation*, 1993.

[5] S. SHILO, *Interpretation of the Succession Law*, vol. 2, 1992, p. 119-124; A.H. SHAKI (note 3), at 63, 68.

[6] HCJ 171/68 *Hanazalis v. Court of the Greek Orthodox Patriarchate et al.*, 23 (1) P.D. 260 [hereinafter: *Hanzalis*).

[7] The *Hanazalis* case (note 6) involved the estate of a resident of East Jerusalem who, following the Six Day War, became subject to Israeli Law under the Law and Administration Ordinance (Amendment No.11) 1967 and the order issued thereunder. East

question of international jurisdiction from the perspective of residence, the implication of the ruling was that an Israeli court has international jurisdiction to determine matters regarding the entire estate, even when the decedent left only a portion of his property in Israel.[8] The Supreme Court later confirmed the *Hanzalis* ruling in Civil Appeal, *Kahana v. Kahana*.[9]

Therefore, under the first alternative of Article 136 of the Law, when the decedent was a resident of Israel at the time of his death, the case law is consistent as to the scope of the court's international jurisdiction. This broad, general jurisdiction extends to *all* of the estate both within and outside of Israel. However, differences of opinion and doubts have arisen regarding international jurisdiction in matters of succession under the second alternative in which the decedent was a foreign resident who left property in Israel. As noted above, the District Court recently ruled that Israeli courts are competent to rule on the estate of a non-resident decedent if he left property in Israel.

In order to clarify the considerations and the rationale for the District Court's ruling, and before addressing it in greater detail, this article first outlines the opposing scholarly opinions on international jurisdiction, as well as the response of the courts to these opinions.

IV. The Scope and Content of International Jurisdiction – The Different Scholarly Approaches

A. The Limitations and Scope of International Jurisdiction

Two different approaches have been discussed by scholars regarding the limits and scope of international jurisdiction of Israeli courts under the second alternative set forth in Article 136 of the Law. Some scholars suggest that international jurisdiction of the courts is broad and applicable to all property, including that which is located outside of Israel. Their conclusions are based on the clear, detailed language of Article 136 of the Law, as well as upon the principle of Unitary Succession.[10]

Jerusalem was thereby included in the territory subject to the law, jurisdiction and administration of the State of Israel.

[8] *Ibid*, at 272. Judge LEVI stressed the language of Article 136, which in his opinion does not limit the jurisdiction of the Israeli court only to the distribution of that part of the estate located in Israel, but actually broadens it to cover the entire estate, including immovable property that the decedent left outside Israel.

[9] C.A. 598/85 *Kahana v. Kahana* 44 (3) P.D. 473 [hereinafter: *Kahana*]. In that case, the appeal focused on the court's international jurisdiction to issue a probate order with respect to a will regarding property located outside of Israel and the law applicable to those assets. The Supreme Court ruled that under Article 136 of the Succession Law, the Israeli court had jurisdiction over the assets of the decedent that were located in France.

[10] See A.H. SHAKI (note 3), at 226; M. SHAVA (note 3).

Other scholars agree that their colleagues are correct in their understanding of the explicit language of the Law and its literal, technical interpretation. But in their opinion, despite the express language, the second alternative in Article 136 is more reasonably construed as restricting international jurisdiction to only that part of the estate located within Israel. These scholars recommend construing international jurisdiction in a manner consistent with its desirable consequences, thus attempting to interpret the Law in accordance with its appropriate practical objectives. In their view, it is not reasonable for an Israeli court to acquire jurisdiction over the estate of a tourist that may be worth millions simply because the tourist died in Israel, leaving behind only the clothes that he wore. The fact that the decedent left an insignificant part of his property in Israel is not itself a sufficient basis for an Israeli court's assertion of jurisdiction over the entire estate. These scholars also argue that according to many legal systems, even if the Israeli court were to exercise such jurisdiction and issue an inheritance decree regarding property outside of Israel, the ruling would neither be recognised nor enforceable abroad. Therefore, they recommend the exercise of judicial discretion regarding the reasonable interpretation of Article 136 so that the Israeli court could either (i) decline jurisdiction on the basis of the *forum non conveniens* doctrine; or (ii) restrict its international jurisdiction only to property located within Israel, as is the customary practice among a number of judges.[11]

Thus, despite their differences of opinion, the scholars agree that according to the language of the Law, the Israeli court is granted international jurisdiction when the decedent only left property in Israel, even in the absence of any other nexus to the State of Israel. Nevertheless, some have suggested that under certain circumstances, it would be appropriate to exercise judicial discretion to decline or to limit that jurisdiction.

B. The Content of International Jurisdiction

An additional difference of opinion among scholars concerns the interpretation of the words "over matters of succession of every person" which appear in Article 136. Did the legislator intend to grant international jurisdiction only over matters that appear in the Succession Law, or also with respect to other matters of succession, that are not mentioned in the Succession Law? In response to this question, the following two approaches have been suggested.

The first approach is a *narrow* one, stating that since there is no definition of "succession" in Chapter Seven of the Succession Law, which deals with private international law, one must look to Article 141 of the same Chapter that provides definitions of terms. Article 141 establishes that, with respect to the determination of jurisdiction and choice of law, each term will have the meaning it is given under Israeli Law. The term "succession" is defined in Article 1 of the Succession Law, which states that "when a person dies, his estate passes to his heirs." The term "heirs" is defined in Article 2 and includes heirs under law as well as heirs under a will. The term "estate" means all the property of the decedent, except for that

[11] S. SHILO (note 5), at 117-121.

which is specifically excluded from the estate, for example under Article 147 with respect to an insurance policy or a superannuation fund.[12]

The second approach *broadens* jurisdiction such that everything comprised by the Succession Law belongs, to some extent, to the estate of a person, except for those items specifically excluded by the Law itself, as mentioned above. This approach is based both on the substantive content of the Succession Law and on the desire of the legislator to encourage the use of the rules of private international law that were especially formulated in the Succession Law. Accordingly, international jurisdiction should be broadened to include matters that can be construed as pertaining to succession, even if they do not appear in the Succession Law. Therefore, under this approach, matters of succession also include the responsibility of the heirs for the debts of the estate, as well as the extent of the estate or the status of property and rights in the estate that are not referred to in the Succession Law.[13]

V. Judicial Discretion and Custom Reflected in Court Rulings

Following the *Hanzalis* and *Kahana* decisions, recent court decisions have not clearly determined the questions surrounding international jurisdiction. There are two main reasons for this lack of clarity. First, there are few recent judgments specifically dealing with the issue of the international jurisdiction of Israeli courts under the second alternative of Article 136 of the Law, and even those cases do not directly address the subject. Second, the Israeli courts did not examine the scholarly opinions that suggest a need to distinguish the scope of international jurisdiction under each of those two alternatives of Article 136 of the Law, despite the express language of the statute and the Israeli Supreme Court rulings in the *Hanzalis* and *Kahana* judgments.[14]

Due to this uncertainty regarding the proper interpretation of the second alternative of Article 136, the Family Courts have developed a practice of limiting inheritance orders and probate decrees with respect to non-resident decedents only to "*the property located in Israel*". It must be emphasised that this practice does

[12] According to Article 147 of the Succession Law, amounts payable upon the death of the decedent under an insurance contract or by a pension fund or superannuation fund are not included in the estate. However, only with respect to insurance payments, an individual may notify the insurance entity that those amounts are to be included in the estate or he may bequeath them in a will and advise the insurer thereof. A.H. SHAKI (note 3), at 123; S.H. SHOCAT/ M. GOLDBERG/ Y. FLOMIN, *Laws of Succession and Estate* 2005, p. 31-32.

[13] S. SHILO (note 5), at 123.

[14] See *e.g.* BR (T.A.) 1630/02 *Rogozin Industries Ltd, in liquidation v. Estate of the Late Harel Ezra*, concerning the bankruptcy of the decedent, a U.S. resident. The court incidentally discussed international jurisdiction in accordance with the second alternative. See also C.A. 2846/03 *Alderman v. Ehrlich* 59 (3) P.D. 529 – regarding whether or not a monetary claim filed by the estate executor, who was a U.S. resident, should be classified as a matter of succession.

not reflect any binding precedent, but is entirely based on the consent of the parties in the absence of any legal or factual disagreement. It is based upon the exercise of judicial discretion under the particular circumstances of each case, while taking into account the considerations of efficiency and the more appropriate forum.[15]

Undoubtedly, this judicial practice is a clear indication that despite their formal international jurisdiction, the Israeli courts have used their inherent power to exercise discretion in determining whether, under what circumstances, and to what extent to apply their international jurisdiction.

A. The Doctrine of *forum non conveniens* and the Principle of Comity as Factors for Limiting International Jurisdiction

Among the fundamental considerations that the Israeli courts have adopted in declining or restricting international jurisdiction in matters of succession – aside from the factors specifically rejected in the Succession Law – are the doctrine of *forum non conveniens* and the principle of comity.[16] These are general considerations, not specific to succession matters. In issues of succession, judicial discretion is used sparingly, according to the particular circumstances of each case, and only under conditions that justify declining or restricting international jurisdiction. Otherwise, the provisions of the Law in Article 136 become useless, superfluous and insignificant.

The doctrine of *forum non conveniens* allows the court to decline international jurisdiction. In light of the special circumstances of the particular matter before the court, it examines whether or not it is indeed appropriate to exercise its legal jurisdiction.

In Israel, the doctrine of the appropriate forum was based on the British and American legal systems. Although this doctrine is expressed differently in each of those systems, the principles are identical. Both systems examine, first and foremost, whether another forum clearly has the most substantial connection to the matter. These systems take into account both private and public considerations in relying upon the doctrine. Each of these systems grants an advantage to the claimant by requiring only that the claimant demonstrate a need to continue litigating before the chosen forum if the respondent has shown that there is a more appropriate forum. On the other hand, a respondent denying the authority of the local court bears the burden of proving that the local forum is a *forum non conveniens*.[17] Proving that the balance of interests favours a foreign forum is no easy task, as it

[15] J. ZILBERG, Confirmation of Probate Will Order – Form and Content, *HaPraklit* 46 (2002) 192, 216. In any event, the probate orders are only given after a preliminary, technical examination of the documents required under the relevant law and regulations, including an expert legal opinion on the law of the testator's last place of residence, as required by the laws relating to choice of law in Israel.

[16] *A.Z.Tz* case (note 1), at 21.

[17] LCA 4716/93 *Arabic Company for Insurance Nablus v. Abd Zarikat*, 48 (3) P.D. 265, 269.

requires that the respondent show an unquestionable preference for the foreign venue.[18]

The decisive test used in Israeli rulings is whether the local forum is indeed the "appropriate forum", or whether a more appropriate foreign forum exists. The courts examine all of the circumstances, including whether there is a real, significant and substantial tie to the particular case before the court. The considerations related to ruling on the *forum non conveniens* doctrine are divided into two categories: personal considerations and public considerations.[19]

Among the personal considerations are those connected to the parties, including all of the factors that point to the appropriateness of litigating the claim in an Israeli court rather than in a foreign venue, such as: the place of residence of the litigants, the centre of their life activities, whether there is a practical possibility of bringing the claim before a foreign forum, and whether the foreign forum will have jurisdiction over both the claimant and respondent.

The courts also consider whether the remedy that the claimant can obtain will be substantially similar to the remedy in the foreign forum, and whether it will grant substantial justice, or perhaps bring about an extremely unreasonable result. A difference only in the amount of compensation that may be awarded, or in the type of remedy that the foreign court would grant does not justify transferring a claim to a foreign venue, as long as substantial justice will be granted to the parties.

In addition, the place of residence of the witnesses, the possibility of requiring witnesses to testify abroad and the costs involved in doing so, the possibility of visiting the scene of the incident, and the possibility of recognition and/or enforcement of the judgment also constitute relevant factors besides the personal considerations.

However, today's perception of the modern world as a large global village, together with advances in transportation and communication, have allowed for the introduction of testimony from witnesses abroad without requiring them to come to Israel. These factors significantly decrease the inconvenience of litigating abroad, such that the Israeli courts today tend to narrow the scope of situations in which the court will accept the argument of *forum non conveniens*, or a claim that a foreign venue is more appropriate. Today, the court no longer gives those arguments the same weight that it did in the past.[20]

In contrast to personal considerations, public considerations are concerned with the court itself, its caseload and the public expense. Public considerations include: the reasonable expectations of the parties regarding the appropriate forum for litigation, the regulatory interests of the local forum and the foreign forum to

[18] C.A. 2705/91 *Abu Jahla v. Electricity Co.*, 48(1) P.D. 554 [hereinafter: *Abu Jahla*].

[19] C.A. 300/84 *Abu Attiya v. Arbatisi*, 39 (1) P.D. 365, 385 [hereinafter: *Abu Attiya*].

[20] LCA 2737/08 *Arbel v. TUI AG* (29/1/2009, available at <www.nevo.co.il>); LCA 2903/96 *Massika v. Dollans*, 52(1) P.D. 817, 821; LCA 2705/97 *Hagebes A. Sinai (1989) Ltd v. The Lockformer*, 52(1) P.D. 109, 114. For an opposing view regarding a reduction in the weight presently given to considerations of "Inconvenient Forum", see M. KARYANNY, *The Influence of the Choice of Law Process on International Jurisdiction*, 2002, p. 99-101.

rule on the conflict, and the desire to provide a service to a local litigant who initiated the proceeding. To that end, the court must consider, *inter alia*, the problematic nature of centralising claims in overburdened courts, as well as the benefit of resolving local conflicts in their natural environments and the desire that claims be decided by a forum familiar with the applicable law.

When focusing on justice, public considerations are intended, in theory, to take precedence over private considerations. Nevertheless, in Israeli court decisions, public considerations have remained factors requiring further discussion.[21] However, in one judgment, the Supreme Court noted that it is desirable to give weight to such considerations, and to take them into account when all other factors are balanced. In other words, "[w]hy should the Israeli legal system and society bear the burden of claims and litigation that are unrelated to them?"[22]

Therefore, the Court has ruled that in examining international jurisdiction, consideration must be given to those factors relevant to matters of succession, and determine their appropriate weight. However, the Succession Law itself reflects considerations that the legislator specifically rejected, and which, therefore, cannot be taken into account. One example is the consideration of *effectiveness*. The effectiveness of orders is measured in terms of the practical possibility of executing them. The effectiveness test thus provides an important criterion for achieving the legislative purpose regarding the extra-territorial scope of the law. Inheritance orders and probate decrees are declaratory in nature, defining a legal status with respect to rights that arise following the death of an individual. They are directed towards the entire world until they are either amended or cancelled.[23] Therefore, these orders are orders *in rem* or *quasi in rem* that do not impose a personal obligation to take or to refrain from taking an action.[24] Accordingly, the principle of effectiveness is not well suited to the rules of international law, when considering inheritance orders and probate decrees.

It is important to emphasise that the Succession Law includes a specific provision regarding the extra-territorial application of the local law. Thus, it explicitly precludes the principle of effectiveness. Therefore, the question of effectiveness and the possibility of executing court orders cannot be raised before a court deciding upon a matter of succession, and the legislative intent must be respected.

Moreover, the Law establishes a specific, clear mechanism to ensure the broadening of international jurisdiction. It is reflected in the rules of choice of law determining the application of the law of the residence of the decedent at the time of his death.

[21] See *Abu Attiya* case (note 19).

[22] See *Abu Jahla* case (note 18), at 269 – 279 (para. 28, per President SHAMGAR).

[23] Article 1 and Article 66 (a) of the Succession Law.

[24] Per Deputy President Judge SHENHAV in *A.Z.Tz* case, *supra* (note 1), at paras 42-43.

Article 137 of the Succession Law states that:

> "[t]he law of the residence of the decedent, at the time of his death, shall be applied to the succession except for the provisions of Articles 138 – 140."[25]

According to Article 138 of the Law

> "[p]roperty passes in inheritance only according to the law of the place in which it is located, and the same law will apply to its inheritance."

Therefore, as a rule, one law will apply to succession, both with respect to immovable and movable property. The applicable law is the law of the place of residence, except that with respect to specific property meeting the criteria set forth in Article 138, the *lex situs* shall be applied.[26]

The question of the inter-relationship between Articles 137 and 138 of the Succession Law and the scope of Article 138 of the Law is discussed in the *Kahana* case referred to above.[27] The Supreme Court determined that Article 137 of the Succession Law expresses the fundamental rule in choice of law in matters of succession. Israeli law generally applies the law of the place of residence. Article 138, which directs the court to the law of the place in which the property is located (the *lex situs*), is an exception to this principle. Thus, Article 138 of the Law shall be applied only when the law of the place in which the property is located specifically prohibits the application of another law by determining that property will pass in inheritance only according to its own laws. Only under those circumstances will the foreign law apply to the succession.[28]

In other words, Article 136 of the Succession Law broadens the international jurisdiction of the court in Israel in matters of succession. That international jurisdiction is not limited to the portion of the estate that is located in Israel, but *extends to the entire estate, including real property located outside of Israel.* Article 136 does not restrict international jurisdiction in any way (for example, based on the possibility of recognition abroad or the amount of property involved). Therefore, the courts in Israel are competent to issue a probate order even if it will not be executable in a foreign court.[29] In this way, when an Israeli court applies its international jurisdiction, there is no guarantee that its inheritance order or probate decree will be recognised and executable outside of Israel since enforcement depends on the laws of each state in which the property is located. It is possible

[25] The reference to the law of the place of residence of the decedent at the time of his death as foreign law is actually a reference to the internal law of the resident state, and there is no need to rely on any external law (Article 142 of the Law, opening phrase).

[26] Article 144 of the Succession Law deals with the right of the State of Israel as an heir and is only relevant when another state claims succession rights in an asset located in Israel. See EF (T.A.) 1773/87 *Skarzinki Estate*, P.M 5749 (2) 20.

[27] See *supra* in the matter of *Kahana* (note 9).

[28] *Ibid*, decision of Judge Levi, at 482.

[29] *Hanzalis*, *supra* (note 6), at 272 (comments of Judge HALEVI; see p. 279, comments of Judge VITKON).

that a foreign court may consider an Israeli court's ruling, but it is clear that from the perspective of the foreign court, the Israeli ruling is a "foreign decree" requiring certification and recognition according to the customary law of each state. Whether a foreign state will recognise an inheritance order or a probate decree with respect to property located in its territory is another question, which is determined by the private international law of each state, according to its own rules of recognition of foreign decrees. It seems that in this way the principle of respect for the foreign country's jurisdiction is also preserved.[30]

B. Additional Considerations for Limiting International Jurisdiction

Alongside the considerations related to the doctrine of *forum non conveniens*, which are concerned with ensuring that the majority of connecting factors evidence a true, meaningful, and significant connection to a given forum, there are additional special conditions for implementing international jurisdiction under the second alternative of Article 136 of the Succession Law. In exercising its discretion regarding the scope of international jurisdiction, the court must consider other factors. For instance, the court needs to consider the extent of the estate, as well as the amount and the kinds of property located in Israel. If the property is insignificant, then there is no meaningful and substantial connection to Israel. Furthermore, the public interest in encouraging foreign investments must take into consideration the possible consequence of granting, to the Israeli courts international jurisdiction over the succession of foreign investors. A good example of additional considerations is described in the Family Court ruling**,** noted above, the *A.Z.Tz.* case, later confirmed by the District Court. In that case, the court decided that its international jurisdiction authorises it to rule on a case regarding a succession under Article 136 of the Succession Law, even though the decedent had not been a resident of Israel, and had had many businesses, including "functioning" businesses in various countries throughout the world. Despite its ruling regarding international jurisdiction, the court refused to appoint a *temporary estate administrator* in Israel for managing the decedent's estate located outside of Israel. Although the court questioned whether the procedures for estate administration are included in its international jurisdiction under Article 136,[31] it also ruled that even assuming the existence of international jurisdiction, it would be impractical and therefore difficult to administer an entire estate from one central location when the estate is spread out in multiple countries. In addition, estate management by an administrator appointed in Israel might not be effective and might even be detrimental to the estate, particularly when each state implements its own laws regarding property, corporate law, banking law, and more. The appointment of a temporary estate administrator involves immediate, urgent action in managing the estate, including *ad hoc* instructions. When an estate administrator is authorised to manage property outside of Israel, it is difficult to enforce and supervise his activity (for example, by imposing a sanction of contempt of court in the event of a violation.)

[30] HC J 970/93 *Attorney General v. Iris Agam*, 49(1) P.D. 561 [hereinafter: *Agam*].

[31] See above section IV.A. regarding the dispute between scholars on this point.

The court based its ruling, *inter alia*, on the general approach of the Succession Law, under which estate administration may be divided among a number of states.[32] The court also relied on the fact that the estate administrator holds a managerial position and functions as the long arm of the Israeli court. Therefore, the management of the estate outside of Israel by an Israeli estate administrator could be detrimental to the principle of respect for the foreign country's jurisdiction. The court added that for the purpose of implementing its authority, the estate administrator would need to complete the process of recognition and enforcement of foreign decrees in the foreign venue. This procedure is complicated and thereby reinforces the conclusion that the appointment of an estate administrator in Israel, especially a temporary appointment, is not efficient. Moreover, since the estate administrator serves as an appointee of the Israeli court, he will be subject to double supervision: both by the court in Israel and by the Israeli Guardian General, for supervision with respect to the property of the estate located outside of Israel.

To summarise the recent majority position of the District Court: when the court implements its international jurisdiction in matters of successions under Article 136 of the Succession Law, it must take into account all of the guiding factors of the doctrine of *forum non conveniens* (except for considerations of effectiveness of the ruling), as well as personal and public considerations arising from international jurisdiction under the second alternative in Article 136 of the Law. These considerations, and others, excluding the consideration of effectiveness, need to be examined together in determining an appropriate balance among them in each particular case.

In contrast, the minority position of Judge SHNELLER in the *A.Z.Tz.* District Court appeal, offers a different approach to limitation of international jurisdiction. Judge SHNELLER wrote that the conclusion is not unequivocal, and that the international jurisdiction of the court in Israel cannot extend to property located outside of Israel when the decedent had not been a resident of Israel despite the identical language of the two alternatives in Article 136 of the Law. Although the language of the Law does not differentiate between them, the rationale behind the two alternatives in Article 136 of the Law is not the same. Therefore, a purpose-oriented approach needs to be adopted, under which literal interpretation alone is not sufficient. Judge SHNELLER commented further that the literal interpretation accepted in the rulings of the Supreme Court was stated as *obiter dicta*, and thus does not constitute binding precedent. In his opinion, the connection to property in the second alternative should not be broadened so as to be transformed into a sort of personal connection that will apply to the entire international estate of the decedent. Instead, the second alternative in Article 136 of the Law is intended to provide a solution for the fate of that portion of the estate located within Israel, and therefore should only apply when there is an *in rem* connection between the decedent and the State of Israel. Accordingly, the jurisdiction of the Israeli court was intended to be limited only to those possessions that the decedent left in Israel. Certainly, the Israeli court would not have international jurisdiction in the absence

[32] In contrast, the management of an estate located in its entirety in Israel cannot be split up into a number of estates and an estate manager cannot be appointed for part of the estate. See LCA 206/70 *Yeshivat Porat v. Homi*, 25(1) P.D. 57; T.A. 1030/01 *Meir Aharon Akerman v. Bank Hapoalim* (not published).

of the property that the decedent left in Israel.[33] In any event, leaving insignificant property in Israel, from among all of the property of an estate, does not, in his opinion, justify extending international jurisdiction to all of the estate. Thus, under this approach, the discussion of the *forum non conveniens*, which according to the majority opinion is supposed to provide a solution for extreme cases, becomes superfluous once the international jurisdiction of the Israeli court is denied.[34]

Judge SHNELLER's conclusion was that the appeal should be denied, and that the matter be left to the more appropriate forum, in that instance Ecuador, with respect both to the inheritance order and to other questions related to the estate.

Despite the fact that the judgment was given as a majority opinion, the lack of certainty and the doubts that arise from international jurisdiction under the Law have yet to be resolved. Close reading of the judgment shows that Judge LEVHAR-SHARON, who joined the opinion of Judge VARDI, also saw fit to question whether the literal interpretation of the Law achieves its intended purpose, when the decedent left only an insignificant amount of property in Israel.

VI. Discussion and Recommendations

With regard to the limitation and scope of the Israeli court's international jurisdiction, this article suggests that the preferred position is that of the second scholarly approach[35] and the minority opinion in the District Court *A.Z.Tz.* appeal.[36] There must be substantial factors connecting the decedent to the State of Israel in order to exercise international jurisdiction over his entire estate. It is argued that in the absence of other connecting factors, merely leaving an insignificant part of the estate in Israel does not justify international jurisdiction over the entire estate of a non-resident decedent. Such jurisdiction would appear arbitrary and would lack sufficient grounds. Therefore, the doctrine of *forum non conveniens* might correctly be applied to this alternative.[37]

As discussed above, the Family Courts have also chosen to restrict their broad international jurisdiction when it is based solely on the fact that a foreign resident left property in Israel. Accordingly, they have developed a practice of limiting their jurisdiction in such cases only to the property located in Israel. This customary practice reflects economic efficiency. Inheritance orders can be carried out immediately, without need for the heirs to request that a foreign court recognise

[33] International jurisdiction is acquired in one of two ways: through legal service or under Regulation 500 of the Civil Procedure Regulations, 1984.

[34] Paras 3-4 of the decision of Judge SHNELLER (note 2), and references therein.

[35] See above, section IV.A.

[36] *Supra* (note 2), See text at (notes 33-34).

[37] For criticism on the implementation of the doctrine of the inappropriate forum by the courts in Israel, see: I. CANOR, Judicial Jurisdiction and Forum Non Conveniens – A New Perspective, *Alei Mishpat* 9 (2001) 209; I. BAUM, Vacationing in Turkey, Suing in Israel: Public Factors in the Forum Non Conveniens Doctrine, *Mishpatim* 42 (2012) 309.

an Israeli decree. Nevertheless, this article argues that this practice does not completely resolve all of the relevant concerns.

When an Israeli court exercises international jurisdiction under Article 136 of the Succession Law, the Israeli decree must be determined in accordance with the law of the decedent's place of residence. Thus, the decree should be identical to one that would have been issued in the decedent's last place of residence.[38] However, such an approach would not ensure that the foreign law would *always* be applied in Israel as it would have been applied by the foreign court, since Article 142 of the Israeli Succession Law, adopts the *single renvoi theory*, stating that:

> "[n]otwithstanding anything in this Law, where the law of a particular state applies and such law refers to some other law, such reference shall be disregarded and the domestic law of that state shall apply; provided that if the law of that state refers to Israel law, the reference shall be made and domestic Israeli law shall apply."

The *renvoi* referred to in this section is obviously *limited*, given that the court is only required to resort to the *internal* domestic law of the foreign jurisdiction or to Israeli law if said domestic law specifically directs the court to do so.[39] Nevertheless, when the foreign law is found to be contrary to Israeli public policy, the Israeli court will not apply it.[40]

Moreover, this article suggests that difficulties exist and unlimited doubts may arise as to the recognition of probate orders issued in Israel. In the leading Israeli Supreme Court decision, the *Agam* case[41], the rules for recognition of foreign judgments in matters of personal status, under the Foreign Judgments Enforcement Law, 1958 were discussed in the context of a foreign probate order. A recent article criticising the court's analysis and conclusions in the *Agam* case also reviewed these rules in detail.[42]

According to the *Agam* case, the Foreign Judgments Enforcement Law determines the entire process for direct recognition of foreign probate orders in Israel. Section 11 of the Foreign Judgments Enforcement Law, 1958, is the only provision of the Israeli Foreign Judgments Enforcement Law that touches upon the *recognition* of foreign judgments, such as those regarding personal status, a category that includes foreign probate orders.

Section 11 establishes two paths for recognition. The first, the direct path, is set out in Section 11(a) and allows for direct recognition by means of a special proceeding specifically designed for that purpose. The second, the indirect path, is

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[38] See *supra* (note 25) and text there.

[39] M. SHAVA, *Personal Law in Israel*, 2001, p. 100, para. 132 and references there; M. SHAVA, Choice of Law and the Doctrine of *RENVOI* in Israel Law – A Comparative Commentary, in *Selected Topics in Family and Private International Law*, 2000, p. 13-30.

[40] Article 143 of The Succession Law; CA 376/68 *Mahlav v. Heirs of Levi*, 22 (2) P.D. 606.

[41] See the *Agam* case (note 30).

[42] A. CHEN, Conflict of Laws, Conflict of Mores and International Public Policy in Israel: Registration And Recognition Of Foreign Divorce Decrees – A Modern Critique *YPIL* 2010, vol. XII, p. 531.

set out in Section 11(b) and provides for incidental recognition, which is the recognition of the foreign judgment incidental to and for the purpose of other specific proceedings.

Direct recognition is the issuance of a declaratory judgment recognising the foreign judgment and granting it legal validity in Israel, so that it may serve as a final judgment in all matters. Such recognition is contingent upon four cumulative conditions:

> (1) There is an agreement between the State of Israel and the foreign state in which the foreign judgment was issued;
>
> (2) Israel has undertaken in that agreement to recognise foreign judgments of the kind in question;
>
> (3) The undertaking applies only to judgments enforceable under the law in Israel; and
>
> (4) The judgment meets the conditions of the agreement between the two states.

In practice, the conditions for the direct recognition of a foreign judgment under Section 11(a) do not allow for the recognition of a foreign probate order. To date, Israel has not signed agreements with other countries with regard to judgments concerning personal status.[43] Even if there are such agreements, it would still be impossible to obtain direct recognition of a foreign succession order because, by its nature, a succession order is not "enforceable" under Israeli law.[44]

In the *Agam* case,[45] the Supreme Court held that Section 11(a) of the Foreign Judgments Enforcement Law *exclusively* governs the subject of direct recognition of foreign judgments in Israel. As unusual as it may seem, the conclusion to be drawn from the *Agam* case is that there is an entire category of foreign judgments that cannot be granted direct recognition because Israeli law does not allow for the direct recognition of a foreign judgment regarding personal status. The negative consequences and severe ramifications of this decision present very serious difficulties. For example, direct recognition ends further litigation and increases procedural efficiency. These considerations are relevant whenever recognition of a foreign judgment is requested, and are not contingent upon the facts of a specific case. In the absence of any possibility for direct recognition of a foreign judgment in matters of personal status, new proceedings must be initiated and repeated claims must be brought to address questions that have already been decided in the foreign judgment. This approach squanders precious court time and may even result in conflicting judgments. Consequently, it is impossible to obtain *direct recognition* of foreign rulings in matters of succession. The only possible

[43] Israel has signed treaties with only four countries: Austria, Great Britain, Germany and Spain. The application of these treaties is limited to civil and commercial matters. See C. WASSERSTEIN FASSBERG, *Foreign Judgments in Israeli Law: Deconstruction and Reconstruction*, 1996, p. 51-52.

[44] Section 11(a)(3) of the Foreign Judgments Enforcement Law limits recognition to judgments "capable of enforcement under law in Israel."

[45] *Agam* (note 30).

type of recognition is incidental recognition under Section 11(b) of the Foreign Judgments Enforcement Law, 1958.[46]

Undoubtedly, the needs of the international community require reciprocal consideration and recognition. However, when Israeli law does not allow for direct recognition of foreign probate orders, but only incidental recognition, it is difficult to request or expect foreign states to recognise Israeli orders unconditionally. Therefore, one may argue that it would be desirable for the Israeli legislator to adopt the approach of many western states according to which international jurisdiction is subject to a significant connection between the decedent and the venue.[47] For example, that international jurisdiction could be contingent upon Israel being the place of the *individual's last habitual residence*. The EU recently initiated one such system that is intended to achieve greater uniformity among its Member States in dealing with matters of succession.

The EU Justice and Home Affairs Council reached a general agreement on a large part of *Regulation (EU) No 650/2012* of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.[48]

Under the EU system, the law of the habitual residence will normally determine which country's courts have jurisdiction in matters of succession, with the exception that when a Member State's law has been validly chosen as the applicable law, a choice of venue agreement can confer jurisdiction on the courts of that Member State.

According to the Regulation, one law governs the entire succession, with respect to both real and personal property. That law will generally be the law of the decedent's last habitual residence, unless an individual designates, in advance, the law of his or her nationality. (There are special rules for countries such as the United Kingdom where one nationality covers different territorial units with different laws on succession).[49]

Given the proximity of Israel to Europe, it would seem worthwhile for Israel to consider aligning its law with that of the European Union regarding international jurisdiction, which requires a close connection between the decedent and the venue. It would be beneficial if Israel would adopt the EU's legislative approach to the applicable succession law, except with respect to the real property of the estate. In this regard, the preferable approach is set forth in Article 138 of the Law, which directs the court to the *lex situs*.[50]

Consistency among legal systems is essential to the distribution of movable property and an ideal that should be sought by legal systems worldwide.

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[46] For a scholarly critique of the *Agam* ruling, see in detail: A. CHEN (note 42), at 538-539.

[47] See, for example, the legal systems in Switzerland and Spain.

[48] *OJ* L 201 of 27 July 2012, p. 107 *et seq*.

[49] For example, a retired British couple planning to live in Spain for a few years could make wills providing that the succession to their estates was to be governed by English or Scottish law.

[50] A discussion of this approach is beyond the scope of the current article.

VII. Conclusions

This research shows that under the Succession Law, international jurisdiction of the courts seems to extend to the entire estate of the foreign resident, even if only an insignificant part of the decedent's assets were situated in Israel. However, in practice, Israeli courts have limited their international jurisdiction in certain instances by relying upon additional general principles, independent and outside the realm of succession doctrines.

This article suggests that the present legal situation with respect to the second scenario of Article 136 could be improved with additional connecting factors. Substantial factors connecting the non-resident decedent to the State of Israel are required in order to exercise international jurisdiction over his entire estate. In the absence of other connecting factors, merely leaving an insignificant part of the estate in Israel does not justify international jurisdiction over the entire estate of a non-resident decedent. Such jurisdiction could appear to be arbitrary and lacking sufficient grounds. Therefore, the doctrine of *forum non conveniens* might correctly be applied to this alternative.

This study points out, among other factors, the difficulties that may arise, (such as in the application of foreign law in Israel, and the recognition of Israeli probate orders). It suggests that the Israeli legislator replace the connecting factor of "the law of the residence" with "the law of last habitual place of residence" – both with respect to international jurisdiction and with respect to choice of law in matters concerning movable property.

This solution will more closely conform to the approach of EU legislation, and may assist in bringing about uniform results in multiple forums. After all, a shared system of uniform rules would reflect the ideal of a consistent result in every forum, which is an essential goal in the distribution of the movable property of an estate and one to which the law should aspire.[51]

[51] B. CURRIE, Book review – Conflict of laws by A.A. EHRENZWEIG, (1964) *Duke.L.J.* 424, 428; A.A. EHRENZWEIG, A Proper Law in a Proper Forum: A "Restatement" of the *lex fori* Approach, (1965) 18 *Okla L. Rev.* 340, 342.

DO YOU SPEAK MAREVA? HOW WORLDWIDE FREEZING ORDERS ARE ENFORCED IN SWITZERLAND

Sandrine GIROUD*

I. Introduction

Worldwide Freezing Orders (WFOs), also known as Mareva injunctions, have been described as "nuclear weapons" of the law.[1] Often granted at the pre-trial stage in *ex parte* hearings, a WFO is a protective measure preventing a defendant, by way of an interim injunction, from disposing of their assets pending the resolution of the underlying substantive proceedings.[2] While granted only in certain common law jurisdictions, such orders can take effect worldwide. However, their

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[1] *Bank Mellat v. Nikpour* [1985] F.S.R. 87.

[2] *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep 509 (CA), although the first recorded instance of such an order in English jurisprudence was *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 WLR 1093. See generally T. WEIBEL, *Enforcement of English Freezing Orders ("Mareva Injunctions") in Switzerland*, Basel 2005, p. 3. See also M. BERNET, Die Vollstreckbarerklärung englischer Freezing Orders in der Schweiz, *Jusletter* 19 January 2004, para. 2, available at <http://jusletter.weblaw.ch/article/de/_2904>; P. PEYER, Vollstreckung unvertretbarer Handlungen und Unterlassungen, *Zürcher Studien zum Verfahrensrecht* No. 145, p. 61 *et seq.*; A. BUCHER, *CR-LDIP/CL*, *ad* art. 31, para. 17.

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enforcement can prove problematic in other jurisdictions that may not provide for corresponding measures.

A 2010 decision of the Zurich Court of First Instance, appealed to the Zurich Court of Appeal and then to the Swiss Federal Supreme Court, illustrates the difficulties raised by the enforcement of English WFOs in Switzerland.[3] The applicants had obtained a WFO from the London High Court of Justice against the defendant who held assets in Switzerland. They later requested the Zurich Court of First Instance to declare the WFO enforceable in Switzerland and to issue protective measures against the defendant and the Swiss bank with which the defendant held an account.

As will be seen, WFOs remain a language difficult to speak by Swiss courts and some appear more fluent than others. After a brief description of the legal framework applicable to the enforcement of WFOs in Switzerland (*cf. infra* II), this contribution will review the several decisions rendered by the cantonal courts and the Swiss Federal Supreme Court in relation to the enforcement of the WFO at stake (*cf. infra* III), and will critically comment upon the issues arising in relation to protective measures requested in support thereof, to conclude that the objections commonly raised may be overcome (*cf. infra* IV).

II. Enforcement in Switzerland

The enforcement of a WFO in Switzerland is subject to different legal regimes depending on whether the WFO has been issued by an EU Member State court or by a non-EU court.

The enforcement of an EU WFO is governed by the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (LC 2007) which is the successor of the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (LC 1988).[4] As to non-EU WFOs, their enforcement is regulated by the 1987 Swiss Private International Law Act (PILA).

EU WFOs are generally enforced in Switzerland pursuant to Articles 31-49 LC 1988, and Articles 38-56 LC 2007 respectively, both of which apply to interim decisions.[5] In contrast, Swiss courts generally refuse the enforcement of non-EU

[3] Decision of the Swiss Federal Supreme Court 4A_366/2011 31 October 2011.

[4] The LC 1988 and LC 2007 are parallel agreements to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), respectively the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). While the LC 2007 entered into force on 1st January 2010 for the EU, Denmark and Norway, it has only applied to Switzerland since 1st January 2011 and to Iceland since 1st May 2011.

[5] Decision of the Swiss Federal Supreme Court ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*); ECJ, C-125/79, *Bernard Denilauler v. SNC Couchet Frères*, [1980]

WFOs, because under the PILA a foreign decision must be final in order to be enforceable in Switzerland.[6] This condition is usually not met by WFOs because of their interim nature.

In addition, the enforcement of *ex parte* WFOs issued by EU courts requires that the defendant was granted the right to be heard in the underlying proceedings within a reasonable time and prior to the application for recognition and enforcement in Switzerland.[7] In a decision of 2003, the Swiss Federal Supreme Court considered that a five business day period for the defendant to apply for variation or discharge of the *ex parte* WFO was too short.[8] One might conclude that the WFO could have been recognised in Switzerland if the time for varying or discharging the order had been longer, e.g., one month. One might also assume that an *ex parte* WFO which has been confirmed after an *inter partes* hearing should, in principle, be enforceable in Switzerland. The implementation of the defendant's right to be heard is, however, subject to subtle differentiations by the Swiss Federal Supreme Court, which have given rise to various academic interpretations.[9] Clearer guidance on this issue would be welcome.

While WFOs are in principle subject to recognition and enforcement under the relevant provisions of the LC 1988 and LC 2007, their actual "translation" in a foreign jurisdiction is often difficult – if not impossible – due to the absence of equivalents in domestic law. This concerns in particular protective measures to be ordered in their support. One important issue relates to the nature of a WFO which is a measure *ad personam*, *i.e.*, a measure aimed at a person. In contrast, an attachment, one of the Swiss closest equivalents to a WFO, is a measure *in rem*, *i.e.*, a measure targeting a person's assets.[10] Under Swiss domestic law, it is, therefore, not possible to attach "all the defendant's assets located in Switzerland" as is often provided in WFOs.[11]

ECR 1553. S. KOFMEL EHRENZELLER, in *Lugano-Übereinkommen, Handkommentar*, 2nd ed., Bern 2011, *ad* art. 31, p. 639.

[6] Article 25 PILA.

[7] ECJ, C-125/79, *Bernard Denilauler v. SNC Couchet Frères*, [1980] *ECR* 1553, with effect also in Switzerland pursuant to Protocol 2 of the LC 1988 and LC 2007; Decision of the Swiss Federal Supreme Court ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*), para. 5.2.1.

[8] Decision of the Swiss Federal Supreme Court 4P.331/2005 of 1 March 2006.

[9] See A. BUCHER (note 2), *ad* art. 31, paras 12 *et seq.* See also M. BERNET (note 2), paras 9 *et seq.*; S. KOFMEL EHRENZELLER (note 5), *ad* art. 31, p. 639.

[10] An attachment is only possible against specific assets to be detailed by the applicant, or generic assets to be described as precisely as possible with at least an indication of their type and location, failing which the attachment request is considered a fishing expedition (in French: "séquestre exploratoire" and in German: "Sucharrest") and is rejected. Attachment of generic assets generally applies to assets held with banks as third party custodian.

[11] T. WEIBEL (note 2), at 32.

III. The Case

In the case considered, the applicants obtained a WFO from the London High Court of Justice against the defendant and sought enforcement of the WFO in Switzerland, where the defendant held assets.

They requested the Zurich Court of First Instance to (i) declare the WFO enforceable and (ii) order protective measures against the defendant, including measures to be enforced by a Swiss bank with which the defendant held an account. The applicants requested in particular that the defendant be prohibited from disposing of his assets located in Switzerland up to a specific amount and that the Swiss bank with which the defendant held assets be prohibited, under the threat of criminal sanction pursuant to Article 292 Swiss Criminal Code (SCrC), to dispose of the defendant's assets or make outgoing payments in favour of the defendant. These prohibitions were subject to an *Angel Bell* order, which authorised the disbursement of the defendant's expenses for living costs, legal advice and continuation of business up to a specific amount.

The two requests were subsequently subdivided into separate proceedings.[12] Although the case was decided under the LC 1988 – the WFO having been issued by the English court before the entry into force of LC 2007 –, its reasoning holds true under the LC 2007 as the provisions regarding recognition and enforcement of WFOs, as well as protective measures are substantively identical under the LC 1988 and the LC 2007.

The following discusses the several decisions rendered by the cantonal courts and the Swiss Federal Supreme Court concerning the applicants' request to obtain a declaration of enforceability and request for protective measures.

A. The Decisions of the Zurich Court of First Instance and Court of Appeal

1. Declaration of Enforceability

The Zurich Court of First Instance held that a declaration of enforceability of a WFO could only be granted if the protective measures requested on this basis were admissible in Switzerland. However, given the WFO's *ad personam* effect, the Court considered that the protective measures that could be ordered in Switzerland might go beyond the measures ordered in the State of origin. It found that translating the WFO into an attachment would give an *in rem* effect to the *ad personam* measures ordered in the WFO, thus exceeding what the court in the State of origin had envisaged. The Court of First Instance, therefore, deemed the requested protective measures inadmissible. As a result, the Court found that, because protective measures could not be granted, the applicants lacked a "legitimate interest" for obtaining a declaration of enforceability of the WFO – as opposed to the actual

[12] Decisions of the Zurich Court of First Instance (*Bezirksgericht Zürich*) of 22 December 2010 (EU100827) regarding the request to obtain a declaration of enforceability and (EU102419) regarding the request for protective measures.

enforcement – and rejected the request. The Court of First Instance also acknowledged that although the WFO was not legally binding on third parties on the Swiss territory, banks in Switzerland usually comply voluntarily with a foreign WFO upon its informal notification. The Court of First Instance thus concluded that a declaration of enforceability would *de facto* be of no use to the applicants.

The Zurich Court of Appeal rejected the applicants' appeal for the same reasons and confirmed the decision of the Court of First Instance.[13] In particular, the Court of Appeal held that the court seized with the enforcement request had some leeway to interpret and adapt the foreign decision so as to render it fit for enforcement. However, where the implementation of the foreign decision is impossible because it is not sufficiently determinate ("Bestimmtheit"), the request for enforcement shall be rejected on grounds of public policy. The Court of Appeal further considered that a decision which could substantively not be enforced resulted in a declaration of enforceability deprived of any concrete effect which the Court qualified as a "naked declaration of enforceability" ("nackte Vollstreckbarerklärung"). The Court of Appeal then recalled an earlier decision of the Swiss Federal Supreme Court,[14] whereby a similar WFO was declared enforceable, and held this case law applicable to the case at hand, thus in a last minute twist apparently admitting the enforceable nature of the WFO.

However, referring to domestic civil procedural rules, the Court of Appeal made the declaration of enforceability of the WFO in Switzerland conditional to the existence of "a legitimate interest". Indeed, under Swiss procedural law, a party seeking declaratory relief must in principle demonstrate that it has a "legitimate interest" in obtaining such relief. Against this background, the Court of Appeal went on to examine whether the protective measures requested in support of the enforcement of the WFO could be granted and concluded that they were inadmissible as the order was not sufficiently determinate. As a result, the Court of Appeal considered that the applicants had no legitimate interest in obtaining a declaratory order since protective measures could not be ordered.

2. Request for Protective Measures

Using the same arguments as stated above, the Court of First Instance considered that the protective measures requested on the basis of the WFO could not be granted as it was not possible to translate their *ad personam* effect into Swiss law without going beyond the scope of the measure initially ordered in the State of origin.

Reviewing the decision of the Court of First Instance, the Court of Appeal recalled that such measures are to be issued in accordance with the law of the jurisdiction requested. It then referred to the relevant provisions of Zurich civil

[13] Decision of the Zurich Court of Appeal (*Obergericht des Kantons Zurich*) of 9 May 2011 (NL 110002-O/U, joined under NL 110006).

[14] Decision of the Swiss Federal Supreme Court ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*), para. 5.4.

procedure law,[15] which did not exclude measures aimed at third parties, but stated that such measures could only be applicable if the order was sufficiently determinate. Referring to earlier case law, the Court of First Instance considered that a WFO providing for an *Angel Bell* order did not pass the required threshold of determinateness and should thus be rejected.

B. The Decision of the Swiss Federal Supreme Court

The applicants successfully appealed to the Swiss Federal Supreme Court which found that the LC 1988 did not require a party seeking a declaration of enforceability to simultaneously request the enforcement of the WFO. Indeed, while Article 39(2) LC 1988 provides for the possibility to request protective measures, there is no obligation to do so. A request to obtain a declaration of enforceability without enforcement measures ("nackte Vollstreckbarerklärung") is, therefore, admissible.

The Swiss Federal Supreme Court further held that the voluntary compliance of Swiss banks with a WFO is irrelevant to the applicants' right to have the order declared enforceable. It therefore considered that a party benefitting from an English WFO had a legitimate interest in obtaining a declaration of enforceability from a Swiss court.

The matter was remanded to the Zurich Court of Appeal which was asked to re-examine the requested declaration of enforceability and protective measures.

C. The Revised Decision of the Zurich Court of First Instance

To guarantee that the applicants were granted two levels of judicial review, the Zurich Court of Appeal sent the matter back to the Court of First Instance which issued two separate decisions, one addressing the requested declaration of enforceability and the other addressing the request for protective measures.[16]

1. Declaration of Enforceability

Although bound by the Swiss Federal Supreme Court's ruling to grant the applicants a declaration of enforceability, the Court of First Instance criticised the Swiss Federal Supreme Court's case law.[17] In particular, it noted that the reasoning of the Swiss Federal Supreme Court led to the creation of a new category of "hybrid" cases considered sufficiently clear to be declared enforceable in Switzerland, but

[15] The WFO was issued before the entry into force of the Swiss Civil Procedure Code (CPC) on 1 January 2011 which unified and replaced cantonal provisions on civil procedure.

[16] Decision of the Zurich Court of Appeal (*Obergericht des Kantons Zürich*) of 23 December 2011 (RU110060-O/U).

[17] Decision of the Zurich Court of First Instance (*Bezirksgericht Zürich*) of 27 February 2012 (EZ110064-L/U).

insufficiently determinate to allow protective measures to be granted. In its conclusion, it took the liberty to express regrets as regards the Swiss Federal Supreme Court's stubbornness in maintaining a reasoning considered by the Court of First Instance dogmatically difficult to follow.

2. Request for Protective Measures

Examining each of the applicants' requests for protective measures separately, the Court of First Instance dismissed them all.[18] First, it held that the prohibition to the defendant to dispose of his assets could not be granted because of his location abroad. Second, restating its earlier position, the Court of Appeal held that the prohibition imposed on the bank to dispose of the defendant's assets could not be enforced because translating the *ad personam* WFO into a Swiss *in rem* measure would go beyond the framework of the WFO and, therefore, would exceed the effects foreseen by the initial order. It also considered that, in practice, such a measure could not be enforced by the bank for it could not oversee the defendant's financial situation worldwide and thus monitor whether the prohibition to dispose in the amount set by the WFO was complied with or not.

In this context, the Court of First Instance finally concluded that the applicants may be better advised to request the English courts to issue a decision which would be internationally enforceable rather than petitioning the Swiss courts to enforce a decision which could not be translated into Swiss law in practice.

IV. Commentary

These decisions illustrate the difficulty that applicants face when seeking the enforcement of WFOs in Switzerland and the divergent positions that Swiss courts adopt on this issue. In this context, the Swiss Federal Supreme Court's decision provides a welcome clarification on the conditions related to the declaration of enforceability of a WFO. However, it leaves the question of whether and, if so, what type of protective measures can be ordered in support of a WFO, unresolved. The position of the Zurich courts in that respect may however not be as convincing as it appears.

Protective measures available in support of an EU WFO are regulated by Article 39 LC 1988[19] and Article 47 LC 2007, respectively.[20] Accordingly,

[18] Decision of the Zurich Court of First Instance (*Bezirksgericht Zürich*) of 27 February 2012 (EZ110065-L/U).

[19] Article 39 of the LC 1988 provides that:

"During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorising enforcement shall carry with it the power to proceed to any such protective measures."

protective measures must be accorded pursuant to the law of the requested State.[21] Under Swiss law, a distinction is made between non-monetary claims and monetary claims. While the enforcement of the former, including protective measures, is regulated by the Swiss Code of Civil Procedure (SCCP) (Articles 262 *et seq.* SCCP), the enforcement of the latter is regulated by the Debt Collection and Bankruptcy Act (DEBA) (Articles 271 *et seq.* DEBA).

In spite of this, it would appear impossible – at least for the Zurich courts – to translate a WFO into the corresponding Swiss protective measures. The reasons invoked are, in particular, (i) the *ad personam* effect of WFOs[22] and (ii) the fact that they are allegedly not sufficiently determinate, among others, as regards the implementation of an *Angel Bell* order. These objections, while not entirely unfounded, may ultimately be overcome.

Indeed, it lies in the court's power to extend the *ad personam* effect of a WFO to third parties who possess assets belonging to the debtor, thus providing an *in rem* effect to the WFO.[23] Several decisions – although cantonal – support this line of reasoning. For instance, in a decision dated 16 June 1999, the Zurich Court of Appeal considered that Zurich cantonal civil procedure law allowed, in appropriate cases, the granting of injunctions against third parties.[24] By contrast, in the

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[20] Article 47 of the LC 2007 provides that:

"1. When a judgment must be recognised in accordance with this Convention, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought."

[21] While paragraphs 2 and 3 of Article 47 are substantially identical to Article 39 LC 1988, paragraph 1 of Article 47 LC 2007 is new. Yet, it does not entail any substantive novelty to the already existing Swiss case law. R. RODRIGUEZ/ S. ROTH, *Table de concordance commentée de la Convention de Lugano révisée du 30 octobre 2007 et de la Convention de Lugano du 16 septembre 1988*, in *Jusletter* 26 November 2007, p. 42-43, available at <www.jusletter.ch>.

[22] A. HAUENSTEIN, Die Vollstreckbarerklärung der englischen Freezing Order unter dem Lugano-Übereinkommen und das rechtliche Gehör, *Revue suisse de procédure civile* 2007, p.190.

[23] See D. TUNIK, L'exécution en Suisse de mesures provisionnelles étrangères: un état des lieux de la pratique, *Semaine judiciaire* (SJ) 2005 II, p. 319.

[24] The Court of Appeal granted an order *ex parte* in the following terms: "[Third party] is ordered with immediate effect as of service of this order, and under pain of prosecution under Article 292 of the Swiss Criminal Code in the event of failure to comply, to desist from disposing of any assets of [Respondent], which they hold for him directly or through third parties or of which he is the beneficial owner, namely [but not confined too] all credit balances and claims in Swiss Francs or other currencies, including matured, current and future interest and dividends, in particular current account balances, credit balances on other accounts, time deposits, fiduciary deposits, options, precious metals,

2003 *Motorola* case,[25] the Zurich Court of Appeal, rejected an injunction prohibiting a third party – custodian – to dispose of the targeted assets due to an *Angel Bell* order contained in the WFO. In particular, it held that the formulation of the WFO allowing the spending of a "reasonable sum" for legal costs and payments "in the ordinary and proper course of business" was not as specific and straightforward as required for the enforcement of the order under the threat of criminal sanctions as set out in Article 292 SCrC. Yet, on appeal, the Swiss Federal Supreme Court held that an *Angel Bell* order did not render the WFO so indeterminate so as to create an obstacle to declare it enforceable, but left open the question whether an *Angel Bell* order prevented the application of Article 292 SCrC.[26] Interestingly, the Geneva Tribunal of First Instance did not entertain the same hesitations or objections cited by the Zurich courts for refusing protective measures in support of a WFO. In a decision of 2009,[27] the Tribunal of First Instance declared a WFO enforceable and granted the requested prohibition order against the defendants to dispose of their assets up to a specific amount, in particular the assets held with several Swiss banks designated by the applicant. The Geneva courts have since upheld this position in more recent – yet unpublished – decisions.

As shown, rather than limiting the translation of a WFO to an *in rem* measure such as the attachment, Swiss law provides the possibility to translate it into an equivalent *ad personam* measure. Such a measure could be ordered on the basis of Article 340 et *seq.* SCCP. Accordingly, the enforcement court may order protective measures which could, among others, be obligations to act, to refrain from acting or to tolerate something. The court might also issue a threat of criminal penalty under Article 292 SCrC.

Ordering an *in personam* measure, even against third parties, allows overcoming the first objection often raised against the translation of WFOs under Swiss law, whilst at the same time it does not create any specific issues regarding the rights of the defendant or the third party concerned. The interim nature of the WFO and the guarantee of the defendant's due process rights are in any event sufficient safeguards and limitations to the scope of the WFO. The second objection regarding holding the WFO insufficiently determinate, in particular as regards the assets to be frozen, could in practice also be overcome by coordination measures ordered

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claims from foreign exchange and commodity transactions as well as amounts deposited as security for such transactions, claims and receipts from bank guarantees, any and all claims (be they sole or joint with others) against Swiss and foreign custodians of securities, securities, precious metals, open and closed deposits and the contents of safe deposit boxes, all in an amount up to CHF [...]." (free translation) U/EU990521, 16 June 1999, mentioned in S. BERTI, Translating the "Mareva" – The Enforcement of an English Freezing Order in Zurich, in *"Nur, aber immerhin" – Festgabe für Anton K. Schnyder zum 50. Geburtstag*, Zürich/Basel/Genf 2002, p. 16. See also Decision of the Swiss Federal Supreme Court ATF 125 I 412.

[25] Decision of the Swiss Federal Supreme Court ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*).

[26] T. WEIBEL (note 2), at 105-106.

[27] Decision of the Geneva Tribunal of First Instance (*Tribunal de première instance*) of 19 January 2009 C/566/2009.

by the foreign court following information provided by the debtor.[28] As a result, Swiss courts may be able to find a way to "speak" the WFO language.

Other trends support the better translation of WFOs into a Swiss equivalent. One is the Recast of the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Recast of the Brussels I Regulation"). The Recast of the Brussels I Regulation clearly states the duty of the courts to adapt foreign measures or orders, insofar as possible, in their domestic system to a measure or order which has equivalent effects attached to it and pursues similar aims.[29] Interestingly, the provisions regarding protective measures remain unchanged but the spirit of their implementation is directly clarified in the recitals of the Preamble. It remains to be seen whether the LC 2007 will be amended accordingly. Notwithstanding this, the Recast of the Brussels I Regulation may find application in Switzerland further to the obligation of uniform interpretation set out in Protocol II of the LC 2007 which requires Swiss courts to take due account of the decisions rendered by courts of other Member States. Since only the recitals and not the provisions related to protective measures were amended, it might be that EU courts' decisions translating WFOs into their system become binding upon Swiss courts. In any event, this is a clear statement in favour of more flexibility from the courts seized with enforcement requests of protective measures in support of WFOs.

Another interesting trend is the recent tendency of Swiss courts to issue protective measures, including freezing injunctions, with extraterritorial effect.[30] Considered by some commentators as a "Copernican revolution", this development could be compared to the enforcement of WFOs in Switzerland.[31] As a result, Swiss courts could become more sensitive to the imperatives and practicalities of foreign protective measures, including WFOs.

V. Conclusion

As illustrated by the decisions reviewed, the enforcement of WFOs in Switzerland remains a language which is spoken with difficulty by Swiss courts. Due to the

[28] D. TUNIK (note 23), at 320.

[29] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), recital 28:

"Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State."

[30] Decisions of the Swiss Federal Supreme Court 5A_259/2010 of 26 April 2012 and 5A_262/2010 of 31 May 2012.

[31] V. JEANNERET/ E. BARUH, Exécution forcée en Suisse de mesures provisionnelles, *Revue suisse de procédure civile* 2013, p. 95.

flexibility required, it seems that silence is often the favoured solution. Other courts have, however, shown more adaptability, thus demonstrating the possibility to find practical solutions to the enforcement of WFOs.

In this world of immediate connection and globalised transactions, it is imperative that courts find ways to adapt, without of course sacrificing the principles on which their legal order rests such as in particular due process. The trends set out by the Recast of the Brussels I Regulation and the recent protective orders issued by Swiss courts with extraterritorial effects point in that direction. However, until the Swiss Federal Supreme Court settles the question of whether and, if so, which protective measures could be issued in support of a WFO in Switzerland, WFOs are likely to be "lost in translation".

ALL ABOARD FOR THE FERTILITY EXPRESS
SURROGACY AND HUMAN RIGHTS IN INDIA

Anil MALHOTRA* / Ranjit MALHOTRA**

I. Introduction

Mythological surrogate mothers are well known in India. Yashoda played mother to Krishna, although Devki and Vasudeva were Krishna's biological parents. Likewise, in Indian mythology Gandhari made Dhritarashtra the proud father of 100 children even though he shared no biological relationship with the children.

The primordial urge to have a biological child of one's own, aided by technology and the purchasing power of money, coupled with the Indian entrepreneurial spirit has generated a "reproductive tourism industry" that is estimated at Indian Rupees 25,000 crores (US dollars 5 billions). This comes as a boon to childless couples worldwide. At the same time, this reproductive tourism raises serious ethical and legal concerns and also spotlight's the plight of the poor who are willing to sell something as sacrosanct as motherhood.

In a developed country like the United Kingdom, surrogacy agreements are not legally binding. Likewise, in most of the United States compensated surrogacy arrangements are either illegal or unenforceable. Australia goes one step farther, making the arrangement of commercial surrogacy a criminal offence in some states and voiding any surrogacy agreement giving custody to others. In Canada and New Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. However, in France, Germany and Italy, surrogacy is not unlawful. Israeli law accepts only the surrogate mother as the real mother, thereby rendering commercial surrogacy illegal. What prompted India to enact a proposed

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law to make surrogacy agreements legally enforceable is the protection of the genetic parents, surrogate mother and the child.

India's surrogacy boom began in January 2004 with a grandmother delivering her daughter's twins. The success flashed over the world, launching a virtual industry in the State of Gujarat in India. Today, while Iceland has its first openly gay female politician as Prime Minister, India boasts of being the first country intending to legalise commercial surrogacy to legitimize both intra and inter-country surrogacy, which are rampant.

Would-be parents from the Indian Diaspora in the United States, United Kingdom and Canada, as well as foreigners from Malaysia, UAE, Afghanistan, Indonesia, Uzbekistan, Pakistan and Nepal, are descending on sperm banks and In-Vitro Fertilisation (IVF) centres in India looking for South Asian genetic traits of perfect sperm donors. Equally, renting wombs is another easy and cheap option in India. The relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and the lack of any law to regulate these practices is attracting both foreigners and Non-resident Indians (NRIs) to sperm banks and surrogate mothers in India.

India, surreptitiously, has become a booming centre of "reproductive tourism" which is estimated to be worth at least Indian Rupees 25,000 crores (US dollars 5 billion) today. Officially termed "Assisted Reproductive Technology" (ART), this practice has been in vogue in India since 1978, and today an estimated 200, 000 clinics across the country offer artificial insemination, IVF and surrogacy.

This issue is so prevalent that in the recent decision of the Supreme Court dated 29 September 2008, Baby Manji Yamada's case,[1] the Court observed that "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: wombs for rent, outsourced pregnancies or baby farms". This practice is considered legitimate because, presumably, no Indian law prohibits surrogacy. But then, there is also no law permitting surrogacy. However, the changing face of the law will now usher in a new rent-a-womb law, as India is set to be the only country in the world to legalise commercial surrogacy.

II. Some Recent Happenings

The complicated case of the Japanese baby Manji born to an Indian surrogate mother with IVF after fertilization in Tokyo and the embryo being implanted in Ahmedabad, triggered complex, knotty issues. The Japanese parents ultimately got divorced and the mother disowned the infant upon its birth in India. The infant's grandmother petitioned the Indian Supreme Court, challenging the directions given by the Rajasthan High Court relating to production and custody of the baby. Following the directions of the Supreme Court dated 29 September 2008, the Regional Passport Office in Jaipur issued an "Identity Certificate" to the baby on 1 November 2008. The grandmother then flew to Japan with the baby. This opened a

[1] Baby Manji Yamada vs. Union of India (UOI) and Anr. AIR2009SC84.

Pandora' Box of questions and issues related to ethics and legality surrounding surrogacy. In addition, the baby's citizenship status remained unclear.

In another case, a gay Israeli couple became parents in India on 12 October 2008, when their child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra.

Reportedly, the couple had been together for the past seven years and had decided to start a family. But since Israel does not allow same sex couples to adopt or have a surrogate child, they looked to India to find a surrogate mother. The couple first came to Mumbai in January 2008 for an IVF cycle. Thereafter, they selected an anonymous "mother". Accordingly, the child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra. After the child was born, the couple left for Israel with the child on 17 November 2008.

In 2010, another gay couple from Israel were stranded in India after the The Jerusalem Family Court refused to allow a paternity test to initiate the process for Israeli citizenship for twins born to them through a surrogate. The issue was debated in The Knesset (Israeli Parliament), where Prime Minister Benjamin Netanyahu had to intervene to allow the children to be brought to Israel following legal proceedings. Ultimately, on appeal, the Jerusalem District Court found that it was in the best interest of the child to hold a paternity test to establish the father of the twin boys. Ultimately, the paternity test proved the identity of the children's father and, after being stranded in Mumbai for over 3 months, the father and his twins returned to Israel in May 2010 after being granted Israeli passports.

In another case, after a frustrating two year legal battle in India a German couple were allowed to return to. Twin were born in the State of Gujarat in January 2008 and registered as children born of a foreign couple through an Indian surrogate mother. After being declined birth certificates, the German mother sought relief with the Gujarat High Court, which ruled that because the surrogate mother was an Indian national, therefore, the children would also be treated as Indian nationals and would be entitled to Indian passports. However, the Government of India challenged this decision on the ground that the toddlers were surrogate children and could not be granted Indian citizenship. This would render the twins stateless. Indeed, the German authorities had also refused visas to the twins on the ground that German law did not recognize surrogacy as a means to parenthood. Ultimately, the parents went through an inter-country adoption process in India, upon which the Indian Government granted exit permits to the German surrogate twins to enable their journey back home to Germany.

Homosexuality is no longer an "Unnatural Offence" in India, as Section 377 of the Indian Penal Code, which criminalized homosexuality, was struck down as unconstitutional by the High Court of Delhi on 2 July 2009. There is also no bar to gay couples hiring a surrogate mother to deliver children in India. Thus, there are reports in the media that there are numerous gay couples coming to India to look for surrogate mothers.

III. The Position of Indian Law on the Subject of Surrogacy

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued Guidelines in 2005 to limit Assisted Reproductive Technology (ART). However, these national guidelines for Accreditation, Supervision and Regulation of ART Clinics in India are non-statutory, have no legal sanctity and are not binding. The Guidelines lack teeth and are often ignored. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant and often go undeterred, leaving many surrogate mothers mistreated with impunity. Surrogacy in the United States, the United Kingdom and Australia generally costs more than $50,000, whereas advertisements on websites in India give varying costs of about only $10,000, which also includes the services of egg donors and surrogate mothers. This has created a free trading market flourishing and thriving in the business of babies.

At a time when the world's first Test-tube baby Louise Brown is a mother herself and high profile international adoptions by celebrities like Madonna and Angelina Jolie are glorifying international adoption, India is not lagging behind. Noted Indian film actress Sushmita Sen inspires single women both in India and abroad to adopt children, breaking conventional taboos and age-old practices. Accordingly, orphaned girls are finding mothers in both India and abroad.

There are reportedly twelve million orphaned children in India. However, child adoption in India is a complicated issue. It is over burdened with cumbersome legal processes and lengthy, complicated procedures. Sixty years of Indian independence has failed provide a comprehensive adoption law applicable to all its citizens, regardless of their religion or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). As a result, those who cannot adopt turn to options of IVF clinics or rent surrogate wombs. India must adopt a law which facilitates the dreams of those who live abroad, rather than turning to sometimes tragic and unethical practices.

A silent revolutionary change is fast heralding a new dawn in matters of inter-country adoptions. However, the plethora of Indian laws does not improve the plight of twelve million orphaned children in India who need adoptive parents. The Guardian and Wards Act (GWA) of 1890 permits guardianship only, not adoption. The Hindu Adoption and Maintenance Act (HAMA) of 1956 does not allow non-Hindus to adopt a Hindu child. Immigrations requirements only make the problem worse. Time is now ripe for new Indian laws to legitimize adoptions. However, such laws would be successful only if an international viewpoint is reflected. Society has engineered changes. Indians, whether NRIs, OCIs or PIOs, are all still Indians and must get the first benefit of adopting Indian children.

IV. The New Law in the Making

In a phenomenal exercise to legalise commercial surrogacy, The Assisted Reproductive Technology (Regulation) Bill & Rules – 2010, a draft bill prepared by a 12 members committee including experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare, and Government of India, was recently posted online for feedback. This bill is purported to provide a national framework for the Regulation and Supervision of Assisted Reproductive Technology and matters connected therewith or incidental thereto. Abetting surrogacy, it legalizes commercial surrogacy by providing that the surrogate mother may receive monetary compensation and, in exchange, will relinquish all parental rights. Single parents can also have children using a surrogate mother. Foreigners, upon registration with their Embassy, can also seek surrogate arrangements. The Regulation requires the surrogate mother to enter into a legally enforceable surrogacy agreement. Additionally, the Regulation requires that foreigners or NRIs coming to India to rent a womb must submit documentation confirming that their country of residence recognizes surrogacy as legal and that the country will give citizenship to the child born through the surrogacy agreement from an Indian mother.

This Regulation needs serious debate. Ethically, should women be paid for being surrogates? Can the rights of women and children be bartered? If the arrangements fall foul, will it amount to adultery? Is the new law a compromise in surpassing complicated Indian adoption procedures? Is the new law compromising with reality in legitimising existing surrogacy rackets? Is India promoting "reproductive tourism"? Does the law protect the surrogate mother? Should India take the lead in adapting a new law not fostered in most countries? These are only some questions which need to be answered before the new law is enacted. Let us turn inward and examine our hearts and decide carefully. Are we looking at a bane or a boon?

The proposed Bill, which is called an Act "to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto" provides the constitution of a National Advisory Board for Assisted Reproductive Technology, comprised of members not exceeding 21, whose functions are confined to promoting the cause of reproductive technology. The salient details are as follows:

- The new Assisted Reproductive Technology (Regulation) Bill & Rules, 2010, legalises commercial surrogacy, stating that the surrogate mother may receive monetary compensation for carrying the child in addition to healthcare and treatment expenses during pregnancy.
- The person(s) seeking surrogacy through the use of Assisted Reproductive Technology and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.
- The surrogate mother will relinquish all parental rights over the child once compensation is paid and birth certificates will be in the name of commissioning parent(s).

- Surrogates must be between 21- 35 years old. The proposed Bill also states that no women shall act as a surrogate mother for more than five children, including her own.
- Anyone is allowed to have children using a surrogate mother. In the case of a single man or a woman, the baby will be his /her legitimate child. A child born to an unmarried couple using a surrogate mother will, with the consent of both the parties, be their legitimate child.
- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the attending physician. The foreign couple must also state to whom the child should be entrusted to in case of the parents
- Foreigners and foreign couples as well as an NRI individuals or couples seeking surrogacy in India must appoint a local guardian legally responsible for taking care of the surrogate child.
- The party seeking surrogacy must ensure and establish to the ART clinic that the party is responsible for the child outside of India.
- A child born out of surrogacy shall be the legitimate child of the commissioning parent(s). The birth certificate will contain the name or names of such parent(s). If the parties get divorced or separated, the child shall be the legitimate child of the couple.
- If foreigners seek sperm or egg donation or surrogacy in India and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.
- Foreigners or NRIs coming to India seeking surrogacy in India must appoint a guardian who will be legally responsible for taking care of the surrogate during and after pregnancy until such time as the child is delivered. Furthermore, the party seeking surrogacy must ensure through proper documentation that the country of their origin permits surrogacy and that the child born through surrogacy in India will be permitted entry into the country of their origin as a biological child of the commissioning person(s). If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obliged to take the child and be free to hand over the child to an adoption agency. In case of adoption or the legal guardian having to bring up the child in India, the child will be given Indian citizenship.
- Surrogacy may be recommended to women for whom it is medically impossible/undesirable to carry a baby to term.
- ART clinics must not advertise surrogacy arrangements. The responsibility should rest with the couple or a sperm bank.
- ART clinics must ensure that the surrogate woman satisfies all criteria (the absence of any sexually transmitted or communicable disease that may endanger the pregnancy).
- A prospective surrogate mother must be tested for HIV and shown to be free of the virus just before embryo transfer.

V. Legal Issues Currently Plaguing the Field and their Solutions

A. Position of Indian Law Today *vis-à-vis* Surrogacy Arrangements

Many questions arise from surrogacy, including (i) How would the biological parent(s) to obtain exclusive legal custody of surrogate children; (ii) how can the rights of the surrogate mother be waived completely; (iii) how can the rights of the ovum or sperm donor be restricted; and (iv) how can the genetic constitution of the surrogate baby be established and recorded with authenticity.

As of now foreigners, non-Hindu couples, single parents, and gay parents, can only claim guardianship of a child under the GWA in surrogacy arrangements. The adoption process can take place only in the foreign parent's country of nationality or permanent residence. This is because the HMGA and HAMA disallow any adoption proceedings to non-Hindus and thus any foreign non-Hindu parent cannot invoke the HAMA/HMGA. Unless these Indian enactments are amended or a new provision is enacted, adoption may be difficult for non-Hindu couples or foreigners.

Surrogacy in India is legitimate because the law does not prohibit it.

To determine the legality of surrogacy agreements, the Indian Contract Act would apply and, as such, the enforceability of any such agreement would be within the domain of Section 9 of The Indian Code of Civil Procedure (CPC). Alternatively, the biological parent(s) can also apply under the Guardian and Wards Act for an order appointing that parent as the Guardian of the surrogate child.

In the absence of any law to govern surrogacy, the 2005 ICMR Guidelines apply; however the Guidelines are not enforceable in a Court of Law. Under para 3.10.1, a child born through surrogacy must be adopted by the genetic (biological parents). However, this may not be possible in the case of non-Hindu foreign parents, who cannot adopt in India.

Under Section 10 of the Indian Contract Act, 1872, all agreements are contracts if (1) they are made by free consent of parties competent to contract; (2) they are for a lawful consideration; and (3) there is a lawful object; and (4) they are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions it is an enforceable contract. Thereafter, under Section 9 CPC, the can be the subject of a civil suit before a Civil Court to establish any and all issues relating to the surrogacy agreement, including a declaration/injunction for the relief prayed for.

Another issue for consideration is whether a single or a gay parent can be considered to be the custodial parent of a surrogate child. Currently single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. The particular cases discussed above are clear examples of this rule. These cases were based on para. 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of children born through ART. However, a guardianship petition under the GWA or a

suit for declaration in a Civil Court are the only means to determine the exclusive custodial rights for a surrogate child in a court of competent jurisdiction

But what would be the status of divorced biological parents with respect to the custody of a surrogate child? Such a determination must be made in accordance with the surrogacy agreement between the parties. There would be no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if custody is contested, it may require adjudication by a court of competent jurisdiction.

Would biological parent/s be considered the legal parent of the children? It can be stated that the biological parents would be considered to be the legal parents of the children by virtue of the surrogacy agreement executed between the parties. Para 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of the child born through ART states that "a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance." Even in the 2010 Draft Bill and Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman shall be the legitimate child of the couple, man or woman.

How can the domain of international law provide an amiable solution to the complexities of inter-country surrogacy settlements?

However, the moot question which may arise for determination whether a judicial verdict for determination of rights of parties in a surrogacy arrangement is regarding a foreign biological parent who wishes to take the surrogate child to his / her country of origin or permanent residence, it can be said that either a declaration from a civil court and / or a guardianship order must conclusively establish the rights of all parties and prevent any future discrepancies arising in respect of any claims thereto.

B. Position of Law under the 2010 Bill

Under the ART Regulation Bill 2010, Assisted Reproductive Technology, Surrogacy, "gamete", and Surrogacy agreements have been defined as follows:

- "Assisted Reproductive Technology" with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract;
- "Surrogacy" means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying the child to term and relinquishing said child to the party/parties with whom she contracted as a surrogate;
- "Gamete" means sperm and oocyte (that is egg);
- "Surrogacy Agreement" means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother;

Chapter 2 of the Bill describes the constitution of authorities to regulate Assisted Reproductive Technology. A 21-Member National Advisory Board comprised of various experts is sought to promote Assisted Reproductive Technology related issues. State Boards are recommended and State Registration authorities are sought for procedural purposes. Proceedings before the National and State Boards are deemed to be Civil Court Proceedings for limited purposes and are sought to be treated as Judicial Proceedings, even though the constitution of the National or State Advisory Board has no Judicial Officers, Judges or Designated Courts as constituents.

Chapter 3 of the Bill governs procedures for registration and complaints in respect of Assisted Reproductive Technology Clinics.

Chapter 4 deals with the duties of such clinics. Chapter 5 governs Sourcing, Storage, handling and record keeping for Gametes, Embryos and Surrogates. Chapter 6 relates to Regulation on Research on Embryos.

Chapter 7 discusses Rights and Duties of Patients, Donors, Surrogates and Children. The Rights and Duties are well defined and a determination of the status of the child is detailed irrespective of the status of parties. The duty to take children born through surrogacy from India to the country of origin or residence of the biological parents or residence is clearly required.

Chapter 8 establishes Offences and Penalties for contravening the provisions of the Act, and Chapter 9 in the Miscellaneous Section deals with the maintenance of records, the power to search and seize, and the power to make regulation and rules. The Act is in addition to and not in derogation of any other law.

C. Anomalies in the Art Regulation Bill 2010

The Bill has not designated, authorised or created any Court or Judicial Forum to resolve issues pertaining to Surrogacy, ART and Surrogacy Agreements. This omission is a large lacuna in the Bill. There has to be a Designated or a Defined Court to decide disputes arising under the proposed law.

The National and State Advisory Boards are the only authorities who will promote ART Technology, Surrogacy Arrangements and related procedures. The proceedings of these Boards have been deemed to be "Judicial Proceedings" before Civil Courts for limited purposes. There is no designated Court, Judicial Officer or Judge appointed, created or nominated for this purpose. Hence, the reach of the Advisory Boards has yet to be tested.

Chapter 3 governs complaints, Chapter 4 deals with duties, and Chapters 5 and 6 are more ART related issues. Chapter 7 deals with duties. Chapter 8 governs the offences and penalties which carry serious consequences. The question is who will adjudicate such issues and impose penalties. Who will determine these "offences?" Unless and until a Court is designated, all these issues will remain unresolved.

There are already serious issues in determining parentage and nationality, as well as the issuance of passports, visas. No Forum is defined, designated or created to deal with these issues.

Baby Manji Yamada's case and those of the Israeli and German gay couples are the precursors for many problems. Embassies, foreign missions and High Commissions in different countries in India are looking at a Resolution on these issues through law. But problems with parentage, nationality, passports, visas and related issues remained unresolved. There is already a conflict between adoption and guardianship, as non-Hindus cannot adopt in India. Therefore, would it not be better to make it mandatory to create a Court for adoption and Guardianship purposes by proper statutory enactments before a child is removed from India to a foreign country. This would provide a system for uniform application to check malpractices and conclusively ascertain the rights of parties in cases of a dispute. Moreover, all Embassies, Foreign Missions and High Commissions will be guided by proper procedure. Thus, the Indian law cannot afford to remain a *kupa-manduka*, or the frog in a well approach, and must instead embrace the concept of *vasudevayakatumbakam*, *i.e.*, the whole world is my family.

In the light of the above thoughts, it may be necessary to create a procedure for adoption, guardianship, and the determination of rights, which would be mandatory in a designated Court or some other construct for inter-country surrogacy arrangement. Likewise, such a Court or authority could be the Adjudicating authority to determine disputes, decide offences, and determine penalties under the Bill. Without such a Court or authority, the proposed Act lacks certainty, which will only leading to more disputes and inconsistencies.

PLEADING AND PROOF OF FOREIGN LAW IN FINLAND

Tuulikki MIKKOLA*

I. Introduction

In a globalized society, we do not have the luxury of being able to focus only on domestic law and cross-border disputes constantly raise questions of jurisdiction, applicable law and enforcement. In Finland, legislators have taken steps towards addressing challenges posed by cross-border problems by revising the country´s private international law rules over the years. One should always remember to distinguish Nordic from extra-Nordic regimes. The basis of regulation in the former consists of conventions that have been concluded through legislative co-operation between the countries. These instruments continue to have great practical significance since a quarter of a million Nordic citizens are domiciled in a Nordic state of which they are not a citizen. Outside the Nordic countries, international treaties also play a quite significant role. In this respect one could mention the UN Conventions and the Hague Conventions. From another perspective, one can view the legislation governing cross-border civil cases in terms of EU regulation. Until very recently, rather than focusing on choice of law, Community Law has concentrated on international procedure, that is, rules pertaining to the recognition and enforcement of international jurisdiction and foreign judgments.

Cross-border disputes raise problems of both a substantive and a procedural nature. Questions concerning the situations in which the court should apply foreign law – and which foreign law – are problems of substantive nature and are answered by the rules of the private international law of the forum rather than by any harmonized rules. This means that problems concerning the role of the court and the parties with regard to the application of foreign law, though closely interrelated with the nature and functions attributed to substantive rules, are of a procedural nature and as such are subject to the adjective laws of the forum.[1] Furthermore,

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[1] See for instance S.L. SASS, Foreign Law in Civil Litigation, *American Journal of Comparative Law* 1968/16, p. 332.

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when talking about the applicable law, at least two questions must be distinguished: who is obliged to plead to foreign law (the applicability of foreign law) and the proof and methods of ascertaining that law. In this respect, the approach to foreign law varies in different jurisdictions in the conflicts process, since all European procedural rules have their own procedural traditions. For instance, in some jurisdictions such as Germany it is the judge's responsibility to ascertain the content of foreign law; in some other jurisdictions, the judge is not allowed to conduct his or her own research.

Therefore, procedural law has a key function in international civil proceedings. It determines how foreign law is ascertained in each system and it also sets the standard for evaluating the sufficiency of the proof provided. It also provides the solution in circumstances where the proof of the applicable foreign law is not sufficient, which is generally to apply the law of the forum. This is true also in Finland. In order to achieve unified results (and true harmonization of substantive rules), there must be a unified way of proving the law and also evaluating the sufficiency of the proof. As stated in legal literature: "It is not exaggerated to claim that the divergences in the national procedures of the Member States in respect of application of foreign law create an obstacle to the good functioning of civil proceedings within European Union".[2]

In this paper I focus on pleading and proof of foreign law in a court process. I explain the Finnish rules that determine the questions of to what extent and by which means a judge is allowed to examine the content of foreign law. I also explain whether the judge is obliged to apply conflict rules ex officio and what is party autonomy with regard to this issue. I begin by explaining the general legislative norms concerning pleading and proof of foreign law.[3]

II. Pleading and Proof of Foreign Law According to Finnish Procedural Rules

Finnish courts must apply choice of law rules ex officio if the dispute is indispositive by nature.[4] In dispositive cases parties' obligation to make clear the legal basis of their respective position includes an obligation to demand the application of choice of law rules and foreign law thereto. Since law is scarce in this area, the above-mentioned principle is based on legal literature. However, presently prevailing procedural treatment of foreign law may be changing as discussion continues.

[2] R. HAUSMANN, Pleading and Proof of Foreign Law – A Comparative Analysis, *The European Legal Forum* 1/2008, p. 13.

[3] For a brief introduction to civil litigation in Finland see S. LAUKKANEN, The Influence of Foreign Laws on the Development of Finnish Law of Procedure, in M. DEGUCHI/ M. STORME (eds), *The Reception and Transmission of Civil Procedural Law in the Global*, Antwerpen/ Apeldoorn 2008, p. 213-222.

[4] Concept dispositive includes the areas of law in which the parties have the free disposition of their rights.

The above-mentioned *ex officio* treatment of conflict rules do not eliminate the court´s obligation to communicate all relevant arguments to the parties for their comment. In all cases the norms to be applied must be cleared up as early as possible; and, if the judge responsible for the preparation considers that the legal basis is unclear or the law referred is wrong, he should ask the claimant about the applicable law. Then the statement of claims – including the plaintiff´s answer – are sent to the defendant for answer. If the defendant agrees with the claimant´s opinion on applicable law, this is interpreted as an agreement, a choice of law that the court will accept, even if it would go against an earlier agreement or a choice of law rule (except for indispositive cases).[5]

Even though there are no explicit provisions on the pleading of conflict rules, the legislature has given guidelines concerning the duty to ascertain the content of foreign law. The Code of Judicial Procedure (CJP, 4/1734) chapter 17, section 3 (571/1948) states that:

(1) A fact that is notorious or known to the court ex officio need not be proven. In addition, no evidence need be presented on the contents of the law. If the law of a foreign state is to apply and the court does not know the contents of this law, the court shall exhort the party to present evidence on the same.

(2) If, in a given case, it is specifically provided that the court is to obtain information on the contents of the foreign law applicable in the case, the specific provisions apply.

(3) If, in a given case, foreign law should apply, but no information is available on its contents, Finnish law applies instead. (165/1998)

As the principle of *iura novit curia* applies only with regard to Finnish law, proceedings are governed by the principle that a party or parties of the dispute should bring information (evidence) of the foreign law to the court. Only where the foreign law is notorious by nature or where specific provisions provide that the court should obtain the evidence is there no obligation on the parties to present any evidence on the foreign law.

There are no provisions in the procedural code to stipulate which party should bring information about the applicable law.[6] It is up to the presiding judge to decide which party is required to bring evidence. Usually the party who has claimed the application of foreign law has more motivation to present sufficient information; the other party can be opposed to application of foreign norms, and one can generally presume that this party has no interest bringing information of good and sufficient quality regarding the foreign law.

From a comparative perspective the question how the content of foreign law has to be brought to the knowledge of the court depends primarily on the procedural law of the forum and the characterization of foreign law as fact or as law. In Finland, foreign law is generally in the law of evidence and treated as a question of

[5] See H.T. KLAMI/ E. KUISMA, *Finnish Law as an Option. Private International Law in Finland*, Vammala 2000, p. 7-8. This means that in dispositive cases the court is not permitted to apply foreign law ex officio if neither party has requested its application.

[6] For an exception to this see for instance posted workers act (1146/1999) section 2 (6) which states that "A party claiming in legal proceedings that the law of another country should be applicable to the employment contract of a posted worker shall show proof of the contents of the applicable."

fact; parties may hear, for instance, expert witnesses. Parties are, in principal, free to choose the method by which to obtain knowledge on the foreign law: parties are allowed to use whatever means they choose to ascertain the content of foreign law. Usually the material is translated by an officially authorized translator. However, the presiding judge may decide that official translations are not required.

Under Finnish procedural law it is clear that the burden of proof rests on the party who pleads the application of the foreign law; and if foreign law is not proven, the court should apply *lex fori*.[7] The court is also permitted to complete the information of foreign law if it thinks that information received from parties is not sufficient. However, it is not obliged to do so.[8] If both parties present conflicting information, the court may and has to decide which is correct and what is *the true content* of foreign legal norms.

Since there are no provisions on the burden of proof, the court has a wide discretion to decide whether or not the standard of proof has been exceeded. In the absence of sufficient information, the court may apply Finnish law instead of foreign norms (CJP 17:3.3) Under private international law doctrine one should be able to apply the foreign law in a loyal way. This means that it is not enough to present the statutes and rules and to interpret them according to their wording, but the court should be able to apply foreign law in the same way as it is being applied in the country of its origin. Therefore, one has to refer to both foreign judicial practice and principles, and methods of interpretation. There is a close connection between private international law requirements for information of foreign law and sufficient proof of foreign law and comparative law method (how to achieve correct information of foreign law).

Based on the private international law doctrine, a court should exclude the foreign law if it is contrary to Finnish *ordre public*. As elsewhere, this concept is rather elastic, at least in detail, but of course principles which protect fundamental principles of Finnish legal system are included. Such fundamental principles include, for example, equality of spouses and the best interest of a child. Nowadays it seems that *ordre public* is frequently pleaded but courts are cautious to accept it as an argument. Pursuant to Finnish case law, what matters is not the wording of

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[7] R. KOULU, *Kansainvälinen prosessioikeus pääpiirteittäin*, Helsinki 2003, p. 203. See also of the same author, *Lainvalinta oikeudenkäynnin ongelmana*, *Defensor Legis* 2002, p. 387, where he states that it is not common practise that the court would state in a preparation phase whether the proof provided is sufficient or not. Because the sufficiency is evaluated in an actual process, the party who has been obliged to provide information of foreign law may be surprised to hear that the proof is not sufficient and *lex fori* is applied instead.

[8] Presiding court is free to choose the method of how to ascertain the foreign law. Judges may use diplomatic or consular channels or consult the Foreign Ministry. Note, that Finland is also a party of the London Convention on Information on Foreign Law of 1968. However, the Convention is not frequently used in Finnish courts. In legal literature it has been said that the situation is and should be changing toward more active role for the courts to take. According to Risto KOULU, at least the burden of proving foreign law should be shared between the court and the parties. The information brought to the court by the parties is almost always subjective and court's active role is needed to ascertain the correctness of the information.

the law but whether the contents of the decision rendered would be in conflict with the public policy. Furthermore, the violation must be obvious.[9] One should also bear in mind that a court may decline the application of foreign law in some other circumstances (other than *ordre public*), although I will not consider those circumstances here.

III. Case-Law Concerning the Standard of Proof of Foreign Law

CPJ 17:3.3 reflects the circumstances at the time that it came into force. At that time, the available means by which to become apprised of foreign law and foreign jurisprudence were very different to those available today. That is why it was thought that the law needed a safety valve to be applied in those cases where it was not possible to clarify the rules of foreign legal system. It is true that the Internet has meant a revolution in the area of legal informatics; nevertheless, establishing the content of foreign law is not always easy or even possible, and the safety valve rule still holds its place and is justifiable in our procedural system. The threshold for application of the rule has become higher as years have gone by and courts (at least higher courts) apply the law of the forum (CJP 17:3.3) infrequently.[10] Can one infer from this fact that the information brought to the court is usually of good quality and courts are able to decide the cases according to the material presented? Conversely, is the standard of proof too low against the requirements of private international law? These are the two main questions I asked when I took a journey of exploration to the most relevant and recent Supreme Court[11] cases where foreign law was the applicable *lex causae*.

In the 1990's, judicial practice concerning conflict of law issues was scarce. Cross-border disputes were often litigated in arbitration proceedings. Courts were not prepared to apply private international law, apart from in cases where the result would have been the application of the forum law. If foreign law was applied, the principle of loyalty was not followed as parties normally failed to present anything other than statutory texts and their translations to the court. This situation can be explained by history: Finnish legislation concerning private international law was inadequate and universities and researchers were not interested in cross border issues as cases were infrequent. However, cross-border cases have grown in num-

[9] See also H.T. KLAMI/ E. KUISMA (note 5), at 9-10: "It is to be observed that resorting to open rejection of foreign law and its reasons are rarely made explicit. It is for this reason difficult to say anything certain about the actual situation, when one has in straightforward manner applied Finnish law. Our general impression, however, is that the application of *ordre public* or *lois d'application immédiate* are rare exceptions".

[10] See also R. KOULU (2002) (note 7), at 388. According to him, application of CJP 17:3.3 is avoided. The legal situation is same in other Nordic countries, as well.

[11] See the functions and precedents of the Supreme Court Internet: www.kko.fi/29538.htm. The Supreme Court hears both civil and criminal appeals, but cases are admitted only under certain conditions.

ber and the legal situation has slowly improved, although general understanding of principles of choice of law, private international law and foreign law (comparative law) has not radically improved, especially amongst judges and lawyers of the elder generation. It is worth mentioning in this respect that the only permanent professorship of comparative law and private international law is in Lapland, held by myself.[12]

Without exaggeration one can say that in Finnish judicial practice, private international law and foreign law aspects are still uncommon. Moreover, in cases where choice of law has led to a result where *lex causae* is foreign law, the court's arguments seem to emphasize the process of choosing the law, and the process of proving its content has not been seen as problematic. I found four Supreme Court precedents that I thought would indicate what kind of a proof of foreign law is considered sufficient; in other words, cases I thought would help to set the standard of proof of foreign law. I also wondered if party autonomy also has a place at this stage where the applicable law has been chosen and its content should be presented to the court: does it matter if the other party approves or disapproves the evidence provided? These questions are interesting since we do have recent cases where private international law rules have resulted in the application of foreign law, however in those cases we do have, courts have not applied the safety valve rule - meaning that information of foreign law provided by the parties has been considered sufficient in all these cases. Has the evidence provided in each case been similar in terms of width and depth – that is to say quality, or has the standard of proof varied?

In a case KKO 1999:98 (recovery to a bankrupt's estate) the plaintiff presented two expert opinions – drafted years before the contestable conveyance - on Spanish law. The experts were bank officials, one from a Finnish bank and the other from a Spanish bank. The expert opinion drafted by the Finnish bank official had no references to Spanish law, Spanish case law or legal literature. The other expert had based his/her conclusions on one article of the Civil Code but the opinion ended with a following statement: "Our comments are based on solely scholarly opinions that are contested (not-unanimous) in our legal science." The Court of Appeal considered that this proof was not sufficient and applied the safety valve rule, resulting in the application of forum law. Surprisingly though, the Supreme Court considered the proof sufficient and applied Spanish law.

The Supreme Court made general comments in its reasoning regarding what the type and extent of proof that should be required. According to the Supreme Court, there are cases in which "the judgment cannot be made, if the precise wording of a relevant foreign provision is not known." Sometimes "it is enough that the main principles, according to which a certain legal question is provided within the legal system of a relevant state, are known." However, these *obiter dicta* –like sentences, stated by the Supreme Court, ignore the essential core of comparative law; that is, to apply foreign law authentically, individual provision must be put against the relevant legal system. It is vital to comprehend what kind of rules of interpretation direct the application of law in the legal system where a provision

[12] See T. MIKKOLA, Comparative Law Teaching in Finland, in T. MODEEN (ed.), *Aspects of Finnish Contemporary Law*, Helsinki 2002, p. 13-26.

has originated, and whether there are legal principles that direct the application of law, or justify exceptions from the main principle.

According to Risto KOULU, the standard of proof in KKO 1999:98 was too low. He states that the burden of proof was divided between the parties involved. The plaintiff had the primary obligation for proof, whereas the corresponding obligation of the defendant was secondary, according to which the defendant should have provided information of possible exceptions to the main principles of Spanish law. KOULU describes this as a model of divided burden of proof which suffers from structural problems and does not guarantee that the proof is of good quality or that the main rules and possible exceptions to those (especially in the meaning of legal principles) are set out in the evidence provided.[13]

The problem is that by the division of the burden of proof one cannot directly impact on the quality of evidence. If the obligation to deny the given proof is posed to another party, because otherwise the given evidence is taken as such as the basis of a judgment, the conclusion can be that the standard of proof remains too low – and that is precisely what occurred in this case. The court must concentrate on the quality of the evidence provided, rather than making conclusions on the amount of proof on the basis of actions taken by the parties. In this case the court should have requested proof to be complemented by the party who provided it – or by the court should have complemented it by its own initiative.

The case KKO 2006:108 also concerned recovery to a bankrupt's estate. According to the private international law rules, the law of Estonia was the applicable law. Paragraph 14 of the reasoning of the Supreme Court is conspicuous, stating that the bankrupt's estate had delivered "quite extensive evidence to the District Court, mainly legal norms with translations. This evidence is not disputed". From a review of the documents it turns out that bankruptcy legislation as well as civil code (translated in Finnish) were provided. The reasoning of the Supreme Court gives the impression that when the Court assessed the sufficiency of the proof, significance was given to the actions taken by the defendant and to whether he/she has disputed or accepted the evidence given. In this way, the published reasoning suggests that standard of proof of foreign law was considered discretionary in character.

The case KKO 1997:160 concerned guarantee and its limitation period. Choosing the law seemed to be here – as in the foregoing cases – in the centre, because the reasoning concerning it by both lower court and the Supreme Court was remarkably longer than the process of proving of the applicable foreign law (in this case German), which actually was not seen as problematic at any stage. The judgment does not offer anything new to the question of, what kind of clarification one should represent about foreign law, so that the standard of application provided in CJP 17:3, would be satisfied.

The latest decision concerning the application of foreign law is KKO 2011:97. It concerned payment of alimony, that is maintenance, to a spouse after divorce. This time the reasoning concerning the choice of law was short because it

[13] R. KOULU (note 7), at 385, in which the author states that the model of divided burden of proof is endangered by arbitrariness when the preconceptions of the court determine the scope for the burden of proof.

was indisputable that the applicable law was Swiss legislation, and the problem concentrated on proving, on one hand the foreign law and on the other the economic circumstances of the parties. The District Court acquired information of Swiss law and legal literature by means of executive assistance. The Court delivered the request for legal advice to the international unit of the Ministry of Justice with the headline "for clarifying the contents of a foreign legislation and its application in a Finnish court (in a maintenance case)." The information given by the Swiss authorities (Federal Office of Justice) was subsequently delivered to the District Court. Both parties of the case had also acquired a statement from Swiss attorneys.

The amount of information on comparative law collected in the case is remarkable. The question of whether a spouse has a right to alimony from an ex-spouse after divorce is, even within Finnish law, an issue, to which answering requires knowledge of case law and legal literature, and the written law does not answer to the question by itself.[14] This applies to the Swiss legislation as well and, accordingly, a wide range of Swiss case law and legal literature was provided in the case, within which the main rule and possible exceptions were sought by the court.

What kind of arguments did the Supreme Court give in respect of applying the foreign law? The reasoning of the majority states the following (paragraphs 4, 9 and 17): "In Switzerland alimony is provided in Article 125 of the Civil Code. According to it, a spouse must pay proportionate alimony, covering even relevant pension, if it is not reasonable to require that the other spouse takes care of his/her own maintenance […] As it becomes evident from the judgment of the District Court, when deciding the amount of alimony, in accordance with the Swiss law, one must take into account especially the distribution of work during the marriage, the duration of the marriage and the standard of living during it, the age and health of the spouses, as well as income and property, parties' other obligations to provide maintenance, the education of the party requesting alimony and income possibilities as well as rights to a pension. The District Court has also stated that, according to the previous Swiss legislation, a spouse who is over 45 years old and who has not been working during a long marriage, has not been required to return to working life after divorce. During the validity of the existing law this rule has not been seen as unexceptional. The decided amount of alimony cannot be over the solvency of the party liable to provide maintenance. By the evidence provided on Swiss legislation, Swiss case law and legal literature as well as income, property and living costs of the parties, the Supreme Court decides those starting points based on which the District Court and the Court of Appeal have made their decisions, justified by the Swiss legislation. Maria PV has the right to receive alimony from Martin P. It is also in accordance with the Swiss legal principles, as stated previously in the paragraph 9, that the decided amount of alimony cannot exceed the solvency of the party liable to provide maintenance. Since Martin P has moved to

[14] See H. SALMENKYLÄ, Finland, in J. STEWART (ed.), *Family Law. Jurisdictional Comparisons*, Thomson Reuters 2011, p. 97-111, esp. p. 104.

Finland, his solvency must be estimated in accordance with the predominant circumstances here."

The reasoning of the majority does not therefore touch the problematic question of the standard of proof. Accordingly, it does not discuss the basic questions of comparative law, such as the reliability of the sources of foreign law and their relative "ranking" order. The reasoning lacks pro and contra-arguments, even though the maintenance law, case law and the legal literature do not offer any clear answer to the question of a spouse's right to alimony. In other words, even though a lot of comparative information about the contents of foreign law was provided in this case, the basic doctrines of comparative law were not utilized or, at least, they are not apparent from the reasoning of the majority. Thus, we do not *know* how widely the justices of the Supreme Court have actually utilized comparative law when making the decision.

The dissenting opinion was more comparative by nature. Hence, also the significance of the quality and scope of the information becomes clearer for the reader. The reasoning has a somewhat "pre-chewed" taste, however it aims further. The beginning of the dissenting opinion states that "considering that the parties have not exactly pronounced on the contents of the Swiss case law, to which *inter alia* the commentary mentioned below refers, I consider, that the parties of the case must still be heard." I might indicate that the dissenting justice would have preferred to clarify even more deeply, what the foreign court practice says about the applicable legal norms in a dubious case like the one at hand, reasoning that separating *a legal norm* from a foreign case does not always happen in the same way as here in Finland.

In cases concerning alimony, establishing solvency and the need for maintenance require that non-legal factors are also taken into account. Non-legal factors include for instance the following question: what is the extent of the need for maintenance, if the one entitled to maintenance does not live in the same country with the one liable to pay, and the case is decided in the home country of the latter. In this case non-legal factors were also taken into account, more widely in the dissenting opinion which states that "decisive in this case is, however, whether Maria PV has proved that she cannot herself take care of the appropriate level of maintenance. In other words, the question is, what maintenance level Maria PV is entitled to, whether her own employment - corresponding this maintenance level - is possible, and whether this requirement is proportionate." To answer these questions, one has to study *inter alia* the labour market situation of a foreign country and what the average salary is for a person with a similar situation and background as the party requiring maintenance in a case. In the dissenting opinion, the reasoning concerning this point, as well as the reasoning concerning the establishment of the need for maintenance, is highlighted. The comparison is wider, considering non-legal, social factors and it is for this reason that it is very difficult to decide maintenance cases which go beyond state borders in a way that respects the main principles of comparative law and respects the differences compared to the court's own legal system.

IV. Conclusions

One of the major functions of comparative family law is to reveal foreign law in order to apply it in a court. At this point one should be aware of the main rules and principles of comparative law. The most important rule to remember is that written laws do not tell the whole story and that the sources of law are not the same everywhere. Understanding specific legal rules presupposes a conception of what modern law is in that particular legal system.

Law must be conceived as one part of a systematic entity and as rules of social practices. A legal system must be considered from the perspective of its normative, conceptual and methodological elements. The normative elements of a legal culture include the legal principles of different fields of law, for instance in Finland the best interests of a child in child law, testamentary freedom in the field of inheritance law and spouses contractual freedom in marital law. The conceptual elements include the concepts that structure certain fields of law. Concepts may seem to be the same in two or more legal systems but they must be interpreted as system-based notions. For instance, guardianship is as a legal concept recognized in different legal system but what it entails is a question that must be asked within each legal system. The third element of a legal culture is connected to the functional side of law. It is a methodological element of a legal system, by which I mean the way to read and apply the law, and the patterns of argumentation. In comparative law this tells the story of how law is made concrete.

Nation states have had a vocabulary of their own and national boundaries are still boundaries of legal speech. This is true even today and also within Europe. One of the main problems with EU law is the varying discourses in the field of law in member states, even in those member states that have common roots in Roman law. In order to understand a legal system as an entity, one must consider who in the specific legal system has the responsibility of elaborating principles and concepts. In European legal systems, the responsibility usually lies with the legal science. In England, for example, the situation is somewhat different: the responsibility lies with the judges who are the most influencing group of legal actors there.

In other words, one should take comparative law seriously.[15] At the beginning of this article, I posed a question whether decisions of the supreme court give us clear guidelines what kind of information – concerning quantity as well as quality - is required when providing proof of foreign law. As a conclusion I dare to say that in some of the decisions proof of foreign law has been of a very low quality. In addition, the question of content of foreign law and the threshold for its application appear to be dependent on the parties' agreement; in other words, whether or not the other party accepts the information provided.

Contrary to what practice seems to be, courts should take comparative method seriously. A loyalty principle requires that foreign rules must be reflected against the *home system's* conceptual structure and style of operation. Even though under the Finnish legal system a judicial precedent is not binding, it creates

[15] On the subjectivity of comparative law see T. MIKKOLA, The Risks and Opportunities of Foreign Connections in Marriages, in B. ATKIN (ed.), *The International Survey of Family Law*, Jordan Publishing 2008, p. 77-105, esp. p. 105.

consistency in case law. Case law could and would also help to set the standard of proof in cross-border cases if the reasoning in decisions was open and transparent. At the moment, published justifications do not provide information and insight into interpretational practices concerning a proof of foreign law. According to legal doctrine there is no party autonomy governing sufficient information of foreign law and evaluating the standard of adequate proof is a matter for the court; according to Finnish case law, however, the burden of proof rests on the party who pleads foreign law and if not contested by the other party, the court will apply it as such. Thus, comparisons with no references to systematic elements of the jurisdiction are not trustworthy and in addition, this approach does not guarantee that the requirement settled by legal doctrine – the loyality principle – is reached.

THE INTERNATIONAL JURISDICTION OF THE TURKISH COURTS ON PERSONAL STATUS OF TURKISH NATIONALS

Zeynep Derya TARMAN*

I. Introduction

In Turkish law, the international jurisdiction of the Turkish courts is based on the internal jurisdiction rules. In the Private International Law and International Civil Procedure Code (hereafter: PIL Code) dated 21 November 2007 and numbered 5718,[1] Art. 40 provides: "The international jurisdiction of Turkish courts shall be determined by the rules of domestic law on internal jurisdiction." Thus, article 40 establishes the general principle designating the international jurisdiction of the Turkish Courts. Therefore, in case of a conflict involving a foreign element, the question of whether the Turkish courts have international jurisdiction shall be determined based on the rule of internal jurisdiction in accordance with domestic

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[1] The law has been carried into effect as of the date of its publication in the Official Gazette (OG) on 12 December 2007 Nr. 2678.

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law. Also, in addition to the general rule, there are also special international jurisdiction rules determining the international jurisdiction of the Turkish courts in terms of certain legal conflicts (PIL Code Art. 41-46). In such cases (where the international jurisdiction of the Turkish courts are regulated in particular ways) such particular jurisdiction rules shall apply instead of the general rule.[2] There are also certain international jurisdiction rules that apply due to conventions to which the Republic of Turkey is a contracting party.[3] The rules in those conventions govern in such situations [PIL Code Art. 1(2)].

In this paper, the rule of special jurisdiction regulating the international jurisdiction of the Turkish courts concerning the personal status of the Turkish nationals (PIL Code Art. 41) shall be discussed. The rule of special jurisdiction stated in Art. 41 is currently of interest due to the divorce suits filed by the Turkish nationals residing abroad, which are litigated again in Turkey. The purpose of this study is to discuss the consequences of suits that concern the personal status of persons when such suits have been litigated in a foreign country and again in Turkey. Within this framework, it will be examined whether the special jurisdiction rule stated in Art. 41 of the PIL Code establishes an exorbitant jurisdiction.[4] First, the article will analyse the rule of international jurisdiction stated in Art.41 of the PIL Code, the conditions concerning its application and the characteristics of the jurisdiction rule it provides. This will be followed by a discussion of the competent courts provided by Art. 41, certain problems that may arise if Art. 41's conditions are not met, and the exceptional cases where the Turkish courts may have jurisdiction despite legal action concerning the legal status of Turkish nationals being litigated in a foreign country. Finally, the article will discuss the resolution set forth by the Convention on the recognition of decisions relating to the matrimonial bond signed at Luxembourg on 8 September 1967 by the International Commission on Civil Status.[5]

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[2] B. TİRYAKİOĞLU, Türklerin Kişi Hallerine İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, *Prof. Dr. Tuğrul Arat'a Armağan* 2012, Ankara, p. 1141. For counter view see E. NOMER, *Devletler Hususi Hukuku*, Istanbul 2011, p. 456. The author does not evaluate the international jurisdiction rules as an exception to the general international jurisdiction rules stated in Art. 40 and qualifies the special jurisdiction rules as complementary rules.

[3] Convention on the Contracts for the International Carriage of Goods by Road (CMR), Art. 31 (OG 14 December 1993 Nr. 21788); Convention concerning International Carriage by Rail (COTIF), Appendix A Art. 52 (OG 1 June 1985 Nr. 18771); Convention for the Unification of Certain Rules for International Carriage by Air-Montreal, Art. 33 (OG 1 October 2010 Nr. 27716).

[4] Jurisdiction is exorbitant when the court seized does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action. In other words, exorbitant jurisdiction is described as "jurisdiction validly exercised under the jurisdictional rules of a State that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction." K.A. Russell, Exorbitant Jurisdiction and enforcement of judgements: the Brussels system as an impetus for the United States action, *Syracuse Journal of International Law and Commerce*, Spring 1993, p. 2.

[5] OG 14 September 1975 Nr. 15356.

II. The Rule of International Jurisdiction: Art. 41 PIL Code

A. The Rule

The Turkish PIL Code regulates the international jurisdiction of the Turkish courts regarding legal actions concerning the personal status of Turkish nationals. In conjunction with this subject matter, the Code provides Turkish courts with jurisdiction in all cases, despite the jurisdiction rules presented by the internal law (Art. 41). In the aforementioned article, it is stated: "Suits relating to the personal status of Turkish nationals shall be heard before the court having internal jurisdiction in Turkey, provided that these suits have not been or may not be brought before the courts of a foreign country, if there is no court having internal jurisdiction in Turkey, the legal suit shall be heard before the court where the person concerned is resident, if he/she is not resident in Turkey, before the court of last domicile in Turkey and if there is no court of last domicile, before one of the courts in Ankara, Istanbul or Izmir."

In accordance with Art. 41, Turkish nationals may bring suits regarding personal status in either the courts of a foreign country or a Turkish court. Moreover, if Turkish nationals are unable to bring these suits in a court of a foreign country or if they do not wish to do so, and if there are no competent courts based on internal jurisdiction in Turkey, the article also provides a court that shall have jurisdiction for such cases that are firmly affiliated with personal status.[6]

Former Art. 28 of the PIL Code,[7] which was revoked when the new PIL Code became effective, contained a special provision that regulated the competent Turkish courts in cases involving Turkish nationals that did not have a domicile in Turkey. Art. 41 eliminates the restrictions on Turkish court jurisdiction that were contained in former Art. 28. Most importantly, under Art. 41 Turkish court jurisdiction is no longer dependant on whether or not the Turkish national is domiciled in Turkey. In other words, it is not mandatory for a suit concerning the personal status of a Turkish national to be brought before a court in the country where the Turkish national is residing. Pursuant to Art. 41, two conditions must be met in order for the Turkish courts to have jurisdiction: (i) the suit must concern the personal status of a Turkish national; and (ii) the suit must not or could not have been brought before the courts of a foreign country. Art. 41 does not require a genuine connection between the foreign country where the case was first brought and the suit or the parties to that suit. It has been argued that Art. 41 could introduce the criteria of genuine connection between the place where the case has been litigated and either the suit or the parties.[8] Since the possibility exists that a court in a foreign country could be called upon to decide a suit that has no connection with that country, it may be possible for Art. 41 to establish conditions, such as the

[6] A. ÇELİKEL/ B. ERDEM, *Milletlerarası Özel Hukuk*, Istanbul 2012, p. 544.

[7] The PIL Code dated 20 May 1982 and numbered 2675 has been revoked in accordance with Art. 64(1) of the current PIL Code.

[8] B. TİRYAKİOĞLU (note 2), at 1151.

condition that one of parties to the suit be domiciled in the country where the case has been litigated or, at least, be working in that country. Thus, when a party is attempting to have such a judgment recognized and enforced in Turkey, the fact that the court in the foreign country does not have a genuine connection with the parties or the suit could act as an obstacle against the judgment's recognition and enforcement in Turkey [PIL Code Art. 54/1(b)].[9]

B. Conditions for the Application of the Rule

1. Legal Conflict Concerning the Personal Status of Turkish Nationals

The personal status of Turkish nationals is the first condition to Turkish court jurisdiction. The determination of whether the suit concerns personal status must be performed in accordance with Turkish law.[10] Within this framework, the suits concerning personal status are those that involve the laws regarding civil status and capacity of a person, as well as family law. These suits include matters such as divorce and separation, nullity of marriage, guardianship, descent and capacity.[11] Thus, excluded are suits concerning matrimonial property and maintenance claims, as such suits do not relate to personal status. In the same way, suits concerning material and immaterial damages, even if they are litigated for a conflict concerning personal status, are not considered to be suits concerning personal status.[12] Therefore, suits concerning legal capacity, matrimonial cases and cases concerning descent and guardianship will be subject to Art. 41 within the framework of "personal status". If a suit litigated in a foreign country does not concern personal status but, nonetheless, has been brought before the Turkish courts, Art.41 shall not apply and the courts indicated in this article shall have no jurisdiction.

For Turkish courts to have jurisdiction in accordance with Art. 41, it is not mandatory that both parties be Turkish nationals; it is sufficient that one of the parties is a Turkish national and that the conflict concerns the personal status of a Turkish national.[13] Turkish nationality is regulated in accordance with Turkish law. Suits concerning the personal status of individuals who are nationals of Turkey under the provisions of the Turkish Nationality Act dated 29 May 2009 and numbered 5901[14] are subject to Art. 41 of the PIL Code.[15] Thus, residency and domicile are inconsequential. Whether the concerning person has a nationality from a different country besides his/her Turkish nationality or whether his/her Turkish nationality is acknowledged by another country is of no significance either. What is important is that one of the parties be a Turkish national at the time the suit is

[9] B. TİRYAKİOĞLU (note 2), at 1151.

[10] B. TİRYAKİOĞLU (note 2), at 1145.

[11] E. NOMER (note 2), at 449-450; A. ÇELİKEL/ B. ERDEM (note 6), at 541.

[12] B. TİRYAKİOĞLU (note 2), at 1145.

[13] E. NOMER (note 2), at 450.

[14] OG 12 June 2009, Nr. 27256.

[15] A. ÇELİKEL/ B. ERDEM (note 6), at 545.

litigated. Loss of Turkish nationality after suit is filed has no effect on jurisdiction. Jurisdiction is not impacted by any changes that may occur concerning the circumstances which established jurisdiction. This conclusion is based on the general provision (PIL Code Art. 3) which establishes jurisdiction on the date the claim is filed.[16] Within the framework of Art. 41, stateless foreigners and refugees are not in the same category as Turkish nationals, and Art. 41 may be applied only to those persons maintaining their status as Turkish Nationals.[17]

2. No Litigation in a Foreign Country

The suit concerning personal status must not have been litigated in a court of a foreign country. The parties must have not, for any reason, litigated the suit in the country in which they are residing. This is true despite the fact that one of the purposes of Art. 41 is to always maintain a court with competent jurisdiction for Turkish nationals who wish to litigate suits concerning their personal status in the courts in Turkey instead of the foreign country in which they are residing. It may also be the case that a person who is not of Turkish nationality but of the nationality of a foreign country prefers to litigate such a case against a Turkish national in a Turkish court. For instance, a spouse with foreign nationality that temporarily comes to Turkey from the country where the couple had been residing for some time may prefer to litigate a divorce case against his/her spouse of Turkish nationality in a Turkish court instead in the courts of his/her own country. In some cases, a suit concerning personal status cannot be litigated in a foreign country because the court in the foreign country may dismiss the case on the basis of lack of jurisdiction.

The PIL Code contains no rule regarding the jurisdictional impact of a case having been first litigated in a foreign country. If a suit that has been litigated in a foreign country is litigated once again in Turkey, Articles 41 and 47[18] govern the jurisdiction of the Turkish courts. In such cases, for suits that do not concern personal status the issue of whether Turkish courts have international jurisdiction is determined based on Art. 40 instead of Art. 41. If a competent court exists, the suit must be heard before that court. Likewise, when the conflict concerning personal status does not involve Turkish nationals, designation of the jurisdiction of Turkish

[16] E. NOMER (note 2), at 450.

[17] E. NOMER (note 2), at 450.

[18] PIL Code Art. 47 regulates the terms and consequences of the court of a foreign country being assigned as the competent court in result of a jurisdiction agreement. If the jurisdiction agreement meets the conditions set forth in Art. 47, the Turkish courts shall have no international jurisdiction. In case after the suit is litigated in the competent court of the foreign country in accordance with the jurisdiction agreement and the same suit is litigated once again in Turkey while the first suit is in the process of being heard, foreign pendency shall be taken into consideration. E. NOMER (note 2), at 468. However, in case a jurisdiction agreement is present, concerning the necessity for the Turkish court to dismiss the case based on lack of international jurisdiction instead of foreign pendency, see F. SARGIN, *Milletlerarası Usul Hukukunda Yetki Anlaşmaları*, Ankara 1996, p. 189; B. TİRYAKİOĞLU (note 2), at 1148, fn.19.

courts is not possible under Art. 41. Apart from suits concerning the personal status of Turkish nationals and Art. 47 concerning jurisdiction agreements, the PIL Code contains no regulation allowing objections concerning "the international jurisdiction of Turkish courts" or "foreign pendency", as acknowledged in doctrine, propounding a case that was litigated in a foreign country. Therefore, any objections made against jurisdiction or pendency has no legal basis apart from the regulations put forth in the international conventions to which Turkey is a contracting party.[19]

C. Characteristics of the Rule

PIL Code Art. 41 is a special rule of jurisdiction when compared to Art. 40, which stipulates that the international jurisdiction of the Turkish courts must be determined by the rules of internal law. Art. 40 provides the general rule designating the international jurisdiction of the Turkish courts. Following this statement, the law provides special international jurisdiction rules concerning situations where it is deemed appropriate to designate international jurisdiction in particular situations. In such cases, which are considered within the scope of such special jurisdiction rules (Art. 41-46), it is evident that the international jurisdiction of the Turkish courts is designated in accordance with these rules.[20] For this reason, when there is a conflict regarding the scope of Art. 41, it is wrong to designate the international jurisdiction of the Turkish courts based on Art. 40. Applying the general international jurisdiction rule when a special international jurisdiction rule exists would mean that Art. 41 was not applied. Such a situation would make the *raison d'etre* of the other special jurisdiction rules regulated in the PIL Code disputable.[21] For instance, under Art. 45, which contains one of the special international jurisdiction rules in the PIL Code, the court at consumer's place of habitual residence has competence in suits brought against consumers. In such suits, it is not possible to designate the competent court based on the general international jurisdiction rule stated in Art. 40, despite the presence of Art. 45.[22] Since the issue of concern here is the international jurisdiction of the Turkish courts, such jurisdiction, whether designated in accordance with Art. 40 or based on a special rule, must be taken into consideration ex officio by the judge.[23]

In case the prerequisites for the application of the PIL Code Art. 41 have been fulfilled, suits shall be heard before the court having internal jurisdiction in Turkey. To litigate a suit in a "competent court in Turkey based on internal jurisdiction rules" is possible only if the suit has not or cannot be litigated in a foreign country. When a suit has previously been asserted in a foreign country, the suit brought before a competent court in Turkey based on Art. 40 must be dismissed.[24]

[19] B. TİRYAKİOĞLU (note 2), at 1152.

[20] B. TİRYAKİOĞLU (note 2), at 1156.

[21] B. TİRYAKİOĞLU (note 2), at 1157.

[22] For counter view see E. NOMER (note 2), at 456.

[23] B. TİRYAKİOĞLU (note 2), at 1157.

[24] B. TİRYAKİOĞLU (note 2), at 1158.

Under such circumstances, the procedure would be to wait for the suit in the foreign country to be finalized and, consequently, request that the judgment be recognized and enforced in Turkey.[25]

III. Competent Courts in Accordance with Art. 41

PIL Code Art. 41 states that when the requirements in the concerning article are met, the Turkish courts shall have international jurisdiction. This can be easily understood from the mandatory wording of the article.[26] For this reason, if a suit concerning the personal status of Turkish nationals has not been litigated in a foreign country, the Turkish courts shall have undisputed international jurisdiction. If it is concluded that the Turkish courts have international jurisdiction in accordance with Art. 41, the judge must then examine on its own motion whether the courts described in a hierarchical manner have been properly invoked in the hierarchy described. For instance, if a competent Turkish court exists based on internal jurisdiction rules yet the parties have sought redress instead in a court at the parties' last domicile, which is described as the third possible option in the article, the judge must observe this matter on its own motion and dismiss the case based on jurisdiction.[27]

In Turkish law, internal jurisdiction rules exist not only in the Code of Civil Procedure, but also in the Civil Code. For instance, there are courts with special jurisdictions for suits concerning the annulment of marriage (Civil Code Art. 160), divorce and separation (Civil Code Art. 168), descent (Civil Code Art. 283), the personal relationships of the child (Civil Code Art. 326), and for taking the necessary precautions for protection of the matrimony (Civil Code Art. 195-198) as well as rules concerning adoption decisions (Civil Code Art. 315).[28] For procedures concerning guardianship, jurisdiction resides with the guardianship chambers at the domicile of the minor or the person with the legal disability (Civil Code Art. 411).[29] If there is no competent court based on internal jurisdiction rules concerning the personal status of Turkish nationals, such as when the habitual residence of the concerned Turkish national is located somewhere other than Turkey (Code of Civil Procedure Art. 9), the courts indicated in Art. 41 shall have jurisdiction. Accordingly, the suit shall be brought in the court where the concerned Turkish national resides in Turkey or, if that person does not reside in Turkey, the court located in his/her last domicile in Turkey. If the concerned person does not have a last domicile in Turkey, courts in Ankara, Istanbul or Izmir shall have jurisdiction.

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[25] B. TİRYAKİOĞLU (note 2), at 1158.

[26] N. EKŞİ, *Türk Mahkemelerinin Milletlerarası Yetkisi*, 2nd ed., Istanbul 2000, p. 175.

[27] N. EKŞİ (note 26), at 155.

[28] E. NOMER (note 2), at 451, fn. 188.

[29] Court of Cassation (*Yargıtay*), 2. Civil Chamber, E. 2008/20095, K. 2009/8384, T. 30 April 2009.

According the provision regulating agreements on jurisdiction (PIL Code Art. 47), an agreement granting jurisdiction to a foreign court cannot be entered into regarding matrimonial matters.[30] However, Art. 41 provides the parties with the opportunity to obtain a divorce decree by applying to a court in a foreign country, provided that the parties are in mutual agreement. In the event the recognition and enforcement of such a court judgment is requested in a Turkish court, the parties having previously applied to a court in a foreign country under mutual agreement can not provide grounds for the dismissal of the recognition and enforcement action in Turkey. In such a case, it is possible to qualify this agreement as an agreement granting jurisdiction to a foreign court regarding a matrimonial matter.[31] The conditions that the Turkish law requests to be met for recognition and enforcement (PIL Code Art. 54) are insufficient to dismiss the recognition and enforcement of such a divorce judgment. The jurisdiction of the foreign court is outside the matters to be reviewed by the Turkish judge, unless the exclusive jurisdiction of Turkish courts is concerned.[32]

IV. Issues That Shall Arise in Case the Conditions Stated in Art. 41 Are Not Met

With regard to suits concerning the personal status of Turkish nationals according to Art. 41, Turkish courts have international jurisdiction, only when both conditions indicated above have been fulfilled. If only one of the conditions has been fulfilled, the conclusions that can be reached vary based on which of the two conditions are met.

If the conflict concerns the personal status of Turkish nationals but the other condition has not been met, namely, that a suit has been litigated in a foreign country, in this case, the fact that Turkish courts shall have no jurisdiction is resolutely evident. It is possible for Turkish nationals to litigate a suit concerning their personal status in a foreign court. In fact, it is expected that Turkish nationals will litigate suits in a foreign country, particularly in the country where they reside. Such a decision is usually beneficial for the ruling to have validity in the country where the Turkish national is residing. It is also possible for judgments obtained from a foreign court to be recognized and enforced in Turkey. For this reason, Art. 41 provides that a suit concerning personal status being heard in one of the courts indicated in Art. 41 is subject to that case having not been previously litigated in the courts of a foreign court.

The situation providing the most trouble occurs when a suit has previously been litigated in a foreign country and one of the parties to that suit is attempting to have the matter relitigated in Turkey. On that basis, the explanations below will emphasize the results arising from this situation. Still, if the suit litigated in the

[30] E. NOMER (note 2), at 453.

[31] E. NOMER (note 2), at 453.

[32] E. NOMER (note 2), at 454.

foreign country does not involve the personal status of Turkish nationals, again, Art. 41 will not apply, and the courts indicated in the concerning article will have no jurisdiction. If the suit which has been litigated in Turkey also does not fall within the scope of the special international jurisdiction rules stated in the PIL Code, the international jurisdiction of the Turkish courts will be determined based on Art. 40 of the PIL Code.

There is a consensus concerning what can result if a suit concerning the personal status of a Turkish national that is pending before a foreign court is also litigated in a court in Turkey. According to the doctrine, it is acknowledged that an objection of pendency could be made under such circumstances.[33] For an objection of pendency, it is mandatory for the suit to have been litigated in a foreign country. Under the previous text of Art. 41 (Art. 28), a pendency objection was subject to the conditions that the Turkish national be domiciled in the foreign country and the foreign suit was being litigated in that country of domicile. Thus, not having a domicile in Turkey allowed for an objection of pendency. PIL Code numbered 5718 has removed the statement of "not having a domicile" in Turkey, allowing an unconditional objection of pendency concerning suits involving the personal status of Turkish nationals.

On the other hand, it is argued that if a suit concerning the personal status of Turkish nationals has been litigated in a foreign court, pursuant to Art. 41 the Turkish courts shall have no international jurisdiction and, contrary to the prevailing opinion stipulated by the doctrine,[34] the issue in question should be *lack of international jurisdiction* rather than *objection of pendency.*[35] According to this opinion, if a suit concerning the personal status of Turkish nationals litigated in a foreign country is litigated again in a Turkish court, an objection must claim that the Turkish courts have no international jurisdiction. This objection can be raised during any stage of the suit.

Art. 41 of the PIL Code does not designate an exclusive jurisdiction for Turkish courts, but instead stipulates that jurisdiction rules regarding suits concerning the personal status of Turkish nationals are special jurisdiction rules. In this sense, the court must first verify whether it has the competence in accordance with Art. 41. As a practical matter, if the court determines that it is not competent according to internal rules, it shall dismiss the case without having to verify its international jurisdiction. The dismissal of the case means the Turkish court acknowledges that it lacks competence.[36] The PIL Code does not contain any regulations regarding how an objection as to international jurisdiction must be raised, whether brought on the court's own motion or brought as a formal objection by the parties. The view in the Turkish doctrine on this matter varies. Some argue that the judge should raise the issue on its own motion even if such an objection

[33] A. ÇELİKEL/ B. ERDEM (note 6), at 545; E. NOMER (note 2), at 451; V. DOĞAN, *Milletlerarası Özel Hukuk*, Ankara 2010, p. 81.

[34] See note 33.

[35] B. TİRYAKİOĞLU (note 2), at 1154.

[36] E. NOMER (note 2), at 452.

has not been made by the parties.[37] On the other hand, this matter is also identified as a ground for preliminary objection.[38]

The condition prohibiting jurisdiction in suits concerning the personal status of Turkish nationals that have been litigated in a foreign country creates two possibilities: (1) the possibility of the suit being pending in the foreign country; and (2) the possibility that the judgment has been finalized after the merits of the case has been resolved. Concerning the first possibility, Art. 41 prohibits jurisdiction in a Turkish Court when the suit in the foreign country is currently in the process of being heard. Concerning the second possibility, there is no pending litigation to speak of. Art. 41 mentions a suit that has been litigated. Thus, just like the case of pending litigation, Art. 41 prevents the international jurisdiction of the Turkish courts in this situation as well. If the ruling on the suit in a foreign country has been finalized, what needs to be performed is evident: parties must request the recognition and enforcement of the foreign court judgment in Turkey.[39] However, the Court of Cassation (*Yargıtay*) in its decree dated 14 January 1986[40] held that such a case does not pose any legal obstacles against a new suit being brought in Turkey. The court went on to hold that the obstruction of a Turkish national's right to claim his/her rights in a Turkish court would result in an improper restriction on the person's constitutional rights. However, this is despite the fact that a legal interest, which is a condition for a legal action, is not present in such a circumstance.[41]

V. Exceptional Cases Where the Turkish Courts Can Have Jurisdiction despite a Suit Concerning the Personal Status of Turkish Nationals Being Litigated in a Foreign Country

A case can be litigated again in Turkey despite the fact that the suit was first brought before a foreign country if the foreign suit was dismissed by the foreign courts due to a lack of jurisdiction. In such cases, the courts indicated in Art. 41 gain jurisdiction. The dismissal for lack of jurisdiction thereby fulfils the condition that a suit "may not be brought before", as provided in Art. 41 of the PIL Code.

A case can also be relitigated in Turkey if the Turkish court refuses recognition and enforcement of the foreign judgment. In such a case, it is possible for

[37] B. TİRYAKİOĞLU (note 2), at 1155; N. EKŞİ (note 26), at 170-178.

[38] E. NOMER (note 2), at 460.

[39] N. EKŞİ (note 26), at 156-157.

[40] Court of Cassation (*Yargıtay*), 2. Civil Chamber, E. 1985/11103, K. 1986/97, T. 14 January 1986 (YKD, 1986, C.12, S. 12, p. 1764-1765). For critique see Ch. RUMPF, Zur Internationalen Zuständigkeit türkischer Gerichte für Scheidungsverfahren im Ausland lebender Türken, *IPRax* 1995/3, p. 184.

[41] B. TİRYAKİOĞLU (note 2), at 1156.

the suit to be brought again before a Turkish court.[42] This is a requirement of the right to legal remedies secured by Art. 36 of the Turkish Constitution dated 18 October 1982 and numbered 2709.[43]

PIL Code Art. 41 does not require the foreign country where the suit has been litigated to have any connection with the suit or the concerned parties. In addition, Art. 41 does not answer the question of how long the suit litigated in a foreign country shall act as an obstruction against a new suit concerning the same matter and parties brought before a Turkish court. The doctrine[44] emphasizes that it should be a condition that the foreign court have a connection with the concerned suit and the concerned parties and that such a condition should be applied through an amendment in the Code. It has also been suggested that the question of how long the suit litigated in a foreign country should act as an obstacle against a suit concerning the same matter and parties to be brought before a Turkish court should be answered.[45]

VI. Applicable Law

Because Art. 41 of the PIL Code relates to only one of the spouses being a Turkish national, particularly regarding matrimonial conflicts, it subjects those who are not Turkish nationals to the international jurisdiction of the Turkish courts. For this reason, the international jurisdiction of the Turkish courts has been extended to also cover conflicts concerning the personal status of foreign nationals. In such cases, the law to be applied in accordance with the rules concerning conflicts of laws may also be a foreign law. The application of Turkish law to a conflict may not vest the Turkish courts with international jurisdiction, and the Turkish courts having international jurisdiction in accordance with Art. 41 may not result in the application of Turkish substantive law. For example, in a divorce case involving spouses with different nationalities whose mutual residence is in a foreign country, a Turkish court may have international jurisdiction in accordance with Art. 41 if one of the spouses is a Turkish national. However, the substantive law to be applied is the law of the foreign country where the mutual habitual residence of the parties is located [PIL Code Art. 14(1)]. Thus, even though Art. 41 ensures a Turkish court will be involved in suits concerning the personal status of Turkish nationals, the determination of the applicable substantive law is subject to the conflicts of law rules. According to the rules of conflicts of laws, foreign law may be applied in a suit concerning the personal status of a Turkish national. However, where a provision of foreign applicable law when applied to a specific case is clearly contrary to Turkish public policy, this provision shall not apply (PIL Code Art. 5). Moreover, according to the rules of conflicts of laws, if the foreign

[42] B. TİRYAKİOĞLU (note 2), at 1159.

[43] OG 9 November 1982 Nr. 17863.

[44] B. TİRYAKİOĞLU (note 2), at 1159.

[45] B. TİRYAKİOĞLU (note 2), at 1159.

substantive law that needs to be applied assigns a duty to the Turkish judge that cannot be legitimized by the presiding judge, there is a possibility that the foreign law to be applied may be endangered, resulting in a problematic issue.[46] This final possibility must be thought of as a matter concerning the application of foreign law. However, if certain reasons arise that render it impossible for the foreign substantive law to be applied, it can be argued that the only way to resolve such an issue would be the application of the related provisions of Turkish law.

VII. Evaluation of Art. 41 in Terms of Exorbitant Jurisdiction

A state, while determining the international jurisdiction of its courts, bases its jurisdiction on criteria pointing to a certain connection with the conflict. If the state's jurisdictional criteria are based on the nationality of the parties, the rule is considered to be an exorbitant jurisdiction.[47] Exorbitant jurisdiction may also be present in cases where principles other than the nationality of the parties are utilized as a jurisdictional criterion. For example, in cases where there is not enough connection between the parties and subject matter of the conflict with the concerned court, a case of exorbitant jurisdiction may be present.[48] PIL Code Art. 41 requires that one of the parties to the conflict be a Turkish national for the Turkish courts to have international jurisdiction regarding disputes as to personal status. This means that in a suit concerning legal status, the Turkish courts do not have jurisdiction if both parties are foreign nationals. Despite the fact that in PIL Code a special rule (Art. 42) has been set forth to designate the international jurisdiction of the Turkish courts, the scope of this rule does not cover all conflicts concerning the personal status of foreign nationals (such as divorce and separation or annulment of marriage). In order for Art. 41 to be applied, at least one of the parties must be a Turkish national. The international jurisdiction of the Turkish courts has been designated based on Turkish nationality. The article establishes a special rule of international jurisdiction in suits concerning the personal status of Turkish nationals. For this reason, it is possible for this article to be discussed in terms of exorbitant jurisdiction. Despite the fact that international jurisdiction under Art. 41 requires that at least one of the parties be a Turkish national, that article is not suitable to be discussed as a rule of exorbitant jurisdiction.[49] In terms of Art. 41, there is the stipulation of a competent Turkish court in the event a suit concerning the personal status of Turkish citizens is not or may not be brought before a court in a foreign country. In addition, in terms of the application of Art. 41, it is not mandatory for the Turkish national to be the plaintiff. It is also not the case that the

[46] E. NOMER (note 2), at 453.

[47] N. EKŞİ (note 26), at 52-53.

[48] E. DARDAĞAN, *Milletlerarası Usul Hukukunda "Aşkın Yetki" Kavramı*, Ankara 2005, p. 3.

[49] B. TİRYAKİOĞLU (note 2), at 1161.

recognition and enforcement of a foreign court judgment must be dismissed because Turkish courts have exclusive jurisdiction.[50] Taking all these points into consideration, the statement of "concerning the personal status of Turkish nationals" utilized in the article should be construed to convey the purpose of jurisdiction rule, and not as establishing a rule of exorbitant jurisdiction.[51]

VIII. Convention on the Recognition of Decisions Relating to the Matrimonial Bond

If a suit which has been litigated in a foreign country is litigated once again in Turkey, there are numerous international agreements that must be taken into consideration by the Turkish courts. Since this paper only concerns explanations concerning Art. 41, we shall be concerned solely with the related provisions of the Convention on the recognition of decisions relating to the matrimonial bond dated September 8, 1967, to which Turkey is a contracting party.

The first paragraph of Art. 10 of the Convention stipulates that if a request is made to an authority of one of the contracting states concerning the dissolution, release, existence or non-existence, validity or annulment of the bonds of matrimony, the authorities of other contracting states must abstain from performing rulings concerning the merits of any request brought before them regarding the same parties. Therefore, when a suit concerning the subject matters indicated in Art. 10 has been litigated in one of the contracting states of the Convention, Turkish courts will not be able to render a decision concerning the merits of that suit. The second paragraph of the same article states that the authority by which the second request was made shall have a declaratory authority for at least one year and, if a decision has not been given regarding the merits of the suit at the end of this period, the court to which the second request was made shall have the authority to issue a decision. The one year period stipulated in this paragraph shall be initiated as of the date the request was made to the second authority and not as of the date a request was made to the first authority.[52] The statement contained in the provision indicating that the authority by which the second request was made shall have a one-year declaratory period establishes the minimum amount of time that the authority has to wait after the request is made. Whether or not the decision issued by the first authority regarding the merits has become final is of no importance.[53] For this reason, it is not mandatory for the first authority's decision to be finalized within the one-year period. Instead, what is important is that a ruling regarding the merits of the suit has been provided. In any case, it is not very likely that a suit concerning the bond of matrimony and involving a foreign element can

[50] E. DARDAĞAN (note 48), at 137.

[51] B. TİRYAKİOĞLU (note 2), at 1161; N. EKŞİ (note 26), at 59.

[52] B. TİRYAKİOĞLU (note 2), at 1162.

[53] B. TİRYAKİOĞLU (note 2), at 1162.

be formally finalized within one-year.[54] This provision in Art. 10 of the Convention also applies to situations where the first suit has been brought before a court in Turkey, but the second suit has been brought before a court in another contracting state. In such cases, the second authority must wait the required time for the decision to be issued in Turkey.[55]

IX. Conclusion

Turkish law does not contain any provisions regarding *foreign pendency* for suits that have first been litigated in a foreign country and are then litigated once again in Turkey. Fundamentally, if a suit has been brought before a foreign court, this court has found itself competent to hear the case, and the concerning country has a genuine connection to the suit and the parties, the same suit being brought before a court in Turkey is of no particular legal interest. Despite this fact, aside from articles 41 and 47, the PIL Code does not contain any provisions that prevent a second case from being litigated again in Turkey. This situation could potentially create problems in terms of recognition and enforcement, as the court of the foreign country where the suit was first litigated will refuse to recognize and enforce the judgment rendered by the Turkish court as a result of considering itself competent. On the other hand, if the judgment in the first suit is finalized, it is also highly probable that a request for the judgment to be recognized and enforced in Turkey will be made. However, if the suit litigated in the Turkish court is concluded before the first suit and the Turkish judgment is finalized, the recognition and enforcement of the judgment by the foreign court must be dismissed because of the final judgment in Turkey. As a result, it will not be possible for judgments rendered in either country to be recognized and enforced in the other country.

While Art. 41 requires that a suit concerning the personal status of Turkish nationals may not be brought before the court of a foreign country, whether this country has a genuine connection with the concerning suit has not been taken into consideration. Even though it is highly probable that the court in the foreign country will dismiss the suit on the grounds of international jurisdiction, Art. 41 contains no restriction on such a situation. Therefore, if the court in the foreign country decides to hear the case even though there may be no genuine connection between that country and the suit, such a situation will lead to the obstruction of the jurisdiction of the Turkish courts. Moreover, the recognition and enforcement of such a judgment rendered by a foreign country can be prevented as a result of the defendant raising an objection based on the lack of any genuine relationship with the case or the parties in accordance with Art. 54/1(b) of the PIL Code.[56]

[54] B. TİRYAKİOĞLU (note 2), at 1162.

[55] B. TİRYAKİOĞLU (note 2), at 1162.

[56] B. TİRYAKİOĞLU (note 2), at 1164.

Turkish courts cannot be vested with international jurisdiction according to Art. 41 when suits concerning the personal status of Turkish nationals have been brought before the courts of foreign countries. In this case, it must be acknowledged that, contrary to the prevailing opinion in the doctrine,[57] an objection based on foreign pendency is not an appropriate option; it is evident from the wording of Art. 41 that an issue of lack of international jurisdiction arises in such circumstances.[58] According to this view, because the special international jurisdiction rule stipulated in Art. 41 has the qualification of an exclusive rule of jurisdiction, whether or not the Turkish courts have international jurisdiction must be taken into consideration ex officio by the judge.[59]

The PIL Code does not provide any answers regarding the procedure to be followed when the recognition and enforcement of a judgment rendered by a foreign court concerning the personal status of Turkish nationals is refused in Turkey. In such circumstances, it is possible to litigate the suit again in Turkey in accordance with the right to legal remedies secured by Art. 36 of the Turkish Constitution.[60]

The fact that the PIL Code contains no regulations governing the length of time a personal suit brought before a foreign court will prevent a suit with the same subject matter and parties from being litigated in Turkey is a shortcoming. It is indicated that if the suit is not resolved in a reasonable amount of time, this will be a violation of the right to legal remedies.[61]

[57] See fn. 33.

[58] B. TİRYAKİOĞLU (note 2), at 1164.

[59] B. TİRYAKİOĞLU (note 2), at 1164.

[60] B. TİRYAKİOĞLU (note 2), at 1164.

[61] B. TİRYAKİOĞLU (note 2), at 1165.

FORUM

SUING CORPORATIONS IN A GLOBAL WORLD
A ROLE FOR TRANSNATIONAL JURISDICTIONAL COOPERATION? *

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I. Introduction

This paper will deal with the issue of *rulemaking* in *international jurisdiction*, particularly in what concerns haling *corporations* into court. In terms of the "substantive"[1] rules of jurisdiction that underlie and constitute the anchoring reference of this analysis, rather focused upon the "processes", we will keep in mind the U.S. and European laws, restricting ourselves, as to the latter, to European Union (and not each Member State's) law.

From the outset, it is important to clarify what is meant by *transnational judicial cooperation*. The expression is used in different contexts and with different meanings. For purposes of this paper, we are dealing with the set of circumstances where one state court judge, realizing the need or convenience in having direct contact with another court, intends to establish the contact.

We therefore exclude the well-documented dynamics, for instance in the EU context, of the interaction with supra-national courts, in that case with the Court of Justice of the European Union (CJEU), where "each court is a check on the other, but not a decisive one, asserting their respective claims through dialogue of incremental decisions signalizing opposition or cooperation."[2] In effect, this interaction can unfold in cooperative or rather uncooperative terms, would thus not be necessarily suited for our analysis.

Further narrowing down our purposes, we intend to analyse the possibilities of cooperation at the threshold moment of litigation: *jurisdiction*. In other words, we will ask whether it is suited, and realistically attainable, to make national courts of different sovereign states establish with each other ties of cooperation at the very moment of asserting jurisdiction in a particular case. We will often use the expression *jurisdictional cooperation* to quickly grasp this idea, as the title of the paper reads.

The subject necessarily entails at least a minimum of comparative analysis of the legal systems implied. A threshold framework issue of all discussions regarding comparative law is one's position on the relationship between different legal systems and how it should evolve. Some favour unification as an almost self-standing goal, or at least a growing convergence of the law, most usually (but not inevitably) against the backdrop of an economic analysis. Others approve of a focus on the cultural differences, whereby culture is a protection against a purportedly excessive or misplaced reliance on economic and financial data.[3] The reader will not find a personal take on this debate along the paper. This is not to say that neutrality is claimed for the analysis hereafter embarked upon. It is, quite

[1] As the rest of the sentence aids to clarify, the word "substantive" is herein solely used as the opposite of "process-related". It is evidently borne in mind that rules of international jurisdiction are most commonly *conflicts rules*, which do not purport to address the regulation of "substantive" aspects of the legal relationship that its application will ultimately call for.

[2] A.-M. SLAUGHTER, Judicial Globalization, 40 *Va. J. Int'l L.* 1103, 1108 (2000).

[3] See *e.g.* ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, *Les droits de tradition civiliste en question – À propos des Rapports* Doing Business *de la Banque Mondiale*, 2006.

differently, to say that despite the awareness that those standings may have a bearing on the discussion of these problems, it is submitted that, just like we do not have to necessarily answer the question of what are the *perfectly just* arrangements, "what is a just society?", in order to delineate a "cogent and well-founded theory of comparative justice",[4] we also do not have to make our minds on the economic vs. cultural and/or moral considerations debate, and consequently on the unification vs. diversity in jurisdictional law, in order to lay down a fair opinion about the issues of rulemaking in jurisdictional law we are bringing here to the foreground.

II. Jurisdictional Rulemaking *in the State*

A. Unilateral Rules of Jurisdiction

Legal relationships may be in contact with more than one legal system, due to the characteristics of one or more of its elements. That creates, by definition, *uncertainty* as to the applicable law, as well as to the court where any of the parties involved may be amenable to suit when a dispute arises out of such a relationship. The first uncertainty is dealt with by rules of *conflict of laws*, whereas the second, the one deserving our attention, is addressed by *conflicts of jurisdiction* rules. Within this category, traditionally divided into the issues of *adjudicative* or *judicial jurisdiction* and *recognition and enforcement* of judgments, we are focusing on the first one, in particular when the target of the analysis of the existence of sufficient contacts and/or grounds to be sued is a *corporation*.

With respect to function and structure, a classical methodological classification divides conflict-of-laws rules into *bilateral* and *unilateral*. While *bilateral* rules recognize any law as competent and thus applicable to a particular case, independently of the actual legal systems involved, *unilateral* rules recognize only one law as the competent one (and most commonly the *lex fori*). *Jurisdictional* provisions enacted by national lawmakers are typically unilateral. It is understandable why: unlike in conflict of laws, jurisdictional provisions set the grounds for the use of the State's *authority*, by means of its courts. Therefore, the State will not easily abdicate control over the access to those instances.

This is overcome when States agree upon international instruments, thus creating *bilateral* jurisdictional provisions. Such rules typically designate one set of courts or the other as internationally competent, on the basis of unified grounds of jurisdiction, and hence under the same conditions.

B. Theoretical Underpinnings of Jurisdictional Authority

Even at the *state* level of rulemaking, there may be domestic rules allowing for a judicial full-fledged *cooperation* with foreign courts. The fact that jurisdiction is

[4] "Comparative" here in a sense as opposed to "transcendental" justice: A. SEN, *The Idea of Justice*, 2009, p. 98.

determined by unilateral rules is not in itself an insurmountable technical impediment to jurisdictional cooperation, albeit it is easier to imagine a fruitful "dialogue" to be established when both parties have unified, or at least harmonized, rules concerning the ways in which they may enter into said "dialogue". It is moreover true that the assertion of jurisdiction is a particularly significant dictum of a sovereign, who in that way affirms *authority* through its judicial system. For this reason, it is appropriate to inquire into the theoretical underpinnings of state authority, as applied to jurisdiction. A brief overview suffices to make us realize how the debate is not irrelevant in terms of justifying the use of judicial cooperation.

VON MEHREN provides an insight to the principal theoretical accounts regarding governmental authority, in order to then apply them to "claims of adjudicatory authority over multistate transactions or controversies."[5]

A threshold distinction identifies *relational*, *power*, and *instrumental* doctrines. *Relational* theories have ancestors in feudal systems, where governmental authority flows from the relation between lord and tenant with all its rights and duties. With the modern State came *power* explanations for authority, which go back to HOBBES and the idea that the absolute power of a ruler, necessary to guarantee security in an otherwise hazardous state of nature, is buttressed by the individual's acceptance of such a ruling power. This view, it is known, has been rewrapped into some posterior positivist accounts of law, such as AUSTIN'S; but rejected by prominent, *softer* positivists, such as HART, who does not regard the commands theory of "orders backed by threats" as a good model for the normativity of law.[6] Lastly, *instrumental* theories ground authority on consent, either real or implied, as in Locke's perspective, which can also be seen as the antechamber of other "instrumentalisms", such as BENTHAM'S utilitarianism.[7]

Between *relational*, *power*, and *instrumental* theories, all of them present difficulties when one of the parties is in some sense *not* under the sovereign authority as justified in one of these ways (*e.g.*, when parties are nationals of State A, therefore "*relationally*" under its authority, but dispute real property located in State B, thereby under the territorial *power* of State B). Said problems arise even if we assume all the legal systems would endorse one of those theories. We hence inexorably face the question of how to solve the problem of having more than one State claiming adjudicative authority.

It is here submitted that the perspective of *consent*, real or implied, as a basis for authority in a *jurisdictional* point of view, is both appealing and promising, also in terms of providing a proper basis for the justification of *judicial*, and *jurisdictional*, *cooperation*.

In reality, it is the one possibly best in line with new definitions of *sovereignty*. The "new sovereignty", it has been posited, is "the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one

[5] A.T. VON MEHREN, Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems, *Recueil des Cours* vol. 295 (2002), p. 33.

[6] See L.A. HART, *The Concept of Law*, 2nd ed., 1994.

[7] A.T. VON MEHREN (note 5), at 31-33.

another what they could once only hope to accomplish acting alone within a defined territory."[8] In fact, recent trends claim a "de-territorialisation of sovereign authority",[9] whereby *power* over a territory is no longer the pivotal concept. This does not *necessarily* mean that "statehood" becomes an empty concept: it may rather be a sign of the disaggregation of statehood elements into "transgovernmental networks".[10] This view, closely linked to *legal pluralism*, is not only American: it is embraced across the Atlantic by scholars of both margins.[11]

Coming back to jurisdiction, this shift from *power* to *consent* is an accurate explanation for U.S. jurisdictional-law developments along the twentieth century. Abandoning a very strict *power* vision of the circumstances under which a foreign defendant could be haled into court,[12] in 1945[13] a change of focus was brought about from *power* to what can be reasonably labelled, in this context, as *consent*. That is, concepts such as "minimum contacts",[14] "purposeful availment",[15] or "continuous and systematic general business contacts"[16] are all, to some extent, *proxies for consent* – "implied through *benefits obtained* or *risk created* by the party while inside the political forum in which the court sits".[17]

The idea of consent is thus useful when we seek legitimacy grounds for jurisdictional rules in general. In other words, *adjudicative authority* should extend, not to the limits of *power* of the court seized, but rather to the extent that the parties involved may be considered to have *consented*, expressly or impliedly, to jurisdic-

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[8] A.-M. SLAUGHTER, Sovereignty and Power in a Networked World Order, 40 *Stan. J. Int'l L.* 283, 285 (2004). See a reference to different definitions of sovereignty *id*., at 283.

[9] H.L. BUXBAUM, Transnational Regulatory Litigation, 46 *Va. J. Int'l L.* 251, 306 (2005-2006). Linking such kind of claims to a purported "globalization of jurisdictional law", see N. HATZIMIHAIL/ A. NUYTS, Judicial Cooperation Between the United States and Europe in Civil and Commercial Matters: An Overview of Issues, in A. NUYTS/ N. WATTÉ (eds), *International Civil Litigation in Europe and Relations with Third States*, 2005, p. 8.

[10] *Id.*, at 307.

[11] In Europe, there are important works in the context of "legal pluralism" by F. OST, M. VAN DE KERCHOVE, A.-J. ARNAUD and M. DELMAS-MARTY. See only F. OST/ M. VAN DE KERCHOVE, *De la pyramide au réseau? Pour une théorie dialectique du droit*, 2002. In private international law, C. KESSEDJIAN adheres to OST & VAN DE KERCHOVE'S "network metaphor", at least insofar as rulemaking processes are concerned: C. KESSEDJIAN, Codification du droit commercial international et droit international privé - de la gouvernance normative pour les relations économiques transnationales, *Recueil des Cours* vol. 300 (2002), p. 291, fn. 480. On conflict of laws and global legal pluralism, compare R. MICHAELS, Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, 51 *Wayne L. Rev*. 1209 (2005).

[12] *Pennoyer v. Neff*, 95 U.S. 714 (1877).

[13] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[14] *Id.*

[15] *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

[16] *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

[17] R.B. CAPPALLI, Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction, 43 *Case W. Res. L. Rev*. 97, 102 (1992-1993) (emphasis added).

tion. Even conceding that the concept, as explained above, has not necessarily been developed with this instrumental utility in mind, it appears quite appealing from the standpoint of traditional continental-European views of jurisdiction as a private international law problem, where private interests shall be placed in the foreground. This notion of *consent* will also be relevant in particular when it comes to assess the propriety of jurisdictional *cooperation* tools, as we will see in Part IV.

C. *Hard Tools* vs *Soft Tools* of Jurisdictional Cooperation

To begin with, let us draw at the outset a distinction by first identifying what we may call, in that context, *hard tools of jurisdictional cooperation*.

In some legal systems, such as in the U.S., the court judge may use a set of jurisdictional tools allowing her to *coordinate* proceedings existing, or about to exist, in different courts, regarding materially the same conflict. Such tools are namely *forum non conveniens*, *antisuit injunctions*, and to a certain extent rules on *parallel proceedings* and *lis alibi pendens*.[18]

Forum non conveniens is a doctrine allowing courts to stay or dismiss an action when they find that, in the interest of justice, it should be heard by another forum deemed more appropriate.[19] *Forum non conveniens* is starkly disapproved of in Europe, except in the United Kingdom.[20] CJEU jurisprudence has extended the prohibition of such doctrine, already in force in virtually all Europe, to cases that do not directly involve other Member States, rather only third countries.[21]

Antisuit injunctions are orders issued by courts "forbidding a party from initiating or participating in judicial proceedings in foreign forums".[22] They are widely accepted in the U.S., although courts show caution at the moment of its issuance.[23] Again, similarly to what happens with *forum non conveniens*, the traditional Continental-European view has prevailed in the EU so far, for antisuit injunctions are deemed prohibited by the unified rules of jurisdiction of the

[18] Cooperation between courts is linked to the idea of "judicial comity" articulated in U.S. court decisions. Justice Scalia, in his dissent in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 817 (1993), relied upon a distinction between "judicial comity" and "prescriptive comity", so that the latter refers to the respect "sovereign nations afford each other by limiting the reach of their laws", while the former, more important for this study, is the decision by a court to decline jurisdiction "over matters more appropriately adjudged elsewhere". *See* also A.-M. SLAUGHTER, Court to Court, 92 *Am. J. Int'l L.* 708 (1998), p. 708.

[19] Today's leading authority in the U.S. remains *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

[20] In the U.K., the doctrine is somewhat different from the U.S.: *see* A.F. LOWENFELD, *International Litigation and Arbitration*, 3rd ed., 2006, p. 328.

[21] ECJ, 1 March 2005, C-281/02, *Owusu v. Jackson*.

[22] G.B. BORN/ P.B. RUTLEDGE, *International Civil Litigation in United States Courts*, 5th ed., 2011, p. 567.

[23] *Id.*, at 568.

Brussels I Regulation.[24] The view that they are directed at private parties and not directly to the foreign courts, held by some commentators and the House of Lords when referring the leading European cases to the CJEU for preliminary rulings, was not convincing: in reality, it has been stated that despite of that technicality, antisuit injunctions "effectively restrict the foreign court's ability to exercise jurisdiction."[25]

A different kind of "cooperation" regards *parallel proceedings*. In Europe, *lis alibi pendens* rules allow a court to stay or dismiss proceedings whenever another court with jurisdiction has been previously seized. This is a bright-line rule that pleases the European view of jurisdiction: we may find it in Article 29 of the Brussels I Regulation. It deals with the problem of having *parallel proceedings* on the same material issue by attacking the problem at its very outbreak. Differently, the U.S. sets the focal point at its *culmination*: under the Full Faith and Credit Clause of the U.S. Constitution (Article IV, Section 1), proceedings which come to an end the earliest will benefit from recognition and enforcement by other states' courts, even though the latter were earlier entertaining similar proceedings.[26]

In contrast to these *hard tools of judicial cooperation*, there is some discussion on the proper role to be allocated to other, *soft(er) tools of judicial cooperation*. We call them *soft* in the sense that, unlike the previous ones, they do not imply a peremptory affirmation or dismissal of state's authority through jurisdiction, given that they arise out of consensual contacts established between courts.

In Europe, we can find various ways in which courts, in a way, *cooperate*. The European Judicial Network in civil and commercial matters[27] serves as a repository of useful information and an enabler of common knowledge and understanding of different Member States' courts as regards applicable law, procedural practices, taking of evidence, etc.

But in Europe, with very few exceptions, we do not seem to favour tools that allow for taking advantage of the merits of cooperation *at the stage of establishing jurisdiction*. On the one hand, there are a couple of limited glimpses worthy of mention, where a court that claims jurisdiction, even *exclusive* jurisdiction, *shall* notwithstanding cooperate with another court. In fact, there are two European Regulations where regulation would be theoretically prone to jurisdictional cooperation of this kind, since they address relationships established between judicial authorities of different Member States in a pre-judgment phase. We refer to Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents); and Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts

[24] ECJ, 27 April 2004, C-159/02, *Turner v. Grovit*; ECJ, 10 February 2009, C-85/07, *Allianz SpA v. West Tankers Inc.*

[25] *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 927 (D.C. Cir. 1984).

[26] See *e.g.* P.E. HERZOG, Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?, 43 *Am. J. Comp. L.* 379 (1995); R. MICHAELS, Two Paradigms of Jurisdiction, 27 *Mich. J. Int'l L.* 1003, 1062 (2005-2006).

[27] The EJN-civil began its operation in the end of 2002. Information available at <http://ec.europa.eu/civiljustice/index_en.htm>, (last visited May 7, 2011).

of the Member States in the taking of evidence in civil or commercial matters. In the latter, Article 14(3) is a rare case where rules of international jurisdiction are "bracketed off" as not to hamper the smooth concretization of judicial cooperative efforts. Addressing the execution of a request for the taking of evidence by another Member State's court, it reads:

> "Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it."

On the other hand, the instrument probably closest to a *forum non conveniens* doctrine may be found in Article 15 of Regulation (EC) No 2201/2003, where the "best interests of the child" may justify, "by way of exception", a transfer to a court of another Member-State better placed to hear the case.[28]

All in all, whereas *hard tools of jurisdictional cooperation* are widely available in the U.S., Europe lacks those instruments, with very limited exceptions, in the framework of its hard-and-fast regulation of jurisdiction. Moreover, no *soft* cooperation at the jurisdictional level is provided for expressly in European legal instruments.

D. Jurisdictional Discretion

After this distinction between *hard* and *soft* tools, we can now move forward to one other submission: *discretion* plays a pivotal role in the way legal systems configure their respective jurisdictional rules. Either by assigning it an ample field, or restricting it to a minimum, it is at the level of judicial discretion that stark differences between legal systems, namely the EU and the U.S. legal systems, arise. And when states recognize their judiciary means of judicial discretion to decide upon the assertion of jurisdiction – that is, we may call, *jurisdictional discretion* –, such recognition has two important effects that, being fully compatible with each other in a theoretical perspective, yet play out in opposite directions *vis-à-vis* the reinforcement of jurisdictional cooperation. Moreover, these two effects lead us to a somewhat frustrating outcome.

The first effect is, jurisdictional discretion reduces the need for other tools of jurisdictional cooperation, namely *soft jurisdictional cooperation*. Second, they provide a theoretical basis to legitimize the *soft tools*, for if a sovereign State conceded so far to its judicial system as to allow denial of jurisdiction even when the lawmaker foresaw a given set of facts as grounding jurisdiction, then that same State, *ceteris paribus*, *i.e.*, assuming the absence of other differences, namely at the level of policy reasons, accepts that such judiciary may engage in *soft* court-to-court contacts with other judiciaries.

[28] Also at the level of insolvency law we find well established cooperation between courts entertaining *main* and *secondary* proceedings, bond to a "duty to cooperate and communicate information" (Article 31 of Regulation (EC) No 1346/2000); but no cooperation mechanism is to be found at the threshold moment of asserting jurisdiction.

The frustrating outcome is, the judiciary that less needs *soft tools*, because it is provided with *hard tools*, is the one that more easily can justify its utilization.

Nonetheless, at this stage, we leave open one important question that will emerge again at almost the denouement: *i.e.*, whether a consent-based theoretical account of adjudicative authority, as laid out above, carries in itself a supporting argument for jurisdictional court-to-court cooperation.[29]

III. Jurisdictional Rulemaking *Inter-State*: the Hague Failure

After directing our attention to the rules existing at the state level, we now move forward to a brief analysis of the jurisdictional rulemaking at the *inter-state*, multilateral level.

In 1992, the U.S. took the initiative of proposing to the Secretary General of the Hague Conference of Private International Law the preparation and negotiation of a convention dealing with the recognition and enforcement of judgments. The project started in 1993 and a preliminary draft (the Preliminary Draft Convention) was adopted in 1999 by the experts composing the Special Commission thereto dedicated. However, from the diplomatic conference of 2001 which was supposed to close the process, the only thing that arose was a hugely bracketed text, where previously achieved consensus on proposals was widely questioned. The project ended up being reduced in its scope to exclusive choice-of-court agreements. So, the process initiated in 1992 produced "merely" – when compared to its initial ambitions – the 2005 Hague Convention on Choice of Court Agreements.[30]

Why did the process prove to be unsuccessful? It would be rather naïf, if not disingenuous, to seek to delineate a somehow enlightened explanation of why the Preliminary Draft Convention reached an insuperable stalemate. In several articles, colloquia, seminars, roundtables, *etc*., longtime specialists in this area of law have dedicated themselves to this task, and they do not seem to have fully reached an agreement, even though – or maybe that is not necessarily too relevant – the negotiators of the convention, who include renowned academics in the area have also contributed with their own input.[31] Nevertheless, we will address the issue in the perspective of drawing inferences to the understanding of the ideas of jurisdictional cooperation and discretion, as laid out in the previous Part. We remain at the purely

[29] See *infra* IV.B. *in fine*.

[30] Available at <http://www.hcch.net/index_en.php?act=conventions. text&cid=98>, (last visited May 7, 2011). For a very good, brief survey of this process, see H. VAN LITH, *International Jurisdiction and Commercial Litigation – Uniform Rules for Contract Disputes*, 2009, p. 14-16.

[31] For just a glimpse, see the various contributions in F. POCAR/ C. HONORATI (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, 2005; J.J. BARCELÓ III/ K.M. CLERMONT (eds), *A Global Law of Jurisdiction and Judgments: Lessons from the Hague*, 2002; 2 CILE STUDIES, *Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship*, 2005.

legal point of view, for we are not in the position of issuing a sustained opinion on what may have been the proximate causes of the *disruption* of the negotiations, which had its "swan-song" in the "Kovar letter".[32] Going beyond that would amount, quite evidently, to entertaining sheer speculation.

In February 2000, the Assistant Legal Adviser for Private International Law at the U.S. Department of State, Jeffrey D. KOVAR, wrote a letter to the Secretary General of the Hague Conference, Hans VAN LOON, where he stated the unhappiness of the U.S. *vis-à-vis* the latest developments in the negotiations. Presenting the U.S. view in an eleven-page document, he argued

> "[t]hat the United States must carefully weigh the potential advantages to U.S. litigants of recognition and enforcement of U.S. judgments against the disadvantages of the convention. The disadvantages identified include the loss of traditional litigation practices and the imbalances and economic losses that are likely to be caused by inconsistent application of the resulting convention. These concerns are particularly acute because the project sweeps across a vast spectrum of potentially affected private and public litigation interests."[33]

This statement is followed by a "non comprehensive" nor "final", but quite elucidating, list of some of the most "pronounced concerns" identified by the U.S. Delegation on the text that was on the negotiations table at that time. Two of them constitute, according to the letter, "insuperable barriers" to the success of the convention. They are: first, the "[r]igid principles and factors for prohibiting jurisdiction", that will "lead to excessive litigation and to conflict among parties over the resulting lack of uniformity of application"; and second, the rule concerning "branches [and regular commercial activity]", where the U.S.

> "[d]etected very little support for the bracketed language in the conference room. Yet even that language may not go far enough to satisfy our litigating Bar, which believes strongly in the basic notion that there should be jurisdiction over defendants at a minimum in any forum where a cause of action arises out of their commercial activity in that forum. Without this provision we are at a loss how we can convince the American private sector and the state and federal public sector that the white list of jurisdiction covers all bases of jurisdiction that are reasonable, sensible, and necessary. This seems to be an insuperable barrier to success of the convention."[34]

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[32] See text in the next paragraph, and fn. 33.

[33] Available at <http://legalminds.lp.findlaw.com/list/intpil/doc00003.doc>, (last visited May 7, 2011), p. 3.

[34] *Id.*, at 5, 7. The bracketed text of Article 9 in the Preliminary Draft Convention reads:

Article 9 Branches [and regular commercial activity]

"A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on

To briefly explain the reference above to a "white list", a terminology distinguishes conventions dealing with conflicts of jurisdiction between *simple* and *double*. The former set rules for recognition and enforcement of judgments (also called the *indirect* jurisdictional competence of the reviewing court), whereas the latter add a regulation of the *direct* competence of the courts to assert their own jurisdiction in the first place.[35] VON MEHREN wrote extensively on this subject, affirming the "symbiotic relationship" between both jurisdictional aspects, and hence the convenience of its integrated approach and regulation. And he proposed a structure, adopted in the Preliminary Draft Convention, which included *accepted* basis of jurisdiction on a *white list*, so that recognition of judgments on those basis by other signatory states is required; *prohibited* basis of jurisdiction on a black list, so that recognition of judgments thereon is mandatorily *excluded*; and an uncertain or *gray area* of grounds of jurisdiction the upholding of which depends upon the law of the state of recognition and enforcement. This last aspect characterizes the so-called *mixed convention.*[36]

In any case, the "insuperable barriers" to agreement were not surmounted, nor circumvented, although significant compromises had been obtained in the 2001 draft, as articles 21 and 22 on *lis pendens* and *forum non conveniens* quite vividly demonstrate.

When we regard what most commentators have said on this issue, two main submissions come to the foreground. First, there are objections to the *content* of U.S. court decisions, in particular due to what is regarded as excessive damage awards in money judgments, thus undermining their recognition and enforcement by other states' courts. Second, there are objections to the *broadness* – or *exorbitance*, from the critical perspective – of grounds for assertion of jurisdiction by U.S. courts over foreign defendants. In particular, many take issue with the *tag* and the *doing business* jurisdictional basis upheld by U.S. courts.

A brief consultation of published opinion,[37] as well as of written statements of the U.S. Department of State[38] itself, confirms this assessment.

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regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity]."

[35] See *e.g.* E. JAYME, Identité culturelle et intégration - le droit international privé postmoderne, *Recueil des Cours* vol. 251 (1995), p. 61.

[36] See A.T. VON MEHREN, Recognition and Enforcement of Foreign Judgments- A New Approach for the Hague Conference?, 57 *Law & Contemp. Probs*. 271, 283, 285 (1994).

[37] AMERICAN LAW INSTITUTE, *International Jurisdiction and Judgments Project* (A. LOWENFELD/ L. SILBERMAN, reporters), 2000, p. 6-7 ("Overall, the Preliminary Draft Convention is in many respects different from an American wish list, but the United States is confronted with a difficult situation. Because foreign judgments are recognized and enforced to a much greater extent in the United States than judgments rendered in the United States are recognized and enforced abroad, the United States has the greater need for increased commitment by other states to enforcement […] For other countries, whose judgments are already enforced here […], the primary interest in a convention is in eliminating the range of judicial jurisdiction of American courts over their domiciliaries;" "In particular, American courts' assertions of «general jurisdiction» on grounds of «tag» and «doing business» are viewed as excessive and exorbitant in some other countries.");

Moreover, in the most recent chapter of international jurisdiction cases entertained at the level of the Supreme Court of the United States, *Goodyear*,[39] which deserves particular attention as the first international case of general jurisdiction after *Helicopteros*,[40] confirms in our very days that this is the way U.S. lawyers regard the failure of the negotiations in retrospective.[41]

G.B. BORN/ P.B. RUTLEDGE (note 22), at 107 ("Ultimately, however, the negotiations failed. Among other things, European states insisted that any proposed convention prohibit (a) tag jurisdiction, where general jurisdiction is based on service of process within the forum state's territory; and (b) «doing business» jurisdiction, where general jurisdiction is based upon a foreign, nondomiciliary defendant engaging in significant levels of business activities in the forum." (internal quotations omitted)); A.F. LOWENFELD (note 20), at 247-248 ("The insistence of the civil law states on the limit on jurisdiction other than under Article 2 (domicile) to claims arising out of the operations of the branch, agency, or other establishment is one way of expressing the rejection of the common law concept of general jurisdiction on the basis of «doing business»"; "[t]his difference, more than any other, led to the breakdown of the effort to agree on a proposed international Convention […] that had been in negotiation for a decade.").

[38] *See* U.S. DEPARTMENT OF STATE, Enforcement of Judgments, available at <http://travel.state.gov/law/judicial/judicial_691.html>, (last visited May 7, 2011). This link provides a very interesting interpretation by the U.S. Department of State on why there are *no* bilateral agreements between the U.S. and other States on civil jurisdictional matters:

"There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments. Although there are many reasons for the absence of such agreements, a *principal stumbling block* appears to be the *perception of many foreign states that U.S. money judgments are excessive* according to their notions of liability. Moreover, *foreign countries have objected to the extraterritorial jurisdiction asserted by courts in the United States.* (Emphasis added).

And on personal jurisdiction, after brief description of the law according to *International Shoe* and its progeny, the U.S. Department of State writes:

"As noted above, foreign countries may find that the U.S. interpretation of this issue differs from local foreign law, rendering the U.S. judgment unenforceable abroad. For this reason, you may wish to consult local counsel in the foreign country very early in the U.S. proceeding, long before any judgment is rendered."

[39] *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown et ux., co-administrators of the estate of Brown, et al.*, 564 U.S. 1 (slip opinion; docket No. 10-76) (2011).

[40] See *supra* footnote 16.

[41] Next to *Goodyear*, the "companion case" was *Nicastro*: J. *McIntyre Machinery Ltd. v. Nicastro* (docket No. 09-1343). The former is a case of general jurisdiction, the latter of specific jurisdiction. Information, briefs, and documents for *Goodyear* are still available at <http://www.scotusblog.com/case-files/cases/goodyear-luxembourg-tires-sa-v-brown/>; and for *Nicastro*, available at <http://www.scotusblog.com/case-files/cases/j-mcintyre-machinery-v-nicastro/>, (both last visited June 17, 2013).

In *Goodyear*, the U.S. intervened as *Amicus Curiae*; this very intervention here and not in *Nicastro*, we submit, shows how worrisome in the U.S. the question of the grounds for *general jurisdiction* remains, in particular when an international setting is at hand. The brief of the United States in support of petitioners is available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/11/AmicusUS.10-76.pdf>, (last visited May 7, 2011). In the brief, we can read the following (at 33-34):

It is furthermore interesting to perceive that the American standpoint concerning the negotiations is apparently much more focused on a *bargaining*

"[f]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments […] The conclusion of such international compacts is an important foreign policy objective of the United States because such agreements serve the United States' interest in providing its residents a fair, predictable, and stable system for the resolution of disputes that cross national boundaries. Reversal of the state court's judgment [upholding jurisdiction] […] would thus serve the diplomatic interests of the United States."

It is furthermore interesting to notice how the parties in the litigation, not only the U.S. Government, address the problem of the inexistence of an international harmonization or unification of jurisdictional rules. As to petitioners, who argue for denial of jurisdiction, its assertion "[u]ndermines the predictability and fairness that are at the core of due process constraints on personal jurisdiction" (petition of certiorari, at 18, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Pet.10-76.pdf>, (last visited May 4, 2011)). Also, in oral argument – see official transcript, available at: <http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-76> (last visited May 2, 2011), p. 51 –, counsel for *Goodyear* added:

"[o]bviously we wouldn't recognize that under our Due Process Clause, and I think it points up some of the reasons why, at least at the margins, it is important to be able to negotiate treaties so that we can avoid having that sort of jurisdiction exercised against our citizens, just as within the European Community they have an agreement that it's not exercised within that community."

As to respondents, they gave their take on this issue as well in their brief, available at <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_10_76_Respondent.authcheckdam.pdf>, (last visited May 7, 2011), p. 54: "[i]nternational business' purported disenchantment with the American judicial system cannot reasonably be blamed on the potential outcome in this case. Some foreign corporations *already* fear litigating in American courts. Likewise, even trade partners who impose «exorbitant» jurisdictional rules on American businesses have long complained when general jurisdiction is asserted over non-resident corporations under certain circumstances." (Footnotes omitted).

Some of the rules of the "trade partners" are identified (*id.*, at 54, para. 25):

"France permits anyone domiciled in France to sue anyone, anywhere, over anything in the French courts. […] Germany bases jurisdiction on the presence of a defendant's assets in Germany; England on personal service in the U.K. […] Pursuant to the Brussels and Lugano trade treaties, these practices have migrated to other signatories, including Luxembourg and Belgium."

Finally, the subject was addressed by respondents also in oral argument (see official transcript, cited above, at 26, 34-35):

"[e]ven as far back as 15 years ago, the Hague Convention, our trade partners that are complained of here, talked about the fact that using -- attributing contacts or counting contacts that were based on conduct performed by others was appropriate and was not really a sticking point and that they were perfectly content to leave that to other cases. […]

I think […] if the Court's view is basically […] that you are limited to principal place of business, State of incorporation, and physical presence [as the sole grounds for general jurisdiction], which we don't think is the state of the law, and, frankly, if it were the state of the law, then we would have a Hague Convention now and it wouldn't have taken 20 years to negotiate."

exercise than, at least expressly, the European one, whereby the latter is purported to have been more concentrated at attaining the best possible set of rules for international jurisdiction.[42]

Possibly relevant – and only *thus* far goes our speculation – was the fact that the project was a "U.S. idea". The circumstance that it ended up following a path so different from the one envisaged initially by the U.S., coupled with the growing relevance of new difficulties posed by controversial and inherently difficult issues of jurisdiction such as e-commerce, intellectual property, and human rights violation, may have seriously contributed to the abrupt interruption, for the most part, of the project. Besides, the awareness that the usual location in the U.S. of sufficient assets to be attached when suing the "typical foreign defendant" in a U.S. court made the U.S. realize, in a *bargaining* perspective as described above, that it did not have so much to gain as it would have probably to lose, given that the need for recognition and enforcement abroad was not as pressing as it might have once appeared to be.[43]

But technically, we reiterate, the source of disagreement – moreover in the second aspect we identified, the one linked to rules of jurisdiction (*i.e.*, "exorbitance" of U.S. jurisdictional grounds)[44] – turns on the *discretion* recognized to U.S.

[42] R. MICHAELS (note 26), at 1064.

[43] See *e.g.* F.K. JUENGER, A Hague Judgments Convention?, 24 *Brook. J. Int'l L.* 111, 114 (1998-1999) ("[t]he typical foreign defendants in American courts are global enterprises such as Volkswagen or Mitsubishi with enough domestic assets to satisfy any American judgment. Even medium-sized and smaller foreign enterprises are bound to have open accounts or other assets that American judgment creditors can readily attach.").

[44] To be sure, the common vision of U.S. jurisdictional provisions, when compared to the European, is that the former are more expansive in terms of asserting jurisdiction over defendants that would not be amenable to suit in mirrored circumstances before the European courts, given the more restrained basis for jurisdiction in these courts. But the truth is also that some features of each of the systems seem to compensate its more (U.S.) or less (European) expansive character by bringing them nearer to one another. For instance, in some cases, defendants in European courts, when domiciled in "third countries", are not afforded the rules of jurisdiction of Brussels I, instead are subject to usually more expansive national rules, which could sometimes lead to violations of the Due Process Clause, had they been sued in the U.S. See A.T. VON MEHREN, Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States, 81 *Colum. L. Rev.* 1044, 1058-1059 (1981), ("[a]rticle 3 [of the Brussels Convention] can be viewed as a kind of due process clause, one that does not set out a basic standard of fairness but proceeds instead by a specification of grossly unreasonable provisions; One sensitive to the standards of justice that have emerged in Western culture can only express shock at the failure to make the article 3 protections available to all defendants just as due process protections under the Constitution of the United States extend to all persons, regardless of nationality or domicile. Shock becomes outrage when it is realized that the Brussels Convention, by providing in articles 28 and 34 that «the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction», requires Member States to recognize and enforce Member-State judgments that rest on jurisdictional bases that the Convention itself condemns as exorbitant and may as well be considered by the State addressed as violations of natural justice. If this parochial and self-serving attitude is to become general in international practice, the international order may well collapse as each State begins to retaliate against the others.").

courts, which finds no direct parallel in the Continental-European legal systems. This amounts to say that even the non-acceptance of the *doing business* ground of jurisdiction, that so much separates Europe and the U.S., boils down to *discretion*, given that such a broad, "exorbitant" basis of jurisdiction would not be possible to comport with, mainly because the court would not have the chance to dismiss the proceedings in case there is another court better suited to adjudicate. There are, to be sure, "expanded bases of activity- or property-based jurisdiction" in the U.S., unheard of in Europe. But there are tools, such as *forum non conveniens*, to *moderate* the effect of such expansion.[45] Independently of how we theoretically explain the Hague failure, the truth is that we can translate the non-surmounted differences in terms of *levels of discretion*. *Considerable* jurisdictional discretion has a moderating effect upon U.S. broad grounds of jurisdiction. *Virtually non-existing* jurisdictional discretion in EU law could not, as it stands, play such a role. Assuming that the strict limits against jurisdictional discretion of the European judge were not to be bargained – actually, a different approach might even pose constitutional concerns in some countries,[46] just like *en revanche* the European approach to co-defendants in Article 6(1) of Brussels I Regulation may be unconstitutional in U.S. eyes[47] –, a broad "general jurisdiction" basis of jurisdiction could not be agreed upon, given the lack of *effective moderators* on the European side.

Furthermore, as regards the way rules of *jurisdiction* hinge on *constitutional* standards, purportedly so much more in the U.S. than elsewhere, it may be argued that the Due Process Clause seems to have departed from a true "constitutional" analysis to a "mere" fairness and reasonableness test, eventually coupled with the minimum contacts standard (*see Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987)), or in any case incorporated in the "traditional notions of fair play and substantial justice" aspect of the *International Shoe* inquiry for *minimum contacts*. On the other direction, the shock waves of European cases like *Krombach* have lead to an awareness of the importance of human rights in the context, recalling that the European Convention of Human Rights is embodied in EU primary law and is hence superior to any limitative rules of jurisdiction or recognition and enforcement that might violate the right to a fair trial (6 ECHR).

[45] A.F. LOWENFELD (note 20), at 313.

[46] See *e.g.*, referring to *forum non conveniens*, H. SCHACK, in J.J. FAWCETT *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, 1995, p. 192.

[47] Article 6(1) of Brussels I Regulation reads: "A person domiciled in a Member State may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Unlike this approach, U.S.'s turns on *each* defendant's contacts with the state of the forum.

IV. Jurisdictional Rulemaking *beyond the State*: Transnational Jurisdictional Cooperation?

A. In European Union Jurisdictional Law

As we have seen in Part II, there are, in the realm of *jurisdiction*, *hard tools* that work effectively as means of jurisdictional cooperation. For instance in *forum non conveniens*, courts may utilize their discretion in a way that in the end protects against extreme forum-shopping tactics. Two opposite thoughts may come across our minds out of this realization.

The first, the pessimistic one for chances of cooperation, is that in legal systems that do *not* dispose of such tools, it is doubtful to accept that courts establish dialogues with each other in respect to jurisdiction, and even more difficult to accept that those dialogues are compatible with domestic procedural law, in the absence of a clearly and expressly enabling, habilitating law. To be sure, it has been argued, for "far too long, judges and procedural law reformers have approached transnational litigation exclusively form the precepts of domestic procedure, failing to engage the larger implications of lawmaking in a transnational setting."[48] But too far a fetch would be to expect cooperation at the *jurisdictional* level to arise out of the mere awareness of judges about the advantages for the parties and/or the public interests of a court-to-court dialogue, independently of the actual, more or less or not at all discretion-attributing, content of the underlying rules of jurisdiction. In addition, this is neither a reality in regionally integrated legal spaces as the European Union, nor in culturally proximal legal systems of our knowledge. Portugal, for instance, is a contracting party of a set of judicial cooperation bilateral agreements with countries sharing strong and long-lasting cultural and linguistic bonds, but in no one is such a guise of jurisdictional cooperation to be found.[49]

The second thought, optimistic for the stakes of cooperation, may claim that it is only the *paradigmatic* difference and correlated *path-dependency* that hinders the acceptance by Europe of an instrument of discretion such as *forum non conveniens*. In fact, Ralf MICHAELS explains the Hague failure in this way: given that both the European and the U.S. *paradigms of jurisdiction* present tools functionally equivalent to each other, to adopt tools from one another becomes unattractive, for the benefits are not great, while it creates costs. So, the stability of

[48] S.P. BAUMGARTNER, Is Transnational Litigation Different?, 25 *U. Pa. J. Int'l Econ. L.* 1297, 1390 (2004) (whereby this would be a cause of the "stalling of important treaty negotiations", such as the ones of the Hague Judgments Convention).

[49] The Portuguese Ministry of Justice provides links to the international bilateral agreements with Angola, Mozambique, Guinea-Bissau, Cape Verde, and S. Tomé and Príncipe, available at <http://www.dgaj.mj.pt/sections/files/cji/outros-instrumentos/>, (last visited May 7, 2011). In some of them, a clause states that "[t]he international jurisdiction of the courts of the Contracting Parties will be determined according to the statutory rules of each State" (translated from Portuguese).

each of these paradigms plays as a disincentive to unification, unless both systems become aware of a pressing need for a common paradigm shift.[50]

Applying this to our second thought, we might say that Europe could very well be ready to accept the introduction of jurisdictional cooperation tools; it simply would not be ready to use, say, a full-fledged *forum non conveniens* doctrine because it so strongly resembles and embodies the American, and in general Common-Law approach, that it would be a surrender to that other paradigm.

All in all, since the values and interests protected in the EU and the U.S. are actually similar,[51] being only this paradigmatic difference the reason for the failure of agreement upon uniformization of jurisdictional rules, a *court-to-court dialogue* could theoretically represent a tool towards equilibrium. This is basically to assume that the actual situation in Europe is not in equilibrium, because of lack of discretion tools, what we might concede as true. And so the *enhancement of judicial cooperation* at this stage could find its way, because it meets the needs of the system in its propensity to equilibrium between legal certainty and flexibility/fairness considerations.[52]

We submit that, notwithstanding the crucial aspect within the first thought, as to the indispensability of a proper legal habilitation of the judge for this matter, some of the rules initially projected in the Brussels I Review Proposal[53] could be characterized as a step towards said enhancement of discretion. In fact, some glimpses of the European Commission's proposal for review of the Brussels I Regulation showed purported interesting steps to be taken towards a greater role for *cooperation*. Article 31 (protective measures) called for judicial cooperation between the courts concerned, which "*shall* cooperate in order to ensure proper coordination between the proceedings as to the substance and the provisional relief" (emphasis added). However, this rule did not pass. The same with Articles 25 and 26, according to which **t**here would be *subsidiary jurisdiction* (25) or *forum of necessity* (26) whenever, among other conditions to be met, "the dispute has a

[50] R. MICHAELS (note 26), at 1068-1069. It remains to be seen if, recurring to this language, the stability of the traditional continental-European paradigm is shaken by the adoption of EU Regulations that include discretion-enabling rules, such as Article 33 of Brussels I *bis* (see *infra* in text).

[51] *See id.*, at 1017 (quoting the U.S. Supreme Court in *World-Wide Volkswagen* (supra footnote 15), in a formulation of "two functions of the law of jurisdiction" that every European private international lawyer would agree upon in principle: "It protects the defendant against the burden of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").

[52] One major tension, when defining the way rules of jurisdiction should be delineated, which is common to other legal discussions, is the debate of *legal certainty* or *predictability* vs. *fairness* or *reasonableness*. It is common-ground submission that the former is favoured by strict, hard-and-fast rules that do not open a broad field of discussion, whilst the latter is privileged by a discretionary role left for the judge to play.

[53] Available at <http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf, (last visited May 7, 2011)>. The final result is Regulation *Brussels I bis*, that is, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.

sufficient connection with the Member State of the court seized" (emphasis added). The appeal to a sufficient connection would have introduced flexibility into the jurisdictional analysis unheard of in that same legal instrument as it still stands today. Particularly in respect to Article 26, it would address an exceptional ground of jurisdiction, created as a guarantee of the fundamental rights to a fair trial or to access to justice. Although, when compared with the U.S. Due Process Clause, the former focuses on the plaintiff and the latter on the defendant, truth is, substantively both instruments share a similar function. This is a reason why such a concept of "fair trial" might be read in terms not too different from the U.S. Due Process Clause – hence a possible reason why it could not pass.

What did pass was Article 33 (then Article 34 in the draft), a *discretionary* third-country *lis pendens* rule: it allows for (*may*) – rather then imposing (*shall*) – the stay of proceedings when others are pending before a court of a third State where *inter alia* "the court of the Member State is satisfied that a stay is necessary for the proper administration of justice." Whilst such a provision does not generally exist in the U.S. – where proceedings may continue their course in parallel and the first judgment rendered is then given priority (*i.e.*, focus on the first judgment rendered, and not on the first court seized)[54] –, its operation in the hands of European judges may functionally play a similar role to either a stay of proceedings on grounds of *forum non conveniens*, or, on the contrary, similar to an antisuit injunction issued in order to stop proceedings elsewhere.

Hence, the initially proposed new rules for the revised Brussels I Regulation, allowing for an ampler field of discretion, appeared as a door through which some new results could have entered into European jurisdictional law, in terms of providing legal grounds for cooperation and thus setting a legal foundation of jurisdictional discretion upon which court-to-court dialogue could be justified. The result, in Brussels I *bis*, is however much more modest than earlier expectations.

B. In Human Rights Violations by Corporations

A somewhat different approach might be proper for the case of litigation related to human rights violations. Let us take the example of the work developed between 2006 and 2012 by the International Law Association Committee on International Civil Litigation and the Interests of the Public.[55]

Resolution 1/2008 (the Rio Resolution) was to propose, among other submissions of a long provision, the following:

[54] See *supra* footnote 26 and corresponding text.

[55] More information available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1021>, (last visited December 27, 2012).

> "*Whether expressly authorized by States or not*, judges from different countries should cooperate with one another to best manage transnational group actions […]"[56] (Emphasis added).

Yet, Resolution 2/2012 of the Committee originated the Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations adopted by the ILA in 2012 as a final outcome of this work, where a different version of this opening statement in respect to "transnational judicial cooperation" is set in stone:

"The Courts of States using these Guidelines shall cooperate with one another."[57]

The emphasized passage of the Rio resolution raises important issues of legitimacy of the court's intervention, particularly acute when the States do not "expressly authorize" such a conduct via a habilitating provision, as discussed above.[58] A development of this amount in the way courts deal with each other should be part of a wider reflection on the role of courts, as it is *not* undoubtedly true that courts' cooperation has nothing but positive effects. An "expansive scope of judicial review" may very well be the source of more problems than solutions, given that the courts' driving force may be nothing more than their respective national interests in constraining their own governments.[59]

Regarding this tension between a *judiciary* and its state's *government*, there is namely a suggestion that a "1993 resolution by the French Institute of International Law calls upon national courts to become independent actors in the international arena, and to apply international norms impartially, without deferring to their governments".[60] But we frown upon such a founding argument for jurisdictional cooperation. For one thing, the independence courts are asked for in such context regards the application of existing and binding international law, as the text of the Resolution clearly shows.[61] And for another, its Article 7 makes clear that "[f]or the

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[56] Article 8.1.; the full provision is available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1021>, (last visited April 29, 2011).

[57] The Final Report of the Committee's work, also available *via* the hyperlink indicated in the previous footnote, expressly conveys "the opinion that transnational cooperation between courts is an essential part of international litigation in the XXIth century" and refers to the reasoning of the Rio resolution (see p. 36).

[58] See *supra* text correspondent to footnote 48.

[59] See E. BENVENISTI/ G.W. DOWNS, National Courts, Domestic Democracy, and the Evolution of International Law, 20 *Eur. J. Int'l L.* 59 (2009) (arguing that courts are increasingly coordinating across borders to constrain their national executives, abandoning the traditional deference to the executive branch in respect to foreign affairs decision-making, in response to globalization); arguing that the last claim in text is plausible but not proven by these authors, see T. GINSBURG, National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs, 20 *Eur. J. Int'l L.* 1021 (2009). A.-M. SLAUGHTER, (note 18), at 711, admits: "Refining and implementing a specific concept of judicial comity may ultimately raise large political and philosophical issues."

[60] A.-M. SLAUGHTER (note 2), at 1104.

[61] INSTITUT DE DROIT INTERNATIONAL, The Activities of National Judges and the International Relations of their State, 1993, available at <http://www.idi-iil.org/idiE/navig_chon1993.html> (last visited May 7, 2011).

ascertainment of facts pertaining to the international relations of the forum State or of other States", national courts "[s]hould be able to defer to the Executive, in particular the organs responsible for foreign policy". That is, quite judiciously the *Institut de Droit International* does not meddle in the internal allocation of sovereign powers, and recognizes implicitly that the judiciary may reasonably *not* be recognized such powers if exorbitant of what is domestically reserved to them according to their own law. So, we believe it would be, at minimum, far-fetched for a court to withdraw from here any legitimacy as to entertain cooperation with other states' courts.

The same should apply, it appears, to a resolution as the one transcribed above, in the absence of a habilitation to the judicature in domestic law.

The only argument we see as worthy of entertainment to this respect, but deserving further thought, in the sense of a more expansive reading of the courts' powers, turns on the notion of "consent" we have laid down above as possibly relevant to this respect.[62] It regards transnational corporations, which by definition develop their activity on the sovereign territory of a multitude of legal systems. And it unfolds as follows: at least for the purposes of liability arisen out of violations of human rights – for out of this particular realm it would certainly be an exorbitant consideration –, corporations might be considered to be giving their *consent*, "implied through *benefits obtained* or *risk created* by the [corporation] while inside the political forum in which the court sits",[63] to submission to the fullest range of procedural measures that may be taken within any one of the multiple legal systems. This broad reading of the corporation's consent would in turn trigger the acceptance, by each state where it acts, of the fullest range of procedural measures that legal systems generally allow, save for an express constitutional limitation that hinders this interpretation of internal procedural law. As long as there is no such hindrance, this "consent" of the corporation would turn void the impediments that domestic procedural law would pose to cooperation, thus allowing judges to act with full authority. We apparently come back to the threshold issue of the existence of a habilitation norm in domestic law for this type of intervention of the judicature. But it may be that one further step for the justification of the court's intervention is given by the conjugation of a particular reading of the "*consent*" postulate with the considerations founded on constitutional law, finally synthesized in the admission of the new procedural tool.[64]

[62] See *supra* at II.B.

[63] See *supra* footnote 17.

[64] This has strengthened persuasive power against the backdrop of a "transgovernmental framework" (*see* supra footnotes 8 to 10 and accompanying text) that reconceptualizes sovereignty, des-emphasizes the role of territory, and which, by "encouraging participation in global processes at all levels of the state architecture [...] suggests a role for national courts in the regulatory process." H.L. BUXBAUM (note 9), at 308.

C. In Corporate Law: *Cooperation within Competition* in Delaware Corporate Jurisdictional Law

Let us finish the train of thought with a short reference to a particular context where cooperation at the jurisdictional level seems to work, not as an *alternative* mechanism to a competition between legal systems, but rather as a *complement* of, or mechanism *within*, the framework of such competition.

It is well known that regulatory competition plays an important role in the analysis of U.S. corporate law – much more than in Europe. The competition is partly driven by the franchise fees that the states receive from their "chartering business", being Delaware, recognized as the "de facto national lawmaker for corporate law",[65] the big player for this matter, in such a manner that many claim there is no longer a true competition.[66] In Europe, quite differently, such competition, though it may occur – and the best example has been the rising number of English private limited liability companies after the *Centros* decision of the CJEU[67] – is pretty much hampered by the fact that Member States of the EU are prohibited to raise franchise taxes to the amounts seen in Delaware, due to EU Directives on capital taxation. That does not mean, however, that European-corporate-law regulatory competition will not be a reality: the truth is there are other economic interests involved in chartering decisions, such as the ones connected to the corporate litigation bar and the services rendered by corporate legal counsel, which may foster it if there is such an opportunity.[68]

The reasons for this reference to corporate regulatory competition are twofold. The first one concerns the way "cross-jurisdictional coordination" is

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[65] M. KAHAN/ E. ROCK, How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity, 58 *Emory L.J.* 713, 714 (2008-2009).

[66] There are however two kinds of claims against the idea that "competition is over". First, the idea that there is a "vertical competition" between Delaware, on the one side, and the U.S. Congress and other federal authorities, on the other, whereby the latter might be seen as a competitor because of the power to displace state law by regulating corporate law at the federal level. See M.J. ROE, Delaware's Competition, 117 *Harv. L. Rev.* 588, 600-634 (2003-2004). This is not a universally shared claim. See *e.g.* M. KAHAN/ E. ROCK, Symbiotic Federalism and the Structure of Corporate Law, 58 *Vand. L. Rev.* 1573, 1587 (2005). Second, the idea, based on so-called "market segmentation", claiming that some niches may and are developing, where particular states offer different kinds of law, namely "laxer laws" in comparison to Delaware, or laws that give higher shareholder protection than Delaware does (Delaware is seen as pretty much manager-friendly, even in the U.S., and most certainly from an European perspective). That may attract some types of companies which may see there an advantage. See *e.g.*, recently, M. BARZUZA/ D.C. SMITH, What Happens in Nevada? Self-Selecting into a Lax Law (March 27, 2011), 5th Annual Conference on Empirical Legal Studies Paper, available at <http://ssrn.com/abstract=1644974>, (last visited May 7, 2011).

[67] ECJ, 9 March 1999, C-212/97, *Centros.*

[68] R. ROMANO, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 *J.L. Econ. & Org.* 225, 240-241 (1985) (franchise fees are only "[t]he tip of the iceberg of an important state industry: Delaware residents, especially the corporate bar, must earn substantial income from servicing Delaware corporations that considerably outdistances the tax collections.").

envisaged in that realm of law, and how we may, or may not, draw conclusions from the corporate debate for a general jurisdictional analysis. The second one regards the recent attention that mechanisms of interjurisdictional cooperation are receiving in Delaware corporate law scholarship.

As to the first issue, corporate-law commentators distinguish two "different – and largely conflicting – forms" of "cross-jurisdictional coordination": *harmonization* and *regulatory competition*. Harmonization is a "top-down" process of legal change, whereas regulatory competition is described as a "bottom-up" process.[69] In terms of the viewpoint of judges on the issue of whether they should cooperate with each other, this context shows there may be a difficulty for courts to have, on their own, incentives for cooperation. And there would be a contradiction in expecting judges to work on their own, from bottom to top, in the expansion of a form of legal change, *i.e.*, through cooperation, when the typical "bottom-up process of legal change" would be, theoretically, competition. Can this same model of analysis be applied to jurisdiction *over* corporations? If that would be the case, transplanting the thought, the incentive for judges would be to *compete* and therefore to assert jurisdiction whenever they have the chance to do so, especially in hard cases where they believe they have a say in best conforming the competing interests at stake.

We submit, however, that such a simplistic transplant from the corporate regulatory competition legal reasoning cannot be made to the corporate general jurisdictional analysis. That holds true especially in the European context, where judges *are not used to compete* in a regulatory race, hence they *do not know how to compete, nor are they keen on it*. One fair explanation, and basis for this submission, is MICHAELS' "paradigmatic" line of thought described above.[70] Unlike Americans, Europeans see jurisdiction in a rather *apolitical* view, in terms of the best "allocation" possible of the suit; private interests are at stake, hence public interests do not play a central role. So, this is not the proper playground for legal competition, on a European perspective. For the U.S. standpoint, the same argument would not be valid; but outside corporate-law matters, we may say, there is not the "soft pressure" of the "chartering business" that we may concede exists when the Delaware corporate-law judicature is called to decide.

As to the second issue, an interesting trend is developing in recent times, mainly arising out of the awareness, according to recent empirical studies, that corporate-law cases involving Delaware-incorporated firms, thus applying Delaware law according to the "internal affairs doctrine",[71] are more and more being adjudicated *outside* Delaware state courts, so that the latter are sitting today

[69] R. KRAAKMAN, *et al*., *The Anatomy of Corporate Law – A Comparative and Functional Approach*, 2nd ed., 2009, p. 34.

[70] See *supra* footnote 50.

[71] *Restatement, Second, Conflict of Laws*, vol. 2, 1971, § 302; *Edgar v. MITE Corp. et al.*, 457 U.S. 624, 645 (1982). See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *Vantage Point Venture Partners 1996 v. Examen Inc.*, 871 A.2d 1108, 1113 (2005).

on a minority of such cases.[72] That is not at all irrelevant, given that Delaware draws important revenues from the "chartering business", and, in a more legal viewpoint, Delaware corporate law's vitality "lies precisely in its normatively-laden, open-ended narratives", once entitled "corporate law sermons" for their "richly detailed and judgmental factual recitations".[73]

As a response to this problem, some commentators have brought their opinions to the foreground. Some are favourable to a voluntary adhesion to Delaware courts through the insertion of forum selection clauses in the corporate charters or bylaws in favour of Delaware courts.[74] Others – and that is what in this context interests us the most – sustain a recourse to mechanisms of *judicial* and *jurisdictional* cooperation. As to *judicial* cooperation, the Chief Justice of the Delaware Supreme Court has recently praised all the advantages of the use of the *certified questions* cooperation instrument. This allows other courts to submit to the Delaware Supreme Court questions of Delaware law whenever they are competent to decide on them, in case less familiarity with "the nuances Delaware corporation law" so advises.[75] As to *jurisdictional* cooperation, the relevant rules – with no surprise, since we are in one of the U.S. states – concern the possibility of Delaware courts deciding to stay proceedings on grounds of *forum non conveniens*.[76] Moreover, in a recent decision, then Chancellor CHANDLER, for Delaware's Court of Chancery, dropped a footnote addressing the "multi-forum deal litigation problem" and a noteworthy "workable solution" proposed by himself:

> "My personal preferred approach, for what it's worth, is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward. In other words – and I mentioned this during an earlier oral argument in this case – my preference would be for defendants to "go into all the Courts in which the matters are pending and file a common motion that would be in front of all of the

[72] J. ARMOUR/ B.S. BLACK/ B.R. CHEFFINS, Is Delaware Losing its Cases? (March 25, 2010), *Northwestern Law & Econ Research Paper* No. 10-03, available at <http://ssrn.com/abstract=1578404>, (last visited May 7, 2011).

[73] F. STEVELMAN, Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law, 34 *Del. J. Corp. L.* 57, 125, fn. 268 (2009); E.B. ROCK, Saints and Sinners: How Does Delaware Corporate Law Work?, 44 *UCLA L. Rev*. 1009, 1016 (1996-1997).

[74] J.A. GRUNDFEST, *Choice of Forum Provisions In Intra-Corporate Litigation - Mandatory and Elective Approaches*, "The 26th Annual Francis G. Pileggi Distinguished Lecture in Law", hosted by The Delaware Journal of Comparative Law, October 8, 2010, PowerPoint available at <http://djcl.org/Pileggi_Lecture/Pileggi_2010.pdf>, (last visited May 7, 2011).

[75] H. DU PONT RIDGELY, Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporate Law, 63 *SMU L. Rev*. 1127, 1132 (2010). The legal basis for the certification of questions to the Delaware Supreme Court is Article IV, Section 11(8) of the Delaware Constitution.

[76] See *In re Bear Stearns Cos. S'holder Litig.*, 2008 *Del. Ch. LEXIS* 46, 16.

> judges that are implicated, asking those judges to please confer and agree upon, in the interest of comity and judicial efficiency, if nothing else, what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter." […] Of course, as I recognized at the time, judges in different jurisdictions might not always find common ground on how to move the litigation forward. Nevertheless, this would be, I think, one (if not the most) efficient and pragmatic method to deal with this increasing problem. It is a method that has worked for me in every instance when it was tried."[77]

This is an interesting evidence of how, even in the midst of a regulatory *competitive* environment, and though typically *competition* and *cooperation* are in tension,[78] a well-managed *jurisdictional discretion* may be the key for a fruitful *cooperation*.

V. Conclusion

In this paper, we dedicated ourselves to issues of rulemaking in international jurisdiction. We concentrated on the threshold moment of litigation, in order to assess whether it is suitable and attainable to make national courts of different sovereign states work with each other at the early moment of establishing jurisdiction (*jurisdictional cooperation*). At the *state* level, a theoretical approach to jurisdictional rules based on the idea of *consent*, expressed or implied, is appealing in terms of providing basis for cooperation, which is also in line with the contemporary notions of sovereignty. A distinction between *hard* and *soft* tools of jurisdictional cooperation made us realize that the former are widely available in the U.S., which is not the case in the EU. Moreover, the recognition of such tools more easily enables the acceptance of the *soft* tools, in the framework of *jurisdictional discretion*, which leads us to the frustrating conclusion that the states who would benefit from them the most more difficultly can justify them according to their own domestic law, namely their domestic procedural law. At the *inter-state* level, the efforts at the Hague Conference of Private International Law were doomed to failure; the idea of jurisdictional discretion, namely the tremendously different levels of discretion between the U.S. and the E.U., may help grasp the source of the disagreement. At the level of transnational jurisdictional cooperation properly so-called, *beyond* the state, some rules initially proposed in the Brussels I Review Proposal could be characterized as a step towards an enhancement of jurisdictional discretion, favourable to cooperation, though only one of them passed in the end.

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[77] *In Re Allion Healthcare Inc. S'holders Litig.*, C.A.No. 5022-CC (Del. Ch. Mar. 29, 2011), available at <http://www.delawarelitigation.com/uploads/file/int63C.PDF>, (last visited May 7, 2011), p. 10, fn. 12.

[78] In a similar tension but at the level of the *sources of law*, we may speak of "competition" vs. "complementarity": C. KESSEDJIAN (note 11), p. 168.

In human rights violations by corporations, the absence of a habilitation provision for cooperation by domestic procedural law to the judicature is a hurdle difficult to overcome, though arguments against that view may be put forward. Finally, by grappling with some of the specificities of corporate jurisdictional law we realized there might be cases where, although the general framework is of *competition*, *cooperation* can play an important role.

THE WEAKENING OF THE NATION-STATE AND PRIVATE INTERNATIONAL LAW
THE "RIGHT TO INTERNATIONAL MOBILITY"

Johanna GUILLAUMÉ*

In the beginning of 2006, Professor Patrick COURBE, my thesis director, suggested that I work on the following research topic: the weakening of the Nation-State as concerning private international law.[1] This was dually inspired by the "statocentrique" characteristic of private international law and the phenomenon of the weakening of the Nation-State.

These two key points have been largely examined through doctrine; they have been taken for granted and have served as postulates. These subjects have therefore been covered in the following introduction in order to understand the context in which the problem is exposed.

The first axiom –the state logic of private international law– is the result of several factors. First, the nature of conflicts of laws and conflicts of jurisdictions need to be considered, since crossing a national border creates extraneousness. Second are the methods, because the objective of the rules of conflict is to localize the international situation in a single state legal order. In addition, the connecting factors used to analyse the situation relate to State constituent elements (territory and nationality) or reach a legal reality being backed by the State itself (choice of

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[1] J. GUILLAUMÉ, *L'affaiblissement de l'État-Nation et le droit international privé*, préf. C. GRARE-DIDIER, Paris 2011, vol. 530.

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law by the parties). As a consequence the substantive law, applicable to the merits, is also most likely a law of national origin. Third are the sources. The rules of law destined to govern private international cases are often promulgated by each State unilaterally and with authoritative sovereignty. The last factor is the nature of the interests at stake. For even if conflicts of laws concern private interests, this does not exclude the presence of public interests as is proven by techniques of mandatory overriding rules or public policy exceptions.

The second axiom − the weakening of the Nation-State – takes into account the polymorphic character of the State: a society organized both juridically and politically, a subject of international law, and a legal body governed by domestic public law constitutive of an administration. It appears that in each of these cases, the State is weakened by either external factors or by internal ones.

As a subject of international law, the State is destabilized by globalization and by the construction of a world legal order within which it becomes a simple element next to international organizations. In addition, globalization generates an economic and a legal interdependency binding the State, which threatens its autonomy. The gathering together of countries by region, such as the European Union, has consequences that are even more clear cut since the principles of primacy and direct effect of the European Union law create a subordination of member States to a European legal order. Although this transfer of competence was originally analysed like an act of sovereignty, state power emerges largely diminished. As far as the State as an administration is concerned, one can see that the structure of government is breaking apart from the forces of decentralization or from polycentricism. However it is necessary to see it more as a reorganization than as a true weakening since while the State distributes its prerogatives to territorial collectivities or to administrative authorities, it is still the public power that is competent, even if it is no longer the State itself. It is finally the State as a society that is the weakest, to the point that one can speak about the failure at the level of unity and cohesion of the Nation. Indeed, the State is progressively unsure of its ability to ensure its mission of integration towards its foreign population and to create a national collective identity. This is especially true since national bonding is today in heavy competition with other bonds of membership from infra-state structure (regional and community ties) and from the supra-state magnitude (the European link).

The State is a modern political structure which, since its beginnings at the end of the feudal system, has progressively supplanted other forms of social organization: namely tribes, cities, the empire, and the monarchy. The State is neither evidence nor a truth. For the most pessimistic of authors, the weakening of the State phenomenon could be a factor which propels the disappearance of the State. Using this hypothesis there would no longer be national laws, and private matters would be formed worldwide without the clashing of state borders. This is unless the State is substituted by other interest groups, other processes of distribution, and processes of incorporation of individuals. This would only renew the problem of the conflict of laws and of the conflict of jurisdictions on a different scale.

At present, it is impossible to bet on the disappearance of the State. On one hand, certain States are faring better than others, which prevent the generalizing of

the phenomenon of the State's decline. On the other hand, even if the State is weakened it remains vested in functions which today it is the only entity able to carry out: it is still the principal vehicle of integration of societies, the intangible place of solidarity, and a space of recognized security. The recent economic crisis has reminded us of this aspect. Consequently, the weakening of the Nation-State is a real phenomenon that should not be trivialized, but that should be put into perspective.

These two postulates have highlighted the fact that private international law rests largely on a state logic, which has been shaken by the weakening of the Nation-State thus modifying the subject. It is this evolution that this study examines, according to the following procedure. Firstly, this study does not take into account current events namely those referring to economic conditions. The framework of this study is more theoretical and is designed to disregard all contingencies. Secondly, the perspective on this issue is as broad as possible. The objective is to carry out an overall study that puts forth evidence concerning the general development of private international law. Most of the resulting reports are not new. The goal is to perceive this subject from behind several known scattered phenomena to see whether a more general movement is taking shape. Finally, the French Nation-State was chosen to serve as a point of reference, even though a number of developments can equally be applied to other types of governments, either Nation-States or plurinational States.

One must therefore question the role and place that the Nation-State plays in matters of dealing with private international relationships, in order to appreciate the consequences of their evolution concerning this subject, as well as future prospects. In order for this to happen, the two functions that the State is occupied with must be contemplated. The first is an active function, which consists of promulgating and enforcing the rules which allow conflicts of laws and conflicts of jurisdiction to be resolved. The second function is a passive one, because it is a state related paradigm, which underlines the conflictual method namely the linking legal matters with a state legal order using connecting factors. The active role of the State in private international law echoes back to the subject's sources, while the passive role refers back to the methods. Each of these aspects has suffered from a mutation resulting from the crisis of the Nation-State.

Concerning sources, one notices that state sovereignty is questioned at this stage of the edification of the rules of private international law. The State is in fact in competition with and controlled by external legal orders. Unlike foreign legal orders whose nature is that of a State, the external legal orders are either interstate orders that find their official source in a treaty ratified by States, such as the European Union's legal order, or non-state legal orders from private sources, such as the legal order of the *lex mercatoria* or the sports legal order. Coming from this pluralistic viewpoint of the law, the State is no longer the only source of rights capable of governing private international relationships: from the moment where the private international situation is carried out on the international level, on the European level, or on the multinational level, some external legal orders have the vocation of intervening. One can certainly raise objections that the birth and development of the European Union, for example, indicates a transfer of competences. This transfer, encouraged and organized by the State, constitutes an act of

sovereignty and not a loss of sovereignty. And yet, there is a loss while the European Union appropriates skills that were not attributed to it, to the detriment of the States. One can equally argue that the State holds the monopoly of forced implementation of the law within its territory. But this power becomes effective only if private individuals make an appeal to the state's public power. Take, for example, a sportsperson in litigation with his international sports federation who accepts the case decision rendered by the sports jurisdiction: the case is left in limbo in a transnational setting, totally escaping state jurisdiction. Therefore, even if the State holds without a doubt a position of privilege, it does not lose less of the monopoly and the liberty of decreeing the norms concerning private international law.

The State is also influenced from a more injurious angle. Although it is neither controlled nor subjected to any purposeful obligation, it is forced sometimes to modify its private international law rules. Since the 1950's, the internationalization of exchanges has helped drive the market's economic development, the progressive opening of borders, the growth of competition, and the globalization of the economy. This has been parallel to the redefinition of the role of the State: the amplification of international competition to attract investments has driven the State to redefine certain legislative politics in the sense of liberalization and deregulation. In fact, thanks to the delocalization or the autonomy of their will, the parties can choose the national legal system that best suits them, making national laws into a commercial commodity, *i.e.* law or forum shopping. From this point forward, the State's objective is to entice more international operators to its market rather than regulating their activities. The legislative competition between state norms is at its height in the European area, as the European Union encourages the member States to align their legislation so as to obtain uniform rules in domains outside of European competence. In this competitive context, the rule of conflict that devotes the autonomy of the will or the principle of origin is both a tool and an object of legislative competition between States. Initially the liberalization wanted by the State is, it seems, being finally turned against the State itself, leading to a dilution of its management power in private international relations to private individual's profit.

The weakening of the State can also be felt when it comes to the enforcement of the rules of private international law. These rules convey the legislative politics of the State in matters of dealing with international private cases. But with increasing frequency, the national legislative politics is framed by legal orders that are hierarchically superior, like the legal order of the European Union or the legal order of the European Convention on Human Rights. Overriding mandatory rules and public policy exception furnish a perfect example of this type of situation. In principle, these two processes are protection mechanisms of the legal order of the forum that impose the respect of certain laws or of certain essential principles in spite of the international nature of the situation. And yet, one notices that overriding mandatory rules and public policy exception undergo the influence of the European Union's law and of the European Convention on Human Rights, which dictate their contents and which frame their enforcement. Therefore, the State is no longer free to sovereignly determine its degree of openness concerning laws and foreign decisions. The general state interest is neglected in favour of supra-state

interests, either interests of the European Union, which are mainly economic, or the fundamental rights of the European Convention on Human Rights.

The infringement of imperative law is so much more concerning than is accentuated by the possibility that the parties can bypass the laws deemed too constricting. While the state sanctions autonomy of the will, it makes provisions for diverse techniques, which would provide control of the parties' freedom of choice. But, these techniques are only effective up to a point, because in a global space subject to liberal politics the strength of liberty comes from within until self-emancipation. In certain cases, the litigants can skilfully navigate around state rules, even those of an imperative nature, in all legality by simply using their judicial freedom in an ingenious manner. Thus, the choice of a state jurisdiction, the choice of an arbitrary tribunal, or still the European freedoms of circulation allow parties to get around mandatory domestic rules without any fraudulent activity with which there would be future reproach. Confronted with this finding, the State is then faced with two options: act *a priori*, in restricting the field of liberty in international private relationships, or act *a posteriori*, in ensuring an effective control.

Study of international private law sources has revealed difficulties, which the handling of these sources must be researched concerning the methods employed. And yet, the methods have equally undergone the influence of the weakening of the Nation-State. The conflictual method, which has been the methodology traditionally favoured, perfectly translates the state logic of private international law. What is more, even if SAVIGNY perceived conflict of laws as a conflict of private interests, he contended that the status method and bilateral conflict rules were equivalent. Indeed, private international law is a distributive legal system because its aim is to, above all, localize legal relations. From this point forward, the conflictual method seems out of date. On one hand, it comes up against the true internationality of some situations. The legal links arising from Internet cases or even situations in which multinational companies are called in to intervene, have been off-shored to the point that one can speak of transnational situations. Therefore, there exists a gap between the logic of state localization and the transnational level of the situation. On the other hand, the renewal of sources has given rise to what we have proposed to entitle "the right to international mobility". Again, the conflictual method seems unsuitable when faced with this new challenge. This time, it is not the national localization of legal relationships which is the problem, rather the abstraction and the neutrality of the rules of conflict. It is this particular aspect of my thesis that I have chosen to develop.

It is necessary to first specify that the right to international mobility is not the same as the right of entry and residence within the territory. The term mobility, as opposed to being a static concept, represents the potential international dimension of each individual. The right to international mobility illustrates the shift from the centre of gravity of the basic principles of private international law, from the State to the individual. To better understand what the law of international mobility covers, it is necessary to first define its meaning (I), then to question the evolution of methods that it is likely to drive (II).

I. The Meaning of the Right to International Mobility

The individual has long been able to weave together the legal transborder links. However, it seems that what was for a long time a simple ability has today become a "right." The emergence of the right to international mobility is the consequence of a paradigm change (A), revealed from the practical plan by the recent evolution of methods pertaining to private international law (B).

A. The Causes: the Paradigm Change

Originally, the equation was simple because it only consisted of two elements: the State and the individual. In this configuration, the cursor was placed on the State (1). Today, the equation has become complex because it also integrates external legal orders. These new facts as well as the evolution of the role and the place of the individual on the international level have led to the sliding of the cursor towards the individual (2).

1. The Former Paradigm

The conflictual method rests on two distinct ideas: the precedence of the internal legal order[2] and the legitimacy of private international connections. This legitimacy is justified by the nature of the things. Man is in fact gifted with a social dimension that allows him to be able to interweave personal and business bonds outside of his own country or with those not of his country. In this sense, the legitimacy of private international relationships is the expression of individual freedom.

Given that a legal transborder link can be located in at least two state legal orders, personal freedom inevitably comes into conflict with public interests. In fact the States concerned cannot afford to be disinterested by the situation because the coherence of their internal order is at stake. The extent of the individual's freedom to live beyond one's country of origin is restricted by the degree of permissiveness of the States. Keeping in mind the state's precedence and of the embryonic character of the international society, priority was previously given to state legal order.

2. The New Paradigm

Today, the data has changed. One can observe a reversal of the original paradigm to the private individual's profit. Notably this is due to the evolution of a private entity's role; from now on, this could compete with national law or influence its

[2] H. BATIFFOL, *Aspects philosophiques du droit international privé*, Paris 1956, rev. ed. 2002, préf. Y. LEQUETTE, esp. p. 323.

working out. One can see that there is a toppling over of bonds of force in the middle of which the litigants become real private powers.

As well as the evolution of the person's role, one can also note an evolution of its place on the international scene. One notices a restructuring, or even a construction, of State and external legal orders and around fundamental rights. Thus, the SAVIGNY law community, the conflictual method foundation, left room for the Human Rights community. This community is organized in a horizontal fashion, but also in a vertical fashion as the legal order of the European Union and the legal order of the European Convention are being built around these laws. As a result, the person acquires a preeminent place on the international scene. This evolution has brought up to date international law doctrines according to which the person is the ultimate goal of the law.

George SCELLE, in particular, affirmed that international society is not a society of States, but a society made up of individuals. The author considered that the State is only a constituency of international society, a place of individual connection, a fiction that is not necessary. The interstate society would only be a moment of evolution of the international society. These are the people who make up the essence of international society in forming a universal community. Consequently "the role of governing bodies and officials, either during regulations of individual connections or during the control, or the execution of legal situations fulfilled, consists uniquely and exclusively of organizing, encouraging, controlling, and assuring them".[3]

This idea of a human community has already been found in Emmanuel Kant's work, in particular when the philosopher intended to establish the project of never-ending peace. The author imagined a cosmopolitical law, defined as the law of "universal hospitality"[4] that consists of granting the right to all men to not be treated as an enemy in a foreign country. It is the right to visit, inherent not in nationality or in existing relationships between the country of origin and the host country, but which rests on the connection to the human community. The original idea is that because of the 'circularity' of the earth, man cannot be scattered in infinity. Besides, humans must live together, because not one of them has "from the start the right of being at one place on earth rather than at another".[5] This cosmopolitical law is actually rather rudimentary and does not even allow the foreigner to ask for a right of entry or of establishment. Nevertheless, the idea developed at the end of the 18th century, according to which men should be considered as "citizens of a human universal city,"[6] today offers new perspectives.

Indeed, the mobility facilitated by means of transportation and especially the growth of fundamental rights give to the doctrines a new outlook. The idea of a universal human community gives the incentive of keeping account of the potential international dimension of each individual, particularly on the legal level and

[3] G. SCELLE, Règles générales du droit de la paix, *Recueil des Cours* vol. 46 (1933), p. 330, esp. at 342.

[4] E. KANT, *Projet de paix perpétuelle*, transl. J. GIBELIN, 1795, rev. ed. Paris 1999, p. 55.

[5] *Ibid*., p. 54.

[6] *Ibid*., p. 29, footnote.

relativizing the division of the world into States. In other words, it is about disputing the determinism that results from the place of birth or from one's living environment in order to allow the individual to be fulfilled in spite of state borders, one's nationality, or even one's domicile. Indeed, these connections are most often the fruits of luck, in the sense that they are not the results of choice. They must not therefore bring on a hurdle to the development of business or personal relationships beyond borders. It is this that one can call "the right to international mobility".

From a concrete point of view, the right to international mobility would intervene on two distinct levels. First, when the international situation was already created: it is then a right to continuity that expresses itself through the idea of recognition. Secondly, at the time of the creation of the international situation, the matter then is not to obstruct the development of private transborder relationships, which implies foreseeability and protection. Continuity, foreseeability, and protection are the three words of order concerning the right to international mobility.

At this stage, the right to international mobility has an explanatory valor: it is the consequence of the paradigm's reversal, thus allowing one to understand certain methods of private international law that distance themselves from the traditional rules of conflict of laws.

B. The Clues: the Evolution of Methods

Neutrality and abstraction of the conflictual method cannot satisfy the demands of the right to international mobility, because this implies a substantive justice. It is the person who must be placed at the centre of reasoning and not the applicable law or the legal relationship. The positive law has already changed in this sense, whether it is a matter of recognition (1) or creation of a legal relationship (2).

1. The Recognition of a Situation Created Abroad

After the situation has been already created, the positive law shows a relaxing of rules concerning the recognition of foreign decisions. European regulations make the circulation of legal decisions easier between member States, even going as far as abolishing the *exequatur*. In ordinary law, the *Cornelissen* decision of 2007[7] abolished the review of the law applied during the *exequatur* of foreign decisions.

When no judgement has been rendered, but in the presence of rights acquired abroad, one sees a method of recognition spread whose objective is to receive situations created abroad without interference of the rule of conflict of the forum. It is a unilateralist method as it is centred on the normative point of view from one legal order, thus creating a universalization of legal situations. The unilateral method has a coordinating vocation, because the legal order considered is that of the place of creation and not the legal order of the forum. The reasoning that

[7] Cass. civ. 1ère, 20 February 2007, *Cornelissen*, *Rev. crit. dr. int. pr.* 2007, p. 420, note B. ANCEL/ H. MUIR WATT; *D.* 2007, p. 1115, note S. BOLLÉE/ L. D'AVOUT; *JDI* 2007, p. 1195, note F.-X. TRAIN.

rests on considerations of substantive justice is focused on rights acquired by the person and not on the rule of law, thus assuring permanence of judicial status.

This method is particularly efficient between member States, because it takes the form of mutual recognition and rests on the freedoms of circulation. In forcing Germany to recognize the name that Denmark, the country of residence of the child concerned, had given to a German national, the legal decision *Grunkin and Paul*[8] confirmed that the freedom of circulation implies obligation for the member States to recognize the situation that is formed in another member State. But the right to mobility is not simply intra-European, because it can also find a foundation in some international texts. For example, if the child, Grunkin-Paul, had had the nationality of a third country, the German authorities could have been forced to respect his identity while applying the Convention on the Rights of the Child, according to which the child is entitled to a name and the States commit to preserving the identity of the child including his name, or still in applying Article 8 of the European Convention on Human Rights, which consecrates the right to respect of private and family life. It is also on the latter foundation that the European Court of Human Rights rendered the decisions *Wagner*[9] and *Negrepontis*:[10] Luxembourg then Greece were forced to recognize an adoption regularly pronounced abroad but which was not satisfying the conditions of recognition of the forum even though these conditions were mandatory in the second case.

Although efficient, this method of recognition has necessarily a limited domain, as it implies that the situation has already been created. Essentially it tends to insure the goal of continuity of the right to international mobility.

2. The Creation of an International Situation

At this stage of the creation of the legal relationship, the right to international mobility implies not obstructing the birth of private transborder relationships. For this, it is important to keep in mind the foreseeability of solutions. It is a classic objective of the subject. Besides, the solution must lead to a fair and adapted result. Then, the solution must not infringe on the identities of the parties. The last two requirements are more recent because international private law has traditionally an objective of localization and distribution, and not of protection.

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[8] ECJ, 14 October 2008, *Grunkin-Paul*; *Rev. crit. dr. int. pr.* 2009, p. 80, note P. LAGARDE; *JDI* 2009, p. 203, note L. D'AVOUT; *D.* 2009, p 845, note F. BOULANGER; *AJ Fam.* 2008, p. 481, note A. BOICHÉ.

[9] ECtHR, 28 June 2007, *Wagner et J.M.W. c/ Luxembourg*, No. 76240/01; *D.* 2007, Jur, p. 2700, note F. MARCHADIER; *D.* 2008, Pan. DIP, p. 1507, esp. 1517, obs. F. JAULT-SESEKE; *RTD civ* 2007, p. 738, note J.-P. MARGUÉNAUD; *Rev. crit. dr. int. pr.* 2007, p. 807, note P. KINSCH; *JDI* 2008, p. 183, note L. D'AVOUT; *AJDA* 2007, p. 1918, obs. J.-F. FLAUSS; *Gaz. Pal.* 2008, Nos 81 et 82, note M.-L. NIBOYET; *JCP* 2007, I, 182, obs. F. SUDRE.

[10] ECtHR, 3 May 2011, *Negrepontis-Giannisis c. Grèce*; *Dr. famille* 2011, alerte 48, obs. M. BRUGGEMAN; *JCP G* 2011, No. 28, 839, Chr., obs. Y. FAVIER.

The research for a fair and adapted result is ensured by rules of conflict of laws, which have a substantive aspect, that try to achieve a predetermined result. This method is not exactly recent; we are more interested in the goal of the protection of the identity of individuals.

Article 27 of the International Covenant on Civilian and Political Rights from December 16, 1966, as well as Article 30 of the November 20, 1989 United Nations Convention on the Rights of the Child, guarantee the protection of minorities. This protection goes notably through the applicable law. So a United Nations report blames the uniform application of private law rules, considering that it carries prejudice to the protection of minorities guaranteed by the International Covenant of 1966. From a normative angle, the cultural identity of the individual should be protected, rather than trying to integrate the person.

In this sense, one can wonder if the subjective rights inherent to nationality should not follow the individual no matter the place where he is found, even if these rights have not yet been taken advantage of. This would imply application of the law of nationality or consecrating an option of legislation between the law of nationality and the law of domicile. For example, why not authorize two people to celebrate a polygamous marriage or a homosexual marriage in France, if their law of nationality allows them to? If these solutions are up until now out of the question, it is from other domains where the judge shows himself to be eager to respect the identity of the individuals, as is notably shown in the rendering from the Paris Court of Appeals of March 8, 1994.[11] A Frenchman of Senegalese origin was married once in France and once in Senegal. To know if the second marriage should be annulled, the judges apply the French law as prescribed by the rule of conflict of the forum. Article 201 from the Civil Code states that the invalid marriage must produce a result in favor of the spouse who was in good faith. In this case, the spouse was granted the benefit of putative marriage, because he comes from a country where the polygamous customs are still strong and he could legitimately think that he had the right to a second marriage. The court of appeals therefore appreciated the good faith of the husband with leniency, in regards to his origins and his culture, which is to say by integrating foreign values and concepts.

The respect of identity must not lead to an excess of the reverse, which is to say to lock the person in his prohibitive status. The subject is sensitive because the private person is always connected at least to a State, and the State remains, in spite of everything, the place of ideal reassurance for the individual. The satisfaction of private interests cannot therefore be done to the detriment of the general interest. Therefore, the right to international mobility must not permit one to go fraudulently abroad to get what one cannot obtain in one's forum of origin, if the situation is due to be later imported in the forum of origin. The coherence of the forum, assured by the respect of intangible values, must not be disrupted. On the other hand, since the ties with the forum of origin have been weakened, the prohibitive status of the individual must no longer be an obstacle to the creation of transborder situations. At the moment, the public policy based upon proximity

[11] CA Paris, 8 March 1994, *D.* 1994, IR, p. 87; *RTD civ.* 1994, p. 326, note J. HAUSER.

allows to take into account the distance between the person and his legal order of origin.

Contrary to the full public policy of the attenuated effect of public policy, the public policy based upon proximity does not protect some values that are vital for the forum but some subjective rights of the individual. This tendency can be observed from the *Fontaine* decision of 1938,[12] which contains the premise of the public policy based upon proximity. In this situation, the English law normally applicable did not allow the mother to legally acknowledge her out-of-wedlock child. The English law was not applied by the highest court of jurisdiction, motivated by "the indefeasible rights of a French mother to legally recognize her child in forms and conditions prescribed by French law". The decision is based upon Article 8 of the Civil Code according to which, "every French person enjoys civil rights". The public policy based upon proximity is brought into play on condition that a personal or territorial connection does not exist. In this manner, the jurisprudence does not defend an essential value of the French society but a subjective right of the person. In a similar case, the public policy based upon proximity creates therefore two categories of individuals: those who enjoy a subjective right because they are French and/or live in France, and those, who by default of similar links, are deprived of such a right. So, while the links with the forum are insufficient, the person cannot escape his prohibitive status in being granted some subjective rights that his forum of origin does not confer to him.

The demand of proximity acts like a filter in the recognition of rights: whereas the French child or child living in France has the right to see his paternal filiation established, the child of a personal prohibitive status who is not linked to France, does not enjoy such a right.[13] Such a selection does not justify when the right at stake is a human right, that is to say a right attached to the state of being a person and not of being a national or a resident. The restrictive effect of the principle of proximity could be improved by a universalization of connecting factors: the mechanism of public policy based upon proximity should be adapted to the importance of the right at stake, which implies that a hierarchicalization of fundamental rights is necessary.

So, the absolute fundamental rights should benefit individuals without conditions of connection to the forum, except the competence of a jurisdiction of the forum. The violation of an absolute fundamental right would justify such a jurisdictional competence, on the basis of the universal civil competence. It is such in the *Moukarim*[14] decision. The French jurisdictions declared themselves competent to handle the dispute involving a Nigerian employed by a British individual in

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[12] Cass. Civ., 8 March 1938, *Fontaine*, *Rev. crit. dr. int. pr.* 1938, p. 653, note H. BATIFFOL; B. ANCEL/ Y. LEQUETTE, *Les grands arrêts de la jurisprudence française de droit international privé*, 5th ed, Paris 2006, No. 17.

[13] Cass. civ. 1ère, 10 May 2006, *Léana-Myriam*, *D.* 2006, p. 2890, note G. KESSLER/ G. SALAMÉ; *D.* 2007, Pan, p. 1751, obs. P. COURBE; *JCP* 2006, II, 1165, note T. AZZI; *JCP* 2007, I, 109, note L. CORBION; *Dr. fam.* 2006, p. 33, note M. FARGE; *AJFAM* 2006, p. 290, obs. A. BOICHÉ.

[14] Cass. soc., 10 May 2006, *Moukarim*, *Rev. crit. dr. int. pr.* 2006, p. 856, note É. PATAUT/ P. HAMMJE; *JCP* 2006, II, 1121, note S. BOLLÉE; *RDC* 2006, p. 1260, note P. DEUMIER; *D.* 2007, Pan, p. 1751, obs. P. COURBE.

Nigeria with a token fee as compensation. Neither the European rules of jurisdiction nor the domestic rules of jurisdiction could justify the competence of French tribunals. Only the particular nature of the rights at stake, which is to say the right to not be enslaved, justified this solution. On the other hand, while the fundamental rights in question are less absolute, the bringing into play of the public policy based upon proximity would demand a connection between the situation and the forum other than the competence of French jurisdictions. However, to enlarge the field of beneficiaries, the source of the fundamental right must be taken into account. If the principle's defence must be assured and is of a European source, its benefit must not be reserved for only French or foreigners habitually residing in France. It is the idea of legal proximity, according to which a subjective right is granted since the person concerned has the nationality of a State or resides habitually in a State that has a similar institution to the one to which the forum attributes a fundamental value.

The difficulty lies in identifying the fundamental rights gifted of an absolute value. Two objective criteria can be taken into account. First is a temporal factor, according to which the recent fundamental rights are still deprived of an absolute imperativity contrary to long established rights. For example, the respect of life and of the human body, the dignity of man, equality between men and women are some established fundamental rights, as opposed to the right of changing one's sex. Second is a special factor, which consists of asking if the fundamental right is recognized in a plethora of States or if it is rather restricted to a certain region.

In addition to the obstacle of the hierarchicalization of fundamental rights, the public policy based upon proximity remains a derogatory method that not only can serve as a core method but that, in addition, presents the inconvenience of uncertainty. The right to international mobility implies resounding a general method that would combine foreseeability and protection. To satisfy this objective, a functionalist method must be employed.

II. The Proposition of a Functionalist Method

The autonomy of the will could be the principal method of the right to international mobility and therefore the core method of private international law, because it combines conflictual justice and substantive justice (A). However, the State remaining the core element of international society and the connecting place of inescapable incorporation of people, private international law cannot be solely concerned with the individual. The liberty of parties necessarily has a limit: that of general interest. The freedom of choice must therefore be subject to an *ex post* control (B).

A. The Generalization of the Autonomy of the Will

The generalization of the principle of autonomy is not evident. From a legal perspective, individual liberty is self fed and escapes state influence, weakening

thus the power of the State by creating a situation of competition and influence. From an economic perspective, the recent financial crisis can make one doubt of the opportunity of strengthening the freedom of private person's liberty. Nevertheless, two elements oriented me towards this solution: positive law (1) and the risk of delocalization of situations in the context of normative competition (2).

1. A Choice Justified by Positive Law

The first element is positive law. In fact, the legislator, either national or European, increasingly promulgates the autonomy of the will or options of legislation. At first restricted to matrimonial regime and contract, the freedom of choice of the applicable law now concerns new domains like extra-contractual liability as found in Rome II regulation,[15] successions as found in the Hague Convention of 1989 or still divorce with the Rome III regulation.[16]

Autonomy of the will can also be established indirectly, notably while it is the consequence of the choice of the court. Indeed choosing one's judge largely amounts to choosing the specific judge's law. If the legal order of the forum authorizes the parties involved to submit the lawsuit to a foreign judge, which implies that the forum does not have exclusive competence, it is that the forum does not have a particular interest to make use of its own rules of private international law. In these cases, the rule of conflict of laws is nothing other than a proposal of management of private international connections. It is a proposition that is certainly tinged by national considerations but not by urgent reasons. This relativity of the rule of conflict of laws postulates the interchangeability of state laws that are potentially applicable. The Court of Cassation recently carried out this reasoning in authorizing the parties to choose a foreign judge[17] or an arbitrator[18] in spite of the existence of French overriding mandatory rules.

The autonomy of the will is also established indirectly by the recognition of the individual situations. The conflict of laws, being absorbed by the conflict of authorities, depends entirely on the choice of the authority consulted. For example, informing spouses that the marriage performed in State A will be recognized in State B, gives them the choice of the applicable law. When a link of proximity is demanded, it is more precisely a matter of option of legislation.

This will to increasingly establish the autonomy of the will could be denied by the rapid development of French overriding mandatory rules. This movement

[15] Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (*OJ* L 199 of 31 July 2007, p. 40).

[16] Council regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*OJ* L 343 of 29 December 2010, p. 10).

[17] Cass. civ. 1ère, 22 October 2008, *Monster Cable*, *JCP* 2008, II, 10187, note L. D'AVOUT; *D.* 2009, p. 684, note A. HUET; *Gaz. Pal.* 2009, No. 52, p. 27, note Ph. GUEZ; D. BUREAU/ H. MUIR Watt, L'impérativité désactivée, *Rev. crit. dr. int. pr.* 2009, p. 1.

[18] Cass. civ. 1ère, 8 July 2010, *D.* 2010, p. 2884, note M. AUDIT/ O. CUPERLIER.

can however give rise to another interpretation: in suppressing the review of the law applied at this stage of recognition of foreign judgments, the *Cornelissen* judgement has at the same time erased the possibility of counterbalancing liberalism and manipulation of the rules of competence. Because the freedom that is left to the parties is no longer compensated by the conflictual method, other methods have to be found. Accordingly, one of the functions of overriding mandatory rules is now to review at the end of a case the use of the freedom of choice and not only to frame the solutions at the beginning. The risk is then to disrupt the international harmony of legal resolutions. In reality, however, the growing number of overriding mandatory rules partakes in the new meaning of the principle of autonomy. Indeed, investing individuals with a quasi-legislative power makes them aware of their responsibility. This implies that they need to be conscious of the impact of their legal and legislative choices: the risk of legislative diversity must not rest only on the States.

This is the idea that we can find in the text of the General Instruction on Civil Status which gives the spouses, whose law of nationality does not authorize them to get married, the possibility of getting married if the conditions of the French law are fulfilled. To get married the applicants must first be warned that their union risks of not being recognized in their country, and second they must persist in their wish to marry. It is up to the couple to decide if the marriage should take place or not; because if the future spouses know that the question of marriage recognition in their country of origin won't arise, the hypothetical question of a breach to the international harmony of solutions cannot deprive them of their marriage. Then it is the married couple who comes to appreciate the risk at this stage of the creation of the legal relationship.

2. A Choice Justified by the Risk of Relocation

The second argument in favour of autonomy of the will relies on the following observation: the controlling of and the restrictions to the freedom of choice of the parties will not prevent them from avoiding the national legislation judged too restrictive, by modifying the connecting factor, which is to say in relocating. Such a reaction is to be feared in a context of normative competition. This is why the struggle against the bypassing appears largely utopian as long as the legislative diversity remains and that the States do not act in concert to block the strategies of private powers. It is in this sense that it seems more judicious to favour the choice of the parties in using its benefits, on the one hand, and in remedying its weak points, on the other hand.

What are these benefits? The autonomy of the will no longer has only one function of localization as part of the conflictual method. It also fulfils a social function in exercising a function of regulation. Indeed, the parties will not necessarily choose the most advantageous legislation or the most flexible. The level of protection offered to the environment or to salaried workers can be very attractive. Certain businesses have well understood this, since they have drawn up private codes that commit them to not employ children, to put an end to corruption, or still to not disrupt the environment in the hope of attracting clients and investors.

But the choice of the parties involved can also be used by public powers and the European legislator has well understood this. It is thus that Article 7 of Rome II regulation, which provides that the applicable law concerning transborder pollution is the law of the place where the damage was sustained, adding that the victim can, if he (she) prefers it, base his (her) "claim on the law of the country in which the event giving rise to the damage occurred". The uncertainty as for the applicable law requires businesses to take into consideration the two legislations, thus avoiding that a State could draw profits from economic activity without bearing the correlating environmental harm.

However, the social function of private will is necessarily limited because of human nature, which expresses itself selfishly, and not with regard to the general interest. But even if the conflicts of law above all bring into play private interests, the presence of public interests is not excluded. One can even assert that the context of normative competition favours increasing the presence of public interests in private relationships. The freedom of choice must then find a limit in the protection of the general interest. This is not at all incompatible with taking private interests into account, since the general interest contributes to the satisfaction of the private interests, even if it forms arbitration between the diverse interests at stake.

B. Limits to the Right to International Mobility

In order that state control is effective, the State must become aware that it is over extended. It must then act in synergy with its counterparts, as well as with external legal orders both concerning the creation of the legal relationship (1), and its recognition (2).

1. Control of the Creation of the Legal Relationship

In order to impose their imperative political legislation in international relations, the States can choose to act beforehand; it is not in the narrowing of the freedom of choice of parties, but in ensuring that the essential norms are well respected at the stage of creation of the legal relationship. The difficulty comes from the fact that the bypassing of the prohibitive state rule often results from the submission of the case to a foreign authority. The legal order of the forum is then powerless and it will remain as such if the *exequatur* of the foreign decision or the transcription into the civil status registers are not required. Then the States must act in synergy. It is no longer only a matter of coordination between state legal orders but a matter of veritable cooperation.

This cooperation can be organized when it expresses itself through international agreements. At the present time, the organized inter-state cooperation is especially envisaged as a means to ensure international harmony of solutions. The taking into account of state interests through cooperation is still limited, except in

Article 9.1 of the Rome I regulation[19] that provides for the right for the judge of a member State to enforce the overriding mandatory rule of another member State. But this could well change since the States are becoming more and more aware of the necessity to cooperate, in order to find a solution for their deficit of power in the management of private international relationships.

Cooperation between the States can also be spontaneous. During the 20th century, spontaneous cooperation was made difficult owing to the fact that the reciprocity between the States was frequently used as a means of retortion and not as a dynamic principle allowing them to obtain advantages. Now, the decline in state power leads to a necessary solidarity between States and reciprocity is less and less a condition to implement spontaneous cooperation. The state legal orders can cooperate even though they have not committed themselves to do so, for the simple reason that they hope for compensation. Finally, one sees a renewal of the theory of the *comitas gentium* inherited from the Dutch doctrine of the 17th century. This theory explains why a State applies a foreign legislation though nothing requires it to do so. The State applies a foreign legislation not in accordance with an obligation, but in a spontaneous way, in the hope that by a genre of reciprocity, the State of which the law has been applied will do the same. Today, the need for better regulation and better control of private international relationships justifies that the States take each other into consideration as far as regulations of private international situations are concerned. From a practical point of view, the methods of spontaneous cooperation founded on *comitas gentium* are of two orders.

The legal order of the forum can apply the foreign law as the bearer of the foreign general interest. Thus, outside of the scope of the Rome I Regulation, a State, of which the rule of conflict gives competence to the law of the forum, can spontaneously decide to apply the overriding mandatory rule of another State, which is closely connected to the situation.

The legal order of the forum can also adjust the application of forum law designated by its rule of conflict in order to adapt it to the content of the foreign law closely linked to the situation. The technique can be related to the method of the reference to the foreign legal of Mr Paolo PICONE.[20] It allows international harmony to be fulfilled, while respecting the sovereignty of States closely linked to the situation.

This type of spontaneous cooperation can play a part where an overriding mandatory rule of the forum and a foreign overriding mandatory rule are concurrently applicable. The adaptation consists then of not making use of the overriding mandatory rule of the forum, which is normally applicable or of adjusting it, by taking into account the foreign law linked to the situation. A financial example can be given where the globalization of the economy multiplies the hypotheses of conflict of laws. On the subject of take-over bids, the conflict of laws is excluded, because it is the law of the stock market that is competent as overriding mandatory

[19] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (*OJ* L 177 of 4 July 2008, p. 6).

[20] P. PICONE, La méthode de référence à l'ordre juridique compétent, *Recueil des Cours* vol. 197 (1986), p. 229 *et seq.*; *Id.*, Les méthodes de coordination entre ordres juridiques en droit international privé, *Recueil des Cours* vol. 276 (1999), p. 9 *et seq.*

rule. However, the *lex auctoritatis* does not apply as soon as the situation enters into the law's realm of application, as one would expect. Indeed, the overriding mandatory rule has a substantive purpose. When the foreign law to which the bid is connected, *i.e.* the *lex societatis*, pursues the same objectives, the surveillance authorities can decide to not apply the overriding mandatory rule of the forum. If the foreign law allows the fulfilment of the objective set by the overriding mandatory rule of the forum, to apply the overriding mandatory rule would be useless. This one thus steps aside in favour of the foreign law. Conversely, if the foreign law does not satisfy or only imperfectly satisfies the objectives of the overriding mandatory rule of the forum then the latter will apply. Thus, the foreign law can only be applied to the detriment of the overriding mandatory rule of the forum in so far as it is part of the politics of the State of the stock exchange authority.

The State to which the creation of a private international situation is submitted can decide purely and simply to push aside the law of the forum designated by its rule of conflict when it is a facilitative law. A national law can be considered as facilitative if it enables a situation to be created in contrast to a foreign law that would not allow creating the situation because of the harshness of its conditions. Considering the ease with which the persons can travel or relocate, certain of whom are tempted to go abroad to obtain what their home country refuses to authorize. Two possibilities are conceivable. Either, the state's rule of conflict, which is required to create the situation, designates the prohibitive foreign law. In this case, the judge will refuse to create the situation, unless the foreign law is contrary to its international public policy. Or, it is the law of the forum that is designated. If the judge implements the facilitative law of the forum, and if the *exequatur* or the transcription in the civil status registers is not required, the situation acquired abroad will develop its results in the legal order of which the prohibitive law has been bypassed. The judge to whom the case has been referred to could then refuse to create the situation. This would assist the country of origin to struggle against the bypassing of its legislative politics, but also to avoid some unsound situations in conditioning the creation of a situation to its possibility of being recognized in the legal order of which it is the closest.

The difficulty for the judge involved in the creation of an international situation consists in finding the right balance between the respect of the right to international mobility of people and the spontaneous cooperation with the State the closest to the situation. Two criteria must be taken into account: the attitude of the parties involved (subjective criteria), and the place where the situation will be called into effect (objective criterion). As an example, imagine a Swiss couple living in Switzerland who goes to France with the sole objective of benefitting from an assisted reproduction because the couple had not been able to obtain the authorization in their country of origin. The country solicited should refuse to perform the medical intervention that will give birth to a situation adverse to the fundamental conceptions of the Swiss legal order, because at the moment of the situation's creation it is entirely Swiss and it is meant to evolve in Switzerland. The solution would be different if the Swiss couple has their habitual residence in France at the time of the request or if reliable evidence shows that the situation will produce its effects in France.

It is this principle that was adopted in the September 28, 2007 circular of the Minister of Foreign Affairs. It authorized the consul to refuse to register a civil partnership abroad if local public policy forbade this type of union. Thus, the consul had to take into consideration the convictions of the host country and its essential principles, in order to make sure that it was advisable to create an undesirable situation in this country. Concerning private interests, this solution also ensured a stability of the persons' status. The circular however instigated discrimination, because if the two partners were French, the consul could not refuse to record the civil partnership. Only mixed-nationality couples were concerned. The circular was replaced in January 2008: from then on, the consul must always register the partnership if the conditions of French law are met. It is simply meant to warn partners of the existence of a risk, in the eye of the law, and of local social practices. One finds the idea according to which the risk of conflict between French law and local public policy is assumed by the individuals themselves.

While effective from a theoretical perspective, the organized cooperation resting on international conventions and the spontaneous cooperation resting on reciprocity are largely inadequate in practice. The protection of state interests faced with the right to international mobility goes through a necessary *ex post* control, which forms the last bastion of domestic legal order.

2. Control of the Legal Relationship at the Reception Stage

The *ex post* control must be rigorous in order to be effective; and in spite of everything, it must not impede the right to international mobility. To carry out this control, the judge involved has at his disposal two tools: the exception of fraud and the exception of public policy.

The exception of fraud has long been redundant with the other legality conditions concerning foreign decisions; but, it has acquired an independent value since the suppression of the review of the law applied by the *Cornelissen* decision. It thus allows the sanctioning of the artificial transition from an internal situation to an international situation destined to bypass a mandatory rule. The exception of fraud does not undermine the right to international mobility, because as it has already been made clear, this does not give the litigants the right to go to a country in order to create a situation that they know is impossible to obtain in their legal order of origin. But fraud must be perceived in a restrictive sense. The *forum shopping*, even when it is described as *forum shopping malus*, must not be treated like a fraud because it is simply a matter of the exploitation of a preexisting situation. For example, the Court of Cassation rejected the judgement of divorce rendered by the Algerian court of law on the grounds that the spouse of Algerian nationality, who was domiciled in France, had committed a fraud as to jurisdiction in referring the case to an Algerian judge.[21] In this case, the sanction is unsuitable because it prevents the plaintiff from referring to his national judge. Yet in private international law, internationality creates an option of jurisdiction and of legislative competence, which is in the plaintiff's favour. He cannot be reproached for having

[21] Cass. civ. 1ère, 30 September 2009, *JDI* 2010, p. 841, note J. GUILLAUMÉ.

exercised the option of competence in order to choose the farthest, rendering more difficult the defence of the defendant, or still for having chosen the forum that will enforce the most advantageous law, rendering thus a decision that is unfavourable for the defendant. It is indeed logical that the plaintiff exercises his choice according to his own interests, because it is the purpose of the right to initiate legal proceedings that is offered to him. Consequently, while the parties naturally find themselves in a transborder situation, the exploitation of the jurisdictional or legislative diversity cannot be sanctioned as fraud or abuse of rights, except while the choice is made in the sole goal of harming the defendant.

The elimination of the review of the law applied by the foreign judge has also had an effect on the exception of public policy. Indeed, the respect of the overriding mandatory rules of the welcoming country is no longer assured through the review of the law applied. In order to protect the international imperativity of the welcoming State, the review of the respect of the overriding mandatory rules must be included in the condition of the respect of public policy. There is nothing shocking there since public policy is defined as the essence of society and has for an objective to protect the coherence of the domestic legal order. The inclusion of overriding mandatory rules in the condition of respect of public policy at the stage of reception of foreign decisions entails a modification of the method of review. International public policy being essentially composed of values and the control of the situation created is enough to verify the conformity. Either the solution is in accordance with the values of the forum or it is not. On the other hand, the review of the respect of the overriding mandatory rules implies the control of the foreign decision *de facto* and *de jure*, because a judgement, apparently conforming to the values of the forum, can in reality hide a failure to respect the overriding mandatory rules. Such a review does not clash with the principle of the prohibition of review of foreign decisions on the merits, since it does not aim to examine the validity of the decision. It is simply destined to make sure that the conditions of legality established by jurisprudence are respected.

The protection of the general interest by means of the exception of public policy must be effective without eradicating the right to international mobility. In other words, the State must not "take from one hand that which has been given to the other". Whether it is a matter of making sure of the respecting of essential values or of the respecting of overriding mandatory rules, the exception of public policy must then respect the principle of necessity and the principle of proportionality.

The condition of necessity means that the core value of the forum must be effectively reached by the foreign norm. Thus, the judge must conduct an assessment *in concreto* of the respect of international public policy. This is not always the case, notably in the area of repudiation where the principle of equality between men and women leads to rejection of the principle of repudiation.[22] Yet, the assessment *in concreto* must be used, because the principle of equality can sometimes be reestablished, for example when the marriage contract contains a provision for a clause that authorizes the female spouse to repudiate herself. An assessment *in*

[22] Cass. civ. 1ère, 4 November 2009, *Rev. crit. dr. int. pr.* 2010, p. 313, note K. ZAHER; *D.* 2010, p. 543, note G. LARDEUX.

abstracto certainly presents the advantage of foreseeability but damages the international harmony of solutions. There is no reason to impede the continuity of the legal life of individuals if no fundamental right has been effectively breached.

As for the condition of proportionality, it invites the judge to examine if the non-recognition of the foreign decision would not bear prejudice to the parties more than the recognition would disrupt the general interest of the forum. The example of maternal filiation of a child birthed by a surrogate mother is significant in this respect. The Court of Cassation refuses to record American birth certificates of children birthed by surrogate mothers. This refusal is justified on behalf of the principle of the inalienability of the status of persons.[23] One can wonder if the child's interest in having its maternal filiation established in France does not justify a retreat of this principle of public policy. One can notice that the dilemma consisting of choosing between an unclear relationship and the essential values of the forum would not exist if the State of creation had spontaneously adapted its facilitative rules, taking into account the prohibitive rules of the parties' State of origin and of the destination of the situation.

It finally appears that the right to international mobility has an explanatory valor, but it can also take on an operational dimension: since it implies a redefining of the functions of private international law, it justifies an adaptation of methods. In spite of the paradigm change, the interests at stake remain the same; and in the end, it is always the general interest of the State that must prevail. However, the right to international mobility calls for a methodological evolution because it is the expression of the reversal of the initial balance in favour of private persons. The primary reasoning, destined to designate the applicable rule, must be centred on the person; this entails a justice that is not only conflictual but also substantive. The generalization of the autonomy of the will or of the option of legislation seems to be the most efficient method to combine foreseeability and protection. Subsequently, when it is a matter of recognizing the foreign norm, the continuity of legal status must be taken into account to limit the role of the exception of fraud and of the exception of public policy to the bare minimum. If the States do not want to be subjected to the movement and the choices of private persons, they must cooperate with each other.

[23] Cass. civ. 1ère, 6 April 2011 (three judgments), *Rev. crit. dr. int. pr.* 2011, p. 722, note P. HAMMJE; *D.* 2011, p. 1522, note D. BERTHIAU/ L. BRUNET; *JCP* 2011, No. 441, obs. F. VIALLA/ M. REYNIER; *AJ Fam.* 2011, p. 262, obs. F. CHÉNÉDÉ; *Ibid.*, p. 265, obs. B. HAFTEL; *RTD Civ.* 2011, p. 340, note J. HAUSER.

CHAOS RENEWED: THE ROME I REGULATION VS OTHER SOURCES OF EU LAW

A CLASSIFICATION OF CONFLICTING PROVISIONS

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I. General Remarks

A. The Fragmented European PIL System

It is beyond a doubt that we have lived through a wonderful evolution, a "PIL boom" in the European Union in the last few years. Several new regulations have been adopted, some of which include rules on the conflict of laws:

- The Rome I Regulation on the law applicable to contractual obligations (hereinafter referred to as the "Rome I Regulation" or "Rome I");[1]
- The Rome II Regulation on non-contractual obligations;[2]
- The Rome III Regulation on the law applicable to divorce proceedings;[3]
- Regulation (EC) No 4/2009[4] and the related Hague protocol[5] on the law applicable to maintenance obligations; and,
- Regulation (EU) No 650/2012 on successions.[6]

Before this boom in PIL activity – aside from the provisions of the 1980 Rome Convention on the Law Applicable to Contractual Obligations (hereinafter referred to as the "*Rome Convention*")[7] only fragmented and diverse conflict-of-laws provisions could be found in the *acquis communautaire,* focusing on specific areas. Most of them were to be found in directives dealing with substantive law: in these cases, the conflict-of-laws rules were merely extensions of the regulation of certain areas of law. Such rules were common in the fields of consumer protection and insurance law.

[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* L 177 of 4 July 2008, p. 6.

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* L 199 of 31 July 2007, p. 40.

[3] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* L 343 of 29 December 2010, p. 10.

[4] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7 of 10 January 2009, p. 1.

[5] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=133> (31 May 2011).

[6] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. *OJ* L 201 of 27 July 2012, p. 107.

[7] 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), *OJ* C 27 of 26 January 1998, p. 34.

Numerous authors criticised this earlier technique, which resulted in the fragmentation of Community conflict-of-laws rules.[8] As a matter of fact, this method had several disadvantages. Firstly, the body of private international law rules adopted for particular areas became opaque and convoluted. Secondly, in several cases the European legislator only provided a kind of "supra-collisional" rule, or to be more precise, a rule protecting certain substantive provisions of Community law (for such methods, see the classification of EU PIL below);[9] in other words, such Community PIL rules were only to be applied if some of the substantive rules of EU/Community law would have otherwise been violated. This approach made the system unpredictable. Thirdly, the solutions for implementing these rules into national statutes were rather diverse and sometimes inconsistent with each other.[10] Fourthly, such EU/Community PIL rules also disturbed existing and functioning national systems. This was the case for insurance law: EU/Community law "reinvented" effective national insurance PIL rules and in some places, rewrote the rules using ill-chosen constructs. Due to the above, the PIL *acquis* on insurance contracts became almost chaotic. Last but not least, some "hidden" PIL rules were codified in directives: this made their application even more difficult, since the direct effect of non-implemented directives is not always clear.[11]

For all of these reasons, adopting regulations with a wider scope or assembling existing rules in a single text, as was done in the Rome I Regulation with respect to insurance, can be regarded as a great leap forward, even if the methods of codification in the Regulation deserve some criticism.[12] Following the Treaty of Amsterdam, the development of PIL in Europe has followed four distinct paths:

- Firstly, the most important development has been with respect to the aforementioned regulations.
- Secondly, the above-mentioned method of adding conflict-of-laws rules to instruments dealing with other issues is still used. This was the case for insolvency procedures: among other questions, the Regulation on insolvency set the law applicable to insolvency procedures,[13] creating an

[8] Just to mention a few: J. BASEDOW, Europäisches internationales Privatrecht, *NJW* 1996, p. 1929.; R. MICHAELS/ H.-G. KAMMAN,, Europäisches Verbraucherschutzrecht und IPR*, JuristenZeitung* 1997, p. 608.; S. KLAUER, *Das Europäische Kollisionsrecht der Verbraucherverträge zwischen Römer EVÜ und EG-Richtlinien,* Tübingen 2002, p. 138.

[9] We could call these substantive provisions mandatory or imperative rules, but their internationally mandatory character is subject to debate, see D. MARTINY (ed.), *Internationales Vertragsrecht*, Köln 2011, p. 1287-1288.

[10] L. VÉKÁS, Der Weg zur Vergemeinschaftung des Internationalen Privat- und Verfahrensrecht – eine Skizze, in J. ERAUW/ V. TOMLJENOVIĆ/ P. VOLKEN (eds), *Liber Memorialis Petar Šarčevic: Universalism, Tradition and the Individual,* München 2006, p. 178-179.

[11] D. MARTINY (note 9), at 1286; R. MICHAELS/ H.-G. KAMMAN (note 8), at 605-607.

[12] H. HEISS, Insurance Contracts in Rome I: Another Recent Failure of the European Legislature, *YPIL* 2008, p. 261-283.

[13] See Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* L *160* of 30 June 2000 p. 191.

interesting combination of PIL rules and procedural law. Furthermore, the adoption of directives containing PIL provisions is still present. Besides consumer directives, there is some legislation applying the country of origin principle that may have an effect on conflict-of-laws rules.[14]

- Thirdly, it is important to mention the legal developments driven by the ECJ. The ECJ effectively creates autonomous conflict-of-laws rules when interpreting EU law. For instance, we can mention the recent developments on the registration of names,[15] the evolving interpretation of directives dealing with country of origin,[16] or the numerous judgments rendered in the field of company law (for latest case law, see *e.g.* the *Cartesio*[17] and *VALE*[18] cases).[19]
- The fourth path connected with the development of EU private international law is that of individual Member States or the EU itself concluding international conventions or joining existing ones. After the areas of justice and home affairs became part of community law, this latter approach became less common. Yet it still plays a role in particular in the field of family law (consider the law applicable to maintenance obligations,[20] or the Hague

[14] See Article 2 and 23 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. *OJ* L 298 of 17 October 1989, p. 23; Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), *OJ* L 178 of 17 July 2000, p. 1.

[15] ECJ, C-148/02, *Carlos Garcia Avello v Belgium*, *ECR* [2003] I-11613; ECJ, C-353/06, *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin Paul and Standesamt Niebüll*, *ECR* [2008] I-07639. See M. LEHMANN, What's in a Name? Grunkin-Paul and Beyond, *YPIL* 2008, p. 135-164. J. MEEUSEN, The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC, Judgment of the European Court of Justice of 14 October 2008*, Zeitschrift für Europäisches Privatrecht* 2010, p. 186-201; G. ROSSOLILLO, Personal Identity at a Crossroad between Private International Law, International Protection of Human Rights and EU Law, *YPIL* 2009, p. 143-156 and p. 153, fn. 27.

[16] ECJ, 25 October 2011, joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v X, Olivier Martinez, Robert Martinez v MGN Limited, OJ* C 370 of 17 December 2011, p. 9 (not yet published in the *ECR*).

[17] ECJ, C-210/06, *Cartesio Oktató és Szolgáltató Bt, ECR* [2008] I-09641.

[18] ECJ, 12 July 2012, Case C-378/10, *VALE Építési Kft., OJ* C 287 of 22 October 2012, p. 3.

[19] L. BURIÁN, Personal Law of Companies and Freedom of Establishment, *Revue Hellenique de Droit International* 2008, p. 72*. et seq.*; V. KOROM/ P. METZINGER, Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06, *European Company and Financial Law Review* 2009, p. 125-161; P. METZINGER/ Z. NEMESSÁNYI/ A. OSZTOVITS, *Freedom of Establishment for Companies in the European Union*, Budapest 2009.

[20] See Article 15 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in

conventions regarding children[21]). The Rome Convention is also still applied in certain instances. Furthermore, with the EU competence in the area, the EU itself is more and more competent for the elaboration of conventions in this area.

B. The Rome Regulations as Parts of EU Law: Déjà vu – the Glitch in the Matrix

The four paths mentioned above cannot be clearly separated from each other. In general, the relationships among them and with domestic PIL rules can only be seen thorough inspection. This can lead to serious confusion and can cause mistakes in practice (one would, in certain cases, need the abilities of an oracle in order to identify which legal system and which provision should apply).

For instance, the provision theoretically applicable to consumer contracts is Article 6 of Rome I. However, the Regulation may only be applied to contracts entered into after 17 December 2009. If a contract was reached in January 2009, the provisions of the Rome Convention must be applied. If the contract was reached in an area that falls outside the scope of the Rome I Regulation and of the Rome Convention, national legislation (in most cases national PIL Codes) are to be applied. Even if the contract falls within the scope of Rome I, we also have to check for the existence of other rules (*e.g.* those of directives) that may alter the choice of applicable law.

The mentioned problems are rooted in the peculiarities of European law. The legal system of the EU cannot be viewed in the same light as national legal regimes.[22] Such "glitches" (or, better stated: differences) persist mainly because the Member States have kept some limited sovereignty in EU legislation procedures in certain areas. We may have a feeling of *déjà vu* here since this is not only a problem for PIL, but it resembles the basic legal thinking of EU legislation.

Turning back to Rome I, we can establish that it lays down three exceptions, which exclude or may exclude its application:

- Firstly, some exceptions are related to existing international agreements. The Rome Convention may be considered one such agreement regarding contracts concluded before 17 December 2009. Moreover, Article 25 of the Regulation states that "*the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties*

matters relating to maintenance obligations (*OJ* L 7 of 10 January 2009, p. 1): "Determination of the applicable law: The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance in the Member States bound by that instrument."

[21] The Hague Convention of 25 October 1980 on the Civil Aspects of the International Abduction; the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption (1993), available at <http://www.hcch.net/index_en.php> (7 June 2011).

[22] R. MICHAELS/ H.-G. KAMMAN (note 8), at 603.

at the time when this Regulation is adopted and which lay down conflict-of-laws rules relating to contractual obligations." Therefore, in general, the rules of existing international agreements are still in force, although Member States are no longer allowed to enter into any such agreement in the future.

- Secondly, narrowing the material scope is also important. According to Article 1, the Regulation may not be applied in cases excluded from its material scope, *e.g.* some areas of company law, certain contracts on obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments, arbitration agreements, to mention just a few.
- Thirdly, according to Article 22, the Regulation does not prejudice conflict-of-laws provisions of EU legislation adopted previously.

In ouropinion, allowing this exception may not have been the correct solution. There are similar selection mechanisms with respect to torts. Thus, the Rome II Regulation may not be applied to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."[23] Even if this limitation of scope was a necessary and expected measure because of the heavy lobbying,[24] we agree with the authors who find its effects entirely unacceptable.[25] In our opinion, it constitutes a most aggressive narrowing of the scope of Rome II that has an effect on all torts committed by members of the media, newspapers, *etc.*[26] In such cases, Rome II has to be put aside and national rules are applicable. Besides the restrictions on the scope of Rome II, in some cases and in certain countries, the law applicable to torts is still determined by international agreements, such as the Hague Convention on Traffic Accidents. [27]

From the above, we can state that there is competition between legal sources of PIL in the EU. These can be divided into national, European and inter-

[23] See Art. 1(2)(g) Rome II Regulation.

[24] E. DICKINSON (ed.), *The Rome II. Regulation,* Oxford 2008, p. 234-237; R. PLENDER/ M. WILDERSPIN (eds), *The European Private International Law of Obligations,* London 2009, p. 485-490.

[25] G. WAGNER, Die neue Rom II-Verordnung, *IPRax* 2008, p. 10.

[26] C. KUNKE, Rome II and Defamation – Will the Tail Wag the Dog?, *Emory International Law Review* 2005, p. 1733-1772; M. VAN EECHOUD, The Position of Broadcasters and Other Media under "Rome II" Proposed EC Regulation on the Law Applicable to Non-contractual Obligations, available at <http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2006.pdf.en>; A. WARSHAW, Uncertainty comes from Abroad: Rome II and the Choice of Law for Defamation Claims, *Brooklyn Journal of International Law* 2006, p. 269-309.

[27] Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=81> (7 June 2011); See C.I. NAGY, The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping - How So?, *Journal of Private International Law* 2010, p. 93-108.; J. VON HEIN, Article 4 and Traffic Accidents, in J. AHERN/ W. BINCHY, *The Rome II Regulation on the Law Applicable to Non-contractual Obligations*, Leiden/ Boston 2009, p. 153-173.

national sources (first distribution). These groups are further divided into subgroups: numerous international (bilateral and multilateral) agreements are in competition with each other[28] and European law should be divided into the tiers mentioned above (second distribution). Finally, the codified European PIL rules on contract law are to be found in several different sources of the *acquis* (third distribution). To handle the results of such serious fragmentation, the best solution would be to merge the layers. Thus, EU PIL legislation should be unified in one single text or included in few regulations. The coordination in the implementation of PIL directives in national legislation is also important – *i.e.* Member States should try to keep the rules in their PIL codes unified and not allow other laws/acts to govern PIL issues. Any other solution could cause serious problems in legal practice and result in an intractable legal corpus of PIL rules both at EU and domestic level.

C. The Relationship between Rome I Regulation and Other Sources of EU Law

1. The Rome I Proposal

Similar to the final text of the Rome I Regulation, its Proposal (hereinafter referred to as the "Proposal")[29] also laid down rules on the relationship between the Regulation and other rules of EU/Community law. Article 22 stated the following:

> "[t]his Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:
>
> (a) In relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list of such acts currently in force is provided in Annex 1; or
>
> (b) Govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-laws situations; or
>
> (c) Lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law."

The latter provisions would have created an over-complicated system of exceptions from the rules of the Regulation. The related list in Annex I referred to the following legal sources:

[28] H. GAUDEMET-TALLON, De quelques sources internationales du droit international privé: ordre ou désordre?, in P. COURBE, *et al*., *Le monde du droit: écrits rédigés en l`honneur de Jacques Foyer*, Paris 2008, p. 477-482.

[29] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final.

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC)
- Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC)
- Second non-life insurance Directive (Directive 357/1988/EEC of 22 June1988, as amplified and amended by Directives 49/1992/EC)
- Second life assurance Directive (Directive 619/1990/EEC of 8 January 1990 as amplified and amended by Directives 96/1992/EC)

As it can be seen, the list itself contains gaps. One could ask what had happened to all the rules governing consumer protection and insurance law. Supposedly – although we cannot be sure – the majority of these rules would have fallen under Article 22(c) since they are related to the internal market. Consequently, they all would have remained applicable, making the list attached to the Proposal redundant.

2. The Final Text of the Rome I Regulation

In the final text of Rome I the issue was solved in another way. First of all, the major part of the body of law governing choice of law for insurance contracts was built into the Regulation. For contracts other than insurance contracts the list included in Annex I to the Proposal has, in our own view,[30] properly been deleted. The final wording of the Regulation is much simpler than the labyrinthine system presented above. Article 23 settles the relationship with other rules of EU law in one, complex sentence:

> "With the exception of Article 7 [*i.e.* the provisions on insurance contracts], this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-laws rules relating to contractual obligations."

This practically means that – with the exception of acts of EU law on insurance contracts – all EU legislation containing choice-of-law rules takes precedence over the application of the Regulation. Rules governing consumer protection and other contracts remain in force. If a conflict arises between a piece of EU legislation and the law chosen by the Rome I Regulation, the provisions of EU legislation prevail in most of the cases. However, it is very important to mention that in most cases, Rome I functions as a fundamental source of law: it may only be set aside if there is a conflict between the law chosen on the basis of its rules and another piece of EU legislation, provided that the provisions of the latter have direct effect or have been transcribed into national law.

[30] For an opposing view, see: S. LEIBLE/ M. LEHMANN, Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"), *RIW* 2008, p. 531. However, we agree that the earlier list may function as a kind of starting point for the interpretation of Art. 23 the Rome I Regulation.

II. Classification of EU Legal Sources Taking Precedence over the Rome I Regulation

In this section, we will examine and classify the legislation laying down conflict-of-laws rules related to the field covered by the Rome I Regulation. According to Article 23, these rules take precedence over the conflict-of-laws rules of the Regulation. Several criteria of classification can be adopted.

A. The Content of the Rules: Consumer vs Non-Consumer Law Legislation

When overviewing the system of EU PIL, we find that two basic groups can be distinguished, which have an impact on the application of the Rome I Regulation:

- Non-consumer law legislation and
- Legislation (mostly directives) governing consumer protection.

One could think that the most known consumer directives play the most relevant role. However, in other fields as well there are numerous "hidden" provisions which can be relevant: we may find them in several diverse legislations, *e.g.* in the Directive on Commercial Agents,[31] the Directive on the Posting of Workers,[32] the Regulation on the Rights of Sea and Inland Waterway Passengers.[33] Some of these provisions may have a strong impact on the choice of law, leadings to the application of a different law than that set by the Rome I Regulation.

[31] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, *OJ* L 382 of 31 December 1986, p. 17.

[32] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* L 18 of 21 January 1997, p. 1.

[33] Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ* L 334 of 17 December 2010, p. 1.

B. Laws (Directives) Containing vs Laws (Directives) Missing Provisions on their Applicability

The first directives on consumer law did not contain rules on their applicability;[34] neither did the Directive on Product Liability,[35] the Doorstep Selling Directive,[36] nor the Directive on Unfair Terms in Consumer Contracts.[37] Hence, the scope of the directives was determined by the implementing Member States, which resulted in different solutions in domestic legislation.[38]

Later, other consumer and non-consumer law instruments applied different methods and their subject and scope was better defined. As a result, the determination of their scope of application by the Member States is easier than for the previous ones. However, the criteria for the application of EU rules differ from one text to the other.

In certain directives it is emphasised that the consumer may not waive the rights conferred on him by the EU law instrument. This indication has an effect not only on the choice of law made by the parties but on the law applicable in the absence of choice as well. These rules put the personal scope of the instrument (the consumer) into the centre, as, for example, in the new Directive on consumer law (see *infra*).

According to other texts, the Member States have to ensure that the consumer does not lose the protection granted by the directives by virtue of the choice of the law of a non-Member State, provided that the contract falls within the scope of the relevant directive and has a close connection to the EU or one or more of its Member States. In these cases, a close connection is enough to apply the EU rules or the national implementation rules. Thus, not all of the relevant elements of the case have to fall within the territory of the EU. In most of these rules, there is no explicit provision on what we should do in the absence of a choice of law. A

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[34] M. FALLON/ S. FRANCO, Internationally Mandatory Directives for Consumer Contracts?, in J. BASEDOW/ I. MEIER/ A.K. SCHNYDER/ Th. EINHORN/ D. GIRSBERGER (eds), *Private International Law in the International Arena – Liber Amicorum Kurt Siehr*, Zürich 2000, p. 158; L. VÉKÁS (note 10), at 174-175.

[35] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* L 210 of 7 August 1985, p. 29.

[36] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *OJ* L 372 of 31 December 1985, p. 31.

[37] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *OJ* L 42 of 12 February 1987, p. 48.

[38] M. FALLON/ S. FRANCO (note 34), at 158. For the problems this method caused see also von B. VON HOFFMANN, Richtlinien der EG und Internationales Privatrecht, *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* 1995, p. 51-54.

typical example to this approach can be found in Article 6 of the Directive on unfair terms in consumer contracts.[39]

In the third group of rules, the contract must fall under the scope of the directive and all aspects of the relevant situation must be located at the time of the choice of law in one or more Member States. Thus, in these cases, all elements of the contract have to be related to the EU in order to provide protection to the consumer. Usually, this protection is given against a choice of law by the parties. In the absence of this, just as in some of the last mentioned cases, there is often no clear guidance on whether the rules of the directive should be applied or not. Incidentally, besides several directives, a similar approach for this method is the inner market clause as included in Article 3 paragraph 4 Rome I Regulation.

Finally, the simplest and most elegant approach used is to explicitly vest the provisions of the relevant EU legislation with an imperative, internationally mandatory character in the presence of certain contact with a Member State. Such a contact can result *e.g.* from a real estate located in the EU in the timeshare directives (see *infra*). Another example can be found in the Regulation on the liability of carriers of passengers by sea:[40] the ship has to fly the flag of a Member State or has to be registered in a Member State, or the contract of carriage has to be signed in a Member State, or the place of departure or destination has to be in a Member State.

C. *Explicit PIL Provisions vs PIL and Mandatory Character Mixed vs Mandatory Rules Only*

Another basic distinction for the classification of the relevant EU rules is also related to their content.

Some EU instruments contain explicit PIL provisions: in most of these cases it is clear that these rules derogate from the conflict-of-laws rules of the Rome I Regulation. For example, beyond the rules of the Regulation, the Directive on the posting of workers sets new provisions concerning the posting of workers in the framework of the free movement of services. Posting may refer to relocating them, employee rental or even posting in a subsidiary or branch office of a parent company. The key rules for our topic are to be found in Article 3 of the Directive. According to this provision, and contrary to Rome I,[41] certain issues are governed

[39] "Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States." Art. 6(2) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95 of 21 April 1993, p. 29.

[40] Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (Text with EEA relevance) *OJ* L 131 of 28 May 2009, p. 24.

[41] For a detailed explanation of the rules of the Regulation, see P. MANKOWSKI, Europäisches Internationales Arbeitsprozessrecht – Weiteres zum gewöhnlichen Arbeitsort, *IPRax* 2003, p. 21-28; R. MAUER/ S. SADTLER, Die Vereinheitlichung des internationalen Arbeitsrechts durch die EG-Verordnung Rom I, *RIW* 2008, p. 546. *et seq*. See Art. 6 of the

by the law of the Member State in which the employee is posted. In other words, with regard to certain matters, the location of the employee's regular workplace is irrelevant and the law of the place where work is actually carried out should be applied. Such matters are the maximal work periods and minimal rest periods, minimal annual paid leave, minimum wages, the conditions of hiring-out of workers, especially in case of staffing agencies, health, safety and hygiene rules at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, protective provisions for young people, equality of treatment between men and women and other articles on non-discrimination.[42] These provisions may not be applied if the law designated by Rome I is more favourable to workers.[43]

A second set of instruments contains both PIL provisions and provisions which are explicitly designated as mandatory (imperative) rules. This is a typical solution in several consumer law directives, perhaps best exemplified by the new Timeshare directive.[44] Article 12 of the Directive is named "Imperative nature of the Directive and application in international cases." This title perfectly clears up questions arising out of the Directive's application. The rules have an imperative, internationally mandatory character; they have to be applied both in the presence and in absence of a choice of law. In Article 12(1), the Directive provides that "Member States shall ensure that, where the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive." Beyond its substantive law effects, this provision – just as Article 9 of the Former Timeshare Directive[45] – has an effect on the law applicable in the absence of choice of law and, of course, it also limits the scope of the parties' choice of law. Furthermore, there is another rule in Article 12(2) that can be of importance. The Directive states that in cases "where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum […]"

Finally, the third group of EU instruments only contain mandatory (imperative) rules, without reference to special PIL provisions. These rules can also be divided into two subgroups.

Explanatory Memorandum of the Proposal of Rome I Regulation; ECJ, C-125/92, *Mulox IBC Ltd v Hendrick Geels*, *ECR* [1993] I-4075; ECJ, C-383/95, *Petrus Wilhelmus Rutten v Cross Medical Ltd*, *ECR* [1997] I-57.

[42] See Article 3(7) of the Directive.

[43] See Article 3(1)(a) through (f) of the Directive.

[44] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, longterm holiday product, resale and exchange contracts (Text with EEA relevance), *OJ* L 33 of 3 February 2009, p. 10.

[45] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, *OJ* L 280 of 29 October 1994, p. 83.

In certain instances the mandatory character of the rules has been stated in ECJ decisions. For example, in the Directive on Commercial Agents,[46] Article 19 of the Directive expresses that "the parties may not derogate from Articles 17 and 18 [*i.e.* from the rules on compensation for damages] to the detriment of the commercial agent before the agency contract expires." There have been several proceedings conducted before the ECJ concerning this Directive. The first, well-known and controversial matter is the so called *Ingmar* case.[47] There, a Californian company called Eaton Leonard Technologies, Inc. concluded a commercial agent contract with Ingmar GB Ltd, a company established in the UK. They chose California law to apply to their contract: this would have impaired Ingmar's rights (derived from the Directive) to receive compensation for damages suffered because of termination of the contract.[48] In its judgment, the ECJ ruled that the Directive's relevant provisions have an internationally mandatory nature and therefore must be applied even if the law chosen by the parties is that of a non-Member State. This should also apply to cases in which there was no choice of law made by the parties. These fundamental principles have been re-affirmed in other cases,[49] such as *de Zotti*.[50]

On the other hand, in certain directives the mandatory nature of the rules is clearly expressed by the legislator. For example, Article 12 of the Directive on Distance Marketing of Consumer Financial Services[51] states that Consumers may not waive the rights conferred on them by the Directive, and that Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country if the contract has a close link with the territory of one or more Member States. Anyway, in certain Member States the imperative character of latter Directive's provisions is not recognised by the courts to its full extent.[52]

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[46] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, *OJ* L 382 of 31 December 1986, p. 17.

[47] ECJ, C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc., ECR* [2000] I-09305.

[48] See Art. 17 and 18 of the Directive.

[49] H. GAUDMET-TALLON, Le droit international privé des contrats dans un ensemble regional, in *Intercontinental Cooperation Through Private International Law – Essays in Memory of Peter E. Nygh,* 2004, p. 134-136.

[50] ECJ, C-465/04, *Honyvem Informazioni Commerciali Srl v Mariella De Zotti*, *ECR* [2006] I-02879.

[51] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *OJ* L 271 of 9 October 2002, p.16.

[52] J.-J. KUIPERS/ S. MIGLIORINI, Qu'est-ce que sont les lois de police?, *European Review of Private Law* 2011, p.193.

A similar mandatory character of provisions can be found, *e.g.* in the Regulation on the rights of sea and inland waterway passengers,[53] which states that rights and obligations pursuant to the Regulation shall not be waived or limited, in particular by an exemption or restriction of liability clause in the transport contract.

We are faced with the same problem in the Product Liability Directive.[54] Article 12 of the Directive provides that the producer's liability may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Beyond the above, there are various formulations of the mandatory character of the rules included in consumer law directives. If we consider them to be overriding mandatory regulations, their rules can be seen as provisions falling under Article 9 Rome I, such that they have to be applied even in the absence of choice of law. According to certain authors,[55] this seems to result from the aforementioned *Ingmar* judgment of the ECJ. However, we have doubts about whether this interpretation of imperative – internationally mandatory – provisions is true for all of the directives since we share the view that "the mere fact that a rule serves to protect the interest of the weaker party to the contract does not attribute overriding effect to such a rule."[56] Still, we certainly agree that many EU consumer provisions as implemented have the attributes of overriding mandatory rules within the meaning of Article 9 Rome I.

D. Rules Restricting the Parties' Choice of Law vs Rules Creating an Independent Set of PIL Provisions

In consumer law directives, one of the most basic and typical approaches is to try to protect the consumer by limiting the effects of the parties' choice of law. In most provisions of this kind we may perceive a sort of "anti-foreign law" mentality; most of them were made to protect the consumer from a third State's law.[57] This

[53] Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance, *OJ* L 334 of 17 December 2010, p. 1.

[54] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* L 210 of 7 August 1985, p. 29; B. VON HOFFMANN (note 38), at 50; O. LANDO, The EEC Convention on the Law Applicable to Contractual Obligations, *Common Market Law Review* 1987, p. 181.

[55] R. PLENDER/ M. WILDERSPIN (note 24), at 164; N. REICH/ H.-W. MICKLITZ, *Europäisches Verbraucherrecht,* Baden-Baden 2003 p. 474, 480 and 482.

[56] H.L.E. VERHAGEN, The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB LTD v Eaton Leonard Technologies Inc, *I.C.L.Q.* 2002, p. 145; See *ibid* p. 148, 151.

[57] D. LEFRANC, La spécificité des règles de conflit de lois en droit communautaire dérivé (aspects de droit privé), *Rev. crit. dr. int. pr.* 2005, p. 425-426.

simplest solution can be found in numerous directives, including the Directive on Unfair Terms in Consumer Contracts.[58] Article 6(2) of that Directive provides that Member States shall take necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member State as the law applicable to the contract, provided that the latter has a close connection with the territory of the Member States. Similar provisions can be found in a number of other instruments: for example, Article 12 of the Directive on distance marketing of consumer financial services[59] requires a "close link" instead of a close connection, but for the rest has absolutely the same content. Article 6(2) of the Directive on unfair terms in consumer contracts[60] also contains a similar provision. In the Directive on the sale of consumer goods[61] we also find the same content in different terms: Article 7 of this text states that Member States have to take the necessary measures to ensure that consumers are not deprived of the protection afforded by the Directive "as a result of opting for the law of a Non-Member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States."

By contrast, other rules may explicitly contain PIL provisions, or vest some provisions with mandatory (imperative) character – as *e.g.* in the case of the posting of workers (see above).

E. PIL vs Internal Market Rules

In several regulations, as seen above, we find fragmented PIL rules, including explicit or implicit rules on the imperative character of EU legislation.

On the other hand, in other directives we find rules on the internal market, which could have an effect on PIL.

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[58] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95 of 21 April 1993, p. 29.

[59] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *OJ* L 271 of 9 October 2002, p.16.

[60] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95 of 21 April 1993, p. 29. Cf. E. JAYME, Klauselrichtlinie und Internationales Privatrecht – Eine Skizze, in *Lebendiges Recht – Von den Sumeren bis zur Gegenwart, Festschrift für Reinhold Tinkner zum 65. Geburtstag*, Köln/ Münster 1995, p. 577-578.

[61] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* L 171 of 7 July 1999, p. 12. U. MAGNUS, Consumer sales and associated guarantees, in Ch. TWIGG-FLESNER (ed.), *European Union Private Law*, Cambridge 2010, p. 243-256. D. STAUDENMAYER, The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in European Consumer and Private Law, *European Review of Private Law* 2000, p. 547-564. S. GRUNDMANN/ C.M. BIANCA (eds), *EU Kaufrechts-Richtlinie*, Köln 2002.

It is important to note that besides certain articles of the Treaty on the Functioning of the European Union,[62] some sources of secondary legislation[63] also contain similar rules. One of the most interesting texts in this regard is the Directive on e-commerce.[64] From a PIL point of view, the most debated part of the Directive is the one declaring the usage of the country-of-origin principle (*Herkunftslandprinzip*).

However, since this issue is closely related to the regulation of the internal market,[65] we hereby only wish to shortly review the rules of the E-commerce directive. Its Article 3 states that:

> "1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.
>
> 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State."

This complicated text in practice means that the service provider who is active in another Member State "takes" its laws with it, and may have the same benefits as in its home State. Consequently, in a case where a corporate website (The Sunday Mirror) caused harm by releasing news about singer Kylie MINOGUE, the ECJ held that compensation to be paid cannot be higher than in the State where the website was based (in practice, where the website's owner had its seat).[66] Thus, even if compensation awarded abroad were higher and thus the provider's obligations were greater, the laws of the website's "homeland" have to be applied – overriding classic conflict-of-laws rules. Consequently, we agree that the wording "this Directive neither aims to establish additional rules on private international law relating to conflicts of law" is misleading,[67] since the provisions of the Directive may have powerful effects on PIL questions. On the other hand, Art. 1(4) expresses that:

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[62] See the articles on internal market – Four Freedoms, Consolidated Version of the Treaty on the Functioning of the European Union, *OJ* C 83 of 30 March 2010, p. 47. See S. GRUNDMANN**,** Binnenmarktkollisionsrecht – vom klassischen IPR zur Integrationsordnung, *RabelsZ* 2000, p. 458-477.

[63] *E.g.* Art. 2 and 23 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ* L 298 of 17 October 1989, p. 23.

[64] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), *OJ* L 178 of 17 July 2000, p. 1.

[65] J. BASEDOW (note 8), at 1927-1928.

[66] *eDate Advertising* (note 16).

[67] P. MANKOWSKI, Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie, *ZVglRWiss* 2001, p. 179-181.

> "[t]his Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts."

Similarly, Recital (23) of the Preamble says that:

> "[t]his Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive."

Additionally, Recital (55) of the Preamble is also interesting. It states that:

> "[t]his Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence."

Moreover, besides the above mentioned Recitals, the Directive also has some "hidden" provisions for contracts in its Annex, which state that Articles 3(3), 3(1) and 3(2) do not apply to "the freedom of the parties to choose the law applicable to their contract" and to "contractual obligations concerning consumer contacts." As a result, in our case we do not have to take into consideration the Directive's provisions which affect applicable law. If these provisions were not included into the Annex, based on the directive, we would have to apply the seller's law to the contract. The above mentioned *eDate* case clearly shows that the Directive can function as an exception from the rules designated by the Rome II Regulation. On the other hand, its relationship with the Rome I Regulation seems to be solved properly, and we can use consumer law instead.

III. Unification of Choice of Law Rules on Consumer Protection

A. Consumer Law Unification

It may be relevant for our topic that a review of European consumer law started about four years ago. In the year 2008 the European Commission adopted a Proposal[68] that was intended to unify and review the provisions of the following four directives:

[68] Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM(2008) 614 final. See H.-W. MICKLITZ/ N. REICH, Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights, *Common Market Law Review* 2009, p. 471-519; W.H. BOOM, The Draft Directive on Consumer

- Directive on unfair terms in consumer contracts
- Directive on distance contracts
- Directive on consumer sale of goods
- Directive on consumer contracts negotiated away from business premises.

The purpose of the work was to create unified substantive rules on these issues, *i.e.* to create unified rules on consumer protection. The technique used in the proposal was that of total harmonisation instead of the former minimal harmonisation approach.[69] Since this method has been harshly criticised, most of the rules on unfair contract terms and consumer sales have been removed from the Proposal and a mixed approach of minimal and maximal harmonisation was later applied in the text. However, in theory, the Directive still applies to all consumer contracts (see Article 1 thereof). On the other hand, as a result of compromises, it mainly includes the rules of the following two directives:

- Directive on distance contracts
- Directive on consumer contracts negotiated away from business premises.

The Directive was adopted at the end of 2011[70] and the Member States were granted two years (*i.e.* by 13 December 2013) to have it fully implemented in their legal systems. With regard to PIL – despite some justified criticism of the full harmonisation method[71] – unifying all the rules would have been, in our opinion, more useful than reducing the scope of the instrument.[72]

The Directive contains – as did the Proposal[73] – some provisions on PIL. Its Recital (58) states that:

> "[t]he consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable

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Rights: Choices Made & Arguments Used, *Journal of Contemporary Research* 2009, p. 452-462.

[69] E. HONDIUS, The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?, *European Review of Private Law* 2011; H.-W. MICKLITZ/ N. REICH (note 68), at 463 *et seq.*, 474 *et seq.* and 480 *et seq.*

[70] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Text with EEA relevance, *OJ* L 304 of 22 November 2011, p. 64-88.

[71] "And if that EU system follows the model of maximum harmonization, it is, as the Commission correctly contends, more «coherent»– but the damage wrought at national level cuts still deeper." S. WEATHERHILL, Consumer Policy, in *The Evolution of EU Law*, 2011, p. 865.

[72] S. WEATHERHILL (note 71), at 867.

[73] See Proposal, Recital (10) and Art. 43.

> to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive."

Beyond this, Article 25 establishes the imperative nature of the Directive, stating that:

> "[i]f the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.
>
> Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer."

A question arises about what to do if the Directive has not been properly implemented by a Member State. In our opinion, the first sentence of Article 25 is clear: the consumer may not waive the rights that were granted to him by the national implementation of its provisions. If there is no such implementation in Member States, and – according to the Rome I Regulation – the law of that State should be applied, there is no real legal right transposed. Consequently, in a contractual relationship, the consumer may not be protected based only on the Directive, since the Directive has no direct effect (or, more precisely, no horizontal direct effect) in the absence of implementation.

After implementation, the consumer is protected from multiple sides. First, the parties cannot set a lower level of protection than the minimal requirements of the Directive. Moreover, they cannot choose any country's law that would lower the customer's protection. Whether that law is one of a Member State or that of a third state is irrelevant. This approach is coherent with the rules of the Rome I Regulation as well.

B. Sales Law Unification

In 2011, another proposal was elaborated to provide businesses and consumers with a further tool that they could apply in transnational consumer sales contracts: the Proposal for a regulation on a common European sales law.[74] The proposal creates an optional set of rules that the parties can choose to adopt in their contract: thus, the application of the provisions will be based on an opt-in clause. This reflects Article (14) of the Preamble of the Rome I Regulation, which emphasises that if the Union adopts, "in an appropriate legal instrument rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules." In accordance with this method, there are no rules on choice of law in the Regulation.

On the other hand, without going deeper into the analysis of the proposed instrument, we can ascertain that it will contain rules (or, more precisely, certain

[74] Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

chapters) with a mandatory nature (*e.g.* Articles 47, 81, 108, 177, *etc.*) – which is a little bit peculiar since it will only be adopted as an optional tool. How can an optional tool have a mandatory character? The answer is that if the parties choose the applicability of the future regulation, they will have to respect certain of its provisions.

IV. Conclusions

In conclusion, we can be fairly certain that allowing the application of such a great number of different choice of law rules to contracts beside the Rome I Regulation was not a good solution.

Indeed, there are several good reasons for maintaining such legislation, especially consumer directives.[75]

First of all, in certain instances, Article 6 of the Rome I Regulation is not applicable and the general rules of Article 4 of the Regulation would govern the law applicable to consumer contracts. However, this provision leads in most cases to the application of the law of the habitual residence of the professional instead of to the country of the consumer. Thus, it does not ensure that the mandatory rules protecting consumers will apply. This weakness is redressed by the provisions of certain consumer law directives.

Secondly, the scope of the directives is diverse: it would not be an easy task to create general rules for all kinds of consumer contracts. Furthermore, if the conflict-of-laws provisions had been cut from the directives and inserted into the Regulation, this would have resulted in chaos, as was the case for insurance contracts.

Thirdly, the law applicable to consumer and other contracts would be hard to define in cases involving Denmark, which has opted-out of all EU legislation in the area of JHA, and would consequently have a fragmented system.

However, we still do think that there is an obvious need for the unification of sources. On the other hand, if we consider the above-mentioned rules, which were or plan to create a better, unified system in EU consumer contract law, we find the restructuring of sources seems to be lost again in the jungle of EU contract law. There will be two new instruments involving the same or similar legal relationships, and both will contain certain elements, which can affect PIL and the Rome I Regulation.

Despite all of these arguments, we still think that all of the issues could have been settled in a satisfactory way had there been the intention to solve them. The European Commission and some of the major, excellent private institutions like the European Law Institute or the Acquis Group should concentrate more on the re-structuring of sources because the topic has huge practical relevance. Slowly but surely the days of collecting principles will be over and the days of making

[75] Some points of the argumentation were taken from L. DARÁZS, A fogyasztói szerződések új kollíziós jogi szabályrendszere (The New PIL System of Consumer Contracts), in *Magyar Jog* (*Hungarian Law*) 2010, p. 126.

some order among the existing laws will have to come. We are eagerly observing the fate of this choice of law chaos resulting from the directives. We believe that the answer is out there; it is looking for us; and it will find us if we want it to.

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