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Yearbook of Private International Law

Vol. XVIII 2016 / 2017

Founding Editors
Petar Šarčević † and Paul Volken

Editors
Andrea Bonomi and Gian Paolo Romano

PUBLISHED IN ASSOCIATION WITH
Swiss Institute of Comparative Law

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EBSCO Publishing : eBook Collection (EBSCOhost) - printed on 2/10/2023 2:32 PM via
AN: 1949406 ; Andrea Bonomi, Gian Paolo Romano.; Yearbook of Private International Law Vol. XVIII - 2016/2017
Account: ns335141

YEARBOOK OF PRIVATE INTERNATIONAL LAW

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VOLUME XVIII – 2016 / 2017

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SWISS INSTITUTE OF COMPARATIVE LAW
LAUSANNE, SWITZERLAND

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.dnb.de.

Verlag Dr. Otto Schmidt KG
Gustav-Heinemann-Ufer 58, 50968 Köln
Tel. +49 221 / 937 38-01, Fax +49 221 / 937 38-943
info@otto-schmidt.de, www.otto-schmidt.de

ISBN (print) 978-3-504-08012-9
ISBN (eBook) 978-3-504-38563-7

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Swiss Institute of Comparative Law, Lausanne

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The paper used is made from chlorine-free bleached materials, wood and acid free, age resistant and environmentally friendly.

Printing and binding: Kösel, Krugzell
Printed in Germany.

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FOREWORD

Human progress involves periodical questioning of old habits and rules. And so it's good to pause sometimes and to ask why we do what we do and whether what we do – and have been doing for a long time – is still warranted by the realities of the world in which we live.

The rich variety of topical essays offered by this volume of our *Yearbook* starts with a reflection on whether the age-old *lex situs* connection as applied to moveables is still justified, and it goes on with an analysis as to whether the place of harmful conduct, that has been used within the EU ever since *Mines de Potasse d'Alsace* as a basis for jurisdiction in tort, still deserves being preserved. The suggestion that it may not is at odds with the conclusions of a paper on environmental cross-border damage which forcefully propose to expand the notion of 'place of conduct' so as to cover the place of decision-making in those situations where the European parent company is behind the unlawful behaviour of non-European subsidiaries – a sort of 'piercing the corporate veil' which should make access to justice easier for the non-European victims. The apparently diverging scholarly opinions arguably confirm that it might soon be time to consider repealing the single jurisdictional rule embedded in Article 7(2) of Brussels Ia Regulation and replacing it through a host of sub-special rules in order to pursue substantive policies, especially in cases where prevention of damages is of the essence. Environmental wrongdoings are also at the heart of another paper where the intervention of the Hague Conference is advocated for, although mainly to strengthen existing convergences in conflict-of-laws rules on either shore of the Atlantic. On that note, the Hague's crucial contribution to development in this area of law is underscored by the recent entry into force of its last traditional instrument – the Securities Convention – which is presented in detail through a report that examines its ongoing ability to meet the demands in this field.

A special section is dedicated to the last developments in the United States. On the one hand, the U.S. Supreme Court shows an increasing propensity to become involved in private international law issues, as confirmed by *RJR Nabisco v. European Community* – the last of a line of decisions grappling with the seemingly intractable problem of the 'extraterritorial' scope of U.S. law. And it is easy to predict that one of the challenges facing U.S. and EU policymakers in the near future will be to define how best to mutually accommodate the reach of U.S. and EU laws in order to spare the U.S. and EU citizens, residents and entities the unsettling quandaries as to what they are permitted, entitled or required to do under the applicable legislation. With the ever increasing and inherently ubiquitous activity on the Internet, one may wonder whether it's wise to leave this matter up to judicial pronouncements (suffice it to think of the General Data Protection Regulation, which will be in force as of May 2018). While the U.S. Congress does not seem to be willing to remain totally idle in private international law matters, as evidenced through the enactment of the Speech Act a few years

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ago, the work by the American Law Institute for a Fourth Restatement on Foreign Relations is near completion and will hopefully encourage further exploring the intersection between private international law and the law of nations. A thoughtful account of the history of the 'comity' as well as a paper on the immunity of foreign States and instrumentalities – which the much discussed ruling by the ICJ in *Germany v. Italy* has brought to the fore – seem to pave the way.

On the family law front, recognition (or non-recognition) of same-sex marriage before the courts of sub-Saharan African countries – whose substantive legislation mostly prohibits same-sex unions and, in some jurisdictions, still criminalizes homosexual relationships – has attracted little attention so far and one paper courageously fills this gap. The effect of foreign marriages is also the subject of an essay by an Israeli scholar who delves into the religious/lay dichotomy in this field, which is often ignored altogether or fraught with dubious *clichés*. A thorough analysis of two recent rulings by the Swiss Federal Tribunal on cross-border surrogacy is also offered, which includes a discussion on how best to cope with the consequences of non-recognition of the parent-child relationship in the absence of genetic link – a virtually global problem in the aftermath of the *Mennesson* and subsequent decisions by the European Court of Human Rights.

National reports include the first ever comprehensive account of Vietnamese private international law in English language, a presentation of some of the conflict of laws issues arising in Mauritius – which trace their origin back into the island's colonial past, a Turkish perspective on *lis alibi pendens* and one on cross-border successions, which bear witness to the increasing openness of Turkish courts in handling cross-border cases. A number of papers by young authors on such momentous topics as the position of third parties in the conflict of laws, choice of court clauses in international carriage by road and the role of administrative authorities in global governance confirm the vibrancy of the young generation, which – in the words of President Obama – is the most diverse, inclusive, tolerant and educated in all human history.

The Editors

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ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l 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
ibid.	ibidem
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
this Yearbook	Yearbook of Private International Law

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DOCTRINE

THE *LEX SITUS* IN THE LAW OF MOVABLES: A SWISS CHEESE

Jürgen BASEDOW*

I. Background and Development of the *Lex Situs* Rule
II. Widely Accepted Exceptions: *Res in Transitu* and Means of Transport
III. Exceptions of Growing Acceptance: Securities and Cultural Objects
IV. A Critical Appraisal of the *Lex Situs*
V. The *Lex Situs* as a Barrier to Trade in Movables
VI. Party Autonomy as a Solution
VII. Indirect Admission of Party Autonomy
VIII. Choice-of-Law Clauses with *Inter Partes* Effects
IX. Retention of Title Clauses in Export Contracts
X. Party Autonomy for Movable Property
XI. Summary and Outlook

As opposed to obligatory rights arising between specific persons, *i.e. inter partes*, from contract or tort, proprietary rights are potentially effective against everyone: *erga omnes*. They may relate to tangibles, whether movable or immovable, or to intangibles, in particular to intellectual property; this paper focuses on movables leaving aside both immovables and the complicated conflict issues arising in the context of intellectual property rights. In particular, the following inquiry is meant to shed some light on the compatibility of the current conflict rules with the requirements of international commerce. It will first take a closer look at the background and development of the *lex situs* rule, (part I, *infra*), some widely accepted exceptions (part II) and some exceptions that are increasingly gaining acceptance (part III). The arguments in support of the *situs* rule will then be subject to a critical policy appraisal (part IV), in particular in light of the effect of the rule on trade (part V). While choice of law relating to proprietary rights may be a solution

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 1-17
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Printed in Germany

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(part VI), we shall further investigate whether and to what extent it is gaining ground in international legal developments (parts VII to X).

I. Background and Development of the *Lex Situs* Rule

The *erga omnes* effect of proprietary rights has far-reaching consequences in private international law. First, it is usually considered to be an obstacle to the operation of party autonomy which is the leading conflicts mechanism in the field of obligations. With regard to proprietary rights, agreements on the applicable law may negatively affect the rights of uninvolved third parties, in particular the rights of creditors of the parties who agree on a choice-of-law clause; this is contrary to the privity of contracts. Second, the *erga omnes* effect of proprietary rights suggests that the circumstances which determine the law governing these rights should be visible to every interested person; a certain transparency appears to be required that may result from either the location of an asset or from its registration. A third factor that appears relevant to the private international law of proprietary rights is their administration: with regard to both movables and immovables, it is entrusted to laymen, such as sheriffs and registration officials who do not have a diploma or degree in law but should be able to assess the proprietary rights in question nevertheless. This suggests the admission of a limited number of rights enshrined in one and the same legal system. Finally, the historical link between the law of immovable or movable property and the sovereign power of the local lord should be taken into account as a fourth element. The physical ability of seizing land or goods, which is limited to the territory under the governance of the ruler, was a basis for the development of property law.

This applies in particular to property rights in land which have always been governed by the *lex situs*. By contrast, legal scholars of the statutist doctrine took the view that movables were instead governed by the personal law of the owner as indicated by domicile; by the eighteenth century, however, the *lex situs* was also applied to movables.[1] In the mid-1970s, VENTURINI was able to summarise his comparative investigation with the following statement:

> "At the present time it can be said that practically all statutory regimes submit both movables and immovables to the *lex situs*."[2]

On the basis of a large number of modern codifications of private international law, more recent investigations have affirmed this finding.[3] The *lex situs* rule

[1] G.C. VENTURINI, Property, in K. LIPSTEIN (ed.), *International Encyclopedia of Comparative Law: Volume III: Private international law*, Tübingen 2011, Chap. 21, Sect. 1, citing the enquiry of G. DIENA, *I diritti reali considerati nel diritto internazionale privato*, Torino 1895, p. 1 *et seq*.

[2] G.C. VENTURINI (note 1), Sect. 2, citing further comparative enquiries.

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basically applies to both immovables and movables, although with regard to the latter, there is no unanimity; some jurisdictions in the United States still adhere to the former principle applying the law of the owner's domicile. For example, this is the case with regard to movable property according to the Civil Code of California, which establishes in Sect. 946: "[i]f there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."[4] On a similar note, the 2001 version of Article 9 of the Uniform Commercial Code, with regard to the law governing perfection and priority of security interests, provides in § 9-301(1) that, "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral." Despite these divergent conflict rules, the vast majority of modern conflicts statutes refer to the *lex rei sitae* or *lex situs* at least as the starting point of private international law in the area of proprietary or *in rem* rights.[5] The only legislation that ranks the *lex situs* with regard to movables second, after party autonomy, is the Chinese Act on Private International Law of 2010.[6]

Various reasons reflecting the considerations above have been given in legal literature for the *lex situs* rule, namely its simplicity, common sense and

[3] K. KREUZER, La propriété mobilière en droit international privé, *Recueil des cours* 1996 (259), p. 9-318 at 45; citing a large number of statutory provisions from across the globe, the author concludes: "*[a]insi on peut constater que la plupart des lois de droit international privé se satisfont pour l'essentiel de la règle du* situs *pour les biens meubles et immeubles complétée ici et là de quelques règles spéciales*." See also D. GIRSBERGER, *Grenzüberschreitendes Finanzierungsleasing*, Tübingen 1997, p. 193, No. 348: …"*gilt praktisch weltweit das Prinzip, das auf dingliche Verhältnisse das Recht am Lageort, die* lex rei sitae*, anzuwenden sei (*situs-*Regel)*." See also the similar statement in J.C. FERNÁNDEZ ROZAS/ R. ARENAS GARCÍA/ P.A. DE MIGUEL ASENSIO*, Derecho de los negocios internacionales*, 3rd ed., Madrid 2011, p. 470: "*solución común en el Derecho comparado*" ; H. KRONKE, Parteiautonomie und Prorogationsfreiheit im internationalen Mobiliarsicherungsrecht : Zwei Grundprinzipien der Konvention von Kapstadt, in H. KRÜGER/ H.-P. MANSEL (eds), *Liber amicorum Gerhard Kegel*, München 2002, p. 33 *et seq.*, at 34: "[...] *eine der ältesten, gesichertsten und weltweit verbreiteten Kollisionsnormen*." For the Common Law, see J. CARRUTHERS, *The Transfer of Property in the Conflict of Laws*, Oxford 2005, p. 19 *et seq.*, Nos. 1.20 *et seq.* The most detailed survey of national sources of law in this area is provided by H. STOLL, Internationales Sachenrecht, in H. STOLL (ed.) *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen – Einführungsgesetz zum Bürgerlichen Gesetzbuch/IPR*, 13th ed., Berlin 1996, Nos. 5-103.

[4] Cf. P. HAY/ P. BORCHERS/ S. SYMEONIDES, *Conflict of Laws*, St Paul/Minn. 2010, p. 1263 *et seq.*, § 19.18.

[5] It may suffice to refer to § 19 of the Korean Law No. 6465 of 2001, Article 43 of the Introductory Law of the Civil Code as amended in 1999 in Germany, Article 38 of the Taiwanese Act on Private International Law of 2010, and Article 13 of the Japanese Act on General Rules for Application of Laws of 2006.

[6] See Article 37 of the Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations.

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claim to general consensus,[7] but also – in respect of immovables – its link with territorial sovereignty, *i.e.* with public international law.[8] The commercial side of this argument points to the determination, by the law of a given country, of the ordering and prioritisation of creditors with regard to the recovery of assets situated in that State. Other more practical considerations relate to the fact that immovables cannot be relocated to other jurisdictions; that land registers have to be administered by one single law which can only be the law of the State establishing that register; and that for both movables and immovables the location can easily be ascertained by anyone who may have an interest in the respective tangible. A further practical consideration is that a judgment relating to the respective property can only be enforced in the country of the *situs* and that this country is likely to be reluctant to enforce a decision that is not based on its own law, *i.e.* the law of the *situs*[9] (this is a corollary of the sovereignty argument cited above).

II. Widely Accepted Exceptions: *Res in Transitu* and Means of Transport

Many of these arguments are convincing with regard to immovable property, but they should be and have already been partly reconsidered with regard to movables. The *situs* of movables may be purely fortuitous, and even more so in light of the exorbitant growth rates of international trade in goods. Goods travelling from one country to another may transit various other States where they are stored or transhipped without acquiring any relation with that country or with its traders that would somehow justify the application of the law of that *situs* to the proprietary rights vested in those goods. Where goods sold by a Korean manufacturer to a Russian importer are seized on behalf of a creditor in the port of Hamburg, there is no compelling reason for applying German law to the transfer of property as between the two contracting parties, not even where the creditors are Germans. The transhipment could have taken place in Rotterdam or Antwerp in the alternative, with the consequential application, under the *lex situs* rule, of Dutch or Belgian property law. The choice of Hamburg as a place of transhipment is a pure matter of transport convenience and has no relation with the commercial or legal interests of the persons involved in the goods in question.

---

[7] L. D'AVOUT, *Sur les solutions du conflit de lois en droit des biens*, Paris 2006, No. 2, p. 3: "*[s]a simplicité, son bon sens et son caractère consensuel*."

[8] For a general discussion of the grounds militating for and against the *lex situs*, see J. CARRUTHERS (note 3), Nos. 8.02 *et seq.*, p. 195 *et seq.*; A.-C. RITTERHOFF, *Parteiautonomie im internationalen Sachenrecht*, Berlin 1999, p. 55-63. The link with territorial sovereignty is stressed in H. BATIFFOL, *Aspects philosophiques du droit international privé*, p. 262-263, No. 117; D. MARTINY, Lex rei sitae as a connecting factor in EU Private International Law, *IPRax* 2012, p. 119-133.

[9] For these arguments see H. STOLL (note 3), at Nos. 125-126.

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Numerous legislatures have therefore enacted specific rules dealing with goods in transit, which are sometimes subjected to the law of the place of departure,[10] more often, however, to the law of the country of destination[11] or to the law of the State where a change of the right *in rem* has been perfected.[12] These laws do not necessarily ensure the uniformity of outcome that private international law is meant to attain. In the above example of a carriage from Korea to Russia the Russian conflict rule would designate the law of the country of departure, *i.e.* Korean law while the Korean conflict rule would subject the proprietary rights of the goods in transit to the law of destination, *i.e.* Russian law. Would the choice of the applicable law by the parties not be a better and more appropriate solution?

Further exceptions to the *situs* rule relate to *in rem* rights in means of transport, in particular vessels and aircraft, but also the rolling stock of railways and road vehicles.[13] The pertinent conflict rules designate the law of a vessel's or aircraft's nationality[14] or – more often – of the country of its registration[15] or of the

[10] This was the conflict rule laid down in § 10 of the Act on the application of law to international legal relations and to international economic contracts of 5 December 1975 of the former German Democratic Republic (Gesetzblatt DDR 1975 I, 748); see W. SCHÖNRATH, in G.-A. LÜBCHEN *et al.* (eds)*, Internationales Privatrecht – Kommentar zum Rechtsanwendungsgesetz*, Berlin 1989, p. 46; the same rule can still be found in Article 1206 of the Russian Civil Code as amended in 2013.

[11] See, for example, for Belgium Article 88 of the 2004 Code; for Turkey, Article 21, para. 2 of the 2007 Act; for Korea, § 22 of the 2001 Act etc. There is no explicit conflict rule for *res in transitu* in German law, but the escape clause which allows for the *lex situs* to be set aside in favour of a substantially closer connection is sometimes interpreted as permitting the application of the law of the country of destination to goods in transit, see K. THORN in P. BASSENGE *et al.* (eds), *Palandt, Bürgerliches Gesetzbuch*, 75th ed. München 2016, Article 46 EGBGB para. 3.

[12] See, for example, for Austria § 31, para. 1, for Japan, Article 13, para. 2 and for Taiwan, Article 38, para. 3 of the Act of 2010. For further references see K. KREUZER, Gutachtliche Stellungnahme zum Referentenentwurf eines Geseztes zur Ergänzung des Internationalen Privatrechts, in D. HENRICH (ed.), *Vorschläge und Gutachten zur Reform des deutschen internationalen Sachen- und Immaterialgüterrechts*, Tübingen 1991, p. 37-180, p. 163 *et seq.*

[13] See K. KREUZER (note 12), p. 110-136; U. DROBNIG*,* Vorschlag einer besonderen sachenrechtlichen Kollisionsnorm für Transportmittel, in HENRICH (note 12), at 13-36; for proprietary rights of a lessor, see, in the same sense, I. VOULGARIS, Le credit-bail (leasing) et les institutions analogues en droit international privé, *Recueil des cours* 1996 (259), p. 319-412, at 368 *et seq.*, referring, however, to the different solution – party autonomy – adopted by the French *Cour de cassation*, (Cass. 11 May 1982, *Rev. crit. dr. int. pr.* 1983, p. 450 *et seq.* with an annotation by G. KHAIRALLAH).

[14] See Article 20 of the Korean Law of 2001.

[15] See, with slightly different designations, Article 45 of the German Introductory Law to the Civil code for vessels, aircraft and railway rolling stock; similarly Article 22 of the Turkish Law of 2007; for the Netherlands, Article 2, paras. 2 and 3 of the *Wet Conflictenrecht Goederenrecht* of 25 February 2008 (*Staatsblad van het Koninkrijk der Nederlanden* 2008, No. 70) for vessels and aircraft; for all registered means of transport in Belgium Article 89 of the 2004 Code; for registered movables in general, Article 59 of the 1998 Act on Private International Law of Tunisia; for Russia Article 1207 of the Civil Code

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country of its admission to circulation.[16] In some countries, such as Germany or Korea, road vehicles are not covered by specific rules but left to the general principle of the *lex situs*.

However, the rationale for an exemption from that general rule applies to all means of transport: it is continuous movement for which means of transport are designed. It includes cross-border movements, which – under the rule of the *lex situs* – lead to a change of the law applicable to proprietary rights. Several uniform law conventions creating uniform security rights in transport vehicles give evidence of the clear intention of the international community to avoid such changes of the applicable law which often engender changes of the proprietary rights in question and thereby frustrate the commercial purpose of those rights.[17]

III. Exceptions of Growing Acceptance: Securities and Cultural Objects

Further exceptions that have gradually gained acceptance over the years concern securities held by intermediaries and cultural objects. Trade in securities is no longer carried out in tangible negotiable instruments. This is due to an unprecedented growth of such trade in the 1950s and 1960s, which led to what traders called the "paperwork crisis" or even the "paperwork crunch". It forced the New York Stock Exchange for some time to close one day a week to process the backlog of paperwork generated by the week's transactions.[18] The markets' answer was a dematerialization of negotiable instruments and a transition from a direct holding system to an indirect holding system: fewer and fewer securities are actually printed out, and more and more of them exist only as a single global certificate placed in the custody of a central securities depository (CSD). Banks, brokers and other financial institutions hold accounts with the CSD and act as intermediaries between their customers, *i.e.* the investors and holders of securities, and the CSD. The purchase and sale of securities is carried out through bookings which debit or credit the various accounts.[19]

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as amended in 2013, which refers to the law of the place of registration for vessels and aircraft and for cosmic objects.

[16] This appears to be the rule for rolling stock in Korea according to § 20 of the Law of 2001.

[17] The most recent and most successful of these instruments is the Convention on International Interests in Mobile Equipment done at Cape Town on 16 November 2001, see the website of Unidroit <http://www.unidroit.org> with more than 70 contracting parties.

[18] See U. DROBNIG, Dokumentenloser Effektenverkehr, in K. KREUZER (ed.), *Abschied vom Wertpapier? Dokumentenlose Wertbewegungen im Effekten-, Gütertransport und Zahlungsverkehr*, Neuwied 1988, p. 11 *et seq*.

[19] The most comprehensive scholarly analysis of this change of market structure and operations has recently been published in S. SCHWARZ, *Globaler Effektenhandel – Eine rechtstatsächliche und rechtsvergleichende Studie zu Risiken, Dogmatik und Einzelfragen*

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As a consequence the *lex situs* approach, which was often designated as the *lex cartae sitae* approach, is no longer meaningful. The only possible location of a tangible paper would be the establishment of the CSD, which would often be unknown to the parties involved in a securities transaction and to their creditors. Instead, there is a clearly discernible trend towards the use of the relevant account as a connecting factor in more recent developments in the law. In the European Union this comes to the fore in the so-called *PRIMA* approach. It provides for the application of the law of the *P*lace of the *R*elevant *I*nter*M*ediary's *A*ccount as an indicator of the place of that connection, and to all proprietary effects of securities traded in the booking system.[20] Some jurisdictions recognise a choice of the law governing the account in question, attributing *erga omnes* effect to such choice with regard to proprietary rights.[21] This solution has also been endorsed by the Hague Securities Convention of 2006, which took effect after the ratification by Mauritius, Switzerland and the USA, on the 1st of April 2017.[22]

Cultural objects have provoked less spectacular changes with regard to the conflict of laws. But numerous international instruments evidence the international community's rising concern with the preservation of the cultural heritage of individual nations. The main instruments adopted under the auspices of UNESCO and Unidroit have created obligations to issue certificates of origin, to return illegally exported cultural objects to the country of origin, and – as a matter of private law – to restitute stolen cultural property; they essentially deal with measures under public law and substantive private law. Little attention is given to the conflict of laws.

But as the protection of a nation's cultural heritage gains ground, a growing trend can be observed to replace the *lex situs* by the law of the country of origin of a cultural object. This has been most clearly expressed in a resolution of the *Institut de droit international*, which advocates the application of the law of the

des Trading, Clearing und Settlement bei nationalen und internationalen Wertpapiertransaktionen, Tübingen 2016.

[20] See Article 9 of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002 L 168/43); cf. S. SCHWARZ, Financial Collateral, in J. BASEDOW/ K. HOPT/ R. ZIMMERMANN (eds), *Max Planck Encyclopedia of European Private Law*, Vol. 1, Oxford 2012, p. 692-697, at 695, also available in German under the heading "Verwahrung (Wertpapiere)", in J. BASEDOW/ K. HOPT/ R. ZIMMERMANN (eds), *Handwörterbuch des Europäischen Privatrechts*, Vol. II, Tübingen 2009, p. 1720 *et seq.*, at 1726.

[21] See in the USA § 8-110(e)(1) and (2) of the Uniform Commercial Code allowing the parties to designate the relevant securities intermediary's jurisdiction which, in accordance with § 8-110(b), governs the acquisition of a security entitlement and the rights and duties arising out of such entitlement; in Taiwan, Article 44 of the Act on Private International Law of 2010 declares the law specified in the account contract as governing the acquisition, loss, disposition or change of right regarding securities held with a CSD; Switzerland has enacted the Hague Securities Convention (see note 22) as autonomous national law, see Arts. 108a – 108d of the Swiss Law on Private International Law of 1987.

[22] Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, concluded at The Hague on 5 July 2006; see Article 4 on the choice of the applicable law.

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country of origin to the transfer of ownership of works of art belonging to the cultural heritage of a country.[23] Less clear, but binding, is an EU Directive ordering that: "[o]wnership of the cultural object after return shall be governed by the law of the requesting Member State."[24] If the words "after return" refer to the cross-border transfer of the object to the country of origin, they simply repeat the *lex situs* approach with other words. But if these words mean the restitution of the item to the person entitled to its possession, wherever that handing-over takes place, the provision could also designate the law of a country other than the *lex situs*.

IV. A Critical Appraisal of the *Lex Situs*

Apparently, the arguments inferred from territorial sovereignty and the reluctance of the State of location to apply foreign law to proprietary rights are of minor significance where tangibles with an inherent high degree of mobility are concerned. We should ask ourselves to what extent these arguments are relevant at all. Is the application of foreign property law really so exceptional? Are we not prepared to accept such foreign law in a number of contexts? When it comes to succession, many jurisdictions accept the acquisition of ownership of items located within their respective countries by an heir through the operation of a foreign inheritance law. Why should an *inter vivos* transfer of title of the same items raise concerns of sovereignty if put into effect by the operation of a foreign law of property?[25] Similar inconsistencies can be ascertained in the law of insolvency where the insolvency proceedings opened in a given State may also affect the exercise of proprietary rights in assets located in other countries; this may, for example, be the case under the European Insolvency Regulation.[26]

The protection of creditors' trust in the operation of the law of an easily ascertainable location of personal property is not very convincing either. Creditors are aware of the corporeal existence of an object in a given jurisdiction, and they may also discern the identity of the custodian. But they do not know the

[23] See Arts. 2 and 3 of the Resolution of the *Institut de droit international* on "The international sale of works of art from the angle of the protection of the cultural heritage" (INSTITUT DE DROIT INTERNATIONAL, *Annuaire*, Vol. 64, t. II — Session de Bâle, 1991, Paris 1991, p. 402 *et seq.*, also printed in E. JAYME, *Nationales Kunstwerk und internationales Privatrecht — Vorträge, Aufsätze, Gutachten*, Heidelberg 1999, p. 155-157).

[24] See Article 13 of Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), OJ 2014 L 159/1.

[25] See A.-C. RITTERHOFF (note 8), at 71.

[26] See Articles 3 and 7 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ 2015 L 141/19; 4 the extraterritorial effect of insolvency proceedings is restricted in part by Article 8, reserving the application of the *lex situs* to third parties' rights *in rem*. See also the general discussion by RITTERHOFF (note 8), p. 74-75.

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background of that person's entitlement. Does the custodian possess the goods as a purchaser, as a tenant under a rental agreement or in any other capacity as a bailee? Some jurisdictions require registration of certain transactions that entail a separation of ownership and possession, but that registration is never exhaustive; some of those transactions will always remain undisclosed. Thus, creditors' confidence in those positions under substantive law is not protected, nor can they trust that, for example, a rental agreement or a lease contract is governed by the law of the *situs*. It is difficult to see why they deserve better protection when the custodian tells them that he does not hold the goods as a lessee, but instead as a purchaser under a sales contract reserving the title to the seller until full payment of the purchase price. If we look at the legal framework of property rights as a whole, including both substantive law and conflict rules, transparency does not appear to be of utmost significance.

Widely accepted as it is, the *situs* rule appears to be influenced by archaic notions of power over corporeal assets and not to be very consistent with conflict rules governing other areas of the law. In particular, its general approval with regard to property can hardly be reconciled with the wide acceptance of party autonomy in contract law. Since the purpose of many contracts is the creation, transfer or encumbrance of proprietary rights, this discrepancy between the private international law of contracts and of property is unprincipled. In an era of open frontiers, the *situs* rule is increasingly exposed to criticism, and it is especially the exclusion of party autonomy that deserves a closer look in the following section.

V. The *Lex Situs* as a Barrier to Trade in Movables

The problems generated by the *situs* rule relating to goods in transit and to means of transport have already been mentioned above. They concern in particular the loss and acquisition of ownership or other *in rem* rights. But *res in transitu* and vehicles provide only two examples of a more general critique of the application of the *situs* rule to moving objects. Under the *lex situs* rule, crossing a border into another jurisdiction is tantamount to a change of the applicable law (*conflit mobile, Statutenwechsel*). As a result, *in rem* rights established under the previous law have to be adjusted where possible to the categories of the new law. That adjustment should of course maintain the position of the right in question to the extent possible, in particular its effects and priority over competing rights in the same item. Where that adjustment fails because the new law does not provide for equivalent rights, the rights established under the previous law may cease to exist or may be downgraded with regard to their rank.

An example is an Austrian case dealing with fiduciary ownership granted by a German borrower to his German bank without transfer of possession; the chattels in question were later shipped to Austria where they were seized by German creditors of the German borrower. The bank would have been protected under German law as long as the items in question were located in Germany, but after their transfer to Austria it was not protected under Austrian law. Following the bank's objection to that seizure the Austrian Supreme Court held that what the

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German borrower and his bank had agreed upon was equivalent to a pledge; under Austrian law, however, this would have required a transfer of possession to the pledgee. In the absence of such transfer, the fiduciary ownership of the bank could not be recognised in Austria, and the bank was pre-empted from objecting to the seizure and forced sale of the goods in question.[27]

A further example is an Italian court's non-recognition of a retention of title clause contained in the standard contract terms agreed upon by a German exporter in his contract with an Italian customer. In accordance with the German law governing the contract, that clause was valid. Under Italian law, however, which was applicable as the *lex situs* after the export transaction had been carried out, a reservation of title is valid as against third parties only if it is laid down in a document with a "secure date" (*data certa*), a formality which would have required authentication by a notary or public registration.[28] When the Italian buyer became insolvent, the German seller brought an action against the trustee for restitution which was subsequently dismissed because the retention of title clause did not meet the formal requirements of Italian law.[29] Further examples of proprietary rights which have been extinguished as a consequence of cross-border transfers of the encumbered chattels have been identified in Spanish case law.[30]

A change of the applicable law may, as the cases clearly show, strongly disturb contractual relations, impede the use of movables as collateral and thereby undermine international trade. The – undeserved – benefit falls upon the creditors of one of the parties involved, irrespective of whether they are domiciled in the country of the previous or subsequent location of the goods. Within the European Union, the loss of collateral resulting from a combination of the private law and the conflict rules of the country of destination can be assessed as a measure having equivalent effect to a quantitative restriction, which would therefore appear to be prohibited as an infringement of the free movement of goods under Articles 34 and 35 Treaty on the Functioning of the European Union (TFEU).[31]

The law of the European Union may help to scrap the *lex situs* rule in some of the situations described above. But the basic freedoms do not replace the

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[27] OGH, 14 December 1983, *JBl* 1984, 550 = *IPrax* 1985, p. 165, with annotation by D. MARTINY, Nichtanerkennung deutscher Sicherungsübereignung in Österreich, *IPrax* 1985, p. 168-171; see also J. SCHACHERREITER, *Leading decisions zum internationalen Privatrecht*, Vienna 2008, p. 146-149, with comments and further references; the resulting situation has been addressed as a "legal nightmare" (see F. SCHWIND, "Hinkendes Eigentum" im österreichisch-deutschen Rechtsverkehr – Ein juristischer Alptraum, in H.-J. MUSIELAK/ K. SCHURIG (eds), *Festschrift für Gerhard Kegel*, Stuttgart 1987, p. 599-604).

[28] See Articles 1524 and 2704 of the Italian Civil Code.

[29] Corte d'Appello di Milano, 6 April 1956, *Il Foro Italiano* 1957, I, 1856; see with reference to further decisions E.-M. KIENINGER, *Mobiliarsicherheiten im europäischen Binnenmarkt*, Baden-Baden 1996, p. 60-62.

[30] A.-L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ (eds), *Derecho internacional privado*, Vol. 2, 11th ed., Granada 2010, p. 732, Nos. 27-28.

[31] See J. BASEDOW, Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: Favor offerentis, *RabelsZ* 1995, p. 41-48, Nos. 1-55 with further references at p. 43 in footnote 167; E.-M. KIENINGER (note 29), p. 152 *et seq.*, at p. 214; P. VON WILMOWSKY, *Europäisches Kreditsicherungsrecht*, Tübingen 1996, p. 110 *et seq.*

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existing conflict rules with new ones. Moreover, their effect is geographically limited to the internal market of the European Union while the negative consequences outlined above may occur in any international relation, whether inside or outside Europe. A solution should therefore rather be contemplated from a conflicts perspective, not limited to the internal market.

VI. Party Autonomy as a Solution

A possible way out of the dilemma could be a choice-of-law agreement with regard to *in rem* rights. In the cases reported above, the German bank and the German exporter could have insisted, in their bilateral relations with the borrower and the Italian importer, on a contractual choice of German law with regard to the fiduciary ownership and the retention of title respectively. There is no question that the validity of the collateral in both cases was a precondition for the credit granted by them. By contrast, the legitimate interests of the creditors who ultimately prevailed in the Austrian and Italian courts are difficult to ascertain. In the Austrian case, the creditors received a windfall profit from the accidental transfer of the objects in question to Austria, and the situation of the Italian importer's creditors represented by the trustee was similar. Thus, when weighing the interests involved, one hardly finds any valid reason for excluding a choice of law.

Moreover, both proceedings would perhaps have ended with different results if the parties had chosen different legal mechanisms for their transactions, for example lease contracts or rental agreements instead of fiduciary ownership and retention of title.

However, at present, only a few pieces of conflicts legislation contain provisions that permit party autonomy in property law. But they are growing in number.[32] While it would be premature to label this a trend, it is fair to speak of a growing awareness among legislators of the inconvenience that the *situs* rule may precipitate. Consequently, some of the more recent statutes have opened the door for party autonomy, although only slightly and sometimes indirectly, and for limited areas of application.

It is not a simple task to provide a comparative survey of the existing rules on party autonomy in a systematic way, as the approaches and terminology differ widely. In some countries, choice of law relating to proprietary rights is not even openly addressed but is assumed to be effective on other grounds. In other countries, it is limited to the relationship between the parties *inter se*. A third group of jurisdictions, in what may be called a pseudo-unilateral approach, confines the admission of choice of law to export transactions. A more daring approach recognises choice of law with regard to movables without any apparent limitations.

[32] KREUZER (note 3), *Recueil des cours* 1996, p. 67, who ascertains a growing inclination ("*propension croissante*").

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VII. Indirect Admission of Party Autonomy

The least visible deference to party autonomy can probably be found in German law. While basically adhering to the *situs* rule with exceptions for means of transport, the rigid conflict rules adopted in 1999 are, however, not meant to be conclusive. Article 46 of the Introductory Law to the Civil Code mandates the application of a different law if, when compared with the *situs* or the law of the register of the means of transport, a substantially closer connection with that other law can be ascertained. As the legislative materials show, the escape clause is also intended to take account of cases where the parties have agreed, with regard to their bilateral relations, on the application of a different law.[33]

While the German Government wanted to limit the effects of choice-of-law clauses contained, for example, in an underlying sales contract, to the contracting parties, the potential *erga omnes* effect has not explicitly been excluded in the relevant provision of the statute. Thus, where a closer connection is actually ascertained in accordance with Article 46 on the basis of a choice-of-law clause, the law chosen by the parties might very well be effective *erga omnes*. The issue is debated in legal literature and there has been no court decision to date.[34] The main counter-argument is the lack of transparency *vis-à-vis* third parties regarding the choice of law. While this consideration is correct in substance it is not a very credible argument with respect to German law, which has developed various forms of retention of title and fiduciary ownership which are not transparent at all but are nevertheless effective *vis-à-vis* third parties. Apparently, German scholars apply double standards of transparency in substantive law and in private international law.

VIII. Choice-of-Law Clauses with *Inter Partes* Effects

Swiss law is more explicit, allowing the acquisition and loss of *in rem* rights in movables to be subjected to either the law of the State of origin or the law of the State of destination provided that the chosen law is applicable to the underlying contract; on the other hand, Swiss law explicitly prevents the parties from invoking the choice-of-law clause as against third persons; the usefulness of this rule has

[33] See the Draft Bill submitted by the German Government: *Entwurf eines Gesetzes zum internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen, Deutscher Bundestag, 14. Wahlperiode, Drucksache 14/343* of 1st February 1999, p. 19; see also H.-P. MANSEL, Normzweck und Tatbestandsstruktur des Art. 46 EGBGB, in S. LORENZ (ed.), *Festschrift für Andreas Heldrich*, München 2005, p. 899-906 at 905.

[34] In favour of choice of law, see H. STOLL, Zur gesetzlichen Regelung des internationalen Sachenrechts in Art. 43-46 EGBGB, *IPRax* 2000, p. 259-270, at 264 *et seq.*; in favour of a limitation to *inter partes* relations, see H.-P. MANSEL in H.-P. MANSEL (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Art. 43-46 EGBGB (Internationales Sachenrecht)*, Berlin 2015, Article 46 paras. 37-38; for a complete rejection of choice of law, see K. THORN (note 11), para. 3.

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been questioned.[35] The legal situation under Article 1210 paragraph 1 of the Russian Civil Code and Article 39 paragraph 2 of the Ukrainian Law of 2005 is analogous. Similar provisions for *inter partes* effects of choice-of-law clauses were made with regard to the conveyance of an interest in a chattel in general and of a security interest in particular in the American *Restatement Second* on conflict of laws.[36] Without an explicit limitation to the bilateral relationship between the parties, Spanish law allows parties to agree that goods in transit are not located in the country of despatch, but rather in the country of destination. This solution may have been conceived as an indirect choice of the law of the country of destination as being applicable under the rule of the *lex situs*. It appears, however, that the provision gives rise to a great number of uncertainties with respect to interpretation and is of minor significance in legal and commercial practice.[37]

At first sight, Article 51 of the 1995 Italian Law on private international law appears to take an important step towards the recognition of party autonomy relating to proprietary rights. While paragraph 1 almost literally affirms the rule of the *lex situs* which had already been acknowledged in Article 22 of the Preliminary Provisions of the Civil Code of 1942, a second paragraph is added, indicating that the same law governs the acquisition and the loss of *in rem* rights, "except in matters of succession and when the attribution of an *in rem* right depends on a family relation or on a contract." The wording of the provision suggests that the *lex situs* will entirely be replaced as far as the acquisition and the loss of rights – having *erga omnes* effects – are concerned,[38] and that acquisition and loss resulting from a contract are governed by the law applicable to that transaction, which – very often – is chosen by the parties. The prevailing view in Italian scholarship does not appear to draw that conclusion, however. Rather, Article 51, paragraph 2 is to be interpreted in light of the traditional distinction of *titulus adquirendi* and *modus adquirendi*. The *titulus adquirendi* may be constituted by succession, a marital property regime or a contract, and in the latter case would be subject to the law governing the contract, for example the law chosen by the parties. But the *modus adquirendi* is classified as an aspect of the exercise of *in rem* rights and, therefore, is said to be governed by the *lex situs*.[39] This solution essentially amounts to the *inter partes* effect of choice-of-law agreements.

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[35] See Article 104 of the 1987 Swiss Law; see the critical remarks by P. FISCH in H. HONSELL/ N.P. VOGT/ A.K. SCHNYDER (eds), *Kommentar zum schweizerischen Privatrecht – Internationales Privatrecht*, Basel 1996, Nos. 15-18, who suggests extending the effects of the parties' choice *erga omnes*.

[36] See Rest. Second, Conflict of Laws, §§ 244 and 251.

[37] See Article 10.1, para. 3 of the Spanish Civil Code and the detailed discussion in: J.D. GONZÁLEZ CAMPOS *et al.*, *Derecho internacional privado – Parte especial*, 6th ed., Madrid 1995, p. 249-253, Nos. 331-335; J.C. FERNÁNDEZ ROSAS/ S. SÁNCHEZ LORENZO, *Derecho internacional privado*, 2nd ed., Madrid 2001, p. 649-651, Nos. 624-625.

[38] See T. BALLARINO, *Diritto internazionale privato – Manuale*, 3rd ed., Padova 1999, p. 567.

[39] See R. LUZZATTO, Articolo 51 (Possesso e diritti reali), in La riforma del sistema italiano di diritto internazionale privato – Commentario, *Riv. dir. int. priv. proc.* 1995, p. 905-1279, at 1156; F. MOSCONI, *Diritto internazionale privato e processuale – Parte speciale*, Torino 1997, p. 119; BALLARINO (note 38), p. 567 *et seq.*; P. BENVENUTI, in

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IX. Retention of Title Clauses in Export Contracts

Less equivocal are provisions in Dutch, Swiss and Romanian law dealing with retention of title agreements in international transactions. While a 2008 statute of the Netherlands basically subjects the *in rem* effects of retention of title clauses to the *lex situs*, it cautiously allows parties to an export transaction to choose the law of the State of destination provided that the retention of title does not, under that law, lose its effect of postponing the transfer of ownership until the price has been paid in full. A further proviso requires that the goods have actually been shipped to the country of destination.[40] The scope of application of this rule is far from clear; does the designation of the goods in question for "export" refer to any export from any country? This would include import to the Netherlands which, however, in a Dutch statute, is unlikely to be described as "export". The text of the statute rather suggests the exclusive application of the rule to export from the Netherlands. Thus, the scope of the rule is surprisingly narrow: since litigation concerning proprietary aspects usually takes place in the country where the goods are located, this conflict rule, which applies only after the goods have been exported but which is binding only on the courts in the Netherlands, will not be applied very often. The exclusion of imported goods gives evidence of a clear bias in favour of Dutch exporters. In the European Union it might be struck down as discrimination on grounds of nationality in violation of Article 34 TFEU on the free movement of goods.[41]

A similar although less conspicuous bias can be ascertained in Swiss law. Subject to a choice of law by the parties having only *inter partes* effect,[42] retention of title clauses in export contracts are subject to the law of the country of destination.[43] If, on the other hand, goods are imported into Switzerland subject to a retention of title that is not in accord with Swiss law, the seller will retain ownership for three months but cannot invoke his title against third parties acting in good faith.[44]

Finally, Article 54 of the 1992 Law of Romania, now Article 2619 of the New Civil Code, equally permits the parties to an export transaction to choose the law governing the preconditions and the effects of a reservation of title. As opposed to the Dutch provision, the Romanian conflict rule validates the choice-of-law clause irrespective of the location of the goods. It has been criticised for being ineffective as long as foreign countries insist on the *lex situs* rule also in respect of

S. BARIATTI (ed.), *Legge 31 maggio 1995, n. 218 – Riforma del sistema italiano di diritto internazionale privato – Commentario*, Padova 1996, p. 877-1505, at 1331.

[40] See Article 3, para. 2 of the *Wet Conflictenrecht Goederenrecht* of 25 February 2008 (note 15); under para. 3 of that Article, the provision also applies to lease contracts relating to goods designed for exportation. See now the codified version in Article 128 of Book 10 of the Civil Code adopted in 2011.

[41] See *supra*, note 31.

[42] See *supra*, note 35.

[43] See Article 103 of the 1987 Swiss Law on Private International Law.

[44] See Article 102 paras. 2 and 3 of the 1987 Swiss Law.

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the retention of title.[45] This criticism is accurate insofar as it highlights the unilateral character of a rule which is only applicable to export transactions. That unilateral bias will, however, probably be given up sooner or later since it discriminates on grounds of nationality against imports from other EU Member States. In the long run though, rules such as those of the Netherlands and Romania may very well help to overcome the present disadvantages of the *lex situs* rule.

X. Party Autonomy for Movable Property

A first move towards party autonomy at a more general level appears to be laid down in Article 9 UCC in the United States in the field of secured transactions. Exclusively with respect to deposit accounts held with a bank, Article 9 UCC provides that the perfection, the effect of perfection or non-perfection, and the priority of a security interest are governed by the local law of that bank's jurisdiction.[46] What seems at first sight to be another form of localisation of the legal relation, in reality provides ample latitude for party autonomy. The "bank's jurisdiction" is defined as the jurisdiction designated for this purpose in the agreement, between the bank and the debtor, governing the deposit account.[47] Where this definition does not apply, for example in the absence of such a designation, the agreement governing the deposit account between the bank and its customer may expressly provide that it is governed by the law of a particular jurisdiction, which in that case is the "bank's jurisdiction". It is only where such a choice-of-law clause is equally lacking that objective connecting factors are used to localise the legal relationship. A similar cascade of connecting factors, with prevalence given to party autonomy, is laid down for the law governing perfection and priority of security interests in investment property held by a commodity intermediary.[48] For uncertificated security rights in investment property, the relevant provisions refer to Article 8 UCC.[49] These innovations can essentially be explained by the non-physical nature of bank accounts, which often cannot effectively be localised; a substitute connection with the governing law is, therefore, urgently needed. These conflict rules do not apply to tangibles, however, and do not really help to remedy the deficits of the *lex situs* outlined above.

The most far-reaching recognition of party autonomy relating to rights *in rem* has been codified in the 2010 Private international Law Act of the People's

[45] KREUZER (note 3), p. 277 *et seq.* who attributes a "*caractère illusoire*" to the Romanian rule.

[46] § 9-304 (a) UCC; J WHITE/ R. SUMMERS, *Uniform Commercial Code – Secured Transactions*, St.Paul/ Minn. 2000, p. 803-804, consider the conflict rules of § 9-304 as "monumentally unimportant" since the substantive law in all 50 states of the US is the same due to the harmonisation achieved through the UCC.

[47] § 9-304 (b)(1) UCC.

[48] § 9-305 (b)(1) and (2) UCC.

[49] § 9-305 (a)(2) and (3) UCC.

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Republic of China. Article 37 unequivocally states: "The parties may by agreement choose the law applicable to rights *in rem* in movable property." The *lex situs* is a default rule and applies only in the absence of a choice by the parties. A similar rule deals with party autonomy relating to goods in transit (see Article 38). Limited to the transfer of property under a sales contract and to security rights in movables, the same rule could be found in some of the former socialist jurisdictions, for example in East Germany.[50] Given the extreme restrictions on international contacts and legal relations in socialist States as well as the foreign trade monopoly of a few State undertakings, those provisions on party autonomy did not really have to stand the test of practical utility in socialist times.

The unprecedented approach of the Chinese legislation raises questions. To date, there is no practical experience capable of indicating whether or not its radical provisions will be applied under the conditions of a "socialist market economy" without any restrictions and how their practical application may be qualified.[51] We may guess, however, that their application, if it occurs at all, will not be frequent. Where a Chinese court has to decide on proprietary rights under a foreign law chosen by the parties, it has two options to avoid foreign law. It may either find the foreign law, which the parties in cases of choice of law are bound to produce, to be insufficiently proved and therefore apply Chinese law as the *lex fori* pursuant to section 10 of the PIL Act;[52] or it may consider itself as *forum non conveniens* under a judicial interpretation of the People's Supreme Court and refer the parties to a foreign court that has a closer connection to the applicable law.[53] The latter solution is not practical where the goods in question are located in China and the dispute relates to the lawfulness of their seizure. But in light of the clear tendency of the Supreme People's Court to reduce the application of foreign law, it is unlikely that courts will actually assess *in rem* rights under a foreign law chosen by the parties.

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[50] See § 13 of the *Rechtsanwendungsgesetz* of the German Democratic Republic and SCHÖNRATH (note 10), p. 60-61, pointing to the advantage of the concordance of the laws governing the contract and its proprietary effects; see also D'AVOUT (note 7), p. 639.

[51] See the critical remarks on Articles 37 and 38 of the Chinese law by W. CHEN, Chinese Private International Law Statute of 28 October 2010, this *Yearbook* 2010, p. 27-41, at 40; a clear plea for a restrictive interpretation of Articles 37 and 38 is also made by H. DU, The Choice of Law for Property Rights in Mainland China: Progress and Imperfection, in J. BASEDOW/ K.B. PISSLER (eds), *Private International Law in Mainland China, Taiwan and Europe*, Tübingen 2014, p. 99-117, at 107 and 109; for further details, see now P. LEIBKÜCHLER, *Die Parteiautonomie im chinesischen internationalen Privatrecht*, Tübingen 2017, p. 149-162.

[52] See Article 10 para. 1, 2nd sentence and para. 2 of the Law on Application of Law to Foreign-Related Civil Relations (English translation in J. BASEDOW/ K.B. PISSLER (note 51), at 439: "[t]he parties choosing a foreign law shall provide the foreign law. Where the foreign law cannot be ascertained or it contains no provisions, the law of the People's Republic of China applies.").

[53] See § 532 No. 5 of the *Judicial interpretation of the Supreme People's Court of the 2012 Civil Procedure Law, adopted on 4 February 2015*; a German translation edited by K.B. PISSLER is available online at the following address <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764164>.

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XI. Summary and Outlook

To sum up the comparative observations, it may be said that the *situs* rule is in retreat. It is still the starting point of the conflicts analysis with respect to personal property. But it looks more and more like a Swiss cheese being characterised as much by its substance as it is by its holes. "Holes", *i.e.* exceptions to the *lex situs,* are now widely accepted with regard to goods in transit and means of transport, at least vessels, aircraft and railroad rolling stock. The law of the country of registration is increasingly set to replace the *lex situs* also for other registered movables. Further exceptions relate to securities held by intermediaries and cultural objects. With respect to the former, the *PRIMA* approach is increasingly recognised, advocating the application of the law of the *P*lace of the *R*elevant *I*nter*M*ediary. And as the protection of a nation's cultural heritage is gaining ground, a growing trend can be observed to replace the *lex situs* by the law of the country of origin of a cultural object.

A more general challenge to the *lex situs* is party autonomy. But it has not obtained wide acceptance in modern conflicts legislation on the law of personal property to date. Apart from the People's Republic of China, its approval in modern legislation is confined to specific issues and its limits are often uncertain. Moreover, some national legislatures appear to be inspired by the belief that they somehow foster their national interests by admitting party autonomy only in a biased way for export operations while prohibiting it for all other transactions, in particular the import trade. The general view still appears to attach great importance to the transparency of the law governing proprietary rights, a prioritisation that is opposed to non-transparent choice of law. It is, however, hardly compatible with the development of the substantive law of collateral in some countries. Future research should highlight this contradiction, which may open the door for a more extensive use of party autonomy in the field of proprietary rights in personal property.

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DISTANCE TORTS: THE *MINES DE POTASSE* DECISION FORTY YEARS ON

Javier CARRASCOSA GONZÁLEZ *

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 19-38
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I. Distance Torts in Private International Law

A. Concept and Examples

Distance torts (*Distanzdelikte*) are those composed of two elements located in different countries: (a) the generating event, which occurs in one country; and (b) damage, occurring in another country or countries.[1]

Distance torts appear in many areas of private international law. Examples crop up in cases involving trans-border pollution damage, rights relating to personality (right to honour, image rights, privacy) produced by the written press or on the Internet, damage to intellectual or industrial property rights via the Internet or other medium, and damages caused by imported products.[2]

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[1] *Vid*. P. BLANCO MORALES LIMONES, "Art. 5.3" – "Art. 5.4", in A.-L. CALVO CARAVACA (ed), *Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, Madrid 1994, p. 120-138; M. CALLORI, Giurisdizione in materia di responsabilità extracontrattuale, l'art 5 n. 3 della Convenzione di Bruxelles del 1968 e la questione della localizzazione del *forum damni*, *RDIPP* 1997, p. 601-656; P. CARLIER, France. Conflits de lois – Une qualification alternative du fait génerateur – une qualification discutable du fait dommageable (Case note, CA Versailles, 5 February 2010), *Clunet* 2010, p. 126-136; C.L. CORDERO ÁLVAREZ, Algunos problemas de aplicación del art. 5.3 del Reglamento 44/2001, *Anuario español de derecho internacional privado* (*AEDIPr*) 2009, p. 411-428; A. CRESPO HERNÁNDEZ, *La responsabilidad civil derivada de la contaminación transfronteriza ante la jurisdicción estatal*, Madrid 1999; M. ESLAVA RODRÍGUEZ, *La protección civil del derecho a la vida privada en el tráfico privado internacional: Derecho aplicable*, Cáceres 1996; S. FULLI-LEMAIRE, Affaire PIP: quelques réflexions sur les aspects de droit international privé, *Revue Internationale de Droit Économique* 2015, p. 99-122; N. GOÑI URRIZA, La concreción del lugar donde se ha producido el hecho dañoso en el art. 5.3 del Reglamento 44/2001: nota a la STJCE de 16 de julio de 2009, *Cuadernos de Derecho transnacional* 2011, p. 290-295; M. GRÜNBERGER, Zuständigkeitsbegründender Erfolgsort bei Urheberrechtsverletzungen, *IPRax* 2015, p. 56-65; J. VON HEIN, Der Gerichtsstand der unerlaubten Handlung bei arbeitsteiliger Tatbegehung im europäischen Zivilprozessrecht (EuGH, p. 555), *IPRax* 2013, p. 505-515; K. HERTZ, *Jurisdiction in Tort and Contract under the Brussels Convention*, Copenhagen 1998; P. KINDLER, Konzernhaftung zwischen Vertrag und Delikt – Die internationale Gerichtszuständigkeit bei Verstößen gegen gesellschaftsrechtliche Mitteilungspflichten (EuGH, p. 528), *IPRax* 2014, p. 486-490; A. LÓPEZ TARRUELLA, Criterio de "focalización" y "forum delicti commissi" en las infracciones de propiedad industrial e intelectual en Internet, *Revista de propiedad intellectual* 2009, p. 13-52; C. ORÓ MARTÍNEZ, Las acciones declarativas negativas y el art. 5.3 del Reglamento Bruselas I, *AEDIPr* 2011, p. 185-206; B. REINMÜLLER/ A. BÜCKEN, Provokation eines inländischen Deliktsgerichtsstandes im Urheberrecht (Cour de cassation, 25.3.2009 – 08.14.119), *IPRax* 2013, p. 185-188; A. SARAVALLE, "Forum damni" o "Fora damni"?, *Il Foro Italiano* 1995, p. 331-340; A. TENENBAUM, Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier, *RCDIP* 2012, p. 45-60; E. TORRALBA MENDIOLA, La difamación en la era de las comunicaciones: ¿Nuevas? perspectivas de Derecho Internacional Privado Europeo, *Indret.com* 2012; L. USUNIER, Case note, Cour de Cassation, 9 March 2010, *Clunet* 2010, p. 870-885.

[2] A very interesting case on trans-boundary pollution can be found in the newspaper *El País*, 14 July 2006, p. 13.

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B. International Jurisdiction and Distance Torts

Distance torts raise the issue of identifying the country that corresponds to the "*place where the harmful event occurred or may occur*", Art. 7(2) Brussels I (hereinafter "Brussels I") uses the place where the "causal fact" or the place where the "damage" or "harmful result" took place as a ground of special jurisdiction: "*[a] person domiciled in a Member State may be sued in another Member State: (...) (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*".

The *Jenard Report* to the Brussels Convention of 27 September 1968 stated that the contracting States to this Convention did not opt into Art. 5(3) (now Art. 7(2) Brussels I) with the intention of applying the law of the place where the act that caused the damage was committed or the place where the damage took place. The drafters of this legal provision intentionally left the question open to the ECJ's case law.[3] In 1968, the law of the various Member States and commentaries found in academic literature were conflicting over the issue. In France, the harmful event was understood both as the place of the causal event and the place of the damage, and so the plaintiff was left with the opportunity to choose one or the other ground of jurisdiction. Similar criteria were followed in Denmark. In Germany, a number of decisions followed this same approach, *i.e.* the so-called *optio fori* between the place of the causal act and the place of the damage; nevertheless, Art. 32 of the German Civil Procedure Act clearly opted in favour of the place of the causal act (*die unerlaubte Handlung*). In Italy and Belgium, the place of damage prevailed. In the United Kingdom, priority was sometimes given to the place of the causal act, but on other occasions to the place of the damage.

Today's Art. 7(2) Brussels I, which refers to the "place of the harmful event" in response to distance torts, leaves the door open to four potential interpretations. More precisely, the place of the harmful event could be regarded as: 1) The place of the causal act; 2) The place of the damage; 3) Both places, allowing the plaintiff to select either place as that which has international jurisdiction; 4) The place that presents the closest relationship with the tort, *i.e.* "the proper place of the tort". According to the latter, the court before which the lawsuit is filed is to assess the links which the case in hand has with the implicated countries, the result being that the courts of the State having the closest connection with the dispute have jurisdiction. These courts could be those of a Member State other than the State in which the causal act occurred or the State where the damage has taken place. This fourth interpretation should be ruled out for two reasons: (a) it is excessively flexible: one cannot specify *ex ante* and objectively which court has jurisdiction with regard to the tort; this result is not compatible with the aims of the Brussels I Regulation which are to provide a predictable system of international jurisdiction; (b) Since the proper place of the tort approach may grant jurisdiction to some courts that correspond neither to the place of the causal act nor to the place of the damage, this approach should be regarded as incompatible with both the

[3] The Jenard Report, *OJ*, C 189, 28 July 1990, p. 122-180. Opinion of Mr Advocate-General CAPOTORTI delivered on 10 November 1976, available at <http://curia. europa.eu>.

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wording and spirit of Art. 7(2) Brussels I. Therefore, we are ultimately left with three possible interpretations of Art. 7(2) Brussels I in response to distance torts.

In the framework of European private international law, the issue was first addressed in the celebrated ECJ ruling, *Bier vs. Mines de potasse d'Alsace*.[4] The judgment famously opted for the third of the above approaches: the place of the harmful event was to be interpreted both as the place of the causal act and the place of the damage. Hence, the plaintiff is permitted to bring his claim before the courts of either place at his or her own discretion. The judgment has since been the subject of extensive academic discussion. The *Mines de potasse* judgment can now be recognised as one of the leading rulings in European private international law.[5]

II. The Judgment: ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*

A. The Facts

The ECJ ruling in question, *Bier vs. Mines de potasse d'Alsace*, dealt with the following facts: the horticultural company Handelskwekerij GJ Bier BV, established in Nieuwerkerk aan den Ijssel (The Netherlands), together with Fondation Reinwater, whose registered office was in Amsterdam, and whose purpose was the improvement of water quality in the Rhine basin, brought an action before the *Gerechtshof* (Court of Appeal) of The Hague (The Netherlands), against Mines de potasse d'Alsace SA, established in Mulhouse, France. Mines de potasse d'Alsace was accused of contaminating the waters of the Rhine by means of mass discharge of saline waste into the river Rhine through their activities in the potash mines. These discharges were carried out in French territory. The horticultural company Bier BV used the waters of the Rhine in the Netherlands to irrigate their crops, and

[4] 30 November 1976, 21/76, *Recueil* 1976, p. 1735-1758.

[5] *Vid*. M.I. JALLES, Afloramento da supranacionalidade num caso de poluição transfronteiras, *Revista de Direito e Economia* 1976, p. 409-441; R. JOCHEM, Note on ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*, *Juristische Schulung* 1977, p. 614-616; H.U. JESSURUN D'OLIVEIRA, Wie het zout deert die het zout keert, *Nederlands juristenblad* 1977, p. 137; H. LINKE, Note on ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*, *RIW* 1977, p. 358-359; P. BOUREL, Note on ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*, *RCDIP* 1977, p. 568-576; A. HUET, Note on ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*, *Clunet* 1977, p. 728-734; T. HARTLEY, Article 5(3): The Place of Commission of a Tort, *European Law Review* 1977, p. 143-145; G.A.L. DROZ, Note on ECJ, 30 November 1976, 21/76, *Bier vs. Mines de Potasse d'Alsace*, *Recueil Dalloz Sirey* 1977, Jur. p. 614-615; A. REST, Wahl des zuständigen Gerichtes bei Distanzdelikten nach dem EG-Zuständigkeits- und Vollstreckungsübereinkommen. Ein erster Schritt zum Schutz des geschädigten im internationalen Umweltrecht, *RIW* 1977, p. 669-674; J.K. BENTIL, Delictual Liability within the EEC. A Pursuer's Choice of Jurisdiction, *The Scots Law Times* 1978, p. 13-16; T.P. KENNEDY, Untying the Gordian (Jurisdictional) Knot. Bier / Mines de Potasse (1976), *Leading Cases of the Twentieth Century* 2000, p. 275-293.

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complained that the high salt content of the river was having a detrimental effect on its plantations and in particular on the seeds used for its crops. Bier BV was therefore required to take very costly measures to limit the damage. At that time, the French company had in fact been pouring about 11,000 tons of chloride into a canal that flowed into the Rhine every day. Fondation Reinwater, co-plaintiffs, had already promoted all kinds of actions, including lawsuits, to protect and improve the quality of the river Rhine's water. In brief, the plaintiffs, both of them Dutch companies based in the Netherlands, claimed that the saline discharges carried out in France by the French company Mines de potasse d'Alsace were illegal and sued the French company requesting compensation for the damage caused. While the Dutch claimants stressed that the place of the harmful event was in the Netherlands (*i.e.* the place of damage and the country where the crops were damaged), the French defendant claimed that France should be considered as the place of the harmful event (*i.e.* place where the act that allegedly caused the damage occurred, or more specifically, the country where the saline discharges took place). Who was right?

Advocate General F. CAPOTORTI produced a convincing Opinion, delivered on 10 November 1976, prior to the date of judgment, which sustained with sound legal reasoning that the place of the harmful event should exclusively correspond to the place of the damage. In the end, the ECJ sided with neither the Dutch claimants nor the French defendants; nor indeed the Advocate General's Opinion. Instead, the ECJ asserted that this was a distance tort, and for the purposes of what is now Art. 7(2) Brussels I, the "place of the harmful event" is both the place of the Member State in which the "causal event" (France, place of discharge) and the place of the Member State in whose territory the "damage" occurred (The Netherlands, where the crops were subsequently damaged).

B. The ECJ Solution to Distance Torts. The Ubiquity Principle and the *Optio Fori* Rule

The application of Art. 7(2) Brussels I to distance torts may be demonstrated through several rules established by the ECJ's case law over a forty-year period.

1. Ubiquity Principle

The first rule established by the ECJ is the "double identification" of the place of the harmful event for distance torts in determining jurisdiction. As pointed out above, the ECJ stresses that where a distance tort has been committed, the "*place where the harmful event occurred or may occur*" is, at the option of the plaintiff, either "*the place where the damage occurred*" or "*the place of the event which gives rise to and is at the origin of that damage*". This is the "ubiquity principle", as originally established by ECJ in the *Bier* case. The ubiquity principle has subsequently been expanded by a wealth of case law.

The dissociation of this ground of international jurisdiction pursues an asymmetric objective: 1) On the one hand, when the court designated by Art. 7(2) Brussels I is the court of the place of the "causal event", it has jurisdiction to hear

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liability claims for damage committed anywhere in the world (ECJ 7 March 1995, *Shevill*, para. 33); 2) On the other hand, when the plaintiff brings an action before the court corresponding to the place of the "origin of the damage", such court only has jurisdiction to hear the dispute relating to damage produced in that place.

The ubiquity principle followed in the *Mines de potasse* judgment is a staple of ECJ case law. The ECJ has in fact repeatedly called upon this judgment for over forty years in response to many different types of extra-contractual liability: physical damage, damage to intellectual and industrial property, damage to rights relating to personality, financial damage, etc. The ECJ's almost romantic loyalty to the principle can be observed through many of its judgments.[6]

2. The Optio Fori *Rule*

The second rule, which is a consequence of the first, is the so-called *optio fori*. The plaintiff has the option (*optio fori*) of bringing an action before the courts of the Member State in which the "act giving rise to the damage" occurred, or before the courts of the Member State where the "damage" took place. The claimant is completely free to file a lawsuit in any one of the Member States. In no case can the plaintiff be accused of "forum shopping" for lodging his or her claim in the Member State where he or she is domiciled if the place of the causal event or the place of the damage is located in that State.[7] Both places present an equal level of proximity with the tort.

An example of the *optio fori* rule in application can be seen in the judgment rendered by the French *Cour de Cassation* on 28 October 2011. In this case, a company based in Italy prevented its French subsidiary from complying with a series of guarantees. This subsequently caused damage to third parties. The French court considered that this was a distance tort. The event giving rise to the damage had occurred in Italy (the country of the company's headquarters and place where the Italian mother company's decision was made), while the damage itself had occurred in France (the place where the third parties suffered property damage losses). Art. 7(2) Brussels I is applicable and a liability claim can be brought in France, which is the "place of damage" (*i.e. locus damni*).[8]

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[6] *Vid*. ECJ, 21 December 2016, C-618/15, *Samsung Electronics*, para. 25; ECJ, 10 September 2015, C-47/14, *Ferho*, para. 72; ECJ, 21 May 2015, C-352/13, *Cártel Damage*, para. 36-39; ECJ, 28 January 2015, C-375/13, *Kolassa*, para. 45; ECJ, 22 January 2015, C-441/13, *Hejduk*, para. 18; ECJ, 5 June 2014, C-360/12, *Coty Germany*, para. 46; ECJ, 3 April 2014, C-387/12, *Hi Hotel*, para. 27; ECJ, 16 January 2014, C-45/13, *Kainz*, para. 23; ECJ, 16 May 2013, C-228/11, *Melzer*, para. 25; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 26; ECJ, 25 October 2012, C-133/11, *Folien Fischer*, para. 39; ECJ, 25 October 2011, C-509/09 and C-161/10, *eDate*, para. 52; ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 19; ECJ, 10 June 2004, C-168/02, *Kronhofer*; ECJ, 16 July 2009, C-189/08, *Zuid-Chemie*; ECJ, 5 February 2004, *Torline*.

[7] D. BUREAU/ H. MUIR WATT, *Droit international privé, Tome II, Partie spéciale*, 3e edn., Paris 2014, p. 364-371.

[8] *Clunet* 2012, p. 684, note S. CLAVEL; *RCDIP* 2012, p. 640-648, note L. USUNIER.

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Where a distance tort has been committed, the "choice of court" is only feasible with regard to "direct damage" suffered in the different States and not with regard to "indirect damage" suffered by the alleged victim in any other state. The direct damage is an immediate consequence of a causal act, whereas the indirect damage is a consequence of the direct damage. In addition to this, the "choice of court" is only available for damage suffered by "direct victims" and not for damage suffered by "indirect victims", *i.e.* those who suffered damage as a result of other damage produced to another person.

C. Place of the Fact Giving Rise to the Damage and Place of the Damage. The Causal Link

1. Place of the Causal Act and Causal Link

In order to file a complaint before the courts of the Member State where the "causal fact" (*Handlungsort*) occurred, the causal fact must unquestionably be the fact that directly caused the harm.[9] The ECJ has insisted that, for liability to be established for any distance tort,[10] a causal link must be established between the damage and the fact at its origin.[11] Consequently, it must be established that the "causal act" or the "event giving rise to the damage" has directly produced damage. In other words, we can say that Art. 7(2) Brussels I requires "direct causality".

This requirement only works correctly if there only exists one cause of damage, such as the pollutant discharge of saline waste into the river Rhine in France which, when carried by the river flow, subsequently damages crops in The Netherlands. The same happens where a defective product is produced. In these cases, the damage is an immediate and direct consequence of the poor manufacturing of the product, regardless of the country in which the damage takes place.

However, with regard to cases where damage is caused by a combination of two different causes, the "direct causality" requirement should be tweaked somewhat. In difficult cases, the so-called "proper causality" theory may instead be followed. This approach fits perfectly with the aim and function of Art. 7(2) Brussels I, which is to determine with precision – and predictability by the parties – which court will have international jurisdiction in tort litigation. According to this principle, where damage is caused with several concomitant causes, the alleged facts that are not likely to have caused damage should be eliminated from the analysis. The only relevant fact is the "triggering event" of the damage – the one that is most likely to cause damage.

Any act that is merely preparatory but does not directly cause material damage is not relevant to Art. 7(2) Brussels I and is not operational to determine the place of the "causal fact". For instance, the decision to manufacture a product

[9] *Vid*. ECJ, 16 July 2009, C-189/08, *Zuid-Chemie*, para. 13; ECJ, 16 January 2014, C-45/13, *Kainz*, para. 26. *Vid*. P. CARLIER (note 1), at 126-136.

[10] ECJ, 19 September 1995, C-364/93, *Marinari*, para. 19.

[11] ECJ, 18 July 2013, C-147/12, *ÖFAB*, para. 33; ECJ, 16 July 2009, C-189/08, *Zuid-Chemie*, para. 13 and 28; ECJ, 21 April 2016, C-572/14, *Austro-Mechana*, para. 41.

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harmful to health, or the purchase of toxic chemical substances are both purely preparatory acts. Therefore, they cannot be regarded as "causal facts" and the place where they are carried out is irrelevant for the purposes of Art. 7(2) Brussels I. Moreover, awarding jurisdiction to courts at the place where such preparatory acts are carried out would lead to considerable unpredictability for the parties involved.

2. Place of the Damage

In disputes relating to claims arising out of direct pecuniary damage, such as those arising from transboundary pollution, the place of the damage is the place where "direct material damage" occurs for the "direct victim".[12] It is the place where the operative event specifically produces its "harmful effects".[13]

In other words, the place where the damage occurred is the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage.[14] This can be illustrated by way of an example. A company manufactures contaminated material in Belgium and then exports it to The Netherlands where it is used to make fertilizer. The material damage suffered by the importing company is deemed to have occurred in the Netherlands, even if the contaminated material was manufactured in Belgium. In fact, the damage has not occurred in Belgium at all.[15] Consequently, in this case, Art. 7(2) Brussels I allows the victim to bring proceedings before the Dutch courts, which are the courts of the "place of the damage".

D. The Rationale Behind the Ubiquity Principle

The rationale for the ubiquity principle lies in the idea that the tort did not take place any "more" in one Member State than the other. Both States, the State of the causal fact and the State of the damage, present the same "proximity" to the litigation. Both places have a relevant and similar connection to the case.[16]

The proximity of both States to the dispute facilitates: (a) The taking of evidence;[17] (b) The "sound administration of justice";[18] (c) The predictability of the

[12] ECJ, 30 November 1976, *Mines de Potasse d'Alsace*, para. 24-25; ECJ, 7 March 1995, *Shevill*, para. 21-23.

[13] ECJ, 21 May 2015, C-352/13, *Cártel Damage*, para. 52; ECJ, 16 July 2009, C-189/08, *Zuid-Chemie*, para. 26-28.

[14] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 21; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 33.

[15] ECJ, 16 July 2009, C-189/08, *Zuid-Chemie*, para. 29; *vid.* N. GOÑI URRIZA (note 1), at 290-295.

[16] ECJ, 16 June 2016, C-12/15, *Universal Music*, para. 28; ECJ, 21 May 2015, C-352/13, *Cártel Damage*, para. 39-41; D. BUREAU/ H. MUIR WATT (note 7), at 364-371.

[17] ECJ, 10 September 2015, C-47/14, *Ferho*, para. 74.

[18] ECJ, 22 January 2015, C-441/13, *Hejduk*, para. 19; ECJ, 10 September 2015, C-47/14, *Ferho*, para. 73.

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competent court, since both plaintiff and defendant can reasonably foresee that the court of the place of the causal fact and the court of the place of the damage are the most apt to rule on litigation arising from a distance tort. All the while, this "double ground of international jurisdiction" is foreseeable for both parties.[19]

The ECJ's "detachment" of the two places of a distance tort in the context of Art. 7(2) Brussels I is not aimed at favouring the alleged victim and thus enabling him or her to bring an action before the courts of several States (*favor laesi*). This point has been emphasized by the ECJ itself.[20] The "detachment" is, in fact, also applicable to situations where the plaintiff is the person allegedly responsible for the alleged damage. However, one can only conclude that, in practice, the ubiquity principle operates not as a *forum victimae*, but as a *forum actoris*. The country where the damage occurred is most often the country where the claimant is domiciled, no matter whether he is the alleged victim or the alleged offender. Hence, it is common for a victim to a distance tort to start legal proceedings before the courts of his own country using the jurisdictional ground of the place of the damage as interpreted by the ECJ.

E. The Effect of the Case Law

The wording of Art. 7(2) Brussels I refers to the "*court of the place where the harmful event occurred or may occur*" and makes no specific reference to distance torts. The European lawmaker that drafted the Brussels I Regulation (2000) and Brussels I-bis Regulation (2012) was well aware of the case law rendered by the ECJ in such cases. However, unlike other instances, the European lawmaker chose not to alter the original text of the Brussels Convention of 27 September 1968 and made no reference to this case law.[21] The reason for this may be that the legislator did not want to "petrify" the practical application of Art. 7(2) Brussels I in the case of distance torts. Yet, with the current wording of Art. 7(2), the courts have a very wide freedom to forge specific rules with regard to distance torts that may arise in the future, which will undoubtedly be more complex than those which have hitherto emerged.

[19] ECJ, 16 January 2014, C-45/13, *Kainz*, para. 24-28; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 27; ECJ, 18 July 2013, C-147/12, *ÖFAB,* para. 49-51; ECJ, 16 May 2013, C-228/11, *Melzer*, para. 27; ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 32; ECJ, 7 March 1995, *Shevill*, para. 20-21; ECJ, 25 October 2011, C-509/09 and C-161/10, *eDate*, para. 41.

[20] ECJ, 16 January 2014, C-45/13, *Kainz*, para. 30-31; ECJ, 19 September 1995, C-364/93, *Marinari*; ECJ, 10 June 2004, *Kronhofer*.

[21] T. BALLARINO, Azioni di diritto privato per il risarcimento di danni da inquinamento transfrontaliero, *RDI* 1990, p. 849-873.

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III. The Expansion of the Ubiquity Principle. The *Mines de Potasse* Decision in other Legal Areas

A. Damage Arising out of Products

The manufacturing of a product harmful for persons or property can be regarded as the causal event of the damage that occurs at a later stage. Sure enough, the manufacturing of a harmful product is the "direct cause of the harm".[22] The ECJ stresses that where damage is caused by a defective product, the place of the causal event should be located "where the harmful event occurred" and "*with regard to product liability (...), the place where the event which damaged the product itself occurred (...) is, in principle, the place where the product in question was manufactured*".[23] The place where the product is marketed or distributed is not relevant and must not be regarded as the place of the "causal fact". Indeed, the cause of the damage arises where the product has been manufactured and because of its incorrect manufacturing. Moreover, the place where the product is purchased may be a country other than the one where the victim has his or her domicile.[24]

The case is different when a person or property is harmed by a product or device such as a weapon, a piece of glass, a drug, or any other object where liability does not fall upon the maker of the product, but upon the person who directly causes the damage. In such a case, if the object was manufactured in a country Z and used to cause damage in a Member State W, the place of the causal event is not Z (*i.e.* the place where the product was made) but W (*i.e.* the place where the object was used to cause damage). For instance, if someone injures another person in Spain with a knife made in Poland, the place of the causal event is Spain, not Poland.

B. Damage Caused to a Company by its Manager

The ECJ has deemed that the place of the causal event is the place where the administrator of the company carries out his or her tasks and duties as manager. The place of the damage is where the damage to the company occurred, *i.e.* where the damage alleged by the company actually manifested itself.[25]

C. Damage Committed through Means of Distance Communication

In the event of unlawful acts committed through means of distance communication, such as television, newspapers, radio, or internet, the place of the causal event

[22] S. FULLI-LEMAIRE (note 1), at 99-122.

[23] ECJ, 16 January 2014, C-45/13, *Kainz*, para. 27-28.

[24] ECJ, 16 January 2014, C-45/13, *Kainz*, para. 31.

[25] ECJ, 10 September 2015, C-47/14, *Ferho*, para. 76.

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must be identified as that where a person entered the information via distance communication. A number of subrules may help to understand this statement.

1. Defamation by the Written Press

The ECJ has considered that, when libel has been committed, the place of the event giving rise to the damage "can only be the place where the publisher of the newspaper in question is established since that is the place where the harmful event originated and from which the libel was issued and put into circulation". This is the place where the content is entered, *i.e.* the place of the "causal fact".[26] As a consequence, the court of the place where the publisher of the defamatory publication is established has jurisdiction to hear the action in tort for all damage caused worldwide by the unlawful act.

In these matters, the "place of the damage" is where two circumstances cumulatively occur: (a) It must be a place in which the physical publication has been distributed; (b) In addition to that, it must be a place where the victim is known, where he or she has a reputation.[27] In cases involving the written press, it is easy to identify the country or countries in which the physical publication has been disseminated. It is also straightforward to quantify the number of copies of the newspaper distributed and sold in each country. In brief, in the ECJ's view, the damage occurs in the places where the publication is distributed as long as the victim is known in those places. The courts of each Member 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 damage caused in that State to the victim's reputation. In the event of the publication having several places of distribution, the so-called "mosaic rule" arises. In any event, the plaintiff always has the option of bringing the entire claim either before the courts of the defendant's domicile or of the place where the publisher of the defamatory publication is established, as the place of the event giving rise to the damage.

2. Infringement of Intellectual and Industrial Property Rights

Where intellectual and industrial property rights are infringed over the internet, the causal event is not "*the display of advertising itself*", but rather "*the activation by the advertiser of the technical process displaying (...) the advertisement which it created for its own commercial communications"*.[28] The causal event is "*the activation of the process for the technical display*" of the material on a website. The event giving rise to a possible infringement of copyright and trademarks and other IP rights, "*lies in the actions of the owner of that site*".[29] Therefore, the place

[26] ECJ, 7 March 1995, *Shevill*, para. 24; ECJ, 25 October 2011, C-509/09 and C-161/10, *eDate*, para. 52.

[27] ECJ, 7 March 1995, *Shevill*, para. 29.

[28] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 34.

[29] ECJ, 22 January 2015, C-441/13, *Hejduk*, para. 24.

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of the causal event should be located where the decision to put the material online was taken and executed on a particular website. For the purposes of Art. 7(2) Brussels I, the physical place where the advertising is stored – the place of the server – is not relevant;[30] the location of the server is uncertain, and thus it cannot be regarded as the place of the causal event. Normally, the place where the decision to upload the contents was taken and executed on a particular website coincides with the place where the company – the alleged wrongdoer – has its seat.[31] This ground of jurisdiction also operates when the plaintiff is the person liable for an illegal copy or any other unlawful act with regard to IP rights. That is to say, this ground of jurisdiction may be invoked by the alleged tortfeasor of an unlawful act in order to obtain a statement of his non-liability on the issue ("negative declaration"/ *accertamento negativo*).[32] This means that, on the internet, neither the "place of publication" nor the "place of distribution" of these materials can be regarded as the place of the "causal fact" in the event of an alleged IP infringement.

As for the place of damage, the ECJ has provided different rules depending on the type of case under consideration.

1) Damage to IP rights subject to public registration (trademarks and others). The "place of damage" is the Member State in which the trademark or IP right is legally registered and protected.[33] The courts of that Member State have jurisdiction to hear the action for damages for all the harm caused by the unlawful act to the owner of the IP right worldwide. Art. 7(2) Brussels I, contrarily to what is established in Art. 17(1)(c) Brussels I, does not require that the activity in question target a particular Member State in order to activate the place of the damage as a ground of jurisdiction. The ECJ thus rejects the so-called "directed activities theory" (*focalisation*) with regard to Art. 7(2) Brussels I.[34]

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[30] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 36.

[31] *Vid*. O. CACHARD, Case note, Cour de Cassation, 9 December 2003, *Castellblanch*, *RCDIP* 2004, p. 633-644. French *Cour de cassation*, 9 December 2003, *Castellblanch*: "*.... qu'en admettant la compétence des juridictions françaises pour connaître de la prévention et de la réparation de dommages subis en France du fait de l'exploitation d'un site internet en Espagne, la cour d'appel qui a constaté que ce site, fût-il passif, était accessible sur le territoire français*", available at <http://www.legifrance.gouv.fr>; L. KARBANOVÁ, *Lex Loci Damni Infecti* – Applicability to Non-Contractual Obligations in Cyberspace in the Jurisprudence of French Courts, *Masaryk University Journal of Law and Technology* 2014, p. 48-56; J. SUQUET CAPDEVILA, Internet, marcas y competencia judicial internacional: ¿o la superación de la regla *Lex Loci Delicti Commissi*? A propósito de la Sent. de la Cour de Cassation de 9 diciembre 2003, *Diario La Ley*, 30 July 2004, No. 6073.

[32] Judgment by the Italian *Corte di Cassazione* rendered on 10 September 2013, *RDIPP* 2014, p. 647-653.

[33] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 25; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 33, 35, 37.

[34] ECJ, 22 January 2015, C-441/13, *Hejduk*, para. 32-33; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 42; ECJ, 25 October 2011, C-509/09 and C-161/10, *eDate*, para. 46.

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2) Damage to copyright. In the vast majority of legal systems, copyright does not require registration in a public registry to exist *per se*. Normally, copyright exists from the very moment of the creation of the work and by the mere fact of its creation. It is true that copyright is subject to the principle of territoriality. However, copyrights are automatically protected, in particular by virtue of Directive 2001/29 and a number of international conventions, in all Member States; thus, a copyright may be infringed in each Member State. For the purposes of Art. 7(2) Brussels I, the mere possibility of obtaining, via a website which is accessible in a Member State, a reproduction of a work is in itself a copyright infringement, since the law of that State automatically protects the work from the very moment of its creation.[35]

The court seized only has jurisdiction to determine the damage caused within the Member State in which it is situated. In other words, should the material that infringes copyright be accessible via a website in a given State, damage to copyright exists in that State. The courts of the Member State where the material protected by copyright is accessible have jurisdiction to hear the case *ex* Art. 7(2) Brussels I because these are the courts of the "place of damage".[36]

With regard to damage to IP rights over the Internet, some further remarks are necessary.

1) The *eDate/ Olivier Martinez* case does not operate in respect of damage occurring over the internet to rights other than "rights relating to personality". Where IP rights are harmed, the lawsuit cannot be filed for the damage occurring globally before the court where the alleged victim has his or her "centre of interests" (Art. 7(2) Brussels I) as the "place of the harmful event".
2) Where personality rights are harmed over the internet, it is agreed that such rights are protected in all the Member States. On the contrary, with regard to damage arising from the infringement of trademarks, patents, databases, etc., these IP rights are protected exclusively in the State where they have been registered. Consequently, IP rights can only be infringed in the Member States of registration. The ECJ stresses that the protection afforded by the registration of a national brand and other IP rights is, in principle, limited to the territory of the Member State in which it is registered, and thus the owner cannot rely on that protection outside its territory.[37] The ECJ considers that the courts of the Member State of registration are best placed to assess whether the protected IP rights have been infringed in a given situation. These courts furthermore have the power to determine any damage which has allegedly been caused to the beneficiary of the IP rights and to hear an application seeking cessation of such infringement.[38]
3) In ECJ, 18 October 2012, C-173/11, *Football Dataco*, the approach taken by the ECJ was slightly different. In this case, the ECJ considered that the

[35] ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 44.

[36] M. GRÜNBERGER (note 1), at 56-65.

[37] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 25.

[38] ECJ, 19 April 2012, C-523/10, *Wintersteiger*, para. 28-29.

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harmful event took place in the Member State which the wrongdoer intended to target. In this case the ECJ followed the "*focalisation* theory".

4) Where litigation is brought for infringement of copyright, the ECJ has specified that the court seized may hear the case *ex* Art. 7(2) Brussels I only with respect to damage caused in its own territory.[39]

3. Damage to Personality Rights on the Internet

The determination of the "place of the damage" in cases of infringement of personality rights over the internet requires a special solution. According to the ECJ's case law, in these cases the "place of the damage" occurs in two places.[40]

Firstly, the damage occurs in the Member State in which the victim has his or her "centre of interests". That State is normally the State of the victim's "habitual residence". Nevertheless, the victim's "centre of interests" could also be in another country, such as the country in which the alleged victim carries out his or her professional activities. The alleged victim may bring legal proceedings before the court of the Member State where his or her "centre of interests" is located and may claim any damage suffered globally. The victim's centre of interests is the place that represents the bulk of the damage, the place where the most relevant damage has occurred.

Secondly, the place of the damage can also be in the State or States where the content published on the internet is or has been accessible. The courts of each State have jurisdiction only to deal with liability arising from the damage caused in the territory of that Member State.[41]

D. Damages Arising from Infringement of Competition Law

In the case of cartel damage, the place of the causal fact is the place where the cartel was established, *i.e.* "*the place of the conclusion of the cartel*". Where the place of a cartel's conclusion is known, no additional problems arise. However, sometimes it is not possible to identify a single place where the cartel was concluded. This happens when the cartel consists of a number of collusive agreements concluded during various meetings and discussions which took place in different countries. In such a case, when there is one agreement in particular which was the sole causal event giving rise to the loss allegedly inflicted on a buyer, the place of the causal event is to be identified with the State in whose jurisdiction that particular agreement was concluded.[42] In the event that there is no single causal event giving rise to the loss, the place of the damage is identifiable only for each alleged

[39] ECJ, 22 January 2015, C-441/13, *Hejduk*, para. 36-37.

[40] J. CARRASCOSA GONZÁLEZ, The Internet – Privacy and rights relating to personality, *Recueil des Cours* 2016, p. 261-486; E. TORRALBA MENDIOLA (note 1).

[41] ECJ, 25 October 2011, C-509/09 and C-161/10, *eDate*, para. 48 and 51; ECJ, 3 October 2013, C-170/12, *Pinckney*, para. 36.

[42] ECJ, 21 May 2015, C-352/13, *Cartel Damage Claims*, para. 44-50.

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victim on an individual basis and is located, in general, at that victim's registered office.

E. Damage Arising from False Drafting of a Contract and from Compromise Agreements

In the decision, 16 June 2016, C-12/15, *Universal Music International Holding vs. Michael Tétreault Schilling*, the ECJ was faced with the identification of the "place where the harmful event occurred" where the damage consisted exclusively of financial damage which was the direct result of unlawful conduct occurred in another Member State. According to the facts, a contract that had been negotiated and signed in the Czech Republic between B&M and its shareholders, on the one hand, and Universal Music, on the other hand, and entered into force on 5 November 1998. The rights and obligations of the parties as established under the contract, included the obligation on the part of Universal Music to pay a greater amount than originally provided for the remaining 30% of shares. Such contractual obligation, which the parties to the contract did not intend to create, arose in the Czech Republic due to the negligence of the lawyer who drafted the contract. Needless to say, the place of the damage was the Czech Republic, the contract having been signed there. The fact that, to implement the settlement agreed before the arbitration board in the Czech Republic, Universal Music transferred money from a bank account it held in the Netherlands, was entirely irrelevant with regard to the determination of the place of the damage. It is an indirect damage, which cannot be taken in consideration as the place of the damage.[43]

When a lawyer drafts a contract in a way that does not match the intentions of one of the parties, damages to third parties may occur. The place of the causal act is located in the country where the contract was drawn up. The place of the damage materializes in the country where the economic loss concretizes. Thus, in the above case, the damage took place in the Czech Republic – *i.e.* the country where the contract was drawn up – and materialized in the country where the damaged party assumed the obligation to pay an amount derived from the terms of an improperly drawn-up contract. The place of the damage is to be located in the Member State where the parties reached a compromise agreement before an arbitral court, which also happened to be the Czech Republic. Indeed, Universal Music could have chosen any other bank in any other country in the world to proceed with the money transfer. That is why it is not appropriate to consider that the damage occurred in the country where the bank account involved in the operation was located.

[43] ECJ, 16 June 2016, C-12/15, *Universal Music*, para. 32.

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F. Pre-Contractual Liability

Where pre-contractual liability is concerned, the damage occurs in the place where the contract was to be executed, if such a place can be determined. This approach was taken by the Italian *Corte di Cassazione*.[44]

G. Financial Damage

A whole range of practices in financial markets is referred to under the name of "financial wrongdoing" or "financial damage". Hell is empty and all the devils are here. The intention of such practices is to alter the transparent play of that market, the supply and demand of financial products, and to devalue a person's assets.[45] These financial damages include insider trading (*délit d'initié*), falsification of investment information brochures, market abuse, market manipulation, etc. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on market abuse describes in detail all such acts.[46]

Financial damage involves criminal and administrative sanctions, but also civil liability. In the vast majority of cases, in fact, there is no contract between the frustrated investor or victim of financial damage and the person whose liability is claimed. The legal relationship between these two parties should be considered as that of liability arising out of tort.[47] Most "financial damage" actually results from acts of disinformation, forgery, misappropriation of property and general acts of deception carried out by financial advisors, depositories or other intermediaries, without which the investor may not have concluded any contract.

Where the causal event and the financial damage have occurred in different Member States, the claimant may opt to submit his or her claim either before the courts of the Member State in which the event giving rise to damage took place or before the courts of the Member State where the financial damage occurred.

The place of the causal event must be located in the country where the investor's capital is spent by the holding company, the management company, or any other person, in order to purchase financial instruments or shares.[48]

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[44] *Ordinanza* rendered by the Italian *Corte di Cassazione* on 17 December 2007, *RDIPP* 2008, p. 445.

[45] A. TENENBAUM (note 1), at 45-60; M. LEHMANN, Where does economic loss occur?, *Journal of Private International Law* 2011, p. 527-550; M. LEHMANN, Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers, *RCDIP* 2012, p. 485-519; M. LEHMANN, Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte, *IPRax* 2012, p. 399-405; A.-L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, Los daños financieros transfronterizos, *Revista de Derecho Mercantil* 2014, p. 51-70.

[46] *OJ*, L 096, 12 April 2003.

[47] ECJ, 19 September 1995, *Marinari*; ECJ, 27 September 1988, *Kalfelis*; EJC, 22 March 1983, *Peters*; ECJ, 26 March 1992, *Reichert;* ECJ, 27 October 1998, *Réunion Européenne*; ECJ, 11 July 2002, *Rudolf Gabriel*; ECJ, 17 September 2002, *Tacconi*.

[48] S. CORNELOUP, Case note, Cour de Cassation, 7 January 2014 (financial damage and SICAV), *RCDIP* 2014, p. 432-445.

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Furthermore, where it is alleged that false information has been produced in an investment brochure, the place of the causal act is to be located in the State where these brochures have been drafted and initially distributed, which is usually the State of the registered office of the bank or entity.[49]

The place of financial damage (*lieu du préjudice financier*) is where the sum of money has been placed at the disposal of the bank or holding company for the investment to be managed (*lieu de la partie du patrimoine endommagée*). It is there that the capital is spent on investing in other markets and countries. This is the place where the capital is lost, the place where the decrease of the assets takes place. In sum, with regard to the materialization of the damage, this occurs in the place where the investor has suffered his or her loss of capital.[50]

IV. Beyond the *Mines de Potasse* Decision. *Favor Actoris* and Economic Foundation of the Ubiquity Principle

The ubiquity principle established by the ECJ in the *Mines de potasse d'Alsace* decision has been justified by the ECJ itself on the grounds of proximity and the sound administration of justice. The ECJ holds, as mentioned above, that both Member States – the State where the damage occurs and the State where the causal act takes place – are connected with the litigation to the same extent. Thus, as the ECJ points out, the cost of litigation before the courts of the State of origin is equal or at least equivalent to the cost of litigation before the courts of the Member State of the damage. However, such calculation is questionable. For the large part, litigation before the courts of the place of the causal act is more expensive than litigation before the courts of the place of the damage.

Indeed, Art. 7(2) Brussels I should be construed as conferring international jurisdiction exclusively on the courts of the Member State where the damage occurred and not on the courts of the place of the causal event. The ubiquity principle forged by the ECJ responds to an economic foundation only insofar as it confers international jurisdiction on the courts of the place of the damage, not when it activates the place of the causal event as a ground of jurisdiction. This preference for the place of the damage is based on solid arguments.

Firstly, litigation in the courts of the Member State where the damage occurred has the lowest litigation costs for both parties.

On the one hand, and from the point of view of the alleged wrongdoer, it must be stressed that he or she is aware that he or she is acting internationally. The offender knows that, whatever may be the country from which he or she has acted, such activities can produce an impact in other countries. Therefore, the tortfeasor has already taken into account the possibility of being sued in the countries where

[49] ECJ, 28 January 2015, C-375/13, *Kolassa*, para. 53.

[50] ECJ, 28 January 2015, C-375/13, *Kolassa*, para. 52-53.

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the damage may occur. The court of the Member State where the damage occurs is a "foreseeable" court from the alleged offender's point of view.

On the other hand, where a distance tort is committed, and from the point of view of the victim, the latter will usually suffer damage in the country where he or she has his or her habitual residence. The victim will sue in that country, that is, the victim will sue "at home". For the latter, litigation at home reduces any relevant costs.

In conclusion, the cost that both parties must face for litigation in the country where the damage occurred is, for the large part, the lowest possible cost. Litigation before the courts of any other State, including the courts of the Member State in which the causal act took place, is always more expensive for both parties. Indeed, a judicial process in the Member State in which the "act giving rise to the damage" occurred may mean, for the victim, having to litigate before the courts of a totally unpredictable State. Hence, litigation in the country where the causal act is produced is very economical for the offender but very expensive for the victim, whereas litigation in the country where the damage has occurred is very economical for the victim and relatively inexpensive for the offender. In truth, as indicated above, the offender has consciously and intentionally extended the effects of his or her activities to different countries and thus should have been aware of the possibility of being sued in those countries. Accordingly, the place of the damage operates as an economic ground of international jurisdiction inasmuch as it saves on costs for both parties.

Secondly, the "place of the act giving rise to the damage" usually coincides with the place of the defendant's domicile. It is known that, according to Art. 4 Brussels I, the courts of the Member State where the defendant is domiciled have jurisdiction. Consequently, the forum of the place of the causal event is often useless. The plaintiff is normally the victim. For the victim to bring an action before the courts of the Member State where he or she suffered the damage is more economical than to file a claim before the courts of the Member State where the offender is domiciled. Suing at home is always less expensive than suing abroad.

Thirdly, in cases of extracontractual liability, the conduct of the alleged wrongdoer is not as relevant as the resulting damage. This is not criminal law. This is civil law, and in civil law is it generally accepted that there is no liability without damage. What entails liability is not specific conduct, but the damage caused to a victim. Therefore, the rules of international jurisdiction should be determined bearing in mind the place of the damage instead of the place of conduct. The damage is the key element that both parties keep in mind when dealing with disputes arising out of tort.

Fourthly, the law of civil liability tends to be, increasingly, a system of strict liability. Under strict liability, the fact that the damage occurred is the only relevant element. The conduct that produced the damage becomes irrelevant. The place of the conduct has a lesser legal impact compared to the place of the damage, both in civil law and in private international law (see Recital n. 16 of the Rome II Regulation [Law applicable to extracontractual obligations]).[51] In the field of

[51] Recital 16 of the Rome II Regulation: "*Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection*

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applicable law, it is the place of the damage and not the place of the conduct which is the element that the parties have in mind when dealing with disputes arising out of tort.

Fifthly, from the perspective of the sound administration of justice, the place of the damage appears to be the most appropriate ground for international jurisdiction. Indeed, the courts of the Member State in which the damage occurred will apply, in many cases, their own substantive law. This is the so-called *lex damni*, since this is the general rule followed by the Rome II Regulation, *i.e.* the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and of the country or countries in which the indirect consequences of that event occur. The unity between jurisdiction (*forum*) and applicable law (*ius*) would simplify the application of European private international law. On the other hand, the place of the damage is where most of the relevant evidence must be gathered in order to decide on the offender's liability.

Sixthly, Art. 7(2) Brussels I refers to the "*courts for the place where the harmful event occurred or may occur*". It seems convenient to enhance legal certainty using a non-expansive interpretation of this legal provision that would also respect the central role of the defendant's domicile as the main ground for international jurisdiction under Brussels I. Avoiding, as far as possible, a multiplicity of grounds of international jurisdiction with regard to the same damage appears to be an apt solution. Interpreting Art. 7(2) Brussels I as a provision leaving open the possibility of two different courts of two different Member States fits neither the letter nor the spirit of the article.[52]

Forty years later, it should probably be admitted that the Advocate-General of the *Mines de potasse* case, Mr CAPOTORTI, was right. Today's Art. 7(2) Brussels I should confer international jurisdiction on the court of the Member State that corresponds to the "place of the damage". This is the best forum, the most economic ground for both parties and for the sound administration of justice in the European Union's area of freedom, security and justice. However, more than forty years later, the ECJ remains faithful to its own theory, *i.e.* the "double place of the harmful event", the sacred ubiquity principle. Nevertheless and after all, the *Mines de potasse* approach is an elegant theory because it is very well balanced. Indeed, the ubiquity principle grants jurisdiction to the courts of the Member State where the event giving rise to the damage occurred as well to the courts of the Member State corresponding to the place of the damage. It likewise corresponds to a diplomatic solution: jurisdiction is awarded to the two involved Member States. Moreover, it is a very wide and general approach that allows the courts to effectively handle the very distinctive features of the different types of torts that may emerge. Therefore, even if it is not perfect, the ubiquity principle also has its

*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*".

[52] A. SARAVALLE (note 1), at 331-340.

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advantages. Fortune brings in some boats that are not steered and, in the end, the ECJ's loyalty to its own theory looks to be a romantic loyalty and there is nothing more beautiful than love...

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FOREIGN SAME-SEX MARRIAGES BEFORE COMMONWEALTH AFRICAN COURTS

Richard Frimpong OPPONG* / Solomon AMOATENG**

I. Introduction
II. The Concept of "Marriage" in African Legal Systems
III. Positive Public Policy and Constitutional Values
IV. Lessons from the Law on Recognition of Foreign Polygamous Marriages
V. Exercising Divorce Jurisdiction
VI. Conclusion

I. Introduction

There is no gainsaying that the sociocultural and legal definition of the concept of family is rapidly shifting – with significant implications, especially for individuals. Whether considered to be an evolution or revolution, the landscape of family law in many countries has changed profoundly during the past few decades. We live in the era of the modern family or new family forms, and restrictive legal notions of family are being challenged.[1] One area where this has been the case is same-sex marriage.

In many Western countries, laws have been enacted to regulate same-sex marriage.[2] In June 2015 the US Supreme Court in *Obergefell v Hodges*[3] decided

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[1] M.L. SHANLEY, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents' Rights*, Boston 2001, p. 1.

[2] K. BOELE-WOELKI/ A. FUCHS (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives*, 2nd edn., Cambridge 2012; D. GALLO *et al*. (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Heidelberg 2014; R. WINTEMUTE/ M. ANDENAS (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National*, *European and International Law*, Oxford 2001; M. MOSCATI, *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective*, London 2014; M. BAILEY, Same-Sex Relationships Across Borders, (2003-4) 49 *McGill Law Journal* 1005.

[3] 135 S. Ct. 2584 (2015).

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 39-60
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Printed in Germany

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that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage has been lawfully licensed and performed out-of-State. In June 2017, the German Parliament, the Bundestag, voted to legalize same-sex marriage. In Commonwealth Africa[4] (hereafter Africa), the issue of same-sex marriage has been entangled in socio-political controversy, ambiguities in governmental policy, legal uncertainty, and some level of academic neglect.[5] But it remains a live issue.

One aspect of the debate that has so far been neglected in academic discourse are the private international law issues generated by same-sex marriage. While a few writers have touched the issue,[6] there appears to be no comprehensive treatment of the subject. This paper attempts to fill part of the void. The paper is informed by the reality that several countries around the world now formally permit marriage between persons of the same sex. With the growth of international migration, it is only a matter of time before African courts may be confronted with the issue of how to treat such marriages. The courts would be expected to apply the rules of private international law to questions such as the validity of such marriages and whether they should be recognised for any purpose within their respective legal systems.

This paper provides a broad, but critical discussion of the current state of affairs in respect of the recognition of *foreign* same-sex marriage[7] and related private international law issues in Africa. The paper observes that in most African countries, the law is often silent on the issues in this area, the courts have not

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[4] The countries included under this umbrella are Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Cameroon, Mauritius, Mozambique, Rwanda, Seychelles are also part of the Commonwealth but are not examined in this paper. Gambia and Zimbabwe are currently not members of the Commonwealth but are included in this study.

[5] See generally P. KYALO, A Reflection on the African Traditional Values of Marriage and Sexuality, (2012) 1 *International Journal of Academic Research in Progressive Education and Development*; O.A. ODIASE-ALEGIMENLEN/ J. OSAMAGIAGIEMWEN GARUBA, Same-sex Marriage: Nigeria at the Middle of Western Politics, (2014) 3 *Oromia Law Journal* 260; F. OLANREWAJU/ F. CHIDOZIE/ A. OLANREWAJU, International Politics of Gay Rights and Nigeria-US Diplomatic Relations, (2015) 11 *European Scientific Journal* 504.

[6] See *e.g.* R.F. OPPONG, *Private International Law in Commonwealth Africa*, Cambridge 2013, p. 182-183; C. FORSYTH, *Private International Law – The Modern Roman Dutch Law including the Jurisdiction of the High Court*, 5th edn., Cape Town 2012, p. 296, 300-303; C. SCHULZE, Conflict of Laws, in J. HEATON (ed.), *The Law of Divorce and Dissolution of Life Partnerships in South Africa*, Cape Town 2015, p. 659-661.

[7] Although this paper uses the concept "same-sex marriage", it is worth pointing out that same-sex relationships are differently named and conceived under different legal systems, and concepts such as "civil unions", "civil partnerships", "registered partnerships" are used. There is also the situation of persons who are not married, but live in a marriage-like relationship and, under some national laws, are treated as spouses. See *e.g.* s. 3(1)(b) of British Columbia's Family Law Act, SBC 2011 c 25. In future, these will raise complex issues of characterization for African courts.

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authoritatively pronounced on them, and scholars have not systematically studied them. The issue of recognition is, however, important given its implications for other subjects such as jurisdiction, succession, re-marriage, and adoption. The paper argues that constitutional law, public policy, and the common law's historical willingness to recognize polygamous marriages for defined purposes could serve as a basis for recognizing foreign same-sex marriages, even if for limited purposes.

This paper is organised as follows. Following this introduction, section two examines the nature of marriage in African legal systems. It examines how marriage has been defined in African countries and whether the existing definitions may be extended to same-sex marriages and, if so, how such definitions may apply to same-sex marriages. In section three, the paper examines whether public policy could be positively invoked to recognise foreign same-sex marriage as opposed to negatively invoked to deny recognition to such marriages. Section four examines the evolution of the common law jurisprudence on the recognition of foreign polygamous marriages and whether any lessons could be drawn in deciding cases involving the recognition of foreign same-sex marriages. It is suggested in that discussion that the case-by-case approach ultimately adopted by the common law may be suitable in the foreign same-sex marriage context. Section five focuses on divorce jurisdiction in respect of foreign same-sex marriage to further examine some of the themes earlier discussed in the paper. It surveys the existing matrimonial jurisdiction of African courts and examines the prospect of using the existing regimes to grant divorce in respect of foreign same-sex marriages. Section six provides the conclusion to the paper.

II. The Concept of "Marriage" in African Legal Systems

Marriage, as an institution, occupies a very special place in the fabric of every society and is of profound importance for a variety of reasons, locally and internationally.[8] The questions what constitutes marriage, who can marry, when can persons be said to be married, and what status marriage confers on the persons involved are fundamental in all legal systems. In the elliptic words of one writer: "marriage matters".[9]

African legal systems are pluralistic and often comprise the following sources of law: customary law; religious law (especially Islamic law); legislation; and, as a colonial inheritance, the received law (which may be common law, Roman-Dutch law, or civil law depending on the country's colonial history).[10]

[8] *Duplan v Loubser NO* [2015] ZAGPPHC 849, at [8].

[9] J.E. BOND, Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law, (2011) 14 *Yale Human Rights and Development Journal* 1, p. 2.

[10] M. NDULO, African Customary Law, Customs, and Women's Rights, (2011) 18 *Indiana Journal of Global Legal Studies* 87, p. 87-88.

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Accordingly, in most African legal systems there are different forms or methods of celebrating marriage, such as civil marriages, customary marriages and Islamic marriages. These different forms of marriage may also come with their own incidents; for example, while civil marriages tend to be monogamous, customary marriages may be polygamous.

Although it is not a purely private international law issue, the question "what is a marriage" often raises significant private international law problems. Marriage relates to a person's status and a number of private international law determinations are founded on the status of being married. The entitlements, benefits, and obligations that arise from the status of being married often give rise to private international law problems.

In some African countries, marriage has been statutorily defined as "the voluntary union of a man and a woman intended to last for their joint lives".[11] In Kenya, marriage is defined as "the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act".[12] Students of the common law would recall that these statutory definitions of marriage have their roots in Lord PENZANCE's statement in *Hyde v Hyde and Woodmansee* that "marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others".[13] This common law definition of marriage has been elevated to a constitutional or statutory rule in a number of African countries. For example, Article 45(2) of the Constitution of Kenya, 2010 gives every adult "the right to marry a person of the opposite sex, based on the free consent of the parties". This provision may be interpreted as denying persons of the same sex "the right to marry" in Kenya. Under Article 31(2a) of the Constitution of Uganda, 1995, "marriage between persons of the same sex is prohibited".[14] Similarly, section 14 of Malawi's recently enacted Marriage, Divorce and Family Relations Act, 2015 limits the right to marry to "two persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind".

In many other African countries, marriage is not expressly defined by legislation. However, it can be argued that on a purposive interpretation of the relevant statutes, they envisage only relationships between a man and a woman.[15]

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[11] See *e.g.* Sierra Leone: Matrimonial Causes Act, 1950, s. 2; Tanzania: Law of Marriage Act, 1971, s. 9(1).

[12] Marriage Act, 2014, s. 3(1).

[13] (1866) LR 1 P & D 130. See generally R. PROBERT, *Hyde v Hyde*: Defining or Defending Marriage, (2007) 19 *Child & Fam L Q* 322.

[14] This provision was introduced by a 2005 amendment to the Constitution. See Constitution (Amendment) Act, 2005, s. 10(b).

[15] See *e.g.* Botswana: Marriage Act, 2001; Gambia: Civil Marriage Act, 1938, Christian Marriage Act, 1862 and Muslim Marriage and Divorce Act, 1941; Ghana: Marriages Act, 1884; Kenya: Marriage Act, 1902; Nigeria: Marriage Act, 1990; Uganda: Marriage Act, 1904; Zambia: Marriage Act, 1918; Zimbabwe: Marriage Act, 1964. When celebrating a marriage under many of these Acts the celebrating official is expected to declare and announce the parties as "man and wife". It is submitted that this would be interpreted to mean only marriages between a man and woman are contemplated.

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The only exception to the preceding is South Africa which allows for civil unions, defined as "the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others".[16]

The restriction of the statutory definitions of marriage to a relationship between a man and a woman raises significant challenges for the recognition of foreign celebrated same-sex marriages in these countries. This is because the characterisation of such unions is for the *lex fori*, and, accordingly, such unions are unlikely to be treated as marriages in these legal systems. Some Southern African legal systems such as Lesotho, South Africa, and Zimbabwe have expressed a preference for the *via media* approach to characterisation. This approach eschews sole reliance on the *lex fori*,[17] and indeed allows judges the freedom "to depart from categories created by the *lex fori*".[18] Considerations of policy, the need for international harmony of decisions, and justice are all essential features of the *via media* approach. The *via media* approach certainly allows courts to exercise judicial discretion in relation to choice of law, taking into account the consequences of deciding a case one way or the other. The approach provides a means through which differences in the law between the *lex fori* and the *lex causae* might be reconciled. However, in the absence of a similar domestic institution to same-sex marriage, and faced with explicit domestic legislation restricting marriage to a union between a man and a woman, it is doubtful whether the flexibility provided by the *via media* approach would be enough to enable a judge recognize a foreign same-sex marriage validly created abroad.

As noted above, African legal systems are pluralist, with customary law as one of the key sources of law. It is in the customary laws of a few African communities that one witnesses a deviation from the statutory and common law restrictive definition of marriage as a "union between "a man and woman". The customary institution of woman-to-woman marriage exists in communities in a few African countries,[19] but its functions vary from society to society.[20] Woman-to-woman marriage refers to a woman who takes on the legal and social roles of husband and father by marrying another woman in accordance with the approved rules and ceremonies of her society.[21] Writing on societies in eastern and southern Africa,

[16] South Africa: Civil Union Act, 2006, s. 1.

[17] C. FORSYTH (note 6), at 84-90; R.F. OPPONG (note 6), at 4-7.

[18] C. FORSYTH (note 6), at 88.

[19] See generally B. GREENE, The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis, (1998) 37 *Ethnology* 395; R.J. CADIGAN, Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa, (1998) 29 *Journal of Comparative Family Studies* 89; B. OOMEN, Traditional Woman-to-Woman Marriages, and the Recognition of Customary Marriages Act, (2000) 63 *Journal of Contemporary Roman-Dutch Law* 274.

[20] See R.S. OBOLER, Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya, (1980) 19:1 *Ethnology* 69.

[21] H. KATAKAMI, Female Husbands and the House-property Complex: Re-examination of the two guiding concepts in the literature on Woman-marriage, (1998) 52 *Journal of African Studies* 51.

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KATAKAMI distinguishes between two types of female husbands. The first is a surrogate female husband who acts as a substitute for a male kinsman in order to provide offspring for the latter's agnatic lineage. The second is an autonomous female husband who marries independently, without reference to male kin and who is always a pater to children born by her wife or wives.[22]

The institution of woman-to-woman marriage exists among the Nandi and Kikuyu communities in Kenya. In describing the institution as it relates to the Nandi people, COTRAN observed "a woman past the age of [among the Nandi and Kipsigis] child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband".[23] The institution of woman-to-woman marriage also exists among the Lovedu tribe in South Africa.[24] In Nigeria, the Supreme Court has held that where a "woman-to-woman" marriage is not a marriage between two women, but involves a situation in which one woman, due to the fact that she was barren, had procured another woman for her husband as a wife, such arrangement is not contrary to public policy.[25] In the instance case, the court accepted as a valid custom that if a woman has no child she can marry another woman for her husband; any child from the said married woman would be regarded as a child from the woman who married her for the purpose of representation in respect of estates and inheritance.

As noted above, an essential purpose of woman-to-woman marriage is to provide an heir and this has given rise to litigation in recent times in Kenya. In *the Matter of the Estate of Cherotich Kimong'ony Kibserea (Deceased)*, the Kenya High Court found the existence of a woman-to-woman marriage between the petitioner and the deceased under the Nandi custom. The court held that the petitioner was a "wife", and that by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance right, prior to anyone else.[26] In *Eliud Maina Mwangi v Margaret Wanjiru Gachangi*,[27] Kenya's

[22] *Ibid*.

[23] E. COTRAN, *The Law of Marriage and Divorce*, Vol. 1, London 1968, p. 117.

[24] E.J. KRIGE, Woman-Marriage, With Special Reference to the Lovedu-Its Significance for the Definition of Marriage, (1974) 44 *Journal of the International African Institute* 11.

[25] *Meribe v Egwu* (1976) 1 ALL NLR 266. See generally C.O. AKPAMGBO, A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, (1977) 9 *The Journal of Legal Pluralism and Unofficial Law* 87; C.G. NNONA, Woman to Woman Marriage and Cognates in Nigerian Law: An Easy Coalition between Customary Law and Human Rights, (2017) 43 *Commonwealth Law Bulletin* [forthcoming].

[26] In *The Matter of the Estate of Cherotich Kimong'ony Kibserea (Deceased)*, Succession Cause No. 212 of 2010 (High Court of Kenya, 2011).

[27] [2013] eKLR.

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Court of Appeal overturned a decision of the High Court, which held that the respondent was the wife of the deceased. In the opinion of the court, the marriage did not satisfy the essential requirements of the Kikuyu customary law under which the marriage was purported to have been celebrated. In *Millicent Njeri Mbugua v Alice Wambui Wainaina,* Justice MAKHANDIA observed that for a woman-to-woman marriage to be valid, the husband of the woman marrying another must have died; the woman marrying must have been left childless by her deceased husband; she must be past child bearing; the said woman or widow must pay *ruracio* to the family of the woman she is marrying; and she must subsequently arrange for a man from her deceased husband's age group to have intercourse with her wife.[28]

Although the customary institution of woman-to-woman marriage exists in only a few African communities, its existence provide an interesting insight that there was a variable understanding of what constitutes a marriage in Africa before colonial times. The significance of this for the debate on same-sex marriage, including the recognition of foreign same-sex marriage in Africa remains to be seen. It is, however, unlikely that a court would found a decision to recognize a foreign same-sex marriage on this unique customary institution.

The preceding discussion also raises the question whether the statutory definitions of marriage in African countries may be extended through a process of statutory interpretation to include same-sex marriage, especially in countries where the purposive approach to statutory interpretation prevails. This approach to interpretation allows for the law to be adapted to changing times and circumstances. However, this approach cannot discount the historical matrix, public opinion and other legislations within which the concept to be interpreted is situated.

In that respect, it is worth noting that opposition to same-sex relationships in Africa is founded on many complex grounds, including a mixture of religious, cultural, political and anti-colonial reasons or sentiments. These are likely to inform judicial determinations of the private international law issues arising in respect of same-sex relationships.

Interestingly, while some view same-sex relationships as "un-African", there are others who believe they existed among some indigenous African tribes. It has been argued that same-sex relationships, in one form or another, have always existed in Africa.[29] In their edited collection of essays, *Boy-Wives and Female Husbands: Studies of African Homosexuality*, MURRAY and ROSCOE present anthropological evidence showing instances of homosexuality in many parts of Africa. DAVIDSON, for example, gives an account of a 1958 visit to a Dakar boy brothel. He asserted that Dakar was the "gay" city of West Africa.[30] GAUDIO has

[28] *Millicent Njeri Mbugua v Alice Wambui Wainaina,* [2008] eKLR.

[29] See generally S.O. MURRAY/ W. ROSCOE (eds), *Boy-wives and female husbands: studies in African homosexualities*, New York 1998.

[30] See M. DAVIDSON, A 1958 Visit to a Dakar Brothel, in S.O. MURRAY/ W. ROSCOE (eds) (note 29), p. 111-113.

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also described the presence of "male lesbians and other queer notions" in some Hausa communities in Nigeria.[31]

Notwithstanding the historical accounts, some have also asserted that the normative social imperative to marry and procreate is considered fundamental in many African communities.[32] In most African communities, marriage is seen as an institution for procreation. Indeed, in some jurisdictions, infertility and sterility are grounds for divorce.[33] Admittedly, this is not a view shared by all. As was pointed out by the South African Constitutional Court in *Fourie,* limiting the State's interest in marriage to its "procreative potential" … is "deeply demeaning" to married couples who cannot or choose not to have children.[34] Such a view may also be anachronistic in the light of technological advancements that have expanded the avenues for procreation beyond male-female coital engagement.[35] Advances in reproductive medicine and technology, the entrenchment of human rights law and consciousness, globalization and migration, the secularization of marriage, and the strengthening of international legal cooperation in inter-country adoption cases are transforming the nature of the family and the process of creating families. As noted in the introduction to this paper, whether considered to be an evolution or revolution, the landscape of family law in many countries has changed profoundly during the past few decades. We live in the era of the "modern family" or "new family forms", and restrictive legal notions of family and procreation are being challenged. That said, it cannot also be denied that the issue of procreation seems to inform attitudes towards same-sex marriage in Africa.

In addition to the above historical matrix and public perceptions, existing national laws that criminalize homosexuality and/or same-sex marriage may stand in the way of judicial attempts to extend the definition of marriage to same-sex relationships.[36] In 2013, it was reported that homosexuality was illegal in thirty-five African countries, and six additional countries have banned male homosexual activity.[37] For example, in Tanzania an individual who is convicted of same-sex

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[31] See R.P. GAUDIO, Male Lesbians and other Queer Notions in Hausa, in S.O. MURRAY/ W. ROSCOE (eds) (note 29), p. 115-128.

[32] See P. KYALO, A Reflection on the African Traditional Values of Marriage and Sexuality, (2012) 1:2 *International Journal of Academic Research in Progressive Education and Development* 211, p. 211-213; E.O. AYISI, *An Introduction to the Study of African Culture*, Nairobi 1997.

[33] See Ghana: Matrimonial Causes Act, 1971, s. 41(3)(c).

[34] *Minister of Home Affairs v Fourie* 2006 (1) SA 524, at 558.

[35] M.L. SHANLEY, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents' Rights*, Boston 2001; S. GOLOMBOK, *Modern Families: Parents and Children in New Family Forms*, Cambridge 2015.

[36] In some jurisdictions such as South Africa and Canada the courts extended the definition of marriage to include same-sex marriage before legislation was enacted to affirm that position.

[37] A.J. KRETZ, From "Kill the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa, (2013) 11 *Northwestern Journal of International Human Rights* 207, p. 210.

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activity faces life imprisonment.[38] In Ghana, unnatural carnal knowledge is a criminal offence; even if it is between consenting adults.[39] While Ghana's Criminal Act does not explicitly say that homosexuality is illegal, it seems the section can be interpreted to include homosexuality. Under Kenya's Penal Code, a "person who … has carnal knowledge of any person against the order of nature … or permits a male person to have carnal knowledge of him or her against the order of nature" commits a felony, punishable on conviction by a fourteen-year prison term.[40] The phrase "against the order of nature" has been defined as "sexual intercourse or copulation between man or woman of the same-sex, or either of them with a beast".[41] Although there is no express mention of homosexuality in the Code, the courts have interpreted the phrase "against the order of nature" to imply the prohibition of homosexual activities. Early in 2014, Uganda enacted an anti-same-sex legislation,[42] but the country's Constitutional Court declared the *Anti-Homosexuality Act*, 2014 as unconstitutional.[43] There are however a number of African countries, which have not explicitly barred homosexuality by law. These include Burkina Faso, Cape Verde, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Rwanda, Madagascar, the Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Republic of the Congo, and Mozambique.[44]

In addition to criminalizing homosexual activities, same-sex marriage is legislatively prohibited in some jurisdictions. Nigeria's *Same-sex Marriage (Prohibition) Act*, 2013 prohibits a marriage contract or civil union entered into between persons of the same sex, solemnization of same, and for related matters. It expressly provides that only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.[45] In Zambia, section 27(1)(c) of the *Matrimonial Causes Act*, 2007 provides that a marriage shall be void if the parties to the marriage are of the same sex.[46] Similarly, in Burundi, under Article 29 of the Constitution, "marriage between two persons of the same sex is prohibited".

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[38] Tanzania: Sexual Offences Special Provisions Act, 1998, s. 16, which repealed and replaced s. 154 of the Penal Code.

[39] Unnatural carnal knowledge is defined as "sexual intercourse with a person in an unnatural manner or with an animal". See generally Criminal Act, 1960 (Act 29), s. 104. See also *Magaji v Nigerian Army* (2008) 8 NWLR (Pt. 1089) 338 on what constitutes unnatural carnal knowledge.

[40] Kenya: Penal Code, 1930, s. 162. As discussed below, this provision is now the subject of a pending constitutional challenge.

[41] *Ali Abdi Shabura v Republic* [2012] eKLR.

[42] Anti-Homosexuality Act, 2014.

[43] *J. Oloka-Onyango v Attorney General*, Constitutional Petition No. 8 of 2014 (Constitutional Court of Uganda, 2014). The court declared the law unconstitutional on the basis of a lack of quorum in Parliament. It did not address the many important human rights violation arguments raised by counsel for the petitioners.

[44] A.J. KRETZ (note 37), at 210.

[45] Nigeria: Same-sex Marriage (Prohibition) Act, 2013, s. 3.

[46] Zambia: Matrimonial Causes Act 2007, s. 27(1)(c).

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Currently, as noted above, South Africa is the only African country that allows the celebration of same-sex marriage. In 2006, South Africa enacted the *Civil Union Act*, 2006, after a series of judicial decisions which challenged the non-recognition of same-sex relationships.[47] The objective of the Act is to regulate the solemnization and registration of civil unions by way of either a marriage or a civil partnership, and to provide for the legal consequences of the solemnization and registration of civil unions. Article 13 of the Act provides that the legal consequences of a marriage contemplated in the *Marriage Act*, 1961[48] apply with such changes as may be required by the context of a civil union. The Act also provides that, except for the *Marriage Act* and *Customary Marriages Act*, 1998,[49] any reference to marriage in any other law includes a civil union, and husband, wife or spouse in any other law includes a civil union partner.

Most of the existing legislation dealing with same-sex relationships in Africa are "domestic" in orientation and are silent on the extent to which they may be applied to foreign celebrated same-sex marriages. Indeed, only Nigeria's *Same-sex Marriage (Prohibition) Act*, 2013 explicitly prohibits recognition of *foreign* same-sex marriage even if the marriage has been validly contracted under a foreign law.[50] It is arguable that these laws reflect domestic public policy and may inform judicial decisions relating to foreign celebrated same-sex marriages.

III. Positive Public Policy and Constitutional Values

The role of public policy in private international law is often assessed from a negative perspective, that is, it is invoked to exclude the application of foreign law, which would otherwise have applied. In the words of BLOM, "public policy intervenes to block the "normal" application of other conflicts rules in order to avoid an unacceptable derogation from values that the court sees fundamental to its own legal system".[51] In addition to its negative role, public policy can also perform a positive role, although this latter role is seldom discussed. As NEELS defines it, the positive role of public policy in private international law is the application of the *lex fori* or the law of a foreign legal system instead of the *prima facie* applicable

[47] *Minister of Home Affairs v Fourie* 2006 (1) SA 524; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1; *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999 (1) SA 6. See generally P. DE VOS, A Judicial Revolution? The Court-Led Achievement of Same-Sex Marriage in South Africa, (2008) 4 *Utrecht Law Review* 161.

[48] Act 25.

[49] Act 120.

[50] Nigeria: Same-sex Marriage (Prohibition) Act, 2013, s. 1(2).

[51] J. BLOM, Public Policy in Private International Law and its Evolution in Time, (2003) *Netherlands International Law Review* 373, p. 374.

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law, on the basis that the non-application thereof would manifestly infringe domestic public policy.[52]

Public policy plays a prominent role when it comes to national courts dealings with foreign rules of family law, perhaps more so than in any other area of law. In most instances, public policy is invoked to perform a negative role: for the purposes of this article that would be to deny recognition to foreign celebrated same-sex marriages. This leaves unanswered the question whether public policy may be invoked to perform a positive function, that is, to recognise such same-sex marriages.

In the African context, and with the subject matter of this article in mind, the positive invocation of public policy may become important where domestic recognition is sought for same-sex marriages celebrated in a foreign jurisdiction (*e.g.* Nigeria and Zambia) that legislatively prohibits and treats as void such marriages. Most African countries apply the principle that the formal validity of a marriage is governed by the law of the place of celebration and essential validity by the law of the domicile of the parties.[53] This means that where the marriage is void according to the law of the place of celebration or because it is essentially invalid such a foreign marriage would not be entitled to recognition. For example, this invalidity can occur where persons who are not allowed by the law of their respective domiciles to enter into a same-sex marriage (*e.g.* Nigeria), travel to a jurisdiction where a same-sex marriage could be celebrated (*e.g.* Canada) to marry, and then subsequently seek recognition of the marriage in a country other than their domicile or place of celebration (*e.g.* Ghana). One can argue that, in appropriate circumstances, a domestic court may positively invoke its domestic public policy to recognise such a marriage as valid, even though it is void under the *lex causae*.[54]

The Ghanaian case of *In re Kariyavoulas (Deceased); Donkor v Greek Consul-General*[55] demonstrates the potential for such positive application of public policy in the international family law context. In this case, the court held that it would not allow application of the dual domicile principle for determining the

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[52] J.L. NEELS, The Positive Role of Public Policy in Private International Law and the Recognition of Foreign Muslim Marriages, (2012) 28 *South African J Human Right* 212, p. 222; J. BLOM, Public Policy in Private International Law and its Evolution in Time, (2003) *Netherlands International Law Review* 373, p. 375-377. An interesting example of this positive invocation of public policy is in *Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374, at [151]-[163] in which the court was prepared to invoke public policy to recognise title to antiquities provided by foreign law, even if that foreign law could be characterised as an "other public law" and hence excluded from application under English private international law rules.

[53] R.F. OPPONG (note 6), at 183-186.

[54] In his article The Positive Role of Public Policy in Private International Law and the Recognition of Foreign Muslim Marriages, (2012) 28 *South African Journal of Human Right* 212, Professor NEELS discusses how a South African court may positively invoke public policy to recognise Muslim marriages that are not valid in terms of the law of the country in which they were celebrated.

[55] [1973] 2 GLR 52, at 62–63. See E.V.O. DANKWA, Adjuah Donkor – "The Helpless and Hapless, Poor and Pesewaless Widow", (1974) 6 *Review of Ghana Law* 136.

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essential validity of marriage to defeat legitimate claims by Ghanaians who enter into marriages with foreign nationals. It had been argued in the case that a marriage between a Ghanaian and a Greek national, which had been celebrated under native custom in Ghana, was illegal, unrecognizable and not binding, and contrary to the *lex domicilii* of the Greek. In rejecting this contention, the Ghanaian court observed:

> "The courts in Greece may refuse to acknowledge the validity of such a marriage... But the courts in Ghana do recognise the legal validity of a customary law marriage... [S]ex knows no nationality and... when a man transcends the barriers of race and nationality through the avenue of sex, common sense demands that the determination of his rights and liabilities should be by the same rules for the man as they are for the woman... If that proposition be right, I submit, that the consequences of that union whether they relate to status, to property, or to rights should be determined by the same rules. It is preposterous, in my view, to tolerate a situation in this country where one law operates for the benefit of one man and a different law for the other, merely on a question of nationality."[56]

In this decision, the court demonstrated a willingness to depart from rigid adherence to private international law rules where doing so would defeat the legitimate expectations of the Ghanaian spouse that he/she has contracted a valid marriage under Ghanaian law. Another consideration that might propel a decision to recognize a marriage that is otherwise invalid would be the impact of not recognizing it on children to the marriage.

If the positive invocation of public policy may lead to the recognition of foreign same-sex marriages, the values that underlie the constitutions of most African countries will have a prominent role to play. Indeed, these values often shape the content of public policy. It has been observed that, "constitutionalism and human rights, which now occupy a prominent place in the jurisprudence of African courts, are also likely to shape the development of private international law".[57] The values of equality and non-discrimination which permeate the constitutions of many African countries will ultimately prove important when courts are invited to make private international law determinations in relation to foreign same-sex marriages.[58] These values were at the forefront of the jurisprudence of the South African courts[59] that ultimately laid the foundation for the enactment of the country's Civil Union Act, 2006.

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[56] *Ibid*, at 62-63.

[57] R.F. OPPONG, Private International Law in Africa: The Past, Present and Future, (2007) 55 *American Journal of Comparative Law* 677, p. 716; C. FORSYTH (note 5), at 19-20; C. SCHULZE (note 6), at 658-661.

[58] See *e.g.* Constitution of the Republic of Ghana, 1992, Art. 17; Constitution of Kenya, 2010, Art. 27(4); Constitution of the Republic of Gambia, 1997, Art. 33, Constitution of Malawi, 1994, Art. 20; Constitution of Sierra Leone, 1991, Art. 27.

[59] *Minister of Home Affairs v Fourie* 2006 (1) SA 524.

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At present, only the South African courts have had to decide issues related to same-sex marriage in the context of constitutional values. However, in recent times, other African courts have been confronted with homosexuality and related incidental issues and the constitutional questions they raise. Arguably, the decisions of courts on such issues may become relevant in deciding cases on same-sex marriage in the future. However, the existing jurisprudence does not reveal a clear trend in terms of how the courts assess the scope and effect of the values that underlie their respective constitutions. For example, in the Ugandan case of *Nabagesera v Attorney General*,[60] the court held that the Minister for Ethics and Integrity did not violate the applicant's constitutional rights of freedom of expression, association and assembly, and equality before the law when he ordered the closure of a workshop organized by the applicant; the workshop was found by the court to be aimed at or engaging in direct and indirect promotion of same-sex practices contrary to Ugandan criminal laws.[61]

However, in the Kenyan case of *Eric Gitari v Non-Governmental Organisations Co-ordination Board*,[62] the High Court affirmed the constitutional rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) groups to form associations and declared as unconstitutional a decision by the respondent not to register an NGO set up to protect the interests of those groups.[63] The court also held that "an individual human being, regardless of his or her gender or sexual orientation, is a "person" for the purposes of the Constitution" of Kenya.[64] Although the court described this latter decision as "obvious", it is a very significant decision because it affirms that constitutional rights apply to all persons. Similarly, in the Botswana case of *Attorney General of Botswana v Thuto Rammoge*,[65] the refusal of the Minister to allow the registration of the organization Lesbians, Gays and Bisexuals of Botswana, was held to be unconstitutional as it infringed on the respondent's right to freedom of assembly and association.

Finally, it is worth mentioning a pending case in Kenya challenging the constitutionality of the country's penal laws to the extent that they purport to criminalize private consensual sexual conduct between adult persons of the same-sex.[66] The court has certified the case as involving a "substantial question of law".

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[60] [2014] UGHCCD 85.

[61] In this case, the applicant did not contest the constitutionality of the criminal law that prohibited unnatural carnal knowledge. Indeed, the court noted that law "has not yet been declared unconstitutional".

[62] [2015] eKLR.

[63] The court was quick to note that the petition was "not about marriage" and that what the petitioner seeks "is not legalisation of same sex unions or marriages".

[64] [2015] eKLR, at [73]. See also *Attorney General of Botswana v Thuto Rammoge*, Civil Appeal No. CACGB-128-14 (Court of Appeal of the Republic of Botswana, 2016), at [58]-[60], the court described the argument that a homosexual is not a "person" in Botswana's Constitution as "totally unacceptable and irrational".

[65] Civil Appeal No. CACGB-128-14 (note 64).

[66] *Eric Gitari v Attorney General* [2016] eKLR. As noted above, comparatively, the Belize Supreme Court declared a similarly worded provision in the Belize Criminal Code

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A similar constitutional challenge is also pending in Malawi.[67] It is arguable that the decriminalization of anti-homosexuality laws on the continent through the application of national constitutional laws would be an important incremental step that could strengthen the case for the recognition of foreign same-sex marriages.[68]

IV. Lessons from the Law on Recognition of Foreign Polygamous Marriages

The current laws in many African countries would work against the ability of their courts to recognise foreign same-sex marriages; the existing legal impediments and social values are formidable. It is however trite that the law evolves and often does so in the interest of justice and in response to changing social context. In this regard, it is worth recalling the history of the common law's treatment of foreign polygamous or potentially polygamous marriages, and how such marriages became gradually recognised for defined purposes under private international law regimes in common law countries. It is submitted that the gradual recognition of foreign polygamous marriages may provide precedents for recognizing at least some of the civil effects of a same-sex marriage that has validly been created in accordance with the applicable foreign law.

Historically, courts in common law countries – including countries where domestic law allowed polygamy – would not have anything to do with a foreign polygamous marriage, and did not recognize it for any purpose.[69] Thus, courts in many African countries declined jurisdiction in matrimonial causes founded on polygamous marriages.[70] That is no longer the case.[71] As Murphy has noted:

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unconstitutional. *Caleb Orozco v The Attorney General of Belize*, Claim No. 668 of 2010 (Supreme Court of Belize, Aug. 10, 2016). See also *Kanane v The State* 2003 (2) BLR 64.

[67] *The Republic v Mussa Chawisi, The Republic v Mathew Bello, The Republic v Amon Champyuni* (Malawi High Court, 2016). See generally B. DEMONE, LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa* (2016) 60 *Journal of African Law* 365.

[68] See Z.Z. DEVJI, Forging Paths for the African Queer: Is There an "African" Mechanism for Realizing LGBTIQ Rights?, (2016) 60 *Journal of African Law* 343, p. 15, where he describes decriminalization as "the first true step towards establishing equal treatment at both legal and social levels". In June 2016, Seychelles repealed the anti-homosexuality provision in its Penal Code. See Penal Code (Amendment) Act, 2016.

[69] P.A. SHAH, Attitudes to Polygamy in English Law, (2003) 52 *International and Comparative Law Quarterly* 369, p. 374-380.

[70] *Anyaegbunam v Anyaegbunam* [1973] All NLR (Part 1) 385; *Fatuma Binti Athuma v Ali Baka* [1917-1918] KLR 171; *Gulam Mahomed v Gulam Fatima* [1917-1918] KLR 102; *Sithole v Sithole* (1969) ZR 92; *Mwiba v Mwiba* (1980) ZR 175. Polygamous marriages were, however, recognized in respect of issues outside jurisdiction, such as succession and maintenance. *Kader v Kader* 1972 (3) SA 203; *Estate of Mehta v The Master of the High Court* 1958 R & N 570; *Coleman v Shang* [1959] GLR 390.

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> "English law [and the law of many other common law countries], in a notable *volte face*, now predominantly recognises foreign polygamous marriages so long as they were validly created in terms of the formal requirements of the local law and in terms of the capacity of the parties… the significance of being a spouse within a potentially polygamous marriage has all but disappeared. It is equally clear that even actual polygamous marriages will not be recognised for virtually all purposes so long as there is no strong policy reason for refusing recognition in accordance with the court's residual discretion. This represents a welcomed step in the direction of cultural pluralism."[72]

In many African countries, recognizing foreign celebrated polygamous marriages did not present a social or public policy challenge for the courts as their legal systems already allowed the domestic celebration of such marriages.[73] As KIGGUNDU rightly noted "it is easier for the courts of a given country to recognise foreign polygamous marriages if polygamy is permitted under the country's domestic law".[74] This is not the case with same-sex marriage. That said, for the purpose of this paper, the importance of the evolution of the common law jurisprudence on foreign polygamous marriages lies in the case-by-case approach that was adopted following the decision to abandon *a priori* complete non-recognition. Foreign polygamous marriages were recognised for specific purposes decided on a case-by-case basis, and ultimately laws were enacted to provide statutory legal basis for such treatment. It was recognised that blanket non-recognition of polygamous marriage was not only unworkable, but also in some cases can lead to arbitrary and unfair results.

For example, in *Radwan v Radwan (No. 2)*[75] CUMMING-BRUCE J emphasized that "it is an over-simplification of the common law to assume that the same test … applies to every kind of incapacity, non-age, affinity, prohibition of monogamous contract by virtue of an existing spouse and the capacity for polygamy. Different public and social factors are relevant to each of these".[76] Accordingly, the spouses who had lawfully contracted a foreign marriage in accordance with their personal law had the marriage recognized for specific purposes. In *Haussain v. Haussain*, the court did not allow the husband to rely on the

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[71] An exception may be Botswana. S. 4 of Botswana's Matrimonial Causes Act, 1973 provides that: "Nothing in this Act shall authorise any court to pronounce a decree of divorce, nullity, judicial separation or presumption of death and dissolution of marriage, or to make any other order than an order dismissing an action unless the marriage to, or in respect of, which the decree or order relates, is a monogamous marriage".

[72] J. MURPHY, *International Dimensions in Family Law*, Manchester 2005, p. 76-79.

[73] Indeed, in Kenya, marriage has recently been statutory defined as "the voluntary union of a man and a woman whether in a monogamous or polygamous union…". See Marriage Act, 2014, s. 3(1).

[74] J. KIGGUNDU, The Treatment of Foreign Polygamous Marriages in Private International Law, (2003) *Speculum Juris* 214, p. 217.

[75] [1972] 3 All ER 1026.

[76] *Ibid*, at 1037.

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polygamous nature of his marriage to defeat the claim for a decree of judicial separation.[77] In *Yew v Attorney-General of British Columbia,*[78] the court recognized both wives of a polygamous marriage and held that they are entitled to the benefits extended to wives under the *Succession Duty Act*. The non-recognition of the marriage would have meant that the testator's two wives, admittedly lawfully married in China to the testator and throughout his life, would have been without a remedy.[79] As MCPHILLIPS J.A. rightly noted, this would be contrary to natural justice.[80]

These cases illustrate that the courts have moved from the traditional approach of strict application of the rule of non-recognition of polygamous marriages to deciding cases on a case-by-case basis. It is submitted that a similar approach may be adopted with respect to foreign same-sex marriages. A case-by-case approach would allow national courts to recognize rights and status created under foreign law without necessarily applying or endorsing those laws. A case-by-case approach demands that courts undertake a careful consideration of the facts of each case before them and the conflicting policies that may be at stake.

Applying this approach, it may be argued that invoking the jurisdiction of the court in a petition for divorce should not be treated the same way as an application to have a foreign same-sex recognised for the purpose of securing a tax or social security benefit. While the former dissolves the marriage and thus indirectly "advances" a country's desire not to countenance such marriages, the latter presents a more direct challenge. Also, to paraphrase the words of Justice BIELBY used in another context, the recognition of foreign same-sex marriages for all purposes may be inconsistent with prevailing social values and may give rise to social problems in some African countries. However, to deny divorce and its associated corollary relief to parties to such marriage may create hardships for them.[81] A more nuanced approach is thus required in such cases. An even less contentious case for recognition would be a foreign divorce decree and other ancillary reliefs granted by the foreign court in respect of a same sex-marriage.

Similarly, the case-by-case approach may be deployed to recognize a child of a same-sex marriage to enable the latter inherit the estate of one or both parents or secure advantages conferred on children by a legal system, including citizenship. In this regard, it is significant that the "best interests of the child" principle is

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[77] *Haussain v Haussain* [1982] 1 All ER 369.

[78] [1923] 33 B.C.R. 109.

[79] The "incident of marriage approach" has also been used in a number of US cases to grant benefit of inheritance through intestacy as a single, recognizable incident of marriage although the recognition of the marriage was prohibited under State laws. It has been stated that in *Miller v Lucks*, 36 So, 2d 140 (Miss, 1948), the court recognized intestacy rights for an interracial marriage for the limited purpose of allowing the surviving spouse to inherit property, despite a general refusal to recognize interracial marriages. Also, the court in *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App., 1948) recognized intestacy rights for an unlawful polygamous marriage.

[80] *Yew v Attorney-General of British Columbia* (note 78), at 137.

[81] *Azam v Jan* 2012 ABCA 197, at [23].

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part of the laws of most, if not all, African countries[82] and national legislation and court jurisprudence also reveal an erosion of legal impediments that discriminated among children.[83]

V. Exercising Divorce Jurisdiction

In Africa, same-sex marriages will generate complex private international law issues given that some of the existing rules on the continent are framed based on a connecting factor linked to "the husband" or "the father". Examples are the rule that a wife acquires the domicile of the husband on marriage,[84] the rule that a legitimate child acquires the domicile of the father at birth,[85] the rules on legitimacy and legitimation,[86] and the Roman-Dutch law principle that the proprietary consequences of marriage are governed by the law of the husband's domicile at the time of marriage.[87] A detailed examination of these individual rules in the context of same-sex marriages is beyond the scope of this article. Rather, the paper uses the matrimonial jurisdiction to grant divorce to illustrate how some of the themes developed in the paper may play out in court in respect of a foreign same-sex marriage.

To date, there appears to be only one reported instance in which a petition for divorce has been brought before an African court in respect of a foreign same-sex relationship.[88] The South African case of *AS v CS*[89] involved a petition for

[82] See *e.g.* Nigeria: Child's Rights Act, 2003, s. 1; Kenya: Children Act, 2001, s. 4(2); South Africa: Children's Act, 2005, s. 9; Ghana: Children's Act, 1998, s. 2.

[83] See *e.g. In Re Asante (Decd); Owusu v Asante* (1993-94) 2 GLR 271-323; *Attorney-General v Dow* 1992 BLR 119 (on the right of a child with one foreign parent to become a citizen of Botswana); *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (on the principle of male primogeniture in South African customary law); *Lois Chituru Ukeje v Gladys Ada Ukeje* (unreported) 2014 LPELR-22724; *Onyibor Anekwe v Maria Nweke* (unreported) 2014 LPELR-22697 (on the principle of male primogeniture in Nigerian customary law).

[84] R.F. OPPONG (note 6), at 39-44.

[85] *Ibid*, at 39-44.

[86] *Ibid*, at 245-251.

[87] C. FORSYTH (note 5), at 295-303; C. SCHULZE (note 6), at 648-653.

[88] As the only African jurisdiction that legislatively permits the celebration of same-sex marriage, the South African courts have decided a number of civil claims relating to such marriage. However, the claims have been domestic and have not generated conflict of laws issues. See *e.g. Laubscher N.O. v Duplan* [2016] ZACC 44 (on the right of a person in a permanent same-sex partnership to inherit from the intestate estate of their deceased partner); *Gory v Kolver NO* [2006] ZACC 20, 2007 (4) SA 97 (on rights of intestate succession permanent same-sex life partners who were not married); *Volks NO v Robinson* [2005] ZACC 2, 2005 (5) BCLR 446 (on the right of a survivor of a stable permanent relationship between two persons of the opposite sex who had not been married to each other during their lifetime, but nevertheless lived a life akin to that of husband and wife, to be maintained out of the estate of their deceased partner).

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divorce and division of joint assets in respect of a civil partnership celebrated at the West Surrey Register Office in Guildford outside London, UK. Although it was celebrated abroad, both parties to the relationship were South Africans. One issue the court had to decide was its jurisdiction to dissolve a foreign same-sex relationship,[90] in this instance a civil partnership. After holding that a same-sex union concluded under the Act [a domestic same-sex union] is fully cognisable as a marriage, and is capable of dissolution under the Divorce Act,[91] the court turned its attention to foreign same-sex unions.

The court first held that in terms of South African common law, the validity of a foreign marriage is determined by application of the *lex loci celebrationis* principle. Accordingly, if the marriage is duly concluded in accordance with the legal requirements for a valid marriage in that foreign country, it will be recognised by a local court which will be entitled to exercise its powers under the Divorce Act, if the ordinary residential jurisdictional requirements under section 2 of the Divorce Act have otherwise been met. In the instant case, it was held that the lawfully concluded same-sex relationship in England should be accepted as a valid and binding civil partnership in South Africa in accordance with the *lex loci celebrationis* principle, provided it does not otherwise offend South African public policy.[92] The court held that word "marriage" in section 3 of the Divorce Act must be read so as to include registered foreign same-sex marriages or civil unions/partnerships which are lawful in the country in which they are concluded.[93] In the instant case, it was held that the parties were, therefore, entitled to assert in a South African court that they were lawfully "married" for purposes of the application of the Divorce Act, and to request the courts to dissolve their civil partnership in accordance with the provisions of section 3 of the Divorce Act.

The fact that the case involved two South Africans who had travelled to the UK, married there and returned home having entered into a same-sex relationship is significant. It demonstrates how globalization and international migration may ultimately result in issues of recognition of foreign same-sex marriage being brought for adjudication in African courts. Where a country's nationals are involved, the issues take on a more poignant dimension as failing to provide them a remedy may be foreclosing to them what may perhaps be the only avenue for redress (apart from the foreign country in which they were resident or celebrated their marriage).

This case also suggests that one of the principal means through which foreign same-sex marriage may come before an African court is in a petition or application for divorce, or some other matrimonial cause. For example, *A*, a Ghanaian national resident in South Africa, enters into a civil marriage with *B,* a Nigerian national in South Africa. *A* later returns to Ghana and petitions the Ghanaian courts for divorce. In such an application, the Ghanaian court would

[89] 2011 (2) SA 360.

[90] *Ibid*, at [10].

[91] *Ibid*, at [33].

[92] *Ibid*, at [41]-[42].

[93] *Ibid*, at [51].

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have to decide whether it has jurisdiction to dissolve the South African celebrated same-sex marriage.

Whether a court has jurisdiction, or, alternatively, can assume jurisdiction over matrimonial causes is tied to the legal system of each country. Matrimonial actions may arise in cases of divorce, nullity of marriage, judicial separation, presumption of death and dissolution of marriage. In general, the court exercising jurisdiction must have a connection to the parties of the action. In most cases, the primary question is whether the parties have any connection with the territorial area over which the court has exercised its jurisdiction. Factors such as domicile, nationality and residency are some of the main considerations that are involved in determining the issue. In Ghana, the connecting factors in matrimonial causes are determined under section 31 of the *Matrimonial Causes Act*. A court may have jurisdiction when either party to the marriage is a citizen of Ghana, domiciled in Ghana or has been ordinarily a resident in Ghana for at least three years immediately preceding the commencement of the proceedings.[94] Essentially, a party must be able to establish one of these connecting factors for the court to accept jurisdiction.

The position in Ghana is similar to the regime in South Africa. In South Africa, a court can exercise divorce jurisdiction if either of the parties are domiciled in the area of the court on the date of which the action is instituted, or is ordinarily a resident in the area of jurisdiction of the court on the said date, or has been ordinarily a resident in South Africa for a period of not less than one year immediately prior to that date.[95] Significantly, the fact that one of the parties is a national of South Africa cannot, on its own, confer jurisdiction upon the court. This is contrary to the position in Ghana where nationality is a factor allowing the court to exercise matrimonial jurisdiction over the parties. A South African court may exercise matrimonial jurisdiction over a foreign national domiciled in the country while refusing jurisdiction over one of its own nationals on the grounds that the person is not domiciled in or is a resident of the Republic. This is also the case in Nigeria, where proceedings for a decree of dissolution of marriage, judicial separation, nullity, restitution of conjugal rights, and jactitation of marriage may only be instituted by a person domiciled in Nigeria.[96] The issue of domicile is thus a vital condition allowing for the court to exercise jurisdiction.[97] The fact that one of the parties to the proceedings is a resident of Nigeria, or a national of the country does not, in and of itself, provide a basis for the courts to exercise jurisdiction in matrimonial proceedings.

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[94] Ghana: Matrimonial Causes Act, 1971, s. 31.

[95] South African: Divorce Act, 1979, s. 2(1). In South Africa, different rules apply regarding other matrimonial proceedings aside from divorce, which is treated separately. In regards to a nullity suit, for example, it has been argued that the plaintiff may bring his action in any court he pleases. However, a court competent to hear a divorce case, at the same time, may hear other ancillary matters flowing from the divorce. See H.R. HAHLO, *The South African Law of Husband and Wife*, 4th edn., Cape Town 1975, p. 560-561.

[96] Nigeria: Matrimonial Causes Act, 1990, s. 2(2).

[97] See generally *Omotunda v Omotunda* [2001] 9 NWLR 252.

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From the perspective of subject matter of this paper, the connecting factors that establish the jurisdiction of courts in matrimonial proceedings are instructive given that they are not framed in terms of gender. They also do not expressly prohibit courts from assuming jurisdiction is respect of any defined type of marriage. In the *Ghanaian-Nigerian Married in South Africa* scenario above, the burden placed upon *A*, the party who seeks to invoke the jurisdiction of the Ghanaian court, is to establish that either party is a citizen of Ghana, domiciled in Ghana or has been ordinarily resident in Ghana for at least three years immediately preceding the commencement of the proceedings. The type of marriage should not be an issue in deciding whether the court has jurisdiction. In other words, as long as *A* can establish the prerequisites for the court to assume jurisdiction under Ghanaian law, the court should not be concerned about the fact that the marriage it is being called upon to dissolve is a same-sex marriage.

It has been discussed above how the common law jurisprudence on foreign polygamous marriages may be deployed through analogical reasoning in same-sex marriage cases. In the context of exercising jurisdiction over foreign polygamous marriages, Justice BIELBY observed in the Canadian case of *Azam v Jan*,[98] the Alberta courts clearly have jurisdiction to terminate foreign (monogamous) marriages, and queried why they should not be able to terminate all valid foreign marriages (including polygamous marriages) if the parties otherwise meet the Canadian residential and other prerequisites to divorce.[99] The plausible inference from Justice BIELBY's observation is that the court is clothed with jurisdiction in matrimonial causes so far as the prerequisites for exercising jurisdiction are satisfied. In other words, the fact that the foreign marriage in question cannot be domestically celebrated in Canada is not grounds for the courts to refuse jurisdiction. These observations may provide persuasive authority in developing arguments in respect of matrimonial causes involving same-sex couples who seek relief in a state which does not recognize same-sex marriage.

As with the case of matrimonial causes in polygamous marriages, matrimonial proceedings involving same-sex couples terminate the familial relationship rather than create one. By petitioning for divorce or nullity of their marriage, the parties are not seeking recognition as a married couple. The court is not invited to legalize or endorse the same-sex marriage, but to discontinue and determine the marriage. In *Christiansen v Christiansen*,[100] the Supreme Court of Wyoming in the United States considered a divorce petition resulting from a Canadian same-sex marriage. The district court had earlier ruled that the court could not exercise jurisdiction over the petition because the Wyoming court had no subject-matter jurisdiction over the case (the State of Wyoming did not recognize same-sex marriage at the time). Reversing the district court's dismissal of the divorce petition, and holding that the Wyoming court had jurisdiction over the case, the Supreme Court reasoned that

[98] *Azam v Jan* 2012 ABCA 197.

[99] *Ibid* at [18].

[100] (2011) 253 P.3d 153, 157.

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> "recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role."[101]

The instructive reasoning behind the Supreme Court's decision was that the law and policy of the State of Wyoming prohibiting the celebration and recognition of same-sex marriage is not undermined where in a matrimonial proceeding involving same-sex couples, the parties only seek a dissolution of the marriage rather than an enforcement or acceptance of the union. *Christiansen* provides insights for courts considering whether to exercise jurisdiction in matrimonial proceedings involving same-sex marriage where the state prohibits such marriages. A voidable marriage may be dissolved or declared a nullity without recognizing the marriage as valid, or the court may recognize the marriage for the limited purpose of granting the matrimonial relief.[102] Neither approach requires the court to rule, or even opine upon the validity of the marriage before it.[103] BYRN and HOLCOMB rightly note that in putative spouse cases, divorce and nullity are the available remedies to parties who have entered their marriage in good faith even though the marriage is technically void.[104] In doing so, the court need not recognize the marriage as valid. This principle could be equally applied in matrimonial proceedings where a same-sex couple seeks nullity of his or her foreign marriage.

In sum, it is submitted that parties to a same-sex marriage should be entitled to commence matrimonial proceedings in any jurisdiction, provided the connecting factors that permit the court to accept jurisdiction are present. There seems to be no reason for refusing this relief in the case of a valid foreign same-sex marriage where the parties have satisfied the requirements for the court to exercise jurisdiction over them. Assuming jurisdiction to grant matrimonial relief in respect of a foreign same-sex marriage does not necessarily amount to judicial legitimization or condonation of same-sex relationships.

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[101] *Christiansen v Christiansen* (2011) 253 P.3d 153, at 156.

[102] See generally B.J. COX, Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples Marriages, Civil Unions, and Domestic Partnerships, (2004) 13 *Widener Law Journal* 699, p. 729-746.

[103] See M.P BYRN/ M.L. HOLCOMB, Wedlocked, (2012-2013) 67 *University of Miami Law Review* 1, p. 19.

[104] *Ibid* at 20.

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VI. Conclusion

Globalization and the resulting increased movement of persons has enhanced the imperative that marriages celebrated abroad may need to be recognized domestically for various purposes. The challenge for Commonwealth African courts is that while most of them operate in legal systems that do not domestically allow for the celebration of sex-same marriage, that is not the case in other parts of the world. It is thus likely that persons who enter into such a marriage abroad may seek recognition of their marriage before courts in Commonwealth African countries where they have moved to or settled, either temporarily or permanently. To date, there has been only one case in which a South African court has been confronted with this issue. It remains an open question what other Commonwealth African courts will decide should they be confronted with a similar issue.

This paper has noted that there are various socio-cultural and legal challenges that are likely to militate against the recognition of foreign same-sex marriages in Commonwealth African courts. Without diminishing the enormity and complexity of the challenges, this paper has argued for a case-by-case assessment informed by considerations of justice, public policy and, were appropriate, the best interests of the children of such marriages. This paper has argued that *a priori* rule of complete non-recognition – statutory (as in Nigeria) or judge-made – would be inappropriate. Private international law sometimes leads to the recognition of institutions and laws that may be unknown or even impermissible in the domestic context. Thus, the fact that same-sex marriage is impermissible or unknown to some Commonwealth African legal systems may "not provide a sufficient justification for non-recognition as a matter of private international law".[105] It has been argued that a flexible approach may, in appropriate cases, call for the recognition of a foreign same-sex marriage, even if for a limited and defined purpose such as in order to assume jurisdiction to grant a divorce or to recognize a person as the child of the parties to such a marriage.

It would be remiss if it was not emphasized that the arguments in favour of recognizing foreign same-sex marriages, even if for limited purposes, should not be read as a commitment to, or even a belief in, the merits of same-sex marriage *per se*. Whether same-sex marriage is a good thing, or whether it is the best legal institution for recognizing and giving effect to the inter-personal commitments made by same-sex couples are distinct questions that are not addressed in this paper. Obviously, there are arguments on both sides.[106]

Finally, although this paper focused mainly on private international law issues, it is not unlikely that a private international law decision to recognize foreign same-sex marriage for any defined purpose may prompt further discussion on the nature of the domestic substantive law on same-sex marriage. The foreign and domestic aspects are therefore intricately interlinked.

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[105] J. FAWCETT/ M. NI SHUILLEABHAIN/ S. SHAH, *Human Rights and Private International Law*, Oxford 2016, p. 653.

[106] J. MURPHY, The Recognition of Same-Sex Families in Britain: The Role of Private International Law, (2002) *International Journal of Law, Policy and the Family* 181, p. 189.

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ESCAPE CLAUSES AND LEGAL CERTAINTY IN PRIVATE INTERNATIONAL LAW

Monika PAUKNEROVÁ*

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 61-82
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. The Role of Escape Clauses – an Introduction

Escape clauses are a very specific instrument of private international law that allow for derogation from a regular / basic / general conflict-of-laws rule. They apply in special cases when a particular legal situation bears a closer connection to a different legal order than that otherwise applicable under the conflict rule: in such cases it may be more appropriate to apply the more closely-connected law rather than the presumed applicable law.[1]

To my knowledge, escape clauses are never defined in an abstract way: they are simply escapes from a rule; what is important is the particular formulation of a rule deviating from some basic conflict-of-laws rule. Formulations of such clauses differ to a certain extent.

For example, paragraph 3 of Article 4 of the Rome I Regulation on the law applicable to contractual obligations,[2] reads:

> "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply".

A "manifestly closer connection", the "closest connection", or the "strongest connection", but also a "reasonable arrangement": these are typical criteria for the "escape" from a basic rule.

A. Flexibility v. Legal Certainty[3]

Escape clauses allow for flexibility in decision making if the specifics of the situation are taken into account; this is their undeniable advantage. However, not

[1] See in particular S. SCHREIBER, *Ausweichklauseln im deutschen, österreichischen und schweizerischen Internationalen Privatrecht* (Studien zur Rechtswissenschaft, 87), Hamburg 2001, p. 7 *et seq.* with further references; T. HIRSE, *Die Ausweichklausel im Internationalen Privatrecht: methodentheoretische und -kritische Bedanken zur Konkretisierung einer besonderen kollisionsrechtlichen Generalklausel,* Tübingen 2006, p. 13 *et seq.* with further references; S. C. SYMEONIDES, *Codifying Choice of Law Around the World. An International Comparative Analysis*, Oxford 2014, p. 190 *et seq.*; Ch. ADESINA OKOLI / G. OMOSHEMINE ARISHE, The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation, *Journal of Private International Law* 2012, p. 513, referring to S. C. SYMEONIDES, Rome II and Tort Conflicts: A Missed Opportunity, *American Journal of Comparative Law* 2008, p. 173, 197.

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (OJ L 177/6, 4.7.2008), hereinafter "Rome I Regulation".

[3] To various forms of flexibility v. legal certainty and their mutual relations in the conflict of laws see in particular P. HAY, Flexibility versus Predictability and Uniformity in Choice of Law, *Recueil des Cours* 1991 –I/226, p. 291 *et seq.*; S. C. SYMEONIDES, Codifying Choice of Law (note 1), at p. 171-217, and L. Ch. WOLFF, Flexible Choice-of-Law Rules: Panacea or Oxymoron?, *Journal of Private International Law* 2014, p. 431-459 with further references.

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only *prima facie*, it is clear that escape clauses may represent some danger if legal certainty is considered. The application of an escape clause is the responsibility of a concrete decision making authority and it is impossible to accurately foresee how the authority will finally decide.

The Latin saying claims that *exceptio firmat regulam* (the exception proves the rule). Many years of practice show that exceptions to rules may be generally permitted and do not necessarily threaten the rules themselves. However, a number of questions remain: what approach should be taken in order to achieve a result that is balanced and fair? How should a balance between certainty in law and reaching a just solution be established in a particular case? What rules should apply to such an escape? Is it generally practicable to set some exact conditions for the application of an escape clause?

B. View into the Past

Escape clauses are not a new phenomenon. Both jurisprudence and legal practice have been dealing with this issue since the 1980s as a result of the introduction of new national codifications of private international law in Europe. Debates can be found in Swiss and German literature in connection with the Swiss Private International Law Act adopted in 1987.[4]

In Central Europe, an escape clause may be found as early as in the Vienna Draft of Private International Law Act from 1913-1914.[5] Section 16 of the Vienna Draft contains an escape clause following the classical conflict-of-laws rules provided in Sections 13-15. Under Section 16 of the Vienna Draft:

> "If the circumstances of a particular case make it obvious that not these laws but different laws correspond to the reasonable arrangement of legal relations, the different laws should be applied."[6]

This provision applies only to obligations and is not generally applicable. It was just a special escape clause but it expressed well the substance of the issue: a judge

[4] *Bundesgesetz von 18. Dezember 1987 über das internationale Privatrecht (IPRG),* hereinafter "Swiss PIL Act". See in particular A. E. VON OVERBECK, Les questions générales du droit international privé à la lumière des codifications récentes, *Recueil des cours* 176 (1982-III), p. 186 *et seq*.; A. E. von OVERBECK, The Fate of Two Remarkable Provisions of the Swiss Statute on Private International Law, this *Yearbook* 1999, p. 127 *et seq*.; K. SIEHR, General Problems of Private International Law in Modern Codifications – *de lege lata* and *de lege europea ferenda* –, this *Yearbook* 2005, p. 26 *et seq*. with further references.

[5] See F. MATCHER, Die Geschichte des österreichischen internationalen Privatrechts seit der Kodifikation des ABGB, *Juristische Blätter* 1961, p. 53.

[6] See text in F. MÄNHARDT, *Die Kodifikation des österreichischen Internationalen Privatrechts*, Anhang III, Entwurf eines Gesetzes über Internationales Privatrecht (1914), 149, Schriften zum internationalen Recht 10, Berlin 1978. § 16: "*Ist es nach den Umständen des Falles offenbar, dass nicht die Geltung dieser Gesetze, sondern die Geltung anderer Gesetze der vernünftigen Ordnung des rechtsgeschäftlichen Verkehrs entspricht, so sind diese anderen Gesetze anzuwenden*."

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in a particular case for which the basic rule does not appear to be appropriate is provided with the ability to derogate or escape from the basic rule. Laws directly inspired by the Vienna Draft, *i.e.* the Polish and Czechoslovak Private International Law Acts, did not contain such an express clause.

Later codifications introduced not only special escape clauses, but also a general escape clause. The Swiss Private International Law Act 1987 seems to be the most significant inspiration for general clauses; a general escape clause is sometimes also seen in Section 1 of the Austrian PIL Act 1978.[7]

New modern codifications of private international, law including escape clauses, have been adopted in Europe as well as in other countries.[8] Special escape clauses are provided in some international conventions[9] and in European Regulations unifying European private international law, such as Rome I Regulation, Rome II Regulation, Succession Regulation,[10] and other texts, as a project for a Rome 0 Regulation.[11]

C. Interpretation of Escape Clauses

The formulations of escape clauses are not identical: despite their significance, this fact may lead to interpretation problems. It is clear that when compared to the interpretation of national laws, interpretation problems are multiplied in unified legislation, whether European or global, subject to the interpretation of courts in different countries with different legal cultures and traditions.

Derogation from the otherwise applicable law is permitted if the case has much closer connections with another law, considering all the circumstances. An escape clause should be used only exceptionally; it is obvious that it imposes a number of requirements on judges. The role of a judge is strengthened but should

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[7] Bundesgesetz von 15.6.1978 über das internationale Privatrecht (IPRG), Section 1. Compare F. MÄNHARDT (note 6), at 38; K. KREUZER, Zur Funktion von kollisionsrechtlicher Berichtigungsnormen*, Zeitschrift für Rechtsvergleichung* 1992/3, p. 172 *et seq*. with further references.

[8] *E.g.* in Belgium, Netherlands, Lithuania, Slovenia, Quebec, Louisiana and Oregon, Ukraine, Taiwan, Japan, etc. Compare S. C. SYMEONIDES, *Codifying Choice of Law* (note 1) at 190-204 referring to national reports on choice of law codifications presented at the 18th International Congress of Comparative Law in 2010.

[9] See *e.g.* Hague Protocol of 23.11.2007 on the Law Applicable to Maintenance Obligations (Article 5), or Hague Convention of 22.12.1986 on the Law Applicable to Contracts for the Sale of Goods (Article 8(3)).

[10] See Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11.7.2007 on the law applicable to non-contractual obligations (OJ L 199/40, 31.7.2007), hereinafter "Rome II Regulation" (Article 4(3)); and the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4.7.2012 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 201/107, 27.7.2012), hereinafter "Succession Regulation" (Article 21(2)).

[11] See *Embryon de Règlement portant Code européen de droit international privé*, available at <http://www.gedip-egpil.eu/ >, Article 137.

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not be strengthened to such an extent that it would weaken legal certainty and predictability and the protection of third parties.

D. Objections

Escape clauses are not universally accepted. Even the first legislative drafts gave rise to objections.[12] Escape clauses enable judges to consider specific features of the particular case for which a general or basic conflict of laws rule seems inappropriate. On the other hand, various objections have been raised[13] that, in reality, escape clauses undermine conflict rules themselves and relativize the impact of basic conflict rules. The danger of excessive flexibility is often noted, which may lead to purposive decisions and to abuse of the *lex fori*. Escape clauses are sometimes considered redundant. Over time, concerns about the general escape clause in the Swiss codification have not proved to be justified;[14] however, even today there are opponents of escape clauses as can be shown in different approaches to the codification of European private international law.[15] In particular, in original drafts converting the Rome Convention into the Rome I Regulation, after criticism that the escape clause in Article 4(5) of the Rome Convention generated a lack of foreseeability as to the law that would be applicable, the escape clause was not included[16] and it was inserted into Article 4(3) Rome I Regulation only additionally, following the critical objections against such radical change.[17]

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[12] See *e.g.* F. STURM, Die allgemeinen Grundsätze im schweizerischen IPR-Gesetzesentwurf. Eine kritische Analyse, in *Beiträge zum neuen IPR des Sachen-, Schuld- und Gesellschaftsrechts*, FS MOSER, Zürich 1987, p 7 *et seq*.

[13] See e.g. G. KEGEL/ K. SCHURIG, *Internationales Privatrecht*, München 2004, p. 308 *et seq.*; F. STURM/ G. STURM, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch, "Einleitung zum IP"*, Berlin 2003, p. 161-182; H. J. SONNENBERGER, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. 10. Internationales Privatrecht,* München 2010, p. 685-689, etc.

[14] Compare K. SIEHR, (note 4) at 4, 29; F. VISCHER, New Tendencies in European Conflict of Laws and the Influence of the U.S. Doctrine – a Short Survey, in *Law and Justice in a Multistate World*, FS Arthur von MEHREN, 2002, p. 464; A. E. von OVERBECK, The Fate of Two Remarkable Provisions (note 4) at 130, etc.

[15] Compare *e.g.* Proposal for a Regulation on the Law Applicable to Non Contractual Obligations Rome II of 22.7.2003, COM(2003) 427 final, Explanatory Memorandum, 12, remarking that the escape clause in Article 4(5) of the Rome Convention generates a degree of unforeseeability as to the law that will be applicable.

[16] Proposal for a Regulation on the Law Applicable to Contractual Obligations Rome I of 15.12.2005, COM (2005) 650 final, Explanatory Memorandum, 5, presenting the proposed changes which "… seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause." See also Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, 27.

[17] Critical remarks *e.g.* in P. MANKOWSKI, Der Vorschlag für die Rom I-Verordnung, *IPRax* 2006, p. 104 *et seq*.; Max Planck Institute "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)" *RabelsZ* 2007, p. 750 *et seq*.

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We may assume that all substantial issues and features of escape clauses have already been dealt with in the relevant literature. What rather deserve attention are the more recent formulations and cases, to be complemented with some more general comments. I will focus on some escape clauses in national Private International Law codifications, in particular in the Czech law, and in European Private International Law, including some case law.

E. Overlapping Issues

At the outset, one more general issue should be mentioned. Sometimes, escape clauses are confusing and overlap with other instruments which are used to assure flexibility in the determination of the applicable law. The criteria of the *closest connection* or a *reasonable assessment* of the respective relationships deploy not only escape clauses but also other tools allowing for the discretion of a decision-making body, namely connecting factors and means for solving gaps in private international law.

Escape clauses may even be confused with other exceptional means allowing for derogation from basic conflict rules, such as *ordre public*, overriding mandatory rules, etc. However, all these tools must be strictly distinguished as each of them has its own role and significance, position and requirements for its application.

II. General and Specific Escape Clauses in National Private International Law Codifications

Escape clauses can be subdivided into general and specific: (A) general escape clauses provide for the possibility to derogate from conflict-of-laws rules within the legal regulation as a whole, that is, against any conflict rule of such regulation; (B) specific escape clauses permit derogation in relation to particular legal issues, with respect to a particular legal rule or group of rules. However, as suggested earlier, there is no exact definition of what constitutes an escape clause and they may therefore differ in details.

A. General Escape Clauses – Illustrated by the Czech Law

General escape clauses are stipulated in a number of recent national Private International Law codifications, examples being Article 15 of the Swiss codification, Article 19 of the Belgian codification,[18] Article 8 of the Dutch codification,[19]

[18] Loi du 16 juillet 2004 portant le Code de droit international privé (Moniteur belge, 27 juillet 2004, p. 57344). Compare in particular J. MEEUSEN, Exception clauses and conflict of laws: new legislation, same issues, in *Essays in honour of Spyridon Vrellis,* Athens - Thessaloniki 2014, p. 569 *et seq*.

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etc. The new Czech Private International Law Act 2012[20] is also built on the Vienna Draft tradition: its Section 24 contains a general escape clause.

1. Swiss Inspiration

An inspiration for the general escape clause seems to have been Article 15(1) of the Swiss PIL Act, which reads:

> "As an exception, any law referred to in this Act is not applicable if, considering all the circumstances, it is apparent that the case has only very loose connections with this law and that the case has much closer connections with another law".

This wording has obviously had an impact on later general escape clauses all over the world. It is apparent that such a clause, which would derogate from the determination of applicable law under special provisions of relevant legislation, would be used only exceptionally, most restrictively, and cannot rectify the private international law rules based on other objectives.[21] In this context, let me quote the escape clause stipulated in Section 24(1) of the Czech PIL Act 2012:

> "It shall be possible, in completely exceptional cases, to decline from the application of the law which should be applied under the provisions of this Act, provided it seems inappropriate and contrary to a reasonable and fair arrangement of the participants' relation, following a due and reasoned assessment of a set of all the circumstances of the case, in particular the reasonable expectations of the participants regarding the application of another legal order. Under these conditions and provided the rights of third persons are not prejudiced, the law the application of which corresponds to such an arrangement shall be applied".

Thus, derogation from the Czech PIL Act is possible if it corresponds with reasonable and just arrangements in the relationship between the parties. I would maintain that the limits should be proportionality, conflicts justice (the principle of reasonable and just arrangements with respect to the localization of the

[19] Book 10 of the Dutch Civil Code, effective as of January 1, 2012. See in particular A. V. M. STRUYCKEN, The Codification of Dutch Private International Law – A Brief Introduction to Book 10 BW, *RabelsZ* 2014, p. 605 *et seq*.

[20] Act No. 91/2012 Coll. on Private International Law. Coll. – Collection of Laws of the Czech Republic. For details see P. UHLÍŘOVÁ, New Private International Law in the Czech Republic, this *Yearbook* 2014/2015, p. 469 *et seq*.

[21] Compare *e.g.* A. BUCHER/ A. BONOMI, *Droit international privé*, Bâle 2013, p. 108 *et seq*.; H. HONSELL/ N. P. VOGT/ A. K. SCHNYDER/ S. V. BERTI (Hrsg.), *Basler Kommentar. Internationales Privatrecht*, Basel 2007, Article 15, p. 126 *et seq*.

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relationship), considering the aggregate of all relevant circumstances, and the protection of third parties.[22]

Proportionality should be understood in the sense that the condition for application of a particular law is a sufficiently close relationship of the case to this law, corresponding to the conflicts justice. At the same time, it is necessary to compare this solution to the main conflict rule from which this solution "escapes". As pertinently stated the Dutch *Hoge Raad* in the *BOA* case,[23] "… the main rule should be disregarded only if, in the special circumstances of the case, the place of business of the party who is to effect the characteristic performance has no real significance as a connecting factor."[24] I strongly support this restrictive interpretation.

The principle of reasonable and just arrangements in the Czech general escape clause is a classical principle originating in the Swiss private international law[25] and maybe already in the above-cited Section 16 of the Vienna PIL Draft. It is perceived as an objective which should be reached by the selection of the applicable law, thus consistent with the conflicts justice. The reasonable and just arrangement is already fulfilled by the determination of the applicable law, irrespective of the material result.

Protection of third parties means that the exceptional application of a law different from the standard connection should not affect the rights of third persons; this corresponds with, above all, the requirement of legal certainty.

Inspiration may also be found in the interpretation of the general escape clause in Article 8 of the Dutch codification, which mentions some examples of the so called social reality test, *i.e.* the check as to whether a party's actual social ties with the country of his or her nationality are strong enough to justify the application of a rule which designates the law of (common) nationality:[26]

> 1. The law designated by a statutory rule based on the presumption of a close connection with that law shall exceptionally not be applied

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[22] See in detail M. PAUKNEROVÁ, in PAUKNEROVÁ/ ROZEHNALOVÁ/ ZAVADILOVÁ, *Zákon o mezinárodním právu soukromém. Komentář* (Private International Law Act. Commentary, in Czech), Praha 2013, p. 178-180.

[23] HR 25-9-1992, RvdW 1992, No 207, NJ 1992, No 750: *Société Nouvelle de Papéteries de l'Aa SA* (France) – *B.V. Machinefabriek BOA* (Nederland).

[24] S. RAMMELOO, Die Auslegung von Art. 4 Abs. 2 und Abs. 5 EVÜ: Eine niederländische Perspektive, *IPRax* 1994, p. 243, at 244-245: "…*die Hauptanknüpfung erst dann weichen soll, wenn man nach den Umständen des Einzelfalls zu dem Ergebnis kommen muß, daß der Ort, an dem diejenige Partei, die charakteristische Leistung erbringen soll, ihren Sitz hat, keinen reellen Anknüpfungswert aufweist*."

[25] A. F. SCHNITZER, Die Zuordnung der Verträge im internationalen Privatrecht, *RabelsZ* 1969, p. 17 *et seq*. This interpretation has a long tradition in the Czech jurisprudence, see Z. KUČERA *Mezinárodní právo soukromé* (Private International Law, in Czech), Praha 1975, at 149.

[26] K. BOELE-WOELKI/ D. VAN ITERSON, The Dutch Private International Law Codification: Principles, Objectives and Opportunities, *Electronic Journal of Comparative Law*, vol. 14.3 (December 2010), p. 10 and Appendix; see also A. V. M. STRUYCKEN (note 19) at 606, stressing that the escape clause is designed for really exceptional cases only.

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> if – having regard to all circumstances of the case – the close connection assumed in that rule manifestly exists only to a very small degree and a far closer connection exists with a different law. In such a case, that other law shall be applied.
>
> 2. Subsection 1 shall not apply where the parties make a valid choice of the applicable law.

An escape clause should be used only exceptionally and its application should be properly justified. There is no doubt that the application of an escape clause requires a high standard of adjudication by the judge who is to decide the case. There is a clear necessity to set certain limits for this special procedure. Otherwise this provision has the ability to endanger legal certainty and the predictability of legal decisions. It is to be expected that the general escape clause would be applied only rarely and that its application would have to be persuasively justified.

Nevertheless, there are cases where a standard conflict of laws solution appears to be highly inconvenient. On the other hand, it should be noted that the number of such cases is minimised as a result of the fact that rules of private international law are more and more often of a non mandatory nature and, thanks to the maxim "*forum et ius*", connecting factors are also changing, which sometimes simplifies the originally controversial issues.

2. Case of a Czech-German Marriage: Judicial Action to Determine that Immovable Property Located in the Territory of the Czech Republic is Part of the Community Property of Spouses

An example where the escape clause under Section 24(1) of the new Czech PIL Act 2012 might have been appropriate is a case which was decided recently but still under the old Czech PIL Act 1963.[27] The action was brought before a Czech court by the wife (claimant), a German citizen living in Germany, against her husband (defendant) with dual citizenship of Germany and the Czech Republic. The subject of the action was to determine that the immovable property located in the Czech Republic, acquired by the defendant, constituted part of the community property of the spouses. The defendant claimed that both spouses lived in Germany where they had entered into marriage and where their divorce proceedings were in progress at the time of bringing the action. The defendant asserted that he had acquired the immovable property exclusively with his own money. He claimed that unlike Czech law there was no concept of community property under German law, which was the governing law for their divorce in Germany. Instead, there is an institution of the community of accrued gains under which, if certain conditions are met, the property of the husband and the property of the wife do not become the common property of the spouses during the marriage; and if (as in this case) the husband acquired the property with his separate money, the immovable property in the Czech Republic would not become part of community property. The

[27] Act No. 97/1963 Coll. on Private International Law and Rules on Procedure relating thereto (hereinafter "Czech PIL Act 1963").

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main issue in this case was what law should govern this legal question – whether the immovable property acquired by the husband was, or was not, part of the common property of the spouses.

The question of how to resolve this case was rather difficult since the rule contained in Section 21(1) Czech PIL Act 1963 led only to the Czech law, without any possibility to derogate from it (no escape),[28] and did not offer a sufficiently persuasive solution. It would have been more logical to consider the whole case under just one legal system in order to preserve external harmony in decision making. Whilst the court in Germany considered matrimonial property relations under the German law, the Czech court had just one option, namely to consider the ownership of the immovable property located in the Czech Republic according to the Czech law.[29] Such a solution apparently resulted in inconsistency in decision-making, as the whole divorce and matrimonial property case was otherwise considered under the German law. The Czech judges expressed some doubts but they had no discretion to choose a different approach which would be more compatible with German law, to which the whole case obviously had a closer connection.

I would suggest that this is a typical case for which the application of a general escape clause should be considered, taking into account the principle of reasonable arrangements of the parties' relations.

3. Current Situation

It should be noted that the new Czech PIL is no longer built upon nationality of spouses as the primary connecting factor in deciding their matrimonial property relations; instead, habitual residence is primarily relevant and the connecting factor of nationality of spouses is rather a secondary consideration.[30] As a result, if spouses have their common habitual residence in Germany, German law would be the applicable law, irrespective of whether or not the spouses are German citizens. The Regulation on enhanced cooperation in the area of jurisdiction, applicable law and enforcement of decisions in matters of matrimonial property regimes[31] is also based upon the criterion of spouses' common habitual residence (Article 26(1) lit. a); thus, this Regulation would also lead to German law as the applicable law for the whole case.

[28] "Personal and property relations between spouses shall be governed by the law of the State whose citizens they are. If the spouses have different citizenship, such relations shall be governed by Czech law." The husband had dual citizenship – German and Czech, which was supported by the classical solution of dual citizenship under which in a Czech court the Czech citizenship shall be decisive, see Section 33(1) Czech PIL Act.

[29] See decision of the Supreme Court of the Czech Republic No. 22 Cdo 2909/2012 of July 31, 2013, on the application for the appeal review on the point of law against the judgment of the regional Court in Pilsen, No. 18 Co 500/2010-281, in consequence of the judgment of the District Court in Cheb, file No. 15 C 121/2002.

[30] Section 49(3) PIL Act 2012.

[31] Council Regulation (EU) No 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L183/1, 8.7.2016).

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It can be observed that in some other countries (Switzerland, Belgium) nationality is the key issue in debates on the application of the exception clause.[32] Nevertheless, solutions favouring (common) habitual residence of the parties do not degrade the significance of a general escape clause in modern private international law codifications.

B. Specific Escape Clauses

Specific escape clauses always cover only a particular segment of legal issues; they relate to, and form an escape or derogation from, a basic conflict-of-laws rule or a group of rules. Specific escape clauses are usually formulated as an exception to a particular rule, while a general escape clause can be applied against any rule within the Private International Law codification.

Specific escape clauses can be traced in national codifications with increasing frequency, and with different formulations, as suggested earlier. They can be found in codifications which also contain a general escape clause, as well as in codifications without any general escape clause, such as Section 12 of the English Private International Law Act 1995 before the adoption of Rome II (displacement of a general rule on the law applicable to tort or delict by a law of another country being substantially more appropriate with respect to specified connecting factors),[33] or Article 46 of the German Introductory Act to the Civil Code, applicable to property relations (substantially closer connection with the country other than that applicable to property under Articles 43 and 45)[34]. Specific escape clauses are also included in some international conventions, *e.g.* in the Hague Protocol on the Law Applicable to Maintenance Obligations where, as the main rule, the law of the habitual residence of the creditor applies:

> "Article 5 - Special rule with respect to spouses and ex-spouses
>
> In the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply."[35]

Other examples of specific escape clauses in both types of codifications (that is, codifications with or without a general escape clause) are various clauses in family

[32] J. MEEUSEN (note 18), at 577.

[33] Private International Law (Miscellaneous Provisions) Act 1995, Article 12 Choice of applicable law: displacement of general rule.

[34] Introductory Act to the Civil Code of 1896 as amended, Article 46 Substantially close connection: "If there is a substantially closer connection with the law of a country other than that which would apply under articles 43 and 45, then that law shall apply."

[35] Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations (note 9). The general rule laid down in Article 3 is the law of the State of the habitual residence of the creditor.

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law, in particular escapes preventing hardship. For example, Section 61(3) Czech PIL Act on adoption reads:

> "Should it be necessary to apply foreign law under paragraphs 1 and 2 which does not allow adoption or admits it only under extremely onerous circumstances, Czech law shall apply provided the adopter, or at least one of the adopting spouses or the adoptee is habitually resident in the Czech Republic."

It is arguable whether hardship clauses should be considered escape clauses: I advocate that they are exceptions to a particular rule and can be considered escapes *sui generis*, but this is not a generally shared opinion. Rather, hardship clauses are usually regarded as examples of clauses following the objectives of the substantive law and as such they are no longer understood as "classical" escape clauses oriented towards the closest relationship.[36]

Regarding the United States legal system, as escape clauses may be understood, the codified rules in the Restatement (Second) of Conflict of Laws, see *e.g.* § 196 on contracts for the rendition of services providing for specific rules with respect to the general rule on contract law (§ 6):

> "The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services … be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied."

Evidently, such a clause could not be considered a classical escape clause as the applicable law may also be influenced by substantive law considerations.[37] Moreover, the displacement by a "more significantly related law", as compared to the Swiss statute or European codifications, is sometimes assessed as open-ended and vague, with respect to additional factors.[38] However, after all, it is still an escape from a main rule.

C. Preliminary Conclusions

General and specific escape clauses are accompanied by important case law; nevertheless, it would be difficult to draw some more general conclusions from the case law alone. What is particularly relevant is the legal culture, in particular whether there is an attempt to reach a certain level of classification and quantification, *i.e.* an exact approach leading to the formation of a specific methodology for courts to follow, or whether judges are provided with more discretion. At first sight, it appears that "escapes" usually lead to the application of the *lex fori*, as can

[36] See *e.g.* K. KREUZER (note 7), at 183, with further references.

[37] K. KREUZER (note 7), at 177.

[38] P. HAY (note 3), at 360-363 with further references.

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be illustrated by examples from the practice of Swiss courts, Belgian courts and some decisions from the UK.[39] There are also some differences between the use of escape clauses in common law countries and in some civil law countries, for example comparing the case law to Article 4 of the Rome Convention on the law applicable to contractual obligations.[40] The common law practice differentiates among the "strong model" meaning that the main rule is applied robustly, the "weak" model favouring the closest connection and thus the escape clause, and the "intermediate model", which takes the middle ground.[41] However, I would be rather careful about such classification and more general comparative conclusions, which require serious research; one may imagine, for example, a research project in the framework of the European Union.

III. Escape Clauses in European Private International Law

Comparing the interpretation of escape clauses within individual states with the interpretation of uniform rules in European legislation or in international conventions, the latter (*i.e.* interpretation of unified rules) appears to be more difficult. The general problems of interpretation are multiplied by conflicts between different legal cultures and different interpretive procedures.

A. Rome Convention and Rome I Regulation

The most significant in this respect has been the escape clause in Article 4(5) of the Rome Convention on which there have been two important decisions of the Court of Justice of the European Union (CJEU); case *ICF (Intercontainer)*[42] and

[39] See *e.g.* Basler Kommentar (note 21), at 127; J. MEEUSEN (note 18), at 574; from the practice of English courts *e.g.* Apple corp. Ltd v Apple Computer Inc. [2004] EWHC 768 (Ch), [2004] ILPr. 34.

[40] Rome Convention on the Law Applicable to Contractual Obligations of 19.6.1980, OJ C 27/36, 26.1.1998. Compare *e.g.* U. MAGNUS/ P. MANKOWSKI, The Green Paper on a Future Rome I Regulation – on the Road to a renewed European Private International Law of Contracts, *Zeitschrift für die vergleichende Rechtswissenschaft* 2004, p. 159; T. HARTLEY, The Modern Approach to Private International Law International Litigation and Transactions from a Common Law Perspective, General Course, *Recueil des Cours*, Vol 319 (2006), 216; J. HILL, Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts, *I.C.L.Q.* 2004, p. 339 *et seq*.; A. BUCHER, La dimension sociale du droit international privé, Cours general, *Recueil des cours*, Vol 341 (2009), p. 207 *et seq*.; see also *infra*.

[41] See *e.g.* Ch. ADESINA OKOLI/ G. OMOSHEMINE ARISHE (note 1), at 517.

[42] C-133/08 *Intercontainer Interfrigo (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 (*ICF*).

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case *Haeger & Schmidt*[43]. Both cases were very complex in their facts and correspondingly rather difficult from a legal point of view: they demonstrate well how challenging this whole topic is. Demonstration of both cases requires certain simplification for our purposes.

1. Article 4 of the Rome Convention

The key significance of Article 4 of the Rome Convention lies in the fact that it stipulates the applicable law to the contract in the absence of choice. This Article lays down the principle that the contract is to be governed by the law of the country with which it is most closely connected. The closest connection is determined by the characteristic performance principle, that is, the contract is most closely connected with the country that, at the time of conclusion of the contract, is the habitual residence of the party who is to effect the performance that is characteristic of the contract (the performer). This is the first general presumption, followed by two specific presumptions – on immovable property and carriage of goods contracts. These presumptions are disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country; see Article 4(5) Rome Convention.

This means that under special circumstances a closer connection with another country can prevail over the preceding presumptions. The escape clause was the subject of many debates and was considered in several judgments of courts in EU Member States.[44] Some criticism resulted in a new formulation of Article 4 in the Rome I Regulation on the law applicable to contractual obligations.

2. Article 4 Rome I

Whilst the determination of the applicable law in the absence of choice is dealt with in the Rome Convention through a system of presumptions, the system under Article 4 Rome I is different: although the instruments used are similar, there is a practical difference in the systematic arrangements. The Article starts with a list of specific contracts, followed by the characteristic performance principle for contracts not covered or for mixed contracts. An escape clause is then formulated:

> "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."

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[43] C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2014] WLR (D) 441 (*Haeger*).

[44] See in particular Ch. ADESINA OKOLI/ G. OMOSHEMINE ARISHE (note 1); see also P. BEAUMONT/ P. MCELEAVY, *Private International Law A. E. Anton*, Edinburgh 2011, p. 474; P. ROGERSON *Collier's Conflict of Laws*, Cambridge 2013, p. 311; D. MARTINY, in REITHMANN/ MARTINY *Internationales Vertragsrecht*, Köln 2004, p. 128; U. MAGNUS/ P. MANKOWSKI (note 40), at 158; T. HARTLEY The Rome Convention in English Courts in H. MANSEL/ Th. PFEIFFER (Hrsg.) *Festschrift für Erik Jayme*, München 2004, p. 297, etc.

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The law of the closest connection applies to the remaining cases.[45]

What is generally emphasized in relation to the newly formulated escape clause is that its application is stricter when compared with previous experience: the contract must be "manifestly more closely connected" with another country, meaning "exceptional".[46] The order and the whole system of the respective provision are also relevant as they weaken the position of the escape clause. Recital (20) in the Preamble provides as follows:

> "Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."

A question could be raised as to what effect the reconstruction of Article 4 Rome I may have with respect to the function of an escape clause which was absent in the original draft of the provision.[47] I believe that where an escape clause is permitted, albeit in a restricted form with a restrictive interpretation, its application and outcome should always depend on a decision-making authority. There is always a risk that the authority may decide differently than expected, which is caused by the substance of an escape clause itself. I am afraid that, in short, a "safe" escape clause cannot be created.

Recent practice suggests that there may in fact be a certain change in the approach, favouring a more restrictive interpretation of the new escape clause under the Rome I, in accordance with a judgment of the English Commercial Court. The case involved a New York seller, an English buyer and negotiations with an English broker (contract for the sale of bonds). The buyer argued that the contract was manifestly more closely connected with England than with New York. The judge held that the escape clause only applies where the cumulative weight of the factors connecting the contract to another country "clearly and decisively" outweigh the law which would otherwise apply. The word "manifestly" suggests a more stringent standard than before, as does the elevation of the criteria in Articles 4(1) and 4(2) to tests from mere presumptions of closest connection. The new language and structure suggest a higher threshold, which requires that the cumulative weight of the factors connecting the contract to another country must clearly and decisively outweigh the goal of certainty in applying the relevant test in Article 4(1) or 4(2).[48] Accordingly, the proper law of the contract was held to be the law of New York.

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[45] *I.e.* cases outside paragraphs 1 or 2 of Art. 4 Rome I.

[46] In details see *e.g.* P. BEAUMONT/ P. McELEAVY (note 44), at 481.

[47] Detailed analysis see *e.g.* K. THORN, in T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht. EuZPR/EuIPR. Kommentar, Rom I-VO, Rom II-VO*, München 2011, p. 246.

[48] Molton Street Capital LLP v Shooters Hill Capital Partners LLP and another [2015] EWHC 3419 (Comm), para. 94.

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B. The *ICF (Intercontainer)* Case (C-133/08)

The subject of the case was an unpaid invoice for the use of cargo cars and ensuring railway transport between companies with registered offices in Belgium and the Netherlands respectively. While statute-barred under Dutch law, the claim was still actionable under Belgian law. ICF, a company established in Belgium, brought an action against the Dutch companies. The contract (concluded only orally) stipulated that ICF was to provide the Dutch company with cargo cars and to arrange for railway transport. The Dutch company, having leased the cargo capacity to a third party, was responsible for the operational part of the carriage of the goods.

In its decision, the CJEU considered, *inter alia*, the interpretation of the escape clause in Article 4(5). As is well known and often commented, the CJEU interpreted this Article in the sense that if the circumstances as a whole clearly suggest that the contract under consideration is more closely connected with a country other than that determined under any criterion contained in preceding paragraphs, a court should not apply these criteria and should instead apply the law of the country with which the contract is more closely connected.[49]

The interpretation shows a fairly restrictive approach to escape clauses.[50] The CJEU drew the conclusion that the objective of this escape clause is to counterbalance the set of presumptions by reconciling the requirements of legal certainty with the necessity of providing for a certain flexibility.[51] The meaning of the formulation "the circumstances clearly suggest … a closer connection with another country" would have to be determined by a competent court in the particular case as no concrete direction in this respect was provided. The more or less general conclusion of the court might be supported as it is necessary to provide the decision-making body with some discretion.

C. The *Haeger & Schmidt* Case (C-305/13)

This case concerned compensation for loss suffered by *Va Tech*, a company governed by French law, during the carriage of a transformer from Belgium to France. *Va Tech* concluded a contract for the arrangement of the carriage with *Safram*, another French company. *Safram*, as principal freight forwarding agent, concluded a second commission contract with the company *Haeger & Schmidt*, registered in Germany, for organising the carriage of the transformer by inland waterway. For that purpose, *Haeger & Schmidt* chose a carrier established in France. During loading in Antwerp, the transformer slid from the slipway and the barge sunk, together with its cargo. *Va Tech* sought compensation from both forwarding agents in the French courts.

[49] *ICF* (note 42), (64).

[50] Sometimes considered to be a middle ground or intermediary approach, see Ch. ADESINA OKOLI/ G. OMOSHEMINE ARISHE (note 1), at 523, with further references.

[51] *ICF* (note 42), (59).

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In the proceedings, a question was raised with respect to the German company *Haeger & Schmidt*, namely whether the court should apply German or French law. In the end, the French *Cour de cassation* submitted three questions to the CJEU for a preliminary ruling.

1. Interpretation of the Escape Clause

One of the questions submitted to the CJEU related to the use of the escape clause if the said contract was not considered a carriage contract and as such would be subject to the general presumption in Article 4(2) (under the characteristic performance criterion). The initial contractor concluded an agreement with the first agent, who subsequently arranged for its replacement by a second agent. In such a case, there is a question as to whether it is possible "…to allow the law applicable to the contractual relationship between the contractor and the second agent to be determined by reference to the place of establishment of the first agent".[52]

This question interpreting the escape clause in Article 4(5) of the Rome Convention is relevant only if the courts find that the contract cannot be equated with a contract for the carriage of goods.[53] The substance of the question is, as inferred by the CJEU, whether Article 4(2) must be interpreted as allowing determination of the applicable law in a case where the first forwarding agent has been replaced by a second forwarding agent having its registered office in another Member State, solely according to the location where the principal forwarding agent has its place of business.[54]

Under Article 4(2) it is presumed that the contract is most closely connected with the country of the habitual residence of the party effecting the characteristic performance. The presumption of Article 4(2) may be disregarded when the requirements of the escape clause in Article 4(5) are met.[55]

The court must compare the connections existing between the contract and, on the one hand, the country in which the party who effects the characteristic performance has its habitual residence, and, on the other hand, another country with which the contract is closely connected.[56] In doing so, the national court must conduct an overall assessment of all the objective factors and determine which of those factors are most significant, referring by analogy to the *Schlecker* judgment under which the referring court must take account of all elements which define the [employment] relationship and single out one or more as being, in its view, the

[52] *Haeger* (note 43), (16).

[53] Paragraph 43 seems to be rather unclear, since the third question is asked only in the event that the referring court finds that the contract at issue cannot be equated with a contract for the carriage of goods and accordingly is *not* (emphasis added, MP) subject to the general presumption laid down in Article 4(2) - see *Haeger* (note 43), (43).

[54] *Haeger* (note 43), (44).

[55] Referring to the *ICF* judgment, (63) and (64).

[56] *Haeger* (note 43), (48).

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most significant.[57] Significant connecting factors include, in the court's opinion, the presence of a close connection between the contract with another contract or contracts which are, as the case may be, part of the same chain of contracts, and the place of delivery of the goods.[58]

This interpretation is also supported by Recital (20) in the Rome I Preamble, which mentions that the existence of a very close connection between the contract in question and another contract or contracts may be a relevant connecting criterion.[59]

2. Links to the Chain of Relating Contracts?

How to assess this approach? It may be inferred that the CJEU, emphasizing wider links to the chain of related contracts, tends to lean towards a significant connection of both forwarding contracts with French law. Should the claims from both forwarding contracts have been considered separately, and it has to be noted that the CJEU decided only the case where the applicant to the main proceedings was the German freight forwarding agent (the French forwarding agent *Safram* in the meantime went into liquidation), I would prefer a rather more restrictive position.

I believe that if a forwarding agent makes a contract in its own name and responsibility, it should expect the contract to be governed by the law of its habitual residence. The agent undoubtedly effects characteristic performance; it should be clear in the case of forwarding contracts. A chain of contracts should follow from comparison of both forwarding contracts: whether they are interlinked, made after the same model (having identical or similar structure and provisions), etc. The text of the forwarding contracts should be decisive in this respect.

Besides, argumentation based on other, although related, contracts could be left aside here solely because the relevant contracts were not made between identical parties.[60] The place of delivery of the goods as another significant factor is clear and leads to French law, but this factor alone does not seem to be sufficient.

My approach may appear to be rather rigid and conservative – maybe qualified as a "strong presumption approach" under the English jurisprudence[61] - but it is in line with the principle of legal certainty and predictability which should be given primary importance. We can expect that these conclusions of the CJEU will be understood in different ways.

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[57] *Haeger* (note 43), (49). Compare C-64/12 *Anton Schlecker v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551 (*Schlecker*), para 40.

[58] *Haeger* (note 43), (49).

[59] *Haeger* (note 43), (50).

[60] See also H.P. MANSEL/ K. THORN/ R. WAGNER, Europäisches Kollisionsrecht 2014: Jahr des Umbruchs, *IPRax* 2015, p. 30, referring to Th. RAUSCHER/ K. THORN (note 47), p. 150.

[61] Compare Ch. ADESINA OKOLI/ G. OMOSHEMINE ARISHE (note 1), at 519 with further references.

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IV. Final Remarks

Escape clauses, as has been suggested earlier, are relatively similar to each other.

A. General or Detailed Formulation of an Escape Clause

Some escape clauses are defined in more detail, and as such are more demanding as to the fulfilment of requirements for escape. Such formulation can at times be excessively limiting with respect to the court's discretion, as may be illustrated on Article 4(3) Rome II:

> "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

This provision is sometimes criticized. S. C. SYMEONIDES misses in this provision two elements: issue by issue evaluation and correlation to non-geographical over-reaching principles. [62] In my opinion, the last sentence of this paragraph is only an illustration of conditions for an escape ("might be based in particular") and not a strictly limiting condition of applicability of this paragraph; we have to wait for the case law.

Other escapes are formulated in an easier, more general manner which provides more space for their application (and less predictability). Any detailed classification would be difficult to establish, and the question is whether such classification would be of any practical significance.

B. Escape Clauses and Conflicts Justice v. Material Justice

Another aspect of this still incomplete issue that should at least be pointed out is a view on escape clauses under conflicts justice or material justice.

There is an opinion that escape clauses are, or should be, directed only towards conflicts justice and that the material outcome of the application of governing law – when considering an escape – should not be taken into account.[63] However this may be not fully relevant: it depends on the formulation of the

[62] S. C. SYMEONIDES gives a hypothetical example of a French hunter who, while hunting in Kenya, injures a Belgian hunter with whom he had no preexisting relationship. In this example, regarding the issue of damages, neither France nor Belgium would be considered to have a "manifestly closer connection" than Kenya where the damage occurred which may substantially limit the amount of damages. See S. C. SYMEONIDES, Codifying Choice of Law (note 1), 202.

[63] Compare K. KREUZER (note 7), at 177.

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escape. It is true that the escaping the application of something other than the generally applicable law in most of above mentioned examples is based on what is known as conflicts justice, however some formulations may lead to an assessment based on what is known as material justice. Conflicts justice means justice in the sense of the conflict of laws, *i.e.* the determination of the law which appears to be the closest for the respective legal relationship regarding its localisation, and irrespective of substantive-law results. Conflicts justice works with the concepts of the closest or strongest connection, characteristic performance, etc. On the other hand, material justice endeavours to find the best and most convenient solutions under the applicable substantive law. Material justice has become relevant in cases where it is necessary to protect a weaker party, to take into account the best interests of a child, in issues under "extremely onerous circumstances" etc., and is projected mainly, but not exclusively in hardship clauses.

In my opinion, both types of justice can lead to escaping the application of a law other than that determined by the basic conflict-of-laws rule. Whilst conflicts justice is the purpose of most escape clauses, exceptionally material justice may be relevant, leading to a reasonable and fair solution according to the formulation of a clause. Typical concepts are that of the best interests, or, from the other side, extremely onerous circumstances that may permit an escape, usually in favour of the forum law.

For example, the Rome III Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[64] includes a provision that can be considered to function as an escape clause, although some authors would not qualify it as such:

> "Article 10 Application of the law of the *forum*
>
> Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the *forum* shall apply."

C. The Schlecker Case (C-64/12)

In most situations, escapes are allowed only for the purposes of attaining conflicts justice. ECJ Case C-64/12 *Schlecker*[65] can be given as a typical example. Ms *Melitta Boedecker*, a German national, was employed by the *Schlecker* Company, a German entity with branches in a number of other countries. From 1994 to 2006 *Melitta* was employed in the Netherlands. In 2006, problems occurred in relation to a change in the place of work. A question arose as to whether the employment contract was governed by Dutch law as the law of the

[64] Regulation (EU) No 1259/2010 of the Council of 20.12.2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343/10, 29.12.2010), hereinafter "Rome III Regulation".

[65] *Schlecker* (note 57).

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place of habitual performance of work during the previous eleven years, or by the "more closely connected" German law.

Under Article 6 of the Rome Convention the contract of employment, in the absence of choice, is governed by the law of the country in which the employee habitually carries out his work, (…) unless it appears from the circumstances as a whole that the contract is more closely connected with another country.[66] It is to be remarked that Dutch law offered the employee greater protection against the change in place of work made by the employer than German law. The CJEU concluded that with respect to significant factors, such as payment of taxes on the income, social security scheme and pension arrangements, sickness insurance and salary determination and other working conditions, German law should be applicable because the contract is more closely connected with Germany.[67]

These conclusions are apparently based upon conflicts justice, not on material justice. The CJEU concentrated on the "closer connection" and not on the material output of the greater protection offered to the employee against the change of place of work made by the employer. According to the CJEU, in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected. However, the CJEU supports here the Advocate General who pointed out that the interpretation guaranteeing adequate protection must not automatically result in the application, in all cases, of the law most favourable to the worker.[68]

This is an important point. However, it does not suggest that rules based on the possibility to change the applicable law indicated in the basic conflict rule may not be qualified as "escapes" if the material nature of a case is to be considered.

An escape is any exception from a rule where permitted.

D. Article 137 of the Proposal of the European Code on Private International Law

Finally, I wish to draw attention to a Rome 0 Regulation Proposal authored by the renowned Professor Lagarde. Article 137 of the Proposal lays down the general escape clause:[69]

> *"Le droit désigné par la présente loi n'est exceptionnellement pas applicable si, au regard de l'ensemble des circonstances, la situation n'a manifestement qu'un lien très lâche avec ce droit et se*

[66] This escape clause should be considered as *lex specialis* with respect to Article 4(5), as Article 6 is *lex specialis* to Article 4 of the Rome Convention.

[67] *Schlecker* (note 57), (41).

[68] *Schlecker* (note 57), (34), referring to point 36 of the Opinion of AG.

[69] P. LAGARDE, Embryon de Règlement portant Code européen de droit international privé, *RabelsZ* 2011, p. 673 *et seq*.

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trouve dans une relation beaucoup plus étroite avec un autre droit. Dans un tel cas, il est fait application de cet autre droit."

This clause is evidently built upon similar principles to those in Article 15 of the Swiss Private International Law Act. Although debate about a concrete form of this provision could be premature, it nevertheless deserves our attention. This precisely formulated clause provides rather clear guidelines: exceptional application, observing all circumstances of the case, only a very loose connection to the law applicable under the main rule, and much closer connection to another law. The formulation is well balanced and provides sufficient space for observation of the particularities of the case. In my opinion, which is not always shared,[70] European private international law needs a general escape clause as, exceptionally, there may be cases where a standard connecting factor would not be convenient, which deserves some more space of consideration even in areas of conflict-of-law rules without special escape clauses.

E. A Note at the Very End

My contribution has focused on some topical issues relating to the classical concept of escape clauses. It is evident that escape clauses have become an important tool of private international law. Firm conflict of laws rules determining applicable law are not necessarily convenient in all types of situations. On the other hand, clauses allowing for derogation from these rules are more demanding for judges; in addition, they provide parties with no sufficient certainty as to what outcome of the case can be expected and what decision the court may arrive at. An escape clause can never be "safe".

Discretion of a decision-making authority to determine the applicable law plays a significant role in the whole process. It would depend on the judge in question whether he or she would be brave enough to, on the one hand, break through the rule in favour of an exception and, on the other hand (and this may also require bravery!), to point out the limits to be respected in the interests of legal certainty.

[70] See rather critical remarks and skeptical conclusions by O. REMIEN, Engste Verbindung und Ausweichklauseln, in S. LEIBLE/ H. UNBERATH (Hrsg.) *Brauchen wir eine Rom 0-Verordnung?,* Jena 2013, p. 223 *et seq*.

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PROTECTED PARTIES IN EUROPEAN AND AMERICAN CONFLICT OF LAWS: A COMPARATIVE ANALYSIS OF INDIVIDUAL EMPLOYMENT CONTRACTS

Jutta GANGSTED[*] / Geert VAN CALSTER[**]

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 83-141
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. Introduction

International transactions resulting from the progressive expansion of cross-border commerce[1] suffer from what is called the "plurality of law" because they are tied to various legal systems.[2] Private international law has thereby continuously played an important role in determining which courts can adjudicate disputes, what law applies to the relationship and whether the subsequent judgment will be recognised and enforced abroad.[3]

The methodology followed in the United States (hereafter "U.S.") compared to the European Union (hereafter "EU") is different. This research analyses both normative frameworks regarding individual employment contracts, with a specific focus on how they deal with employee protection.

It has generally been observed that freely negotiated contracts have slowly been overshadowed by what one would call "adhesion" or "take-it or leave-it" contracts.[4] They are merely drafted by one party and accepted by the other, leaving

[1] C. WALSH, The Uses and Abuses of Party Autonomy in International Contracts, *University of New Brunswick Law Journal* 2009, vol. 60, p. 12; J.F. HELLIWELL, National Borders, Trade and Migration, *Pacific Economic Review,* 1997, vol. 2, p. 165 *et seq.*; V. NITSCH, National Borders and International Trade: Evidence from the European Union, *Canadian Journal of Economics* 2000, vol. 22*,* p. 1091 *et seq.*; G. RÜHL, The Problem of International Transactions: Conflict of Laws Revisited, *Journal of Private International Law* 2010, vol. 6, p. 61.

[2] P. BEHRENS, Rechtliche Strukturen der Weltwirtschaft aus konstitutionökonomischer Perspektive, *Jahrbuch für Neue Politische Ökonomie* 1999, vol. 19, p. 23 *et seq.*; P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES, *Conflict of Laws,* Saint Paul (Minn.) 2010, p. 450 *et seq.*; S.E. STERK, Personal Jurisdiction and Choice of Law, *Iowa Law Review* 2013, vol. 98, p. 1167 *et seq*.

[3] G. VAN CALSTER, *European Private International Law,* 2nd ed., Oxford and Portland 2016, p. 3. See also F. MORGENSTERN, *International Conflicts of Labour Law,* Geneva, 1984, p. 47.

[4] These types of contracts are usually carefully analysed by courts and scholars. See *Neal v. State Farm Ins. Companies*, 188 Cal. App. 2d 690, 10 Cal. Rptr. 781, 784 (Ct. App. 1961); S.A. ALIAS/ Z.A.A. GHADES, Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts, *Australian Journal of Basic and Applied Sciences* 2012, vol. 6, p. 331 *et seq*.

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no real choice to the weaker party regarding most of the terms.[5] This has notably been highlighted in the EU in the area of individual employment contracts for instance.[6] Stronger parties might wish to circumvent the protective national laws of connected countries by explicitly adopting or imposing a choice-of-law or choice-of-court clause on the other party.[7] If no such choice is made, one could also coordinate the relationship in such a way that the dispute falls within the realm of an advantageous legal system. This is where the State sometimes steps in with protective policies of private international law to shield those who are in a weaker bargaining position; the law thereby acting as a "*shield for the weak and powerless, not a club for the powerful*".[8]

Yet, one must distinguish clearly between jurisdiction and applicable law. The fact that the parties agree that a particular dispute will be adjudicated in a particular forum does not necessarily mean that the forum's laws will apply. Whose law will apply to determine the liabilities arising out of the dispute is determined by the relevant conflicts rules. Yet, the circumstance where the State applies its own labour laws is often considered most attractive[9] as it is argued that the forum is best able to discern, interpret and apply the applicable law, namely its own.[10]

The EU and US systems both allow for party choice to prevail whilst providing for the effective scope of that choice to be reduced when these clauses affect important State concerns (in particular in this area: core labour law).

In the EU, this has been achieved through the enactment of top-down "neutral" rules.[11] The emphasis on neutrality dates back to von Savigny who advocated a "blindfold" approach to private international law;[12] the rules serve only

[5] C.L. KNAPP, Taking Contracts Private: The Quiet Revolution in Contract Law, *Fordham Law Review* 2002, vol. 71, p. 770.

[6] M.V. POLAK, "*Laborum Dulce Lenimen*"? Jurisdiction and Choice-of-Law Aspects of Employment Contracts, in J. MEEUSEN/ M. PERTEGÁS/ G. STRAETMANS (eds), *Enforcement of International contracts in the European Union. Convergence and Divergence between Brussels I and Rome I,* Antwerpen/ Oxford/ New York, 2004, p. 323.

[7] See discussion in G. VAN CALSTER (note 3), p. 8 *et seq.* concerning the relevance of jurisdiction and the issues with forum shopping for the unsophisticated litigant.

[8] As pointed out by Georgia's Governor R. Barnes in J.C. SMITH/ E.V. MOYÉ, Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts, *Texas Tech Law Review* 2012, vol. 44, p. 301 *et seq*.

[9] G. VAN CALSTER (note 3), p. 4.

[10] Indeed, convergence between the jurisdiction and choice-of-law rules is argued to contribute to obtaining adequate legal protection. M.V. POLAK (note 6), p. 323; Opinion of Advocate General JACOBS in CJEU Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075; G. VAN CALSTER (note 3), p. 75.

[11] See also P. NYGH, *Autonomy in International Contracts,* Oxford 1999, p. 139 *et seq*.; E.A. O'HARA/ L.E. RIBSTEIN, Rules and Institutions in Developing a Law Market: Views from the United States and Europe, *Tulane Law Review* 2008, vol. 82, p. 2176.

[12] G. VAN CALSTER (note 3), p. 4.

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to indicate the applicable law and the court is not concerned with its content.[13] This principle has since developed so as to allow for escape mechanisms where judges can choose a more appropriate law or venue if the facts point to another more closely related legal system.[14] The U.S. approach has been shaped by dynamic State competition. The term "conflict of laws" suggests that the various States involved have conflicting interests in seeing their laws applied.[15] Each State has thereby adopted its own method and Congress and the federal judiciary have shown little interest in enacting rules on the matter.[16] Compared to the slightly mechanical EU (continental) method, the modern American approach has opted for a flexible position, which directs more attention to the content of the laws and gives the courts broad discretionary powers. The first chapter (I) outlines how both legal systems determine which courts have jurisdiction to hear an international case involving employment contracts. The second chapter (II) focuses on applicable law, both when a choice has been made and when this is not the case.

II. Jurisdiction Relating to Individual Employment Contracts

Looking at the applicable EU provisions concerning jurisdiction and going through the relevant U.S. case law for comparison, part (1) focuses on choice-of-court agreements,[17] and part (2) reviews the objective determination of jurisdiction *i.e.* in the absence of choice-of-court agreements.

[13] For a recent example where this principle is highlighted in the EU, see Opinion of Advocate General WAHL in CJEU Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551 at §21 where he states that the objectively applicable conflicts rules of Article 4 of the Rome I Regulation (see below: it governs applicable law in contractual obligations) "must be regarded as abstract and neutral, in that they do not seek to favor one party to the contract to the detriment of the other. Accordingly, the substantive content of the laws concerned is not taken into account in determining the applicable law." The European Court of Justice is the EU's centralised court. Previously abbreviated as "ECJ" (for "European Court of Justice"), following the latest Treaty reforms at the Lisbon summit, the Court is now generally referred to as "CJEU" (for "Court of Justice of the European Union").

[14] P. NYGH (note 11), p. 141.

[15] See S.C. SYMEONIDES, The American Revolution and the European Evolution in Choice of Law: Reciprocal lesson, *Tulane Law Review* 2008, vol. 82, p. 1785 *et seq*.

[16] E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2177.

[17] A. BRIGGS/ P. REES, *Civil Jurisdiction and Judgments,* 5th ed., London 2009, p. 163.

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A. Choice-of-Court Clauses

When a contract has a factual link with more than one country, parties often elect the forum that suits them most by agreeing to a choice-of-court clause.[18] This brings some certainty and predictability to the outcome of a dispute and minimises litigation costs by eliminating the risk of a lawsuit about jurisdiction.[19] Such a choice is permitted both in the EU and the U.S., yet conditions affecting them differ.

1. Specific Rules for Forum Clauses to Bind Employees in the EU

In this paper, we take the provisions of the 2012 Regulation, the "Brussels I Recast", as the port of call for the EU analysis. The 1968 Brussels I Convention[20] was replaced by a Regulation in 2001,[21] which itself was succeeded in 2012 by a Recast Regulation effective January 2015.[22]

Both the original 1968 Convention and the successive Regulations provide for a framework in which general choice-of-court clauses, outside the context of employment contracts (or indeed consumer contracts), are valid.[23] The Regulation only partly sketches the requirements to ascertain the scope and validity of these agreements,[24] focusing in particular on the proof of consent. A whole range of

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[18] D. McCLEAN/ V. RUIZ ABOU-NIGM, *Morris on The Conflict of Laws*, 8th ed., London 2012, p. 92.

[19] J. WHINCOP/ M. KEYES, *Policy and Pragmatism in the Conflict of Laws*, Aldershot 2001, p. 41.

[20] Brussels Convention of the 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter "1968 Convention"), 1972 O.J. L 299/32.

[21] 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), 2001 O.J. L 12/1.

[22] 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), 2012 O.J. L 351/1 (hereinafter the "Brussels I Recast"), which applies to proceedings instituted on or after the 10th of January 2015.

[23] See 1968 Brussels Convention, Article 17 and Brussels Regulation, Article 23, now Article 25 in the Recast Regulation. At least as far as employment contracts were concerned, this was widely criticised at the time of the Convention. For early critical reviews, see G. BEITZKE, Gerichtsstandsklauseln in auslandsbezogenen Dienst- und Arbeitsverträgen, *Recht der Internationalen Wirtschaft* 1976, vol. 22, p. 7 *et seq.*; J. LOOKOFSKY/ K. HERZ, *Transnational Litigation and Commercial Arbitration: An Analysis of American, European and International Law*, 2nd ed., New York 2004, p. 697; J. VINCENT, Quelques observations sur les conflits de juridictions en matière de contrat de travail, in R. BLOUIN, *Etudes de droit du travail offertes à André Brun,* Paris 1974, p. 603 *et seq*.

[24] U. MAGNUS/ P. MANKOWSKI, *Brussels I Regulation - European Commentaries on Private International Law,* Munich 2007, p. 450 *et seq*.

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contractual issues are not at all harmonised by the Regulation.[25] The validity of the agreement from the point-of-view of these issues other than proof of consent, remains subject to national, not EU law, as further explained below. It is relevant in this respect to point out that choice-of-court agreements are considered separable from the entire contract[26] so parties cannot circumvent them by claiming the invalidity of the contract as a whole.[27]

This chapter (a) focuses on Articles 25 and 23, which lay down the requirements for valid jurisdiction agreements, respectively for choice of court generally and for choice of court in the specific context of employment contracts, and (b) highlights the important changes brought about by the "Brussels I Recast" Regulation.[28]

a) The Requirements of Articles 25 and 23 of the Brussels I Recast

Article 25 regulates all jurisdiction agreements that fall within the scope of the Regulation[29] and clearly lists a number of formal requirements.[30] Article 25 in its former version provides a test to establish (only) the formal expression of consent to a choice-of-court agreement.[31] A factual enquiry[32] reveals whether such

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[25] The underlying contractual issues *viz.* fraud, duress or any other allegedly vitiating factor for example, are not harmonised by any provisions of the Brussels I Recast. This will be discussed *infra* and might affect the predictability of the jurisdiction-selecting clauses. R. MORSE, The Substantive Scope of Application of Brussels I and Rome I: Jurisdiction Clauses, Arbitration Clauses and ADR Agreements, in J. MEEUSEN/ M. PERTEGÁS/ G. STRAETMANS (note 6), p. 196; G. VAN CALSTER (note 3), p. 82 *et seq*.

[26] This point is now expressly stated in the Brussels I Recast, art. 25(5). For previous opinions on the matter see Case C-269/95 *Benincasa v Dentalkit Srl* [1997] ECR I-376 at §§24-29; Th. KRUGER, *Civil Jurisdiction Rules of the EU and Their Impact on Third States,* Oxford 2008, p. 222; F. VISCHER, Forum Selection and Arbitration Clauses under the Brussels and Lugano Conventions and under Swiss Law, in J.L. GOLDSMITH (ed), *International Dispute Resolution: The Regulation of Forum Selection – Fourteen Sokol Colloquium*, Irvington (New York) 1997, p. 87; A. BRIGGS, What Should Be Done about Jurisdiction Agreements?, this *Yearbook* 2010, vol. 12, p. 317.

[27] CJEU C-269/95 *Benincasa v Dentalkit Srl,* [1997] ECR I-376 at §§24-29.

[28] Brussels I Recast (note 22). See P. BRIZA, Choice-of-Court Agreements: Could the Hague Choice-of-Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way out of the *Gasser-Owusu* Disillusion?, *Journal of Private International Law* 2009, vol. 5, p. 537 *et seq*.

[29] See U. MAGNUS/P. MANKOWSKI (note 24), p. 450 *et seq*. Note that the Brussels I Recast has extended the territorial scope of (now) Article 25 by removing the requirement that at least one of the parties to the agreement be domiciled in a Member State. It now also applies to choice-of-court agreements made by two parties who are domiciled outside the EU, provided that they choose a court that is within one of the EU Member States.

[30] See Brussels Regulation, Article 25(1), second sentence.

[31] Case C-214/89 *Powell Duffryn v Wolfgang Peterit,* [1999] ECR 1745 at §14: "the concept of «agreement conferring jurisdiction» (…) must be regarded as an independent concept"; Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337 at §§14-15: "the purpose of the requirements as to form imposed by Article 17 is to ensure that

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expression is present;[33] however, compliance with one of the formal requirements is clearly neither sufficient nor appropriate to prove the clause's substantial validity.[34] Material existence of the clause must be differentiated from its formal validity.[35] While the Court of Justice of the EU (hereinafter "CJEU") has stated that Member States cannot impose additional form requirements,[36] Article 25 does not give much indication with respect to material consent.[37] This used to provide for uncertainty as to the law that applies to determine whether vitiating factors exist.[38] Jurisdiction clauses being excluded from the scope of Rome I according to its Article 1(2)(e),[39] one could either refer to the autonomous standards at Article 25 or to the rules of the applicable national law.[40] CJEU case law[41] has suggested

consensus between the parties is in fact established."

[32] R. FENTIMAN, *International Commercial Litigation,* Oxford 2010, p. 64.

[33] See also A. DICKINSON, The Revision of the Brussels I Regulation. Surveying the Proposed Brussels I *bis* Regulation – Solid Foundations but Renovation Needed, this *Yearbook* 2010, vol. 12, p. 285; D. SANCHO VILLA, Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime, this *Yearbook* 2010, vol. 12, p. 403.

[34] Report on the Convention on the Association of [..] Denmark, Ireland and the UK to the [1968 Brussels] Convention, 1978 O.J. C59/71 (hereafter the "Schlosser Report"), p. 159: it notes that it has been argued that while (now) Article 25 seems to merely mention the formalities that the parties' consent must fulfil it also requires a certain quality of consent. Consent cannot simply be clearly and precisely demonstrated; it must also be "true" and "free and unimpeded." See Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Jenard Report), 1979 O.J. C 59/1, p. 37; G. VAN CALSTER (note 3), p. 81; U. MAGNUS/ P. MANKOWSKI (note 24), p. 473; T. KRUGER (note 26), p. 284; H. SCHACK, *Internationales Zivilverfahrensrecht mit internationalem Insolvenzrecht und Schieds–verfahrensrecht,* München 2014, p. 205 *et seq*.

[35] Z. TANG, The Interrelationship of European Jurisdiction and Choice of Law in Contract, *Journal of Private International Law* 2008*,* vol. 4, p. 42 *et seq*.

[36] CJEU C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671 at §§25 *et seq*.; CJEU C-159/97 *Transporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* [1999] ECR I-1597 at §37; U. MAGNUS/ P. MANKOWSKI (note 24), p. 80.

[37] U. MAGNUS/ P. MANKOWSKI (note 24), p. 476.

[38] R. FENTIMAN (note 32), p. 64.

[39] Were choice-of-court clauses covered by Rome I (Art. 1(2)(e) excludes choice-of-court agreements from its scope), per its Article 10, their material validity would be determined by the *lex contractus*.

[40] U. MAGNUS/ P. MANKOWSKI (note 24), p. 473; L. MERRETT, Article 23 of the Brussels I Regulation: A comprehensive Code for Jurisdiction Agreements?, *I.C.L.Q.* 2009, vol. 58, p. 545 *et seq*. See also J.P. COOK, Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements, *The University of Aberdeen Law Review* 2013, vol. 4, p. 83; D. SANCHO VILLA (note 33), p. 402.

[41] See Case C-159/97 *Trasporti Castelletti v. Hugo Trumpy* [1999] ECR I-1597 at §§46-52. The CJEU argued that choice-of-court clauses must only be assessed in light of Article 25 of the Regulation and any "further review of the validity of the clause must be excluded and not affect the validity of the jurisdiction clause." See U. MAGNUS/

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the discussion might end with the establishment of formal validity. Yet "if the national Court is not entitled to examine the essential validity of the agreement, the fundamental purpose of the Article may be frustrated"[42] if only because a jurisdiction clause that is valid in form could potentially have been accepted due to fraud, mistake, misrepresentation, duress or undue influence.[43] Member State practice therefore revealed a widespread reference to national contract laws with regard to consent.[44] As a consequence, choice-of-court agreements may be valid in one Member State but not in another,[45] a situation which might lead to forum-

P. MANKOWSKI (note 24), p. 476 and Z. TANG (note 35), p. 42. As noted by the UK Government, "neither the *lex causae* nor the *lex fori* should determine the substantive validity of a choice-of-forum agreement; Article 23 is viewed by the CJEU as a complete set of rules for establishing validity, and no reference to any national law is needed." National Report England and Wales, Study JLS/C4/2005/03, p. 88, available at <http://ec.europa.eu/civiljustice/news/docs/study_bxl1_england_wales.pdf>.

[42] BRIGGS also states "recourse only to the formal provisions of article 23 cannot provide a sufficient response to the use of fraud or duress.": A. BRIGGS *et al.* (eds), *Dicey, Morris & Collins on the conflict of laws,* 15th ed., London 2012, p. 12 *et seq*.

[43] P. STONE, *EU Private International Law,* Cheltenham 2010, 2nd ed., p. 175.

[44] See Schlosser Report (note 34), p. 159, which refers to the national reports in the matter. See for example *BNP Paribas v Anchorage Capital Europe LLP & Ors* [2013] EWHC 3073 (Comm) (11 October 2013) where J. Males argued for English law to be applied to the issue of validity of the clause and upholds it. He bases himself on the *lex contractus,* "either because of the parties' express choice of English law (…) or because English law applies pursuant to Article 4(1)(a) of the Rome I Regulation." See also G. VAN CALSTER, It's not the grammar, stupid! The High Court in Anchorage on exclusive (or not) choice of court, anti-suit injunctions, Rome, Brussels and much more, *GAVC Law blog* 2013, available at <www.gavclaw.com>; J. BASEDOW, Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms, in P. LINDSKOUG/ U. MANUSBACH/ G. MILLQVIST/ P. SAMUELSSON/ H.-H. VOGEL, *Essays in Honour of Michael Bogdan*, Lund 2013, p. 19; J. KROPHOLLER/ A. PFEIFFER, Das neue europäische Recht der Zuständigkeitsvereinbarung, in W.J. HABSCHEID/ H. NAGEL, *Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit: Festschrift für Heinrich Nagel zum 75. Geburtstag*, Münster 1987, p. 159 *et seq.*; U. MAGNUS/ P. MANKOWSKI (note 24), p. 477; H. SCHACK (note 34), p. 207; P. STONE (note 43), p. 124 *et seq.*; U. SPELLENBERG, Doppelter Gerichtsstand in fremdsprachigen AGB, *IPRax* 2007, vol. 27, p. 98 *et seq*.

[45] Schlosser Report (note 34), p. 159. See the series of cases that have caused concern in the field of effectiveness and validity of unilateral jurisdiction clauses. Such clauses have been upheld in Common Law jurisdictions, whilst the recent decisions of the Bulgarian, Russian and French highest Courts have gone in opposite directions, invalidating such clauses on grounds of "unconscionability." For relevant UK cases, see: *Three Shipping LTD v Harebell Shipping Ltd* [2004] All ER (D) 152 (English High Court); *Debenture Trust Corporation plc v Elektrim Finance BV and others* [2005] 1 All ER (Comm.) 476 (English High Court); *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor* [2013] EWHC 1328 (Comm) (English High Court) and compare to the continental cases: Judgment of 2 September 2011, No. 71 in commercial case No. 1193/2010 (Bulgarian Supreme Court); Judgment of 19 June 2012, *CJSC Russian Telephone Company v Sony Ericsson Mobil Communications Rus LLC*, No. A40-49223/11-112-401 (Russian High Court); Judgment of 18 October 2011, *Banque Privée Edmond de Rothschild Europe v X*, No 11/03572 (Paris *Cour d'appel*). See also comments of G. VAN CALSTER, Unilateral Jurisdiction Clauses

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shopping.[46] FENTIMAN and MERRETT, both called for an application of the EU concept of good faith[47] - which is not unknown in CJEU case-law[48] – yet, no such European test for choice-of-court agreements was endorsed by the Court.[49]

On the other hand, (now) Article 23[50] enables courts to disallow certain choice-of-court agreements that violate the employee's procedural interests.[51]

Valid under English Law – The High Court in Mauritius Commercial Bank Limited v Hestia Holdings Limited, *GAVC Law blog* 2013, available at <www.gavclaw.com>; M. SCHERER/ S. LANGEL, The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?, *Kluwer Arbitration blog* 2013, available at <www.kluwer arbitrationblog.com>. In *Credit Suisse*, 25 March 2015, Case 13-27264, the *Cour de Cassation* extended this view (without reference this time to *clauses potestatives*) to choice of court in the context of the Lugano Convention. In *Apple Sales International* v *eBizcuss.com* (held 7 October 2015, ECLI:FR:CCASS:2015:C101053), however, the *Cour de Cassation* effectively qualifies its Rothschild case-law. The Court of Appeal held as unacceptable, under the theory of *clauses potestatives*, choice of court obliging eBizcuss to sue in Ireland, while allowing Apple Sales International to sue either in Ireland, or the place of registered office of eBizcuss, or any place where Apple Sales would have suffered damage. The *Cour de Cassation* now held that this clause is perfectly acceptable under Article 23 (now 25)'s regime, as it corresponds to the need for foreseeability (which more extreme unilateral clauses arguably do not have). As always, the judgment is scant on details of the underlying contract whence it is not entirely clear whether French law was *lex contractus* or whether the *Cour* stuck to *lex fori* as determining the validity of the choice of court.

[46] D. SANCHO VILLA (note 33), p. 403; J. STEINLE/ E. VASILIADES, The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy, *Journal of Private International Law* 2010, vol. 6, p. 578 *et seq*.

[47] The idea is that a choice-of-court agreement obtained by fraud or duress would not be enforced on the basis that the party who tried to rely on it has acted in bad faith. See L. MERRETT (note 40), p. 557; R. FENTIMAN (note 32), p. 67 *et seq*. See also in this sense U. MAGNUS/ P. MANKOWSKI (note 24), p. 476.

[48] See Case C-221/84 *Berghoefer GmbH & Co v ASA SA* [1985] ECR 2699 where the claimant tried to rely on a jurisdiction agreement that he alleged was orally accepted. The other party had raised no objection to the alleged oral agreement in reasonable time. The argument of good faith was used in support of the jurisdiction agreement. L. MERRETT (note 40), p. 560 argues that there is no reason why good faith could not be used also to prevent reliance on the agreement.

[49] The employee may always address the objectively competent courts but, for the choice to prevail over the jurisdiction contemplated in Articles 19 and 20 of the Regulation, the limitations to the parties' freedom of choice must be respected according to Article 21. U. MAGNUS/ P. MANKOWSKI (note 24), p. 411 *et seq.* and p. 472 *et seq*.

[50] As argued in the Commission's Explanatory Memorandum accompanying the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 final 99/ 154, p. 29, "[t]he autonomy of the parties to a contract other than an employment, insurance or consumer contract to determine the Courts having jurisdiction must be respected. Contractual clauses electing jurisdiction between parties with unequal negotiating strength must, however, be regulated."

[51] U. MAGNUS/ P. MANKOWSKI (note 24), p. 472; M.V. POLAK (note 6), p. 334; P. STONE (note 43), p. 142.

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Parties may only depart from the objectively applicable rules,[52] if they expressly[53] permit *employees* to bring their proceedings to *additional courts* besides those specified in the Regulation[54] or to enter into an agreement *after* the dispute arises.

This helps correct the systemic imbalance in power,[55] yet still does not address the underlying contractual issue with respect to vitiated consent, and creates uncertainty with regard to employment contracts.

b) The Recast Adopts a Harmonised Conflicts Rule to Govern the Substantive Validity of Jurisdiction Clauses

The Brussels I Recast addresses the issue by stating in its Article 25(1) that the "law of the chosen forum" which, according to Recital 20, includes "its conflict-of-laws rules",[56] governs the substantive validity of jurisdiction clauses.[57]

Over the past years, the idea of granting jurisdiction to the putatively chosen court has grown in recognition.[58] The idea is that exclusive choice-of-court clause contains an implied right for its validity to be assessed by the chosen court.[59] Informed parties will generally check the requirements for validity in the State of the chosen court when concluding their agreement so that this provision corresponds with their legitimate expectations.[60] In cases involving employees, Article 21 will step in to prevent the employee protective jurisdictional provisions from being circumvented by an inappropriate choice-of-court clause.

While a certain gap between Rome I and Brussels I is now filled,[61] there are a number of points that make it unclear how the provision will really assist the

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[52] Brussels I: (old) Articles 19 and 20 regulate the objectively competent courts, which are those that have jurisdiction if there is no valid choice-of-court clause.

[53] Brussels I, Article 21: "may be departed from only by an agreement on jurisdiction." Indeed, one of the limitations to the parties' freedom is that submission to choice-of-court agreements regarding individual employment contracts must *always* be express, not tacit. Noticeably, Article 21 does not make any mention of the formal requirement that must follow its exercise in practice. It is however suggested that it must be presented in writing or verbally with written confirmation. See U. MAGNUS/ P. MANKOWSKI (note 24), p. 410 *et seq*.

[54] Brussels I, art. 21; U. MAGNUS/ P. MANKOWSKI (note 24), p. 412; T. THIEDE, The European Coordination of Employers' Liability and Workers' Compensation, in K. OLIPHANT/ G. WAGNER (eds), *Employers' Liability and Workers' Compensation,* Berlin/ Boston 2012, p. 514.

[55] C. WALSH (note 1), p. 19 *et seq*.

[56] Brussels I Recast, Recital 20.

[57] The provision expressly states that the law of the chosen forum will apply to assess whether the "substantive validity" of the agreement is void or not. By referring clearly to the "substantive validity" it has been argued that the clause does not encroach on the formal requirements that are left entirely to Article 23. J.P. COOK (note 40), p. 87.

[58] D. SANCHO VILLA (note 33), p. 404.

[59] P. BRIZA (note 28), p. 556 *et seq*.; T. KRUGER (note 26), p. 223 *et seq*.

[60] D. SANCHO VILLA (note 33), p. 404.

[61] J. BASEDOW (note 44), p. 19.

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parties.[62] Firstly, one may deplore that the choice-of-court clause's validity is not determined in accordance with Rome I,[63] especially since the Recast now expressly treats it as an independent agreement in Article 25(5).[64] Moreover,[65] the caveat which states that the chosen court shall have jurisdiction "unless the agreement is null and void as to its substantive validity under the law of that Member State"[66] leads to the situation that the seized court might have to apply rules, different from those governing the contract, to determine the substantive validity of the clause.[67] In addition, it is not quite clear how the rule operates if the jurisdiction clause specifies two or more courts, nor whether parties can avoid the rule by choosing a different law to govern their jurisdiction clause. Where parties expressly make choice of court non-exclusive (non-exclusive choice of court), or where they designate a plurality of specifically identified courts, the *lex fori prorogati* is not immediately ascertainable. Neither is it ascertainable in the event of so-called "unilateral" or "one-sided" choice of court.[68] Also called "one-sided", "hybrid" or "asymmetrical" clauses, these are choice-of-court agreements in which one of the parties, typically the economically stronger one,[69] has a range of jurisdictions to choose from – sometimes expressed in individual terms (*e.g.* "the courts at Amsterdam and the courts at Paris"), but more often in abstract terms (*e.g.* "the courts at any State where the Bank has a branch") – while the other party is bound to take the case to a specific court. Parties would be well advised to insert a specific clause making such a unilateral clause subject to a specifically identified law.

In our opinion, therefore, at the very least for these cases, which are not resolved by the new *lex fori prorogati* rule, parties are best advised to identify separate and explicit governing law for unilateral and non-exclusive choice of court clauses. We also argue that parties ought to be able to set aside, by express provision, the Regulation's rule on the *lex fori prorogati* determining applicable law for the choice of court agreement, even for exclusive, non-unilateral choices of

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[62] See the mixed feelings about the provision in S. GARVEY, Reform of the Brussels Regulation: are we nearly there yet?, *Allen & Overy Publications* 2013, available at <http://www.allenovery.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx?print=true>.

[63] Indeed by including the forum's "conflicts-of-law rules", the Recast contradicts Rome I, as it admits *renvoi* as possible for jurisdiction agreements. A. DICKINSON (note 33), p. 300 *et seq.*; P. HAY, Notes on the European Union's Brussels-I "Recast" Regulation. An American Perspective, *The European Legal Forum* 2013, vol. 1, p. 3.

[64] See Brussels I Recast, Article 25(5), which treats the issue of the validity of jurisdiction agreements as separate to that of the validity of the entire contract so that parties cannot circumvent the choice-of-court clause by claiming the invalidity of the whole contract. P. HAY (note 63), p. 2.

[65] A. BRIGGS (note 26), p. 331.

[66] Brussels I Recast, art. 25(1); P. ROGERSON/ J. COLLIER, *Collier's Conflict of Laws,* 4th ed., Cambridge 2013, p. 138.

[67] J. BASEDOW (note 44), p. 19; P. HAY (note 63), p. 3.

[68] Note 47 above.

[69] This is impossible, of course, where the agreement concerned is subject to one of the protected categories in the Regulation.

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court. The Regulation's intention is to provide for certainty when it comes to the law applicable to a choice-of-court agreement. Parties should be allowed to provide such certainty themselves.

Oddly, the Council has added *renvoi* to the mix ("The reference to the law of the Member State of the chosen court should include the conflict of laws rules of that State"). EU private international law, for good (mostly practical) reasons typically excludes *renvoi*. Adding it here has no merit. Importantly, it is the private international law of the *chosen court*, which will have to be applied: not that of the forum (which may be different). This is relevant in cases where proceedings are not pending before the chosen court (for in such cases the new *lis alibi pendens* rule of Article 31 of the Regulation will oblige all other courts to stay proceedings), and the existence of a forum clause is raised by the defendant.

Whether the *renvoi* that is meant is *renvoi* simple only is not clarified in either text of the Regulation or recital. Neither is it clear whether parties may exclude *renvoi*. We suggest they can (and should). Article 25 as a whole aims to respect parties' choices as much as possible and without unnecessary formality or complication. Given that exclusion of *renvoi* removes a further layer of complication, parties should be able to do so.

To conclude, the Recast has sought to harmonise the issue but has not managed to weed out all uncertainties – a task that might be difficult but that would greatly benefit weaker parties who might not be so well informed when agreeing to a jurisdiction clause. Employees do however receive the benefit of Article 21 of Brussels I, which does limit the validity of jurisdiction agreements to situations where they operate in favour of the employee.[70] It will be interesting to see how the CJEU case law develops in this area in the next few years.

2. No Comprehensive U.S. Legislative Scheme[71] *to Protect Employees against Abusive Forum Section Clauses*

American courts once disfavoured choice-of-court clauses because they considered them to "oust" a court of jurisdiction.[72] However, they are permissible since 1972,[73]

[70] U. MAGNUS/ P. MANKOWSKI (note 24), p. 495.

[71] H. SCHACK (note 34), p. 210.

[72] P.J. BORCHERS, Contract and Tort Law: Categorical Exceptions to Party Autonomy in Private International Law, *Tulane law review* 2008, vol. 82, p. 1648; H. SCHACK (note 34), p. 210.

[73] *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 1, 11, 92 S. Ct. 1907, 1914, 32 L. Ed. 2d 513 (1972). This was not the case in the First Restatement but clearly affirmed in the Second Restatement of the Conflict of Laws of 1971 (hereinafter the "Second Restatement"), Section 80. A.A. EHRENZWEIG, *Treatise on the Conflict of Laws,* St. Paul (Minnesota) 1962, p. 313 *et seq*.; W.L.M. REESE, The Contractual Forum: Situation in the United States, *American Journal of Comparative Law* 1964, vol. 13, p. 187 *et seq*. The Second Restatement is by far the most popular methodology. It is followed by 24 States for contract conflicts and therefore considered to represent the prevailing American view on the issue of party autonomy. S.C. SYMEONIDES, *The Choice of Law Revolution: Past, Present,*

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unless accepted due to "fraud, undue influence, or overreaching bargaining power."[74]

Choice-of-court clauses have recently proven to be very resistant to judicial override, even more so than choice-of-law clauses.[75] They are considered "*prima facie* valid"[76] and courts will only invalidate them when enforcement would be extremely unreasonable[77] or would contravene a strong public policy of the forum.[78] Yet, the U.S. Supreme Court has given little guidance about what sort of agreement is considered reasonable.[79] This stands in stark contrast with the EU

and Future, Leiden/ Boston 2006, p. 9 *et seq*.; P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 544.

[74] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 534. See *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12, 92 S. Ct. 1907, 1914, 32 L. Ed. 2d 513 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). See also the Court's reasoning in *Hartford Fire Ins. Co. v. Novocargo. USA Inc.*, 156 F. Supp. 2d 372, 375 (S.D.N.Y. 2001) and *Acciai Speciali Terni USA Inc. v. M/V BERANE,* 181 F. Supp. 2d 458, 463 (D. Md. 2002).

[75] Courts often argue that choice-of-forum clauses do not prevent the application of the law of the State, which has the most interest in seeing its public policy applied. G. LESTER/ E. RYAN, Choice of Law and Employee Restrictive Covenants: an American Perspective, *Comparative Labour Law and Policy Journal* 2009, vol. 30, p. 402; E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2161.

[76] *Carnival Cruise Lines v. Shute, 499 U.S. 585, 589*, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991): "Turning to the forum selection clause, the Court of Appeals acknowledged that a Court concerned with the enforceability of such a clause must begin its analysis with Bremen v. Zapata Off-Shore Co., *op. cit.*, where this Court held that forum selection clauses, although not «historically (…) favored» are «*prima facie* valid»."

[77] Also called the "reasonableness test." See R. FORCE/ M. DAVIES, *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, The Hague 2005, p. 217. For examples, see *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 146, 187 Cal. Rptr. 3d 613 (2015), as modified on denial of reh'g (June 25, 2015); *Iero v. Mohawk Finishing Products, Inc.,* 243 Ga. App. 670, 671, 534 S.E.2d 136, 138 (2000); *Takemura & Co. v. The Tsuneshima Maru,* 197 F. Supp. 909, 911 (S.D. N.Y.1961).

[78] *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 11, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). See for example, *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 147, 187 Cal. Rptr. 3d 613 (2015); *Am. Online, Inc. v. Superior Court,* 90 Cal. App. 4th 1, 12, 108 Cal. Rptr. 2d 699, 708 (2001), as modified (July 10, 2001); *Intershop Communications v. Superior Court*, 104 Cal. App. 4th 191, 200, 127 Cal. Rptr. 2d 847, 853 (2002).

[79] W.W. PARK, *International Forum Selection,* The Hague 1995, p. 25. This recently became clear from the U.S. Supreme Court case *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013) "the Supreme Court did not outright [*sic*] say that a forum-selection clause will always be enforced as written. Rather, the Court remanded the case to allow the lower courts to decide (…) this is significant because the Court did not establish any objective or «bright line» test to the enforceability of forum-selection clauses." See also S.E. SACHS, Five Questions After Atlantic Marine, *Hastings Law Journal* 2015, vol. 66, p. 761.

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Regulation according to which courts cannot disregard choice-of-court agreements on grounds of mandatory rules of the forum State.[80]

In addition, there are no rules at the federal level like Article 25 of Brussels I Recast that sets out the formal conditions for jurisdiction clauses to be enforceable.[81] Certain States have made efforts in protecting special classes such as employees.[82] For example, some have adopted substantive statutes that contain "localising provisions" as Professor Symeonides calls them; these express provisions make the statute applicable to multistate situations that have certain defined connections to the enacting state.[83] They are "veritable choice-of-law rules of the unilateral genre" so that, when applicable, there is no need to go into a judicial choice-of-law analysis.[84] Recently in *Verdugo v. Alliantgroup, L.P.*[85] for instance, the California Court of Appeals highlighted that a non-California forum selection clause in a California employment contract is not enforceable, unless the party seeking to enforce the clause proves that the employee's unwaivable rights under

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[80] F. VISCHER, Forum Selection and Arbitration Clauses under the Brussels and Lugano Conventions and under Swiss Law (note 26), p. 85; H. SCHACK (note 34), p. 208; U. MAGNUS/ P. MANKOWSKI (note 24), p. 448 and p. 472 argue "as far as art. 23 is applicable it takes precedence over any national law which a EU Member State has enacted on the same subject even if this national law is mandatory (…). As far as the scope of art. 23 extends, it therefore regulates finally and conclusively questions of international jurisdiction agreements."

[81] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 534 *et seq.*; H. SCHACK (note 34), p. 210 *et seq*.

[82] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 545. For example, a new California law, namely S.B. 1241, which adds a section 925 to the Cal. Lab. Code and applies to all employment contracts entered into, modified, or extended on or after January 1, 2017, makes it unlawful for any employer to "require an employee who primarily resides and works in California" to agree to a provision as a condition of employment that would either (1) require the "employee to adjudicate outside of California a claim arising" within the state or (2) "[d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." See <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1241> and an analysis thereof by M.L. FLORES/ J.E. BARSANTI, New California Law Takes Aim at Choice of Law Provisions in Employment Agreements, *Cozen O'Connor,* 2016, available at <http://www.lexology.com/library/detail.aspx?g=2a1d42ff-1408-4a94-9243-3a4300aa2b75>.

[83] S.C. SYMEONIDES, *Codifying Choice of Law Around the World. An International Comparative Analysis*, Oxford 2014, p. 294 *et seq.*; S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey, *American Journal of Comparative Law* 2016, vol. 64, p. 18 *et seq.*; S.C. SYMEONIDES, Choice of Law in the American Courts in 2016: Thirtieth Annual Survey, to be published in *American Journal of Comparative Law* 2017, vol. 65, p. 27 *et seq.*, available at <http://www.asadip.org/v2/wp-content/uploads/2017/02/SSRN-Symeon-Symeonides-Choice-of-Law-in-the-American-Courts-in-2016.pdf>

[84] S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 19.

[85] *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 187 Cal. Rptr. 3d 613 (2015).

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California law will not be diminished when litigating in the chosen court.[86] Nevertheless, "U.S. law [being] generally more pro-business and antiregulatory,"[87] the U.S. Supreme Court has regularly overruled the decisions of the ordinary courts that aim to protect employees over their employers by giving priority to the needs of international trade and commerce.[88]

Interestingly, neither the EU nor the U.S. have uniform laws governing the contract issues presented by such clauses.[89] Under the Second Restatement, the *lex fori* governs the substantive validity of choice-of-court agreements regarding issues of misrepresentation, duress, fraud, undue influence or mistake.[90] Nevertheless, some courts also occasionally call for the application of the law that was chosen by the parties,[91] and certain authors such as Symeonides and Clermont, highlight that for other courts, the answer differs depending on whether the question is one of interpretation or one of enforceability of the clause.[92] In

[86] *Verdugo v. Alliantgroup, L.P.,* 237 Cal. App. 4th 141, 144, 187 Cal. Rptr. 3d 613, 616 (2015): "[a] party opposing enforcement of a forum selection clause ordinarily bears the substantial burden of proving why it should not be enforced. That burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes. In that situation, the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually-designated forum will not diminish in any way the substantive rights afforded under California law." See also J.J. YHEE, Employment – A Limitation on the Enforceability of Forum-Selection Clauses in California, *MasudaFunai* 2016, available at <http://www.masudafunai.com/showarticle.aspx?Show=8712>.

[87] P.J. BORCHERS (note 72), p. 1659; S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 18.

[88] H.G. MAIER, The U.S. Supreme Court and the "User-friendly" Forum Selection Clause: The Effect of *Carnival Cruise Lines* on International Contracts, in J.L. GOLDSMITH (note 26), p. 68; W.W. PARK (note 79), p. 24; see also the following U.S. Supreme Court cases: *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 632 (1985); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974); *Vimar Seguros Y Reaseguros S.A. v. M/V SkyRefer,* 115 S.Ct. 2322 (1995).

[89] S.B. BURBANK, Federalism and Private International Law: Implementing The Hague Choice of Court Convention in the United States, *Journal of Private International Law* 2006, vol. 2, p. 302; D. SIEGEL/ P.J. BORCHERS, *Conflicts in a nutshell,* St. Paul (Minn.) 2005, p. 132 *et seq*.

[90] Second Restatement, Section 187(b), comment b. R. GARNETT, *Substance and Procedure in Private International Law,* Oxford 2012, p. 109; P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 1129.

[91] See for example *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 419 Mass. 572, 573, 646 N.E.2d 741 (1995); *My Café-CCC, Ltd. v. Lunchstop, Inc.,* 107 S.W.3d 860, 867 (Tex. App. 2003); *Melia v. Zenhire, Inc.,* 462 Mass. 164, 168, 967 N.E.2d 580, 586 (2012); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 773 (7th Cir. 2014) ("In contracts containing a choice of law clause, therefore, the law designated in the choice of law clause would be used to determine the validity of the forum selection clause"); and *Med. Transcript v. Walker Rural Health Corp.*, No. 2130901, 2015 Ala. Civ. App. LEXIS 203 (Civ. App. Sep. 4, 2015).

[92] S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 28 *et seq.*; S.C. SYMEONIDES, Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey, *American Journal of Comparative Law*

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Martinez v. Bloomberg,[93] the U.S. Court of Appeals distinguishes between the two and explains why forum law should govern questions of enforceability[94] and the chosen law should govern questions of interpretation.[95] The Court highlights that "questions of venue and the enforcement of forum-selection clauses are essentially procedural, rather than substantive, in nature, and therefore should be governed by federal law."[96] This approach respects both the legitimate expectation of the contracting parties, as well as important federal policies of the forum state. However, if the chosen law were to apply also to the enforceability of the forum-selection clause, then the parties would have an absolute right to oust the courts of their jurisdiction. Note that both in the U.S. and EU, parties cannot contest the validity of the forum selection clause solely on the ground that the contract is void.[97]

Compared to the EU Recast rule pointing firmly to the *lex fori prorogati,*[98] the U.S. solution does not contribute to legal certainty; the forum could be anywhere, employees cannot know where the plaintiff will bring proceedings in breach of the forum clause, and it is uncertain which law the U.S. Court will apply to the clause.[99] So if there is a California jurisdiction clause but proceedings are

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2015*,* vol. 63, p. 340 *et seq.*; K.M. CLERMONT, Governing Law on Forum-Selection Agreements, *Hastings Law Journal* 2015, vol. 66, p. 643 *et seq.*; A.D. BRADT, Symposium: Forum Selection After Atlantic Marine: Governing Law on Forum-Selection Agreements, *Hastings Law Journal* 2015, vol. 66, p. 617 *et seq*.

[93] *Martinez v. Bloomberg LP,* 740 F.3d 211 (2d Cir. 2014).

[94] *Martinez v. Bloomberg LP*, 740 F.3d 211, 218 (2d Cir. 2014).

[95] The Court in *Martinez v. Bloomberg LP*, 740 F. 3d 211, 220 (2d Cir. 2014) highlights the risks that arise if the distinction is not made: "[i]t would undermine the predictability fostered by forum selection clauses if federal law, rather than the law specified in a choice-of-law clause, were to govern the interpretation as well as the enforceability of a forum selection clause. If the interpretation of a forum selection clause were singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole, then the same word or phrase could have a different meaning in the forum selection clause than it has elsewhere in the same contract. Applying federal law to construe a forum selection clause could frustrate the contracting parties' expectations by giving a forum selection clause a broader or narrower scope in a federal court than it was intended to have. It could transform a clause that would be construed as permissive under the parties' chosen law into a mandatory clause, or vice versa, simply because the litigation was brought in a federal court in the United States."

[96] *Martinez v. Bloomberg LP*, 740 F.3d 211, 214 (2d Cir. 2014).

[97] *Provence v. Nat'l Carriers, Inc.,* 2010 Ark. 27, 10, 360 S.W.3d 725, 730 (2010): "generalized allegations of fraud with respect to the inducement of the contract as a whole, (…) will not operate to invalidate a forum-selection clause"; *Rucker v. Oasis Legal Fin., L.L.C.,* 632 F.3d 1231, 1238 (11th Cir. 2011): "a forum-selection clause is viewed as a separate contract that is severable from the agreement in which it is contained" (also refers to *Scherk v. Alberto-Culver Company,* 417 U.S. 506, 519 n. 14 (1974)); *Raydiant Tech., LLC v. Fly-N-Hog Media Grp., Inc.,* 439 S.W.3d 238, 240 (Mo. Ct. App. 2014) ("Raydiant claims fraud in the inducement of the contract as a whole, not solely as to its forum selection clause, which is insufficient per Provence").

[98] G. VAN CALSTER (note 45).

[99] T. KRUGER (note 26), p. 243.

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initiated in Ohio, the Ohio courts will determine the question of the clause's validity according to their own rule on the matter. However, if this scenario were to be replicated in the EU with a French jurisdiction clause and the case is brought before the English courts, these courts would have to analyse the question of the clause's validity as a matter of French law, including its conflicts rules.

Interestingly, any choice-of-court clauses adopted *prior* to a dispute in employment cases are frequently enforced "without hesitation" by U.S. courts.[100] Choice-of-court clauses are "routinely enforce[d]", "even when they appear extreme."[101] This is very different from the EU philosophy.[102] The express EU policy of not enforcing pre-dispute choice-of-forum clauses that are considered to disfavour employees is a concept not found in the American system *per se*.[103]

The seized Court in the U.S. will often validate a choice-of-court clause despite the fact that its *lex fori* does not adhere to the policies of the chosen law,[104] unless the party can prove that the chosen forum would not respect the policies of the first seized court.[105] This often occurs in the context of non-compete.[106]

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[100] S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey, *American Journal of Comparative Law* 2013, vol. 61, p. 247.

[101] S.C. SYMEONIDES, Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey, *American Journal of Comparative Law* 2014*,* vol. 62, p. 242. The Court in *Petersen v. Boeing Co.*, 108 F. Supp. 3d 726, 730 (D. Ariz. 2015) was faced with a choice-of-court clause adopted prior to a dispute in an employment case and argues that, "echoing Bremen, the Atlantic Marine Court held «parties [who voluntarily] agree to a forum-selection clause, [..] waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.» Atl. Marine, 134 S. Ct. at 582.

[102] See Brussels I, Article 21 discussed *infra*, point II.B.1.b.

[103] S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 247.

[104] In *Swenson v. T-Mobile USA, Inc.,* 415 F. Supp. 2d 1101, 1105 (S.D. Cal. 2006); *Crump Ins. Services v. All Risks, Ltd.,* 315 Ga. App. 490, 493, 727 S.E.2d 131, 134 (2012); *Meyer v. Howmedica Osteonics Corp.,* No. 14CV2496 AJB NLS, 2015 WL 728631, at 10-11 (S.D. Cal. Feb. 19, 2015), where the Court highlights that "[w]hile the forum state court's application of the forum state laws may lead to a result that is in conflict with the [forum state's law], [this] does not mandate finding the forum selection clause invalid"; *Mahoney v. Depuy Orthopaedics, Inc.,* No. CIVF 07-1321 AWI SMS, 2007 WL 3341389, at 8 (E.D. Cal. Nov. 8, 2007).

[105] *Crump Ins. Services v. All Risks, Ltd., ibid.* ("If the appellants can show that the restrictive covenants in this case violate Georgia public policy and that a Maryland Court would likely enforce the covenants against them, then requiring them to litigate in Maryland would deprive them of a meaningful opportunity to argue that the covenants were void, damaging them and the applicable Georgia public policy against restraint of trade."); *Lapolla Indus., Inc. v. Hess*, 325 Ga. App. 256, 266-67, 750 S.E.2d 467, 476 (2013) ("Because it is likely that a Texas court applying Texas law would enforce covenants in this case that are unenforceable under applicable Georgia law and public policy, the trial court did not err by refusing to enforce the forum selection and choice of law clauses and dismiss the complaint."). See also *Moon v. CSA-Credit Solutions of America,* 696 S.E.2d 486 (Ga. Ct. App. 2010) and *Iero v. Mohawk Finishing Profs., Inc.,* 243 Ga. App. 670 (Ga. Ct. App. 2000). Cases where the choice-of-law clauses that were in employment contracts were

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Employers therefore tend to combine choice-of-court and choice-of-law clauses that point to the same state: this increases the chances that the chosen court enforces the choice-of-law clause.[107] And in doing so, employers try to avoid the protections that are offered to employees by the non-chosen state's law and encourage the enforcement of an agreement that could be contrary to public policy in another state,[108] but it does not always work. In *Re Autonation* for example,[109] the Texas Supreme Court held that AutoNation should not be allowed to circumvent the fundamental public policy of Texas by inserting, into the contract, both a Florida choice-of-law and choice-of-court clause.[110]

In the landmark *Bremen v. Zapata Off-Shore* case,[111] the U.S. Supreme Court enumerated four reasons to declare choice-of-court clauses void and stated that the "party seeking to avoid [them] had to meet the high burden of proof" showing that it is "unreasonable under the circumstances."[112]

The four reasons that are left to the discretion of the Court's evaluation are as follows:

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found to be contrary to the other State's public policy include: *Keener v. Convergys Corp.,* 312 F.3d 1236 (11th Cir. 2002); *Dearborn v. Everett J. Prescott, Inc.,* 486 F.Supp.2d 802 (S.D.Ind.2007); *Becham v. Synthes USA,* 482 F.App'x 387 (11th Cir. 2012); *Carson v. Obor Holding Co., LLC,* 734 S.E. 2d. 477 (Ga.Ct.App.2012).

[106] G. LESTER/ E. RYAN (note 75), p. 403. Each U.S. State has adopted a very different approach to the matter; some States strongly deplore such clauses and will argue that they are generally contrary to their public policy like California or Nebraska; others have no problem enforcing them like New York and Texas, unless they are unreasonable.

[107] S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 17; see also T.P. GLYNN, Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom, *Washington and Lee law review* 2008, vol. 65, p. 1422; L.E. TEITZ, The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, *The American Journal of Comparative law* 2005, vol. 53, p. 546.

[108] S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 18.

[109] *In re AutoNation,* 228 S.W.3d 663 (Tex. 2007) where Justice O'Neil stated at §670 that it is "not apparent that enforcement of the forum-selection clause in this case will result in application of the contractual forum's law in a manner that will undermine Texas public policy."

[110] *In re AutoNation*, 228 S.W.3d 663, 667 (Tex. 2007) concluded that the "law governing enforcement of noncompetition agreements is a fundamental policy in Texas, and (…) to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy."

[111] See *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), where claimant brought suit in California but the defendant invoked the choice-of-court clause to obtain dismissal. He argued that the suit should be brought to the English Courts as was agreed upon in the contract. It is a landmark case where the jurisdiction clause was upheld. Once the Supreme Court validated choice-of-court clauses, state courts soon followed suit. F.K. JUENGER, Contracts Choice of Law in the Americas, *The American Journal of Comparative Law* 1997, vol. 45, p. 199.

[112] *M/S Bremen v Zapata Off-Shore Co., ibid.* at §10.

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(1) if enforcement of the choice-of-court clause would contravene a strong public policy of the forum in which suit is brought,[113]
(2) if its enforcement would be considered as unreasonable or unjust,[114]
(3) if the contractually chosen forum is seriously inconvenient for the action,[115]
(4) if the clause is invalid for reasons such as fraud[116] or overreaching bargaining power.[117]

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[113] *M/S Bremen v Zapata Off-Shore Co., ibid.* at §15 referring to *Boyd v. Grand Trunk W. R. Co.,* 338 U.S. 263 (1949). See also *Carson v. Obor Holding Co., LLC,* 734 S.E. 2d. 477 (Ga. Ct. App. 2012) in which the Georgian Court reminded that they had numerous precedents that established that there was a compelling reason to avoid a choice-of-court clause if going through with the proceedings in the forum that was selected would offend Georgia's public policy. See for similar rulings concerning choice-of-court clauses that were considered to contravene the public policy of the forum court: *Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., Inc. of Louisiana*, 2013-1977 (La. 7/1/14), 148 So. 3d 871, 887–88; *Pro-Football, Inc. v. Tupa,* 51 A.3d 544 (Md. 2012); *Mathers Family Trust v. Cagle*, 297 P.3d 943 (Colo. Ct. App. 2011), revised, 295 P.3d 460 (Colo. 2013).

[114] *M/S Bremen v Zapata Off-Shore Co., ibid.* at §10. See also *Scott v. Tutor Time Child Care Systems Inc.,* 33 S.W.3d 679 (Mo. 2000), where the Court considered that "where, as here, so much of the litigation will remain in Missouri, it would seem unreasonable to enforce the outbound forum selection clause and thereby require one aspect of this case (…) to be resolved in Florida."; *Investors Guar. Fund, Ltd. v. Compass Bank*, 779 So. 2d 185 (Ala. 2000); *American Bell International, Inc. v. The Islamic Republic of Iran,* 474 F.Supp. 420, 423 (S.D.N.Y. 1979) where the Court decided of its own motion that the jurisdiction agreement should be held void as "[t]here is credible evidence that the Islamic Republic is xenophobic and anti-American (…) we think the current situation in Iran, as shown by the evidence, warrants the conclusion that an attempt by Bell to resort to those courts would be futile"; *Rockwell International Systems, Inc. v. Citibank, N.A.,* 719 F.2d 583 (2d Cir. 1983) where the Court voided the jurisdiction agreement because the "post-revolutionary Iranian judicial system is incapable of affording an adequate remedy."

[115] *M/S Bremen v Zapata Off-Shore Co., ibid.* at §16. The Court in *In re ADM Investor Services, Inc.*, 304 S.W.3d 371 (Tex. 2010) highlights the difficulty with the term "seriously inconvenient" and that "the only discernible definition seems to emerge from piecing together examples of what various courts have held not to be seriously inconvenient." It then refers to *In re International Profit Assocs., Inc.*, 274 S.W.3d 672 (Tex. 2009) where the Court held "that even though plaintiff may have to pursue two suits, one in Illinois and one in Texas, that is not the type of unusual and special circumstances that shows litigating in the contracted-for forum would be so gravely difficult and inconvenient that plaintiff would be deprived of its day in court" and *In re Lyon Financial Services, Inc*., 257 S.W.3d 228, 233 (Tex. 2008) where the Court held that the forum selection clause "was not so inconvenient that enforcing the clause will deprive either party of its day in court," , even though lessee claimed it lacked the financial or logistical ability to pursue its claims in Pennsylvania.

[116] *M/S Bremen v Zapata Off-Shore Co., ibid.* at §24. According to *Stephens v. Entre Computer Centers, Inc.,* 696 F. Supp. 636, 640 (N.D. Ga. 1988), "under *Bremen*'s fraud exception to enforcement, the inclusion of the clause itself must be the product of fraud or coercion." See also *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 722 (6th Cir. 2006) in which the Court said that "[g]eneral claims of fraud" were not enough to invalidate the forum selection clause; *Binder v. Med. Shoppe Int'l, Inc.,* No. 09-14046, 2010 WL 2854308, at *10 (E.D. Mich. July 20, 2010); *Great Earth v. Simons,* 288 F.3d 878, 890 (6th

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In casu, the Court considered the choice to have been "made in an arm's length negotiation by experienced and sophisticated businessmen" so there were no compelling reasons for it not to be validated.[118]

The unequal bargaining power of the parties is therefore not the only factor taken into consideration.[119] The courts weigh up "the totality of the circumstances measured in the interests of justice."[120] There is also no specification as to which types of contracts need particular protection;[121] it will be up to the party who feels disadvantaged to prove that the valid agreement is unreasonable,[122] which is not always easy.[123]

And even if the choice-of-court clause is considered enforceable, courts are still able to decline to hear the case on the basis of the *forum non conveniens* doctrine because another more convenient court is situated elsewhere.[124]

To conclude, U.S. courts may consider employee protection but there is no general consideration to see the employee as the weaker party that needs to be

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Cir. 2002) where the Court highlighted that misrepresentation went only to the location of the arbitration and not the agreement to arbitrate itself.

[117] See for example *Carnival Cruise Lines v. Shute,* 499 U.S. 601, 598 (1991) "the prevailing rule is still that forum selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy"; C.L. KNAPP (note 5), p. 789.

[118] *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 1, 24, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

[119] W.W. PARK (note 79), p. 20.

[120] *D'Antuono v. CCH Computax Systems, Inc.,* 570 F. Supp. 708, 711 (D.R.I. 1983).

[121] In the EU, the types of contracts that need specific protection are clearly outlined in Brussels I and include employment contracts. In the U.S., unequal bargaining power is taken generally as an argument to limit party autonomy and the Courts analyse it on a case-by-case basis; *Carnival Cruise Lines v. Shute,* 499 U.S. 585, 601 (1991) ("when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case, the usual rule that the terms of the agreement are not to be questioned should be abandoned and the Court should consider whether the terms of the contract are so unfair that enforcement should be withheld.")

[122] *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 1, 10, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972): "such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances"; *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 574, 187 L. Ed. 2d 487 (2013): "the plaintiff, as the party defying the forum-selection clause, has the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."

[123] As argued by J. WILLETT in *In re ADM Inv'r Servs, Inc.*, 304 S.W.3d 371, 377 (Tex. 2010), "a party opposing a forum-selection clause bears a «heavy burden» of proving a heavy burden – that trial in the chosen forum would be unjustly onerous."

[124] H. VAN LITH, *International Jurisdiction and Commercial Litigation. Uniform Rules for Contract Disputes,* The Hague 2009, p. 248 *et seq.*; P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 549 *et seq*.

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protected, as is the case in the EU.[125] If employees consider the clause to disfavour them, they must convince the court that the clause is unreasonable under the circumstances.[126] The courts only interfere if the balance is strongly disturbed;[127] courts then consider *inter alia* public policy considerations,[128] the jurisdiction clause's infirmities,[129] the convenience of the chosen court,[130] the parties' bargaining power.[131] There are many grounds to invalidate choice-of-forum clauses;[132] this gives large powers to U.S. courts.

In a position of "weak bargaining power of a party", the U.S. courts still tend to enforce jurisdiction clauses because they consider that even if a case is litigated in a forum that is unfavourable to the policy of the State of the chosen law, it will not prevent it from taking that policy into consideration.[133] In the EU, when employees are concerned, Article 23 of Brussels I Recast must be respected or the jurisdiction clause is invalidated.

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[125] Z. TANG (note 35), p. 58; S.C. SYMEONIDES, Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey (note 83), p. 18 *et seq*.

[126] H. VAN LITH (note 124), p. 416.

[127] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 552; see *Lu v. Drycleaner U.S.A. of California, Inc.,* 11 Cal. App. 4th 1490, 1493, 14 Cal. Rptr. 2d 906, 907 (1992).

[128] See *Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., Inc. of Louisiana*, 2013-1977 (La. 7/1/14), 148 So. 3d 871, 887–88; *Mathers Family Trust v. Cagle*, 297 P.3d 943 (Colo. App., 2011); *Fidelak v. Holmes European Motors, L.L.C.,* 130 So.3d 851, 852, 2013-0691 La. 12/10/13, 1 (La. 2013).

[129] The U.S. Supreme Court stated that the agreement must be "freely negotiated" and "unaffected by fraud, undue influence or overweening bargaining power" in *M/S Bremen v Zapata Off-Shore Co.,* 407 U.S. 1, 12, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

[130] See for example *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 423, 127 S. Ct. 1184, 1186, 167 L. Ed. 2d 15 (2007) where it was reaffirmed that a Court may dismiss a case "when an alternative forum has jurisdiction to hear [the] case, and (…) trial in the chosen forum would establish (…) oppressiveness and vexation to a defendant (…) out of all proportion to plaintiff's convenience, or (…) the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems"; *Iragorri v. Int'l Elevator, Inc.,* 203 F.3d 8, 12 (1st Cir. 2000) where the Court highlighted that the defendant must establish "that there is an «adequate alternative forum» and that «considerations of convenience» and judicial efficiency strongly favor litigating the claim in the alternative forum."

[131] See for example the discussion in *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979) where the Court concludes that the clause is valid but highlights that "overweening bargaining power or inequality in bargaining power ought to be carefully watched for and appearance as «boiler plate» in form contracts is a warning."

[132] F. VISCHER, Forum Selection and Arbitration Causes under the Brussels and Lugano Conventions and under Swiss Law (note 26), p. 76; W.W. PARK, The Relative Reliability of Arbitration Agreements and Court Selection Clauses, in J.L. GOLDSMITH (note 26), p. 8 *et seq*.

[133] *Estate of Myrha v. Royal Caribbean Cruises, Ltd.,* 695 F.3d 1233, 1243 (11th Cir. 2012) where the Court stated that: "a choice-of-forum clause merely directs the litigation to a particular forum (…) it leaves it up to that jurisdiction to determine the applicable substantive law (…) either through the application of its own choice-of-law rules or through its enforcement of a separate choice of law clause in the underlying contract."

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Courts in the EU equally seem to have a certain margin of appreciation in that they review the substantive validity of jurisdiction clauses.[134] There are recent cases where courts struck down certain jurisdiction clauses on the grounds of "unconscionability" that have been described as a "judicial power grab."[135] The French courts were for example criticised in the *Rotschild* case;[136] however, the recent finding by France's highest court in *Apple Sales*[137] points to a change in the case law. The review in the EU should remain "subservient" to the requirements of Article 25(1)[138] and courts should not conduct a control test resembling the U.S. reasonableness test.

B. Objective Rules Determining the Courts' Jurisdiction to Adjudicate

This second part looks at how both systems determine the appropriate forum when the parties have not provided for a choice-of-court in their contract. The analysis first considers the applicable provisions of the Brussels I Recast Regulation before comparing this with the U.S. system.

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[134] See the discussion about how courts approach unilateral jurisdiction clauses in note 67. It was highlighted that the recent decisions of the Bulgarian, Russian and French highest Courts have gone in the opposite direction from what was held in the United Kingdom. Indeed, they invalidated unilateral jurisdiction clauses, sometimes on shaky grounds. See *Banque Privée Edmond de Rothschild Europe v X*, No 11/03572 (*Paris Cour d'appel*) discussed in footnote n° 138 *infra* and the discussion surrounding it. M. SCHERER/ S. LANGEL (note 45); G. VAN CALSTER (note 45).

[135] See the article in the Financial Times for example C. CLOVER, Russian Court Move Seen as Power Grab, *The Financial Times* 4th of December 2012, available at <https://www.ft.com/content/ea1bd9ac-3a0f-11e2-a00d-00144feabdc0>. See also M. SCHERER/ S. LANGEL (note 45).

[136] *Banque Privée Edmond de Rothschild Europe v X*, No 11/03572 (*Paris Cour d'appel*), see also note 45 above. The case concerned a French national residing in Spain, who brought an action for damages against Rothschild as well as its intermediary. She went before the Paris courts, even if the parties had agreed that the forum would be Luxembourg. The French Court held that the jurisdiction clause was not valid under the French doctrine of "*clauses potestatives."* This concept describes a situation where the contract's performance is made dependent on a condition entirely within the power of only one of the parties. The Court therefore seems to have implicitly ruled that French law governs the substantive validity of choice-of-court clauses and referred to (then) Article 23 of Brussels I. Had the new Article 25 already applied in this case, Luxembourg rather than French law would have applied. See M. SCHERER/ S. LANGEL, (note 45). and of G. VAN CALSTER (note 45).

[137] Note 45 above.

[138] A. DICKINSON (note 33), p. 302.

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1. Determining the Adjudicating Court in Individual Employment Contracts in the EU: Articles 20-23 of the Brussels I Recast

The evolution of employee protection in the EU has been interesting. The 1968 Brussels Convention had no tailored employee protective rules;[139] general contract rules applied: *viz.* (then) Article 5(1) of the Brussels Convention, which referred to the place of performance "of the obligation in question."[140] The employee could therefore be dragged to the court of any Member State even one where he had never worked.[141] The risk of forum shopping and possibility of jurisdiction being conferred to courts unfamiliar to the employee was therefore high.[142]

In *Ivenel v Schwab*,[143] the CJEU decided to introduce a judge-made rule for (repealed) Article 5(1) referring to the characteristic obligation of the employment contract.[144] Regardless of what the claim was, the single place of performance was considered to be that of the employee's workplace. This clear-cut rule pointing to a single place[145] was considered necessary for employees to ensure legal certainty[146]

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[139] And this although it did have such rules for the insured and consumers. The idea of inserting special jurisdictional rules for employees was put on the agenda but eventually dropped. It was decided to defer the adoption of those rules until finalisation of the corresponding choice-of-law rules in the Rome Convention (see footnote No 284 for reference to the Rome Convention), which was criticised by scholars at the time and is still sometimes criticised today. See L. MARI, Rapporti di lavoro, principi costituzionali e deroga alla giurisdizione secondo la Convenzione di Bruxelles del 1968, *Riv. dir. int. priv. proc.* 1981, p. 51 *et seq.*; G. VAN CALSTER (note 3), p. 75 who refers to R. KIDNER, Jurisdiction in European Contract of Employment, *Industrial Law Journal* 1998, vol. 27, p. 103 *et seq.* and to the Opinion of Advocate General JACOBS in Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075). Jenard Report (note 34), p. 23 *et seq.*; T.C. HARTLEY, *International Commercial Litigation. Text, Cases and Materials on Private International Law*, Cambridge 2009, p. 66; T. THIEDE (note 54), p. 513.

[140] Brussels Convention, Article 5.

[141] Case C-25/79 *Santicentral v Collin,* [1979] ECR 3423.

[142] U. GRUŠIĆ, Jurisdiction in Employment Matters under Brussels I: A Reassessment, *I.C.L.Q.* 2012, vol. 61, p. 95.

[143] Case C-133/81 *Roger Ivenel v Helmut Schwab,* [1982] ECR 1891. The case concerned a German company who had employed a person to perform work in France. The wages were paid in Germany so the question arose as to where the employee would have to sue his employer for unpaid wages. The Court held that the French courts have jurisdiction when the employee wants to prosecute his employer for unpaid wages, even if the wages had to be paid in Germany. The Court referred to the characteristic obligation "in the case of claims based on different obligations arising under a contract of employment."

[144] *Ibid.* at §20: "the obligation to be taken into account for the purposes of the application of art. 5 (1) of the Convention in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract."

[145] D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 90.

[146] F. VISCHER, New Tendencies in European Conflict of Laws and the Influence of the U.S. Doctrine – A Short Survey, in J.A.R. NAFZIGER/ S.C. SYMEONIDES, *Law and Justice in a Multistate World. Essays in Honor of Arthur T. von Mehren*, Ardsley (New York) 2002, p. 467.

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and to preserve the mandatory protection rules while leaving little space for judicial discretion.[147] The CJEU held its position in a number of cases[148] before the judicially crafted rule was adopted as an amendment to the Brussels Convention.[149] It provided for an exception to the general rule[150] and also specified that if the employee had no one habitual workplace, the employer could be prosecuted in the courts of the place where the business, which hired the employee, was or is now situated.[151]

The special provisions were then mostly taken over by the Brussels I Regulation adopted in 2001[152] and essentially left unchanged in the Brussels I Recast, with one important amendment: the section on employment, like that for consumer contracts, applies regardless of whether the employer is domiciled within the EU. Section 5 has now taken over the rule of the previous Article 5 and applies only to individual contracts of employment.[153]

The basic rule of the Brussels I Recast is based on the defendant's domicile.[154] The CJEU argued that the *favor defensoris* principle rests on the assumption that it is where the defendant can most easily conduct his defence,[155] but the

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[147] T. THIEDE (note 54), p. 513.

[148] Case C-133/81 *Roger Ivenel Helmut Schwab,* [1982] ECR 1891; Case C-266/85 *Shenavai v Kreischer,* [1987] ECR 239; Case 32/88 *Six Constructions Ltd v Humbert,* [1989] ECR 341; Case C-383/95 *Rutten v Cross Medical Ltd.,* [1997] ECR I-57. In Case C-288 *Custom Made Commercial v. Stawa Metallbau Gmbh.,* [1994] ECR I-2913 at §25, the CJEU highlighted that the special regime of the Brussels Convention concerning employees had already been recognised through the Court's interpretation before the 1989 Accession Convention came into force.

[149] This amendment was adopted when Spain and Portugal joined the EU, see Accession Convention on Spanish and Portuguese Accession, 1989 O.J. L 285/1 ("San Sebastian Convention"), Article 4.

[150] Brussels Convention, Article 5 (1): "in matters relating to a contract, in the Courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work." See the explanatory Report to the San Sebastian Convention, 1990 O.J. C 189/06, p. 44 *et seq*.

[151] Brussels Convention, Article 5 (2) also adds that "if the employee does not habitually carry out his work in any one country, the employer may also be sued in the Courts for the place where the business which engaged the employee was or is now situated."

[152] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. L 12/1. See U. GRUŠIĆ (note 142), p. 91 *et seq*.

[153] This special section is Section 5 of the Brussels I Recast Regulation and the specific articles are art. 20-23. T.C. HARTLEY (note 139), p. 66; Jenard Report (note 34), p. 24.

[154] T. THIEDE (note 54), p. 514.

[155] Case C–26/91 *Handte v TMCS,* [1992] ECR I–3967 at §14. Here, the CJEU considered that this rule was positive as it enables a reinforcement of national jurisdiction in the defendants' home country. Brussels I, Recitals 11 and 12 highlight: "[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is

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rationale might have deeper historical roots.[156] Nevertheless, for reasons of equality of arms, one "must ensure that the claimant has reasonable access to relief in a form that is fairly accessible to the defendant."[157] Recital 12 maintains that the defendant's "home court advantage" should be compensated by a number of optional rules of jurisdiction[158] to find the "right balance in the protection of the parties."[159]

Interestingly, the situation when the employee acts as a claimant is distinguished from when he acts as a defendant:[160] it is in his position as a plaintiff that the employee is protected. It is generally considered that the larger the claimant's freedom is, to select his forum, the more procedural advantages he will get[161] and the more chances he has to ensure going to an advantageous forum.[162]

The EU rules, that apply absent a choice-of-court clause,[163] protect the employee by giving him more fora when he is a claimant and restricting these when he is a defendant.[164]

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generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations."

[156] P. STONE (note 43), p. 53 refers to other reasons that go beyond the mere convenience in the conduct of litigation such as the fact that it is there where the defendant keeps most of his assets. This facilitates enforcement against his person or property.

[157] P. NYGH, The Criteria for Jurisdiction under the Brussels I Regulation 2001 and the Preliminary Draft Hague Judgments Convention: A Comparison, in J. FAWCETT, *Reform and Development of Private International Law – Essays in Honour of Sir Peter North,* Oxford 2002, p. 303.

[158] Brussels I, Recitals 11 and 12 state that parties can agree to a different linking factor and apart from the *favor defensoris* principles*,* there should also "be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice." See H. VAN LITH (note 124), p. 337.

[159] J. NEWTON, *The Uniform Interpretation of the Brussels and Lugano Conventions,* Oxford 2002, p. 44.

[160] T.C. HARTLEY (note 139), p. 68. See Brussels I Recast Regulation, Article 21, which concerns claims against an employer. Two options are effectively available to the employee domiciled in a Member State because Article 21(1)(b)(ii) will come into play if the first prong of article 21(b)(i) does not apply. And Brussels I Regulation, Article 22 concerns the situation where a claim is brought against an employee.

[161] P. HAY, Flexibility versus Predictability and Uniformity in Choice of Law, *Recueil des Cours* 1991, vol. 226, p. 306; 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: General course on Private International Law, *Recueil des Cours* 2002, vol. 295, p. 189; H. VAN LITH (note 124), p. 336.

[162] A.T. VON MEHREN (note 161), p. 194 *et seq*.

[163] A. BRIGGS/ P. REES (note 17), p. 158.

[164] U. GRUŠIĆ (note 142), p. 97; P. STONE (note 43), p. 123.

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a) The Defendant's Position

Under the previous version of Brussels I, the residual (national) jurisdictional rules applied when the defendant (employee or employer) was not domiciled in any Member State, per Article 4 (repealed).[165] With exceptions,[166] the national jurisdictional rules thereby entered into play to determine whether the court of the forum-State had jurisdiction.[167]

Nevertheless with respect to individual contracts of employment, Article 4 (repealed) only referred to those defendants who were not domiciled in the EU and did not have a branch, agency or establishment therein.[168] This is because according to Article 18(2) (repealed), if an employee domiciled in the EU entered into an employment contract with an employer not domiciled in the EU but who had a branch, agency or other establishment in one of the Member States, the employer was deemed domiciled in that Member State for disputes arising out of that branch.[169]

The Recital 14 of the Recast Regulation now adds: "[a] defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seized. However, in order to ensure the protection of (…) employees (…) certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile."[170]

Due to modern international trade, there are increasingly more situations where the employer is located outside the EU territory. The rule of Article 18(2) aims at limiting the negative impact of resorting to national solutions.[171]

The "branch rule", now contained in Article 20(2), continues to apply. In setting up a branch, establishment or agency on EU territory, the employer is connected to the European employment market and can reasonably anticipate to be

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[165] Brussels I Regulation, Article 4: "(1) If the defendant is not domiciled in a Member State, the jurisdiction of the Courts of each Member State shall (…) be determined by the law of that Member State. (2) As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force (…) in the same way as the nationals of that State."

[166] These exceptions were provided for in: (1) Article 23 (old) of Brussels I concerning choice of forum, which only requires that one or more of the parties to the agreement are domiciled in a Member State, (2) Article 22 (old) of Brussels I concerning exclusive jurisdiction, which applies irrespective of domicile of the parties and (3) Article 18(2). J. KROPHOLLER/ A. PFEIFFER (note 44), p. 16 *et seq*.

[167] U. MAGNUS/ P. MANKOWSKI (note 24), p. 84 and p. 395.

[168] U. MAGNUS/ P. MANKOWSKI (note 24), p. 397.

[169] Brussels I Regulation (old), Article 18(2). See also the Commission's Explanatory Memorandum accompanying the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 final 99/154, p. 17, where it is argued that "this increases the protection given the worker, considered to be the weaker party to the contract."

[170] Brussels I Recast, Recital 14. See also its Articles 6 and 21(2); P. HAY (note 63), p. 4.

[171] U. MAGNUS/ P. MANKOWSKI (note 24), p. 396 *et seq*.

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hauled into one of the national courts in the EU. The habitual workplace becomes an additional connecting factor, which safeguards the employee's expectations of being able to bring an action for work carried out inside the EU.[172]

But when the defendant is an employee, the employer can only prosecute in the Member State of the EU where the employee is domiciled according to Article 20(1).[173] Unlike what occurs when the defendant is an employer and what was previously provided for in the Brussels Convention,[174] there is no alternative jurisdiction for the claiming employer. And unlike for the employer, the employee does have to be domiciled in the EU for the regime of Section 5 to apply.

b) The Claimant's Position

A claiming employee can address the courts where the employer (if at all) is domiciled in addition to other courts.[175] According to Article 21, he can address courts at (i) the place where he habitually carries out his work or in the last place where he did so[176] or (ii) if he did not habitually carry out his work in a single country, the place where the business that gave him the job is or was situated.[177] It therefore depends entirely on the claimant whether or not he resorts to these special jurisdictions;[178] both have advantages and disadvantages.

It has been argued that the place where the employee "habitually" discharges his obligation towards the employer often also coincides with the plaintiff's own domicile.[179] But the exact determination of "habitual place of em-

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[172] *Ibid.*

[173] Brussels I, (now) Article 22 provides that the employer can only sue at the employee's country of domicile and no alternative is available, unless according to Article 22(2) of Brussels I, the employer submits a counterclaim in the court of the country where the employee's suit is pending. T. THIEDE (note 54), p. 514.

[174] Article 5(1) of the Brussels Convention allowed the employer to bring proceedings against the employee in his habitual workplace. U. MAGNUS/ P. MANKOWSKI (note 24), p. 408.

[175] Brussels I Recast, Article 21(1).

[176] Brussels I Recast, Article 21(1)(b)(i). This rule reflects the concern that even if the employee performs his work in numerous Member States, one should avoid the multiplication of jurisdictions. See therefore Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075 at §11.

[177] Brussels I, Article 21(1)(b)(ii). Advocate General JACOBS in the *Mulox v Geels* case, stated that one should "make a determined effort" to identify the habitual or principal place of employment rather than giving in to the second possibility which is that the claim could be brought in the court where the business is or was situated. His argument was based on the opinion that this second option could lead to the application of a system of law with little connection to the dispute. Opinion of Advocate General JACOBS in Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075. See also Case C-383/95 *Rutten v Cross Medical Ltd.,* [1997] ECR I-57. T.C. HARTLEY (note 139), p. 70.

[178] U. MAGNUS/ P. MANKOWSKI (note 24), p. 399.

[179] P. STONE (note 43), p. 140. See also Commission's Explanatory Memorandum accompanying the Proposal for a Council Regulation (EC) on jurisdiction and the recogni-

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ployment" has caused much ink to flow and shall be discussed *infra.* This is a major disadvantage of relying on the first prong of article 21, as it produces some uncertainty.[180] Nevertheless, it is a solution that seems best suited to protect employees,[181] as it is "the place where it is least expensive for the employee to commence proceedings, or defend himself against court proceedings."[182] It has been argued that it is a reasonable and predictable forum for the employer as well, as it is the employer who determines the place where the employee carries out his work.[183] Last but not least, it is argued that this venue favours the convergence between the *forum* and the *ius* (so-called *Gleichlauf)*, which as discussed *supra*, is usually beneficial to both parties.[184]

The rule contemplated in Article 21(1)(b)(ii) directs jurisdiction to the courts of the place where the business which hired the employee was or is situated. Its application can lead to submitting the issue to a court that does not have a rational connection with the dispute,[185] which is an unsatisfactory result according to Advocate General Jacobs.[186] He therefore pleaded for a broad interpretation of the "habitual workplace" criterion in Article 21(1)(b)(i).[187] In recent years, as a result of the CJEU's jurisprudential practice, the second prong has indeed acquired a strong residual character.[188] The advantage of it is still that if the business has

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tion and enforcement of judgments in civil and commercial matters, COM (1999) 348, p. 28: "[i]n relation to insurance, employment and consumer contracts, the weaker party should be protected and there should be an exception from the general rule allowing that party in appropriate cases to bring the action in the Courts for his domicile."

[180] See for example the difficulties that arose in the Belgian Ryanair case: *Tribunal de travail de Charleroi (3e chambre)*, 4th of November 2013, available at <http://www.kluwer.be/files/communities/legalworld/rechtspraak/Arbrb-Charleroi-6-november-2013-(Ryanair).pdf>.

[181] This was expressed in Case C-266/85 *Shenavai v. Kreischer,* [1987] ECR 239 and Case 32/88 *Six Constructions v. Humbert*, [1989] ECR 341. See also Case C-383/95 *Rutten v Cross Medical Ltd.,* [1997] ECR I-57 at §16.

[182] Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075 at §19.

[183] U. MAGNUS/ P. MANKOWSKI (note 24), p. 400.

[184] P. MORENO, La competencia judicial internacional en materia de contrato de trabajo en la Comunidad Europea, *Derecho Internacional y de la Integración* 2003, vol. 2, p. 7 *et seq*.

[185] J.P. BÉRAUDO, The Arbitration Exception of the Brussels and Lugano Conventions, *Journal of International Arbitration* 2001, vol. 18, p. 13 *et seq.*; T.C. HARTLEY (note 139), p. 70; U. MAGNUS/ P. MANKOWSKI (note 24), p. 406.

[186] Opinion of Advocate General JACOBS, at §37, in Case C-125/92 *Mulox v Geels,* [1993] ECR I-4075: "the substitute connecting factor (in the sense of (old) art. 19(2)(b)) is capable of producing somewhat anomalous results: if, for example, Mr Geels had been engaged in Luxembourg by an entity which had since transferred itself to Italy, that might be sufficient to confer jurisdiction on the Courts of Luxembourg or Italy, even though he had never worked in either country." He therefore highlights the importance that one should make a "determined effort" to identify a principal or habitual place of employment.

[187] *Ibid.*

[188] In U. MAGNUS/ P. MANKOWSKI (note 24), p. 406 it is argued that the rule of (old) Article 19(2)(b) has indeed been "marginalized by the *loci laboris* as a result of the juris-

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been relocated, the forum of the place where it used to be situated is competent to hear the case.[189]

Note that an employee temporarily posted away within the EU may also, in certain circumstances,[190] address the courts of the Member State where he is posted or temporarily employed when the claim concerns rights conferred by Directive 96/71.[191] This is a consequence of Article 67 (the numbering has not changed in the Recast) of the Regulation.[192]

It seems clear that the *favor laboratoris* has become a guideline[193] in the European structure as the legal provisions encourage the treatment most favourable to the employee – both when he is acting as a defendant and as a claimant.

The disadvantages lie especially for employees working in the international travel or transportation businesses. The Regulation does not clarify whether they are to be treated as habitually working in one country in the sense of Article 21(1)(b)(i), *e.g.* in the case of air transport the aircraft's flag State maybe, or habitually working in more than one country as in Article 19(2)(b).[194] This leaves scope for interpretation by the judges and thereby diminishes the predictability of the case.[195]

c) Determination of the "Habitual Workplace"

The recent judgment of the Labour Court of Charleroi on the 4th of November 2013 shall be the point of departure of this discussion.[196] The case concerned a flight

prudential tendency of the CJEU to «reinterpret» art. 19(2)(a) extensively." See the following cases: C-125/92 *Mulox v Geels,* [1993] ECR I-4075; C–37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002] ECR I–2013; C-29/10 *Heiko Koelzsch v État du Grand-Duché de Luxembourg* [2011] ECR I-1595.

[189] U. MAGNUS/ P. MANKOWSKI (note 24), p. 405. See also J.P. BÉRAUDO (note 185), p. 13 *et seq*.

[190] This rule is limited in its scope of application to cases of enforcement of the right to the terms and conditions of employment guaranteed in Article 3 concerning the activities stipulated in Article 1 of the Directive. See U. MAGNUS/ P. MANKOWSKI (note 24), p. 407 *et seq*.

[191] P. STONE (note 43), p. 141. See also M.V. POLAK (note 6), p. 329-339 for a critical analysis of the coexistence between Rome I, Brussels I and the Directive 96/71/EC. On the jurisdiction front, POLAK proposes to amend (then) Article 19 and 20 of Brussels I by incorporating Article 6 of the Directive – he considers that it is undesirable for there to be various instruments for one field of law.

[192] According to Article 67 of the Regulation, other provisions in specific matters that govern jurisdiction and enforcement of judgments contained in EU or national legislation harmonised pursuant to such instruments, shall not be prejudiced. Therefore, if the case concerns the Council Directive 96/71 that applies to workers posted abroad for example, the private international rules of the Directive shall also be applicable.

[193] U. MAGNUS/ P. MANKOWSKI (note 24), p. 398.

[194] M.V. POLAK (note 6), p. 331.

[195] U. MAGNUS/ P. MANKOWSKI (note 24), p. 404.

[196] *Tribunal de travail de Charleroi (3e chambre)* (note 180).

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attendant living in Spain and dismissed by Ryanair in 2011 after two years of employment.[197] He needed Charleroi to be determined as the habitual workplace in order for the Labour Court of Charleroi to have jurisdiction over the case.[198] This would also have an impact on the applicable law because even if the parties had reached a choice-of-law agreement, the mandatory laws of the place of habitual employment could not be excluded if they were more favourable to the weaker party.[199] Despite the plaintiff's long list of factual considerations in favour of Charleroi as his habitual workplace,[200] the Belgian Court came to the conclusion that Belgium was not the country where the employee performed the greater part of his work, given the elements that characterise the job of a steward.[201] It stated that Ryanair's "organization at Charleroi was a skeleton only"[202] and all major organisational decisions were taken in Ireland.[203]

In the authors' view, the Belgian Court mistakenly departed from the idea of determining the place from which the employee was employed rather than where he habitually "actually"[204] carried out his work. Of course, the task was difficult because undoubtedly the "majority of the work is indeed performed in the air."[205]

The case refers back to the most important CJEU precedents in the matter: *Mulox,*[206] *Rutten,*[207] *Weber*,[208] *Koelzsch*[209] and *Voogsgeerd*.[210] In *Mulox,* the CJEU

[197] G. VAN CALSTER, Ceci n'est pas une base Ryanair?, *De juristenkrant: een actuele kijk op recht* 2013, p. 4.

[198] G. VAN CALSTER, Ceci n'est pas une base Ryanair – The Court in Charleroi on "place where the employee habitually carries out his work", *GAVC Law blog* 2013, available at <www.gavclaw.com>.

[199] See Article 8, Rome I; G. VAN CALSTER (note 197), p. 4.

[200] Plaintiff argued that his shifts as a steward always started and ended at Charleroi; that he was therefore practically obliged to rent a flat near Charleroi; that his hours were "clocked" from an office situated at the Charleroi airport; that flight routes were communicated to him through a PC in Charleroi; that personnel matters were handled there too; that his equipment was delivered to him there; that training and fitness tests were conducted there. See G. VAN CALSTER (note 197), p. 4.

[201] *Tribunal de travail de Charleroi (3e chambre)* (note 180), p. 8; see also Dossier Ryanair: pas suffisamment de preuves, available at http://www.lalibre.be/economie/libre-entreprise/dossier-ryanair-pas-suffisamment-de-preuves-527724bf357046af56a06128 which states that the tribunal did not deem itself competent in the matter because the majority of the flight attendant's work was not performed in Belgium: "*Enumérant les différentes activités du personnel, le tribunal a conclu que la part de la Belgique dans ces activités n'était pas prépondérante, et que, dès lors, il n'était pas compétent pour juger ce dossier.*"

[202] G. VAN CALSTER (note 198).

[203] *Tribunal de travail de Charleroi (3e chambre)* (note 180), pp. 7-8; Dossier Ryanair: pas suffisamment de preuves (note 201). Ryanair had argued that all the employees could become acquainted with all organisational decisions via internet on their PC's and that no team was present in Charleroi to take these decisions. They came directly from Ryanair but the staff could access the information from anywhere.

[204] G. VAN CALSTER (note 198).

[205] G. VAN CALSTER (note 197), p. 4.

[206] Case C-125/92 *Mulox v Geels* [1993] ECR I-4075.

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first argued that (then) Article 19 of Brussels I must be determined in such a way "as to avoid any multiplication of Courts having jurisdiction" so that it was necessary, in a case where the work was carried out in several places, to specify one place where the employee is presumed to have habitually carried out his work.[211] If this is difficult,[212] the CJEU specified in *Rutten* that the national courts must look at the place where the employee "has established the effective centre of his working activities and where, or from which he in fact performs the essential part of his duties *vis-à-vis* his employer."[213] The CJEU therefore created a rebuttable presumption, which the national courts must test against the factual background of each case.[214]

In order to assess where the "greater part of the obligations" is performed, the CJEU argued in *Koelzsch* that the courts may take a qualitative approach based on elements and circumstances of the specific activity itself.[215] This was reaffirmed in *Voogsgeerd*.[216] If there was no such permanent centre of activities and the same

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[207] Case C-383/95 *Rutten v Cross Medical Ltd.* [1997] ECR I-57.

[208] Case C–37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002] ECR I–2013.

[209] Case C-29/10 *Heiko Koelzsch v État du Grand-Duché de Luxembourg* [2011] ECR I-1595.

[210] Case C–384/10 *Jan Voogsgeerd v Navimer SA.* [2011] ECR I-1595.

[211] Case C-125/92 *Mulox v Geels* (note 206) at §11.

[212] Sometimes determining the "place where or from which the employee principally discharges his obligations towards the employer" is difficult or nearly impossible, for example because there are two or more places that are equally relevant or because there are none. See Case C-125/92 *Mulox v Geels* (note 206) at §26; U. MAGNUS/ P. MANKOWSKI (note 24), p. 402; P. STONE (note 43), p. 140.

[213] Case C-383/95 *Rutten v Cross Medical Ltd.* (note 207) at §23.

[214] U. MAGNUS/ P. MANKOWSKI (note 24), p. 402 lists a series of points to consider: "whether or not the worker carried out his work from one particular office, whether he organized his professional activities from that office, whether he had his residence in that place, how long he stayed there, whether he went back there after every business trip."

[215] See U. MAGNUS/ P. MANKOWSKI (note 24), p. 404. For example Case C-29/10 *Heiko Koelzsch v État du Grand-Duché de Luxembourg* (note 209) involved transport workers and the court specified at §§48-50 that it must "take account of all the factors which characterize the activity of the employee" such as "determine in which State is situated the place, from which the employee carries out his transport tasks, receives instructions concerning his tasks and organizes his work, and the place where his work tools are situated" and "determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks."

[216] Case C–384/10 *Jan Voogsgeerd v Navimer SA.* (note 210) at §44: "when the court seized establishes that the employee must always report to the same place where he receives instructions, that court must regard the employee as habitually carrying out his work in that place, within the meaning of art. 6(2)(a) of the Rome Convention. Those matters, which characterize the actual employment, all concern the determination of the law applicable to the contract of employment on the basis of that linking factor."

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job was continuously performed as in *Weber,*[217] the total working relationship must be taken into account including its duration.[218] This presumption may only be rebutted when it is clear from the facts that there is a greater relationship with one particular Member State.[219]

The Belgian Court recalled in the Ryanair case that, unlike in *Mulox* and *Rutten,* the worker did not have an office representing the effective centre of its activities.[220] The Court therefore used *Koelzsch* and *Voogsgeerd* as analytical tools to factually ascertain a substantial connection with one particular country.[221]

Nevertheless, with the appeal now pending in Mons, the Court might be guided by the decision in *Schlecker*.[222] In that case, Advocate General Wahl listed a number of substantive criteria to prove a closer connection with a particular country.[223] These include *inter alia* the fact that the employer pays taxes relating to the income from his activity and that he is covered by the social security schemes.[224] Notably, it was confirmed in January 2014, that Ryanair will now, in conformity with an EU Regulation, pay the social security contributions of its Charleroi-based employees in Belgium.[225] This might be used as an argument in line with Wahl's criteria that Ryanair therefore implicitly recognises that its employees are based in Charleroi. Regrettably, had the CJEU been able to rule on a similar issue in *Warbecq,*[226] this tricky situation might not have presented itself.[227]

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[217] Case C–37/00 *Herbert Weber v Universal Ogden Services Ltd.* (note 208).

[218] *Ibid.* at §51, the CJEU stated that any qualitative criteria is irrelevant. This means that the place where the employee has worked the longest is usually the relevant place. U. MAGNUS/ P. MANKOWSKI (note 24), p. 403; P. STONE (note 43), p. 140.

[219] U. MAGNUS/ P. MANKOWSKI (note 24), p. 404.

[220] *Tribunal de travail de Charleroi (3e chambre)* (note 180), p. 5.

[221] *Tribunal de travail de Charleroi (3e chambre)* (note 180), p. 6.

[222] Case C□64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551.

[223] See therefore G. VAN CALSTER, Wahl AG Offers Substantive Criteria for "Closer Connection" Test for Contracts of Employment, *GAVC Law blog* 2013, available at <www.gavclaw.com> and also G. VAN CALSTER, "More Closely Connected" in Employment Contracts – The CJEU in Schlecker Emphasizes Tax and National Insurance (Social Security), *GAVC Law blog* 2013, available at www.gavclaw.com.

[224] Opinion of Advocate General WAHL (note 13), at §68.

[225] "Ryanair paye ses lois sociales en Belgique", *Communiqué de presse de la Centrale Nationale des Employés (CNE) 2014*, available at https://cne.csc-en-ligne.be/cne-gnc/actu/communiquedepresse/2014cp.html>; see also "Ryanair – arrêt de la cour de travail à Mons", *Fil Info de la Centrale Nationale des Employés (CNE) 2016,* available at <https://cne.csc-en-ligne.be/cne-gnc/actu/Filinfo/ryanair-arret-de-la-cour-de-travail-de-mons.html>.

[226] See Case C–555/03 *Warbecq v Ryanair Ltd* [2004] ECR I–6041. In this case, Ryanair had claimed that they could terminate the contract of the employee according to Irish law, which allows for a year's trial. Belgian law on the other hand limits the trial period to six months. The CJEU was seized with a preliminary ruling but declared that it had no jurisdiction to rule on the case because in those days not all courts were able to refer preliminary questions to the CJEU on matters of private international law. In the end, the labour Court of Charleroi ruled on the 21st of March 2005 that it was competent to hear the case and that the contract termination was illegal as Belgian law applied to their contract.

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The Ryanair case in Mons went up to the CJEU as Joined Cases C-168/16 and C-169/16, *Nogueira et al.* and *Osacar v Ryanair*. Saugmandsgaard ØE opined in April 2017. The weakest part of the judgment in the national court of first instance, was that it looked to the employer's organisation as the most relevant criterion in determining the place of habitual employment. That clearly went against the *favor laboris* inherent in Article 19 of the Brussels I Recast Regulation. The Advocate General agrees with that view: see, in particular, paragraph 100 of his opinion. In sum, Saugmandsgaard ØE recalled that CJEU case law on the matter essentially requires the courts to either identify the "place where" the employee principally carries out his obligations *vis-à-vis* his employer, or the "place from which" he principally carries out those obligations. The workers at issue were employed as cabin crew on an aircraft operated by Ryanair. Those employees performed their work in more than one Member State, namely in Belgium, where the airport of departure (Charleroi) was situated, the Member State of the airport of arrival and any other Member States crossed during the flight. The AG suggests (at para 92) that it is not possible, in such circumstances, to identify a "place where" those employees principally carried out their obligations *vis-à-vis* their employer, for it is difficult to attach greater weight to the tasks carried out by those employees in the airport of departure, on board the aircraft or in the airport of arrival.

A "place from which" those employees principally carried out their obligations *vis-à-vis* their employer, however, can be identified. The referring court had listed a number of factual considerations among which the AG suggested (at para. 97 *et seq.*) the following as being highly relevant.

– First, appellants started and ended their working day at Charleroi Airport. To the AG's mind, that fact is of overriding importance, which he suggests is confirmed by the Court's consistent case-law in particular *Koelzch* and *Voogsgeerd*.
– Second, appellants received the instructions relating to their tasks and organised their work at Charleroi Airport by consulting their employers' intranet. (It is on this point that the AG rejects any relevance of the location of organisation of the work schedule by the employer).
– Third, the Ryanair aircraft on board of which appellants worked as cabin staff, were based at Charleroi. Here the AG refers to CJEU case law that, in the international transport sector, the place where the work tools are located constitutes a relevant indicium for the purposes of determining the place from which the worker principally fulfils his obligations *vis-à-vis* his employer.
– Fourth, appellants were contractually required to live less than one hour from Charleroi Airport. It is noteworthy that this indication (in the main proceedings at 103) does not refer to the workers' actual place of residence

Ryanair appealed. See G. VAN CALSTER (note 197), p. 4; Ryanair Loses Belgian Sackingcase, Told to Pay Damages, *Expatica* 2005, available at <http://www.expatica.com/be/news/local_news/ryanair-loses-belgian-sackingbrcase-told-to-pay-damages-18312.html>.

[227] G. VAN CALSTER (note 198).

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but rather to the place of work near which they live, namely Charleroi Airport.

– Fifth, the referring court noted that Ryanair and Crewlink jointly had a "crew room" at Charleroi Airport. The existence of an office made available by the employer is another factor, whose relevance of which has been emphasised in the Court's case-law. That this is not formally a "branch" of either company, is irrelevant.
– Finally, appellants were required to attend Charleroi Airport if they were unfit for work and in the event of disciplinary problems.

The AG points out that on the basis of the criteria, the Court at Mons formally will have to complete the analysis; however, he concludes (at page 107) that on the basis of the findings of fact communicated by that court in its request for a preliminary ruling, those six indicia unequivocally designate the courts of the place where Charleroi Airport is situated.

A few other issues are worth mentioning. Firstly (at 108) whether the worker is directly employed by Ryanair (Case C-169/16) or assigned to Ryanair by Crewlink (Case C-168/16) is irrelevant for the purposes of identifying the place where the work is habitually carried out, within the meaning of Article 19(2)(a) of Regulation No 44/2001. That place, the AG suggests, is independent of the legal link between the worker and the person who benefits from the work done.

Further, the AG suggests that the concept of "home base" has relevance to the analysis, albeit indirect. "Home base" is a term used in relevant EU civil aviation law. At 109 *et seq.*: "place where the employee habitually carries out his work", used in Article 19(2) of Regulation No 44/2001, should not have to depend on a concept in an act of Union law which belongs to a quite different area, namely that of the harmonisation of rules in the civil aviation sector. At 116: "the relevance of the home base, for the purposes of identifying the place where the contract of employment is habitually carried out, is only indirect. Indeed, it should be taken into account only insofar as it supports the indicia mentioned above as relevant for the purposes of identifying that place" (which it certainly did *in casu*).

Further and convincingly, the AG emphatically suggests that the nationality of the aircraft is entirely irrelevant for the discussion (118 *et seq.*).

Finally, at 73 *et seq.,* the AG suggests that there ought to be parallel interpretation of the findings on jurisdiction, and the rules on applicable law, among others in the Rome I Regulation. Those rules were not included in the referring court's request for preliminary ruling.

We have to await the Court's judgment, of course. However, all in all this is a convincing Opinion which, as specifically flagged by the AG (at 101), is instrumental in addressing forum shopping by employers and consequently will be extremely helpful in addressing social dumping in the EU.

2. Determining which Court Can Adjudicate in the U.S.: No Special Rules Regarding Individual Employment Contracts

When comparing the guidance provided by Brussels I to that of the American system, it is noticeable how little assistance is given on the US federal level. There

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are no jurisdictional cases of the Supreme Court that precisely concern employment. Lower courts therefore apply the Supreme Court cases relative to general contract jurisdiction by analogy.[228] The States' case law is therefore divided, yet a recurring fact pattern can be distinguished.

When a defendant is domiciled in another State than that of the forum, the system departs from the idea that two States will be interested in hearing the case and the seized court will therefore compare State interests.[229] Specific rules therefore enter into play to determine which court can render an effective judgment, *i.e.* under State law and its Constitution.[230]

Binding the parties to a State court's judgment is a matter of personal jurisdiction; the plaintiff will be bound by the mere fact of commencing proceedings in the forum.[231] But in order to bind the defendant, the court must satisfy the Constitution's due process clause.[232] Under this constitutional requirement, a court's assertion of jurisdiction over a non-resident defendant is limited to cases where the defendant "purposefully establishes certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[233] Jurisdiction is only fair when there is sufficient contact between the defendant and the forum.[234] The function thereof is twofold; "it protects the defendant against the burdens 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."[235]

In comparison to the European approach, which as we have seen takes a *pro-defendant* stand, the American system can be characterised as particularly *pro-claimant*. The plaintiff disposes of a wide and often non-exhaustive jurisdictional catalogue to locate a court that is competent.[236] The defendant's domicile is a valid jurisdictional ground but others, some of which would be considered as exorbitant under the Brussels model, are also accepted.[237] These include tag-jurisdictions,

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[228] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 450 *et seq*.

[229] D. SIEGEL/ P.J. BORCHERS (note 89), p. 33.

[230] R.J. WEINTRAUB, Commentary on the Conflict of Laws, 5th ed., New York, Foundation Press, 2006, p. 119.

[231] D. SIEGEL/ P.J. BORCHERS (note 89), p. 42.

[232] U.S. Constitution, Amendment XIV, Section 1.

[233] *Guajardo v. Deanda,* 690 F. Supp. 2d 539, 536 (S.D. Tex. 2010) quoting *Aviles v. Kunkle,* 978 F.2d 201, 204 (5th Cir.1992) and see especially the landmark case *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945).

[234] R.J. WEINTRAUB (note 230), p. 159.

[235] *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-292, 100 S. Ct. 559, 562, 62 L. Ed. 2d 490 (1980).

[236] H. VAN LITH (note 124), p. 342; A.T. VON MEHREN (note 161), p. 191.

[237] T.C. HARTLEY (note 139), p. 158; S.E. STERK (note 2), p. 1195.

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where jurisdiction is based on physical presence alone,[238] but also the "doing business" rule, where a defendant can be subject to jurisdiction in every forum where he transacts business even if there is only a single commercial contact.[239] There is even a "catch-all-provision" in certain statutes that provide for jurisdiction on any basis as long as it does not violate the standard of constitutional due process.[240]

a) The Defendant's position

To satisfy the minimum contact requirement, there is not one element that is decisive;[241] "rather the touchstone is whether the defendant's conduct shows that it «reasonably anticipates being haled into Court.» The defendant must not be haled into a jurisdiction solely as a result of «random» contacts, or of the «unilateral activity of another party».''[242]

When an employee acts as a defendant, it frequently involves breaches of non-compete clauses[243] or similar restrictions in his employment contract.[244] The employer will usually prefer litigating in his home State, which will be accepted[245] unless the employee does not perform a substantial part of his work in that State.[246] So a Michigan-based employer will usually be able to prosecute in Michigan even if his employee is domiciled in Louisiana, unless the employee works mostly in

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[238] Personal jurisdiction can even be based on a defendant's mere temporary presence in a State, see *Burnham v. Superior Court of California, Cty. of Marin*, 495 U.S. 604, 628, 110 S. Ct. 2105, 2106, 109 L. Ed. 2d 631 (1990). Courts can therefore hear cases that do not have any connection to the defendant other than the fact that the defendant was temporarily in the State and even if defendant's actions only took place in his home State. See S.E. STERK (note 2), p. 1195. The EU regime would seem to prohibit tagging jurisdiction against defendants domiciled in EU Member States. T.C. HARTLEY (note 139), p. 158.

[239] W.E. O' BRIEN JR., The Hague Convention on Jurisdiction and Judgments: The Way Forward, *The Modern Law Review* 2003, vol. 66, p. 496; A.T. VON MEHREN (note 161), p. 189.

[240] H. VAN LITH (note 124), p. 343. VON MEHREN also explains that in the U.S., "State legislation either explicitly or through judicial interpretation today typically claims state-Court adjudicatory authority to the constitutionally permissible extent." A.T. VON MEHREN (note 161), p. 200.

[241] *Southern Machine Company v. Mohasco Industries, Inc.,* 401 F.2d 374, 382 (6th Cir. 1968).

[242] *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 562, 62 L. Ed. 2d 490 (1980).

[243] G. LESTER/ E. RYAN (note 75), p. 389.

[244] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 450.

[245] *T.M. Hylwa v. Oalka,* 823 F.2d 310 (9th Cir. 1987); *Nordmark Presentations, Inc. v. Harmann,* 557 So.2d 649 (Fla. Dist. Ct. App. 1990); *Ciena Corp. v. Jarrard,* 203 F.3d 312 (4th Cir. 2000).

[246] *Colt Plumbing Co. v. Boisseau,* 435 Pa. Super. 380, 645 A.2d 1350 (1994); *United Rentals, Inc. v. Pruett*, 296 F.Supp.2d 220, 230, 231 (D. Conn. 2003).

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another State than Michigan. In the EU, the employer would only be able to litigate in the place of domicile of the employee.

b) The Claimant's Position

In the EU, a claiming employee may resort to specific rules that enable him to select another forum than that of the employer's home court.[247] No policy considerations in the U.S. have led the legislator to allow such an explicit jurisdictional preference for employees.[248] Any consideration for the employee's weaker position therefore takes place under the American due process analysis.[249]

In employment cases, courts in the U.S. usually consider factors such as (1) whether the performance of contractual duties was to occur within the forum or (2) whether the defendant "purposely reached" into the forum State to solicit employees.[250]

The first situation (1) often involves an employee who continues to perform part or all of his work in his home State but is employed by a foreign employer. Employees will easily maintain the lawsuit at home because courts generally consider there to be a sufficient connection with the forum if the employer knowingly allows the employee to perform work at home.[251] If, however, it is the employee insisting on working at home for his own convenience or unilaterally decides to do so, home State jurisdiction may not be accepted.[252] Taking the example of a Louisiana-based employee working for a Michigan firm but performing work in Louisiana, the employee may usually prosecute in Louisiana, unless his employer did not know or allow work to be performed there. In the EU, the home court would only have jurisdiction if the employee *habitually* performs work

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[247] U. MAGNUS/ P. MANKOWSKI (note 24), p. 399.

[248] H. VAN LITH (note 124), p. 337.

[249] F. POCAR, La protection de la partie faible en droit international privé, *Recueil des Cours* 1984, vol. 188, p. 339 *et seq.*; A.T. VON MEHREN (note 161), p. 202.

[250] *Consulting Engineers Corp. v. Geometric Ltd.,* 561 F.3d 273, 278 (4th Cir. 2009), highlights that various factors are taken into consideration, which include examples (1) and (2) given here but also others such as (3) whether the defendant maintains offices or agents in the forum state, (4) the nature, quality and extent of the parties' communications about the business being transacted, *etc*. See *Peanut Corp. of Am. v. Hollywood Brands, Inc.*, 696 F.2d, 311, 314 (4th Cir. 1982); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985); *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 278 (4th Cir. 2009); *Wright v. Zacky & Sons Poultry, LLC*, 105 F. Supp. 3d 531, 538 (M.D.N.C. 2015).

[251] *English & Smith v. Metzger,* 901 F.2d 36, 39 (4th Cir. 1990); *Shah v. Nu-Kote International, Inc.,* 898 F. Supp. 496, 502 (E.D. Mich. 1995); *Paine v. Intrepid, U.S.A., Inc.*, No. 3:14-cv-02005, 2015 U.S. Dist. LEXIS 100591, at *2 (M.D. Tenn. July 30, 2015).

[252] *Pennebacker v. Wayfarer Ketch Corp.*, 777 F. Supp. 1217, 1221 (E.D. Pa. 1991); *Romann v. Geissenberger Mfg. Corp.,* 865 F. Supp. 255, 261 (E.D. Pa. 1994); *Failla v. FixtureOne Corp.*, 177 Wash. App. 813, 823-24, 312 P.3d 1005, 1011 (2013).

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in that State. It is not the *knowledge* of the employer that tips the scale but the place where the *actual* work is performed.[253]

The second case (2) often concerns an employee working abroad who comes back home to prosecute his former employer. In those situations jurisdiction at home is often recognised[254] though not always.[255] Courts tend to look at the initiative of recruitment; if the employer actively reached out to seek a foreign employee to recruit him locally for work abroad, there is an intentional connection with the other forum and courts will usually allow jurisdiction there where the employee is resident.[256] Merely agreeing to hire a foreign employee who initiated the contact is not the same and the employee should go to the court where he performed the work.[257]

On the basis of the previous case study, the employee would be able to prosecute in Louisiana for work performed in Michigan if his employer actively hired him in Louisiana. In the EU, courts will first look at the habitual workplace and usually residually[258] allow jurisdiction where the employee was hired if the employer is or was situated there.

The connecting factors in the U.S. are much more subjective, whereas those in the EU are based on objective facts. U.S. courts look at the intentions behind the parties' actions, while the factual circumstances of the case are looked at in the EU. Both nevertheless tend to encourage jurisdiction at the place of employment.

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[253] See Brussels I, (old) Article 19(2)(a).

[254] *Burchett v. Mastec North America, Inc.,* 322 Mont. 93, 102, 93 P.3d 1247, 1252-1252 (Mont. 2014) where plaintiff was a Montana resident but lived and worked in Oklahoma, California and Indiana. He sued his employer in Indiana for breach of a Montana law. The trial court dismissed the case for lack of subject-matter jurisdiction. The Montana Supreme Court reversed and remanded, holding that Montana was the appropriate forum and Montana law applied to this case. See also *Dotson v. Fluor Corp.,* 492 F. Supp. 313, 317 (W. D. Tex. 1980); *Runnels v. TMSI Contractors, Inc*., 764 F.2d 417, 421 (5th Cir. 1985); *Clark v. Moran Towing & Transport Company,* 738 F. Supp. 1023, 1028 (E.D. LA. 1990); *Moreno v. Milk Train, Inc.,* 182 F. Supp. 2d 590, 594 (W.D.Tex. 2002).

[255] *Robert Half of Iowa, Inc. v. Citizens Bank of Newburg,* 453 N.W.2d 236, 239 (Iowa Ct. App. 1990); *Freudensprung v. Offshore Technichal Services, Inc.,* 186 F. Supp. 2d 716, 723-724 (S.D. Tex. 2002); *Hainey v. World AM Communications, Inc.,* 263 F. Supp. 2d 338,343 (D.R.I. 2003).

[256] U. GRUŠIĆ (note 142), p. 123; *Mabry v. Fuller-Shuwayer Co.,* 50 N.C. App. 245, 251, 273 S.E. 2d 509, 512-513 (1981); *Runnels v. TMSI Contractors, Inc., and TMSI Arabia, Ltd.,* 764 F.2d 417, 421-423 (5th Cir. 1985); *Clark v Moran Towing & Transp. Co.,* 738 F. Supp 1023, 1030 (E.D. La 1990); *Moreno v. Milk Train, Inc.,* 182 F. Supp. 2d 590, 594-595 (W.D.Tex. 2002); *Guajardo v. Deanda,* 690 F. Supp. 2d 539, 551-555 (S.D. Tex. 2010); *Watson v. Blessey Marine Servs.*, No. 11cv1252, 2011 U.S. Dist. LEXIS 135181, at *10-12 (W.D. Pa. Nov. 23, 2011); *Davis v. NIH Fed. Credit Union,* No. 12-cv-05502-JCS, 2013 U.S. Dist. LEXIS 69280, at *17 (N.D. Cal. May 15, 2013).

[257] *Farbman v Esskay Manufacturing Co.,* 676 F. Supp. 666, 668-670 (W.D.N.C. 1987); *Speckine v Stanwick International, Inc.,* 503 F. Supp. 1055, 1058 (W.D. Mich. 1980); *Conti v. Pneumatic Prods. Corp.* 977 F.2d 978, 982-983 (6th Cir. 1992).

[258] For example, if it is impossible for the judge to determine the country with which the work has a significant connection. U. MAGNUS/ P. MANKOWSKI (note 24), p. 406.

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In a way, the philosophy behind the Regulation might be similar to that of the American rules. The EU rules are aimed at supporting the reasonable anticipation of the parties; the employer is normally the one to determine where his employee works[259] and should, in organising a branch, establishment or agency or in hiring in the EU, anticipate that he has connected himself to the system.[260]

To sum up, the EU departs from a pro-defendant standpoint but then incorporates the *favor laboratoris* principle in the jurisdictional rules of the Regulation. Based on whether the employee acts as a claimant or defendant,[261] *ex ante* hard and fast rules either restrict[262] or widen the number of courts available to the claimant.[263] Jurisdiction at the defendant's domicile is not the starting point in the U.S. and does not stand on equal footing with other jurisdictional rules.[264] The plaintiff's choice of forum only becomes unacceptable when it violates the defendant's due process rights.[265]

On both continents, a defending employee will usually appear in his home State. Nevertheless this can be rebutted in the U.S. if the claimant proves that the employee has performed a substantial part of work in another state. While POLAK argues that this might be beneficial to the employee if the applicable law is also the *lex loci laboris,*[266] it does not accord with the reasoning that: the fewer the fora

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[259] Referring to the rule of (old) Article 19(1). U. MAGNUS/ P. MANKOWSKI (note 24), p. 400.

[260] Referring to the rule of (old) Article 18(2). U. MAGNUS/ P. MANKOWSKI (note 24), p. 396 *et seq*. By comparison, the American system allows for jurisdiction to extend to the owner of a branch without enacting specific provisions to that effect. This broader approach to jurisdiction merely refers to the obvious local economic involvement of the foreign enterprise in the forum State ("continuous and systematic business relations with the State") to justify general jurisdiction over the defendant for any legal claim, even unrelated to anything that connected them to the State. See discussion in P. HAY (note 63), p. 4 *et seq.*; U. MAGNUS/ P. MANKOWSKI (note 24), p. 400; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 915, 131 S. Ct. 2846, 2848 (2011).

[261] U. MAGNUS/ P. MANKOWSKI (note 24), p. 398.

[262] In contracts cases, the claimant can drag the defendant both to the court of the defendant's home country according to (now) Article 4 of the Brussels I Recast or to the court of the place of performance according to (now) Article 7(1) of the Brussels I Recast. If the defendant is an employee however, the only court available to the employer is that of the employee's domicile according to (now) Article 22 of the Brussels I Recast.

[263] F. JUENGER, Judicial Control of Improper Forum Regulation: Some Random Remarks and a Comment on How not to Do It, in J.L. GOLDSMITH (note 26), p. 311; H. VAN LITH (note 124), p. 338.

[264] H. VAN LITH (note 124), p. 346.

[265] R. MICHAELS, Two Paradigms of Jurisdiction, *Michigan Journal of International Law* 2006, vol. 27, p. 1049 *et seq*.

[266] M.V. POLAK (note 6), p. 326 *et seq.* argues that the *forum loci laboris* is probably the most competent to apply its own labour rules. Indeed, in both the EU and the U.S., when no choice has been made as to which law applies to the contract, the rules often point to the *lex loci laboris*. See Article 8(2) of the Rome I Regulation for the EU provision and Second Restatement, Section 188(3) and 196, which has been adopted by most U.S. States. But it has also been argued that one "should not exaggerate the importance of the link between

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available to the claimant, the better for the defendant.[267] In the EU, opting for the *forum loci laboris* is not possible for the employer prosecuting his employee.

As claimants, employees both in the EU and U.S. have a number of options to choose from. The closed EU jurisdictional catalogue provides for a well-considered yet rigid set of competent courts from which the claimant cannot depart.[268] The number of *fora* available to the claimant is virtually unlimited in the U.S. but in order to prosecute outside the employer's home State, the employee carries the burden of proving minimum contacts and that the defendant could reasonably anticipate the action there.[269] The court then has a discretionary power to weigh the appropriateness or convenience of the forum *in casu*.[270] This acts as a counterweight to the claimant's wide choice but leaves the door open to uncertainty.

As seen in the *Ryanair* case, there are some uncertainties in the EU too but it is exceptional for the judge to have a lot of leeway – which is the rule in the U.S. where employee protection is dependent on the *ex post* appreciation of the court.[271] As SCHLOSSER puts it: "American Courts are the plaintiff's heaven. In contrast, the European Courts (…) are the defendant's heaven."[272]

Nevertheless, the U.S. rules are more flexible[273] and apply to non-Americans in the same way as they apply to Americans, as opposed to the protective measures offered by the Brussels I Recast Regulation that only apply to defendants (at least as employees) domiciled in an EU Member State.[274] In Europe therefore, the protection offered to non-residents is quite limited.[275] This can cause

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jurisdiction and *lex causae.*" G. VAN CALSTER (note 3), p. 75 who refers to R. KIDNER (note 139), p. 103 *et seq.* and to the Opinion of Advocate General JACOBS concerning CJEU C-125/92 *Mulox v Geels,* [1993] ECR I-4075. See also L. MARI, Rapporti di lavoro, principi costituzionali e deroga alla giurisdizione secondo la Convenzione di Bruxelles del 1968, *Riv. dir. int. priv. proc.*, 1981, p. 51 *et seq*.

[267] The claimant has advantages over the defendant as he is the one to commence proceedings; he can determine the claim and unilaterally select the forum best suited to his needs. U. GRUŠIĆ (note 142), p. 97; M. KEYES, *Jurisdiction in International Litigation,* Sydney 2005, p. 199.

[268] H. VAN LITH (note 124), p. 338.

[269] R. MICHAELS (note 265), p. 1049 *et seq.*; L.J. SILBERMAN/ A.F. LOWENFELD, The Hague Judgments Convention – and Perhaps Beyond, in J.A.R. NAFZIGER/ S.C. SYMEONIDES (note 146), p. 121 *et seq*.

[270] One of the particularities of the U.S. system is also the principle of *forum non-conveniens*, which allows courts to decline jurisdiction if they consider another forum more appropriate. *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 347 (S.D.N.Y. 2008); F. JUENGER (note 263), p. 311; H. VAN LITH (note 124), p. 370.

[271] R. MICHAELS (note 265), p. 1057; H. VAN LITH (note 124), p. 344.

[272] P.F. SCHLOSSER, Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems, *University of Kansas Law Review* 1996, vol. 45, p. 37.

[273] T.C. HARTLEY (note 139), p. 156.

[274] *Ibidem*.

[275] See also in this sense S.P. BAUMGARTEN, Recent Reforms in EU Law. Recognition and Enforcement of Foreign Judgments, *Judicature* 2014, vol. 97, p. 191.

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discrimination against frontier workers[276] or whenever an employee changes residence right after the employment is terminated and right before the commencement of proceedings.[277]

III. Applicable Law Relating to Individual Employment Contracts

This chapter (A) briefly outlines the EU and U.S. methodologies regarding the determination of applicable law. It then compares how both systems approach the issue of employee protection; first when (B) a choice-of-law clause is provided and (C) when instead, the choice-of-law rules enacted by the legislative authority apply.[278] Most international contracts include a choice-of-law clause.[279] This is permitted in both the US and the EU.[280]

A. Determining the Applicable Law for Contracts – The Overall Approach in the EU and the U.S.

1. In the EU: A Harmonised Approach in Rome I

The Rome I Regulation lays down a comprehensive structure of conflicts rules on the law applicable to contractual obligations in civil and commercial matters within the EU.[281] It is relatively clear; the contract's proper law can either be

[276] T. THIEDE (note 54), p. 514. See also S.P. BAUMGARTEN (note 275), p. 190.

[277] U. GRUŠIĆ (note 142), p. 123.

[278] C. WALSH (note 1), p. 14. A majority of the countries worldwide enable private parties to choose the forum and the law applicable to their contracts before the objectively applicable law rules come into play; only a minority of countries (excluding the U.S. and the EU) do not accept this principle. See F. MORGENSTERN (note 3), p. 15 for a comparative analysis.

[279] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency, in E. GOTTSCHALK/ R. MICHAELS/ G. RÜHL/ J. VON HEIN, *Conflict of Laws in a Globalized World,* Cambridge 2007, p. 158.

[280] In the EU, this was first codified with the Rome Convention (Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. L 266/1) and then taken over by the Rome I Regulation in Article 3(1). P.J. BORCHERS (note 72), p. 1646. In the U.S., it is codified in Section 187 of the Second Restatement of 1969, which is followed by most American states. S.C. SYMEONIDES, The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing, *Maryland Law Review* 1997, vol. 56, p. 1248 *et seq*. American courts now accept free choice of law as a basic principle of contract conflicts of law and even the States that formally still follow the First Restatement (which does not recognise choice-of-law clauses) accept the provision of party autonomy of Section 187. See for example *Cherry Bekaert & Holland v. Brown,* 582 So. 2d 502 (Ala.1991). S.C. SYMEONIDES, Choice of law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 309.

[281] E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2148; see Regulation (EC)

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chosen by the parties,[282] or generally determined by reference to the contract's characteristic performance.[283] Courts can also apply a "closest connection" test if it is clear that the contract is manifestly more connected with another country.[284]

Rome I applies to contractual obligations in civil and commercial matters entered into on or after December 17, 2009. Interestingly, an important point regarding the temporal scope of application is currently *sub judice* at the CJEU in *Nikiforidis*.[285] Article 28 of Rome I provides that it applies to contracts concluded "as from 17 December 2009" (this is the corrected format; initially Article 28 read "after"). When exactly a contract is "concluded" needs to be determined in accordance with the *lex causae* as identified by the Regulation (an extension of Article 10(1), suggested by most if not all relevant scholarship). To date, there has been much less noise about the application of Article 28 to "continuing" contracts: those concluded before the temporal scope of the Regulation, continuing after, however renewed, renegotiated, amended… Do these continue to be covered by the Rome convention *ad infinitum*, or is there a cut-off point at which these continuing contracts become newly concluded? Any suggestion along these latter lines presumably requires determination of a threshold. For instance, adaptation of price in line with inflation is presumably not sufficient to speak of a "new" contract, but would a contractually foreseen price renegotiation lead to such a new contract? One's intuitive assumption may be to prefer autonomous interpretation of the concept "concluded" however in the current state of (or lack of) harmonisation of contractual law, it is more likely that the court will prefer an Article 10(1)-type solution: the putative *lex contractus* (the law that would apply to the contract were it valid) determines when a contract is "concluded" and when changes to a continuing contract lead to a newly concluded one.

2. In the U.S.: Various Approaches

Unlike in the EU, the U.S. system on choice of law is not harmonised. Each State has its own conflicts rules and there are virtually no federally imposed limits.[286] The only constitutional boundary lies in the due process requirement[287] and the

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 O.J. L 177/6.

[282] Rome I, Article 3(3).

[283] Rome I, Article 4(1).

[284] Rome I, Article 4(3).

[285] Case C-135/15 *Hellenic Republic v Grigorios Nikiforidis* [2016] ECR EU:C:2016:774.

[286] J. BASEDOW, Internal and External Conflicts, Federalism, and Market Regulation. Federal Choice of Law in Europe and the United States – A Comparative Account of Interstate Conflicts, *Tulane Law Review* 2008, vol. 82, p. 2128; E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2149.

[287] U.S. Constitution, Amendment XIV, Section 1. It guarantees the safe administration of justice.

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Full-Faith and Credit clause.[288] Yet these merely set outer limits but do not specify a choice-of-law method that states must follow.[289]

Over time, American jurisprudence moved away from the traditional theory of vested rights of the First Restatement[290] and innovated by adopting various approaches.[291] The most important ones should be mentioned. These include the Second Restatement where the law with the "most significant relationship" to the case applies,[292] the "interest analysis approach"[293] of Currie and the "better law

[288] The Full-faith and Credit clause requires states to respect the sovereignty of their sister-states by giving the same force and effect to their judgments, as they would have had in the rendering State. For the U.S. rules and analysis, see *Treines v. Sunshine Mining Co.,* 308 U.S. 66, 60 S. Ct. 44, 84 L.Ed 85 (1939); G. LESTER/ E. RYAN (note 75), p. 414; S.C. SYMEONIDES, Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey, *The American Journal of Comparative Law* 2009, vol. 57, p. 315. For the EU rules and analysis, see Brussels I, Article 34; Jenard Report (note 34), p. 43; Schlosser Report (note 34), p. 126; P. STONE (note 43), p. 230; R.J. WEINTRAUB (note 230), p. 743.

[289] R. MICHAELS, The New European Choice-of-Law Revolution, *Tulane Law Review* 2008, vol. 82, p. 1641.

[290] The theory of vested rights illustrated by Beale was a territorial notion that dominated the American choice of laws for some years until it was eventually dropped by most States. It provided for the foundation of the First Restatement and was based on the affirmation that every State had the obligation to recognise and enforce the rights that had been legally vested in accordance with a foreign law *i.e.* another State's law. Party autonomy did not have its place in the process, which is why the principle was not recognised in the First Restatement. See J. BEALE, *Treatise on the conflicts of laws,* New York 1935, p. 105; A. MILLS, The Identities of Private International Law: Lessons from the U.S. and the EU Revolutions, *Duke Journal of Comparative & International Law* 2013, vol. 23, p. 453; M. ZHANG, Party Autonomy and Beyond: an International Perspective of Contractual Choice of Law, *Emory International Law Review* 2006, vol. 20, p. 531; S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 30.

[291] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 153.

[292] This approach has received the widest acceptance amongst American States. C. SPILLENGER, Principles of Conflict of Laws, St. Paul Minn., West, 2010, p. 104 *et seq.*; S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 243 and for the alphabetical list of methodologies in each State: p. 278.

[293] B. Currie considered that States had an interest in having their laws applied for private law cases which is why he has courts decide which governmental interest should prevail in the given cases. B. CURRIE, Notes on Methods and Objectives in the Conflict of Laws, *Duke Law Journal* 1959, vol. 1959(2), p. 183 *et seq.*; C. SPILLENGER (note 292), p. 66 *et seq*.

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approach"[294] of Leflar. This paper will focus on the Second Restatement as it has been adopted by most American states.[295]

After characterising the subject matter, courts establish whether there is a "conflict" at all between the laws of different states.[296] There is a "false conflict" if all potentially applicable laws would attain the same result[297] and the forum court applies its own laws.[298] There is a "true conflict" when applying the *lex fori* or that of the other interested state would reach different results[299] and the forum court uses its own conflict-of-law approach to determine which substantive law applies.[300]

B. The Rules Applicable to Choice-of-Law Clauses in Individual Employment Contracts

1. The European Rules: Rome I

Article 8 of Rome I applies to individual employment contracts.[301] It reiterates the possibility for parties to draft choice-of-law clauses.[302] There are three situations where the choice-of-law clause can be overridden.[303]

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[294] LEFLAR listed five "choice-influencing considerations" to serve as a guide to the courts. The fifth is called the "better law" approach destined to direct the judge towards the rule that he considers superior. Some States have adopted it as their choice-of-law methodology like Minnesota for example. See *Allstate v. Hague Ins. Co.,* 449 U.S. 302, 306, 101 S. Ct. 633, 637, 66 L. Ed. 2d 521 (1981); C. SPILLENGER, (note 292), p. 113 *et seq*.

[295] S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 278; E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2164.

[296] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 144.

[297] R.A. SEDLER, American Federalism, State Sovereignty, and the Interest Analysis Approach to Choice of Law, in J.A.R. NAFZIGER/ S.C. SYMEONIDES (note 146), p. 378.

[298] D. SIEGEL/ P.J. BORCHERS (note 89), p. 258; *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)*; Air Products & Chemicals, Inc. v. Eaton Metal Products Co.*, 256 F. Supp.2d 329 (E.D. Pa. 2003); *Hammersmith v. TIG Ins. Co.,* 480 F.3d 220 (3d Cir. 2007).

[299] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 32.

[300] G. LESTER/ E. RYAN (note 75), p. 394; *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487 (1941).

[301] P. STONE (note 43), p. 356.

[302] See Rome I, art. 8(1), which refers to Rome I, Article 3(1).

[303] P.J. BORCHERS (note 72), p. 1647; J. DOLINGER, Resolving conflicts in contracts and torts*, Recueil des Cours,* 2000, vol. 283, p. 358; W.L.M. REESE, Choice of Law in Torts and Contracts and Directions for the Future, *Columbia Journal of Transnational Law* 1977, vol. 16, p. 26.

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a) Mandatory Law

According to the Regulation, one cannot contract out of certain provisions of law.[304] The country issuing the law decides itself which laws are mandatory or not, unless it concerns EU law in which case the CJEU is the judge of it.[305]

Articles 3(3) and 3(4) stipulate that choice of law in purely domestic[306] or intra-community[307] contracts only operate within the boundaries established by the mandatory law of the interested State or of the EU.[308] These rules serve various purposes *viz. inter alia* regulating the contents of private contracts, seeking to protect the interests of those who are seen as economically weak *e.g.* workers.[309]

A similar provision applies to employees specifically;[310] Article 8(1) provides that a choice-of-law clause cannot deprive employees of the mandatory rules that would be applicable had no choice of law been agreed upon.[311] These are mandatory employment protection rules that "cannot be derogated from by contract."[312]

[304] See Rome I, Article 3(3) and 3(4).

[305] G. VAN CALSTER (note 3), p. 142. It was established in *Ingmar* that certain EU rules could be of mandatory nature. See Case C-381/98 *Ingmar GB Ltd v Eaton Loenard Technologies Inc.* [2000] E.C.R. I-09305 at §25. This case was a predecessor to Article 3(4) of Rome I. Nevertheless, VAN CALSTER argues that the case would have a "very different outcome" if it were decided today due to the formulation in Article 3(3) and 3(4) that all other elements must be "located in one or more Member States" and the fact that one of the parties is domiciled in a third-country. G. VAN CALSTER (note 3), p. 143 *et seq*. See also 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, vol. 51, p. 135 *et seq*.

[306] Rome I, Article 3(3).

[307] Rome I, Article 3(4).

[308] D. SOLOMON, The Private International Law of Contracts in Europe: Advances and Retreats, *Tulane Law Review* 2008, vol. 82, p. 1729.

[309] D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 354.

[310] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 167.

[311] As a result, parties therefore often cannot, through their choice, evade the protective laws of the habitual workplace, which is the law usually favoured by the objectively applicable rules in employment contracts (see Rome, art. 8(2) and the detailed analysis of this in Chapter II(3)(A)). See also Rome I, Recital 35: "Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit."

[312] See Rome I, Article 3(3) and Article 8(1). P. STONE (note 43), p. 359. See also Giuliano and Lagarde Report), 1980 O.J. 282, p. 25 *et seq*.

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b) Overriding Mandatory Provisions[313]

Article 9 gives overriding effect to mandatory rules that transcend the contractual employer-employee relationship and involve public policy concerns.[314] These must be applied regardless of the law that would otherwise govern, whether the applicable law is the result of a choice-of-law agreement or not.[315] They are substantive rules of law designed to apply to multistate cases "directly" in the sense that they bypass the ordinary choice-of-law rules.[316] Nevertheless, these must be construed restrictively[317] and courts are given a list of factors to take into account when exercising their discretion.[318]

A forum is not restricted by the Regulation if it wishes to give effect to its overriding mandatory provisions.[319] However if it wishes to give effect to foreign overriding mandatory law, it can only be that of the place of performance of the contract, which makes the acts that are to be performed in that country unlawful.[320]

It is not certain whether an employee could benefit from the protection of mandatory law and overriding mandatory provisions combined.[321]

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[313] Also called "*lois de police*" or "*lois d'application immédiate.*" T.G. GUEDJ, The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis with Modern American Theories, *American Journal of Comparative Law* 1991, vol. 39, p. 664.

[314] P.J. BORCHERS (note 72), p. 1651; H. MUIR WATT, "Party Autonomy" in International Contracts: from the Makings of a Myth to the Requirements of Global Governance, *European Review of Civil Law* 2010, vol. 3, p. 262.

[315] P.J. BORCHERS (note 72), p. 1651, who adds that respect for these mandatory provisions is regarded as "crucial by a country for safeguarding its public interests."

[316] D. SOLOMON (note 308), p. 1735.

[317] Rome I, Recital 37 indicates that the concept is narrower than the concept of "mandatory provisions" of Articles 3(3) and 3(4), and that these provisions must only be applied in "exceptional circumstances." See also P. STONE (note 43), p. 339.

[318] Rome I, Article 9(1). See also M. FRANZEN, Conflicts of Law in Employment Contracts and Industrial Relations, in R. BLANPAIN, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies,* Alphen aan den Rijn 2010, p. 236; O.L. KNÖFEL, Kommendes Internationales Arbeitsrecht: Der Vorschlag der Kommission der Europäischen Gemeinschaften vom 15.12.2005 für eine "Rom I"-Verordnung, *Recht der Arbeit* 2006, p. 269 *et seq*.

[319] See Rome I, Recital 37; P. STONE (note 43), p. 339.

[320] D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 379; G. VAN CALSTER (note 3), p. 145.

[321] Indeed, the CJEU has not yet addressed the issue. J.J. KUIPERS, *EU Law and Private International Law: The Interrelationship in Contractual Obligations*, The Hague/ Boston/ London 2011, p. 56; P. STONE (note 43), p. 358. Opinions diverge as to whether employees should receive double protection or not. See P.J. BORCHERS (note 72), p. 1652; J.J. KUIPERS (noted above), p. 56; F. MORGENSTERN (note 3), p. 42 *et seq*.

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c) The Ordre Public *Exception*

Article 21 is characterised as the "last-ditch weapon"[322] to be used at the end the choice-of-law process to disregard the application of a foreign law provision if its *application* would be *manifestly* incompatible with the public policy of the forum.[323]

It differs from the "overriding mandatory provisions" because the focus here is on the *application* of the foreign rule at hand.[324] It is not opposed to the foreign rule as such.[325] In addition, the overriding mandatory law provision positively replaces the offending rule, where Article 21 simply "blanks it out" so that courts then search for an alternative that applies "by default."[326] Judges first try to find another rule from the original legal system that the forum does not object to and only if this fails, will forum law apply.[327] Even if quite exceptional, it can sometimes be a useful tool for employees.

2. The U.S. Attitude

American courts mostly enforce choice of law without hesitation;[328] they were upheld in 85% of the cases in a study that involved 697 cases.[329] Indeed, choice-of-law clauses are permitted by the Second Restatement,[330] the Uniform Commercial Code[331] and are recognised by all states in the U.S. in the area of contracts.[332]

But as in the EU, the freedom of parties to select the governing law is not absolute. There are two major boundaries: (i) the substantial or reasonable connection requirement and (ii) the public policy exception.[333]

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[322] D. JACKSON, Mandatory Rules and Rules of Ordre Public, in P.M. NORTH (ed), *Contract conflicts: The EEC convention on the Law applicable to Contractual Obligations – A comparative Study,* Oxford 1982, p. 62.

[323] D. SOLOMON (note 308), p. 1735.

[324] T.G. GUEDJ (note 313), p. 680; P. STONE (note 43), p. 339.

[325] D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 171.

[326] G. VAN CALSTER (note 3), p. 148.

[327] P. NYGH (note 11), p. 206.

[328] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 158.

[329] L.E. RIBSTEIN, From Efficiency to Politics in Contractual Choice of Law, *Georgia Law Review* 2003, vol. 37, p. 374 *et seq*.

[330] Second Restatement, Section 187.

[331] UCC, Section 1-105 as taken over by the newly inserted Section 1-301(c).

[332] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 156; M. ZHANG (note 290), p. 532.

[333] M. ZHANG (note 290), p. 524.

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a) Substantial or Reasonable Connection Requirement

To enforce a choice-of-law clause, there must be a "substantial"[334] or "reasonable"[335] connection between the chosen law and the parties or the transaction itself.[336] Yet the threshold for *substantial* connection is not very high.[337] Even when there is no factual connection to the chosen law, it can be regarded as having a "substantial relationship" by showing that there is a "reasonable basis" for the decision,[338] for example on grounds of completeness or maturity of the chosen law[339] or because the parties argued that they have a particular familiarity with the chosen law.[340] However, there is no guarantee the requirement will be met. Courts then analyse on a case-by-case basis if the connection requirement is met and invalidate a chosen law that is completely irrelevant to the matter.[341] Some courts have adopted a broad approach, others a more limited one.[342] This creates uncertainty for the employee.

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[334] Second Restatement, Section 187(2)(a).

[335] UCC, Section 1-105(1).

[336] See for example cases *IBM Corp. v. Bajorek,* 191 F.3d 1033, 1038 (9th Cir. 1999); *Johnson Service Group, Inc. v. France*, 763 F. Supp. 2d 819, 826 (N.D. Tex. 2011); *Ulbrich v. Overstock.Com, Inc*., 887 F. Supp. 2d 924, 930 (N.D. Cal. 2012).

[337] Courts have rarely disregarded a choice-of-law clause for lack of substantial relationship. S.C. SYMEONIDES, Choice of Law in the American Courts in 2016: Thirtieth Annual Survey (note 83), p. 47. See also Second Restatement, Section 187, comment e, which highlights that the substantial relationship test is met if parties chose the law of a state where "performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business." It also includes the place of contracting except perhaps, in the unusual situation where this place is wholly fortuitous and bears no real relation either to the contract or to the parties."

[338] Second Restatement, Section 187 comment f. According to the drafters of the Restatement, parties should be able to choose a legal system that they know well and that is relatively mature to at least acquire some form of legal certainty and predictability.

[339] S.C. SYMEONIDES, *Choice of law*, Oxford 2016, p. 370-371; S.C. SYMEONIDES, Party Autonomy in Rome I and II from a Comparative perspective, in K. BOELE-WOELKI/ T. EINHORN/ D. GIRSBERGER/ S.C. SYMEONIDES (eds), *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr,* Zurich 2010, p. 524; Second Restatement, Section 187 comment e.

[340] Second Restatement*,* Section 187 comment f; *Vita Food Products, Inc. v. Unus Shipping Co., Ltd* (1939) A.C. 277 (P.C), where the Court argued that the parties may have reasonably desired for UK law as they were "more familiar" to the principles of English Commercial law; the Court in *Radioactive, J.V. v. Manson,* 153 F.Supp.2d 462, 471 (S.D.N.Y. 2001) validated the chosen law even without factual contact because New York courts specifically have "significant experience" with music recording contracts.

[341] M.J. LEVIN, Party Autonomy: Choice-of-Law Clauses in Commercial Contracts, *Georgetown Law Journal* 1958, vol. 46, p. 260 *et seq.*; M. ZHANG (note 290), p. 511. For example, *Davis v. Siemens Medical Solutions USA, Inc.,* 399 F.Supp. 2d 785, 791 (W.D. Ky. 2005).

[342] J.J. HEALY, Consumer Protection Choice of Law: European Lessons for the United States, *Duke Journal of Comparative & International Law* 2009, vol. 19, p. 537.

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Rome I does not have such a radical rule;[343] parties can choose a neutral law unconnected to the parties or transaction,[344] even reference to "a non-state body of law or an international Convention" is permitted.[345] Yet, the U.S. is slowly moving closer to Europe;[346] Oregon and Louisiana have enacted statutes without any connection requirements and so have California, Texas, Illinois, and New York, under certain circumstances.[347]

b) The Public Policy Exception of Section 187(2)(b) of the Second Restatement

The public policy exception of the Second Restatement is a second limitation to party autonomy. According to Section 187(2)(b),[348] courts can invalidate choice-of-law clauses if the chosen law contravenes the public policy of the state that has a greater interest in seeing its own law applied and whose law would have applied in the absence of such clause.[349] Courts then apply forum law but three criteria must first be met.[350]

In *Ruiz* the Court disregarded a choice-of-law clause in an individual employment contract on the basis that another State had a greater interest in seeing its policy protecting employees enforced.[351] Certain state laws "serve important public policy goals, such as […] protecting employees in a relatively weak bargaining position."[352]

While both the EU[353] and the U.S. "public policy exception" deal with the question as to when and how forum courts can apply forum law to protect fundamental policies, such as employee protection,[354] they must be differentiated.

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[343] S.C. SYMEONIDES (note 339), p. 531.

[344] D. SOLOMON (note 308), p. 1724.

[345] Rome I, Recital 13; F.J. GARCIMARTÍN ALFÉREZ, The Rome I Regulation: Much Ado About Nothing?, *The European legal Forum* 2008, vol. 2, p. 67.

[346] D. SOLOMON (note 308), p. 1725.

[347] Oregon Revised Statutes Section 81.210; Louisiana Civil Code, Article 3540; California Civil Code Section 1646.5; Texas Business and Commerce Code Section 35.51(c); 735 Illinois Compiled Statute Section 105/5-5; New York General Obligations Law Section 5-1401.

[348] Second Restatement, Section 187(2).

[349] S.C. SYMEONIDES, Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey (note 100), p. 242.

[350] M. ZHANG (note 290), p. 525.

[351] *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1324 (9th Cir. 2012).

[352] *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1198, 127 Cal. Rptr. 3d 185, 191, 254 P.3d 237, 241 (2011) in which the Californian Supreme Court ruled that non-resident employees who do not live in California but often travel there for work, must be paid overtime under California's strict overtime laws for work performed in California. There are similar judgments in other courts such as *Adams v. Catrambone*, 359 F.3d 858, 863 (7th Cir. 2004), for example.

[353] Rome I, Article 21.

[354] T.C. HARTLEY (note 139), p. 633; E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2164.

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The effect of declaring a rule "public policy" in the U.S. is actually similar to affirming it as an "overriding mandatory" rule in Rome I.[355] It transcends the contractual relationship. Forum law can therefore supplant parties' choice in the U.S. when the clause aims to evade protective forum law.[356]

Both the EU and U.S. seem to utilise a similar idea of the American *interest analysis*;[357] the close contact between forum, contract and parties justifies the application of mandatory forum law above the otherwise applicable law when considered crucial to safeguard its public interests or policies.[358] In order for it to be "public policy",[359] State law must "contain language or legislative intent indicating that it represents a fundamental policy."[360] Similarly, in the EU, the Member States express in which situations it considers the protective laws to be mandatory.[361]

However, the European rules give a greater scope to the choice-of-law clauses.[362] First, the circumstances where mandatory rules may supersede party autonomy are exceptional[363] and must be construed restrictively.[364] Secondly, the mandatory laws remain linked to a very "public interest"[365] as the rules seek to defend either the interests of the State itself, or private interests that the State wishes to protect,[366] *i.e.* labour.[367]

In a sense, the American system can be qualified as unilateralist; courts first look at their own interest in applying the *lex fori* to determine the applicable law.[368] Public policy is a rule that lies at the heart of the methodology[369] and is not merely

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[355] Rome I, Article 9; T.C. HARTLEY (note 139), p. 514.

[356] E. FRIEDLER, Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem, *University of Kansas Law Review* 1989, vol. 37, p. 492.

[357] It has been argued that most modern American approaches indeed utilise this concept or a version of it. M.J. LEVIN (note 341), p. 264; P. NYGH (note 11), p. 223; M. ZHANG (note 290), p. 525. For more information about Currie's "interest analysis" approach, see B. CURRIE (note 293), p. 183 *et seq*. See also T.G. GUEDJ (note 313), p. 681 *et seq.*; P. NYGH (note 11), p. 208 and p. 223; P. STONE (note 43), p. 342; M. ZHANG (note 290), p. 539 *et seq*.

[358] Rome I, Recital 37; P. STONE (note 43), p. 342; G. VAN CALSTER (note 3), p. 145.

[359] D. SIEGEL/ P.J. BORCHERS (note 89), p. 172.

[360] *Kunda v. C.R. Bard, Inc.*, 671 F.3d 464, 468 (4th Cir. 2011).

[361] P. NYGH (note 11), p. 211.

[362] E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2164.

[363] P. STONE (note 43), p. 342.

[364] H. VAN HOUTTE, From A National to a European Public Policy, in J.A.R. NAFZIGER/ S.C. SYMEONIDES (note 146), p. 842.

[365] P. NYGH (note 11), p. 203; P. STONE (note 43), p. 342.

[366] P. NYGH (note 11), p. 203.

[367] F. VISCHER, General Course on Private International Law, *Recueil des Cours* 1992, vol. 238, p. 157.

[368] J. VON HEIN, Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution, *Tulane Law Review* 2008, vol. 82, p. 1684.

[369] J. DOLINGER (note 303), p. 347.

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a corrective mechanism as in the EU.[370] The hint of unilateralism picked up in the European mandatory rules can be called the "intellectual cousin of the interest analysis"[371] because it only operates when it is most realistic to actually speak of *interests*; these must impact more than just the parties involved.[372] The EU approach is multilateralist in considering that the *lex fori* should not receive preferential treatment compared to foreign laws.[373] Indeed, not one but potentially four different States could favour their substantive limitations: that in which all elements relevant to the situation are located,[374] that of the *lex causae* in employment contracts,[375] that of performance[376] and that of the *lex fori*.[377]

All in all, American courts have a large discretion in deciding whether to uphold a choice-of-law clause.[378] Yet recent U.S. cases show that choice-of-law clauses calling for the application of the law of the place of employment were usually upheld.[379] It is also the law that would otherwise be applicable if no choice of law had been made.[380] Disputes where American courts validated choice-of-law clauses pointing to the law of another State than that of the place of employment are quite rare and date back to the 1970's.[381]

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[370] Second Restatement, Section 6(2)(b): "the relevant policies of the forum is one of the general choice-of-law principles"; P. HAY (note 161), p. 379 *et seq.*; H. VAN HOUTTE (note 364), p. 842.

[371] P.J. BORCHERS (note 72), p. 1655.

[372] T.C. HARTLEY (note 139), p. 652; E.A O'HARA/ L.E. RIBSTEIN (note 11), p. 2164.

[373] J. VON HEIN (note 368), p. 1683.

[374] According to Rome I, Article 3(3). Remember Article 3(4) also provides for EU law to apply when all elements relevant to the situation are located in one or more member States.

[375]See also B. VERSCHRAEGEN, *Internationales Privatrecht: ein systematischer Überblick,* Manz, Wien, 2012, p. XXIV. In employment contracts, the substantive limitations of the otherwise applicable rules are mandatory rules from which an agreement cannot derogate. This is often the law of the State where the employee performs his work. See Rome I, Article 8.

[376] According to Rome I, Article 9.

[377] Sometimes according to Rome I, Article 21.

[378] T.C. HARTLEY (note 139), p. 652.

[379] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 172.

[380] According to the Second Restatement, Section 188. See also the following cases in which the law of the place of performance of work was applied in the absence of a valid choice-of-law clause: *Rubin v. Rudolf Wolff Commodity Brokers, Inc*., 636 F. Supp. 258, 259 (N.D. Ill. 1986); *Priestman v. Canadian Pacific Ltd.,* 782 F.Supp.681 (D. Me. 1992); *Bradley v. TNT Skypack, Inc.*, 983 F. Supp. 1147, 1149 (N.D. Ill. 1997); *Young v. Am. Bureau of Shipping,* NO. 01-96-00870-CV, 1998 Tex. App. LEXIS 3471, at *10 (App. June 4, 1998); *Ingram v. Rencor Controls, Inc*., 256 F. Supp. 2d 12, 18 (D. Me. 2003).

[381] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 172 *et seq*. See the following cases *Boase v. Lee Rubber & Tire Corporation,* 437 F.2d 527, 531 (3rd Cir. 1970); *Matthews v. Swift and Company,* 465 F.2d 814, 818 (5th Cir. 1972); *Craig v. Bemis Company, Inc.,* 517 F.2d 677, 680 (5th Cir. 1975).

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Courts usually invalidate clauses opting for the application of laws other than those of the workplace,[382] especially if they thereby violate employment protection laws.[383] Therefore an employment contract for work performed in Kentucky with an Illinois choice-of-law clause runs the risk of being invalidated. Had the clause designated Kentucky law, chances are that it would have been upheld. In an EU setting, the first option would be upheld if the clause is valid under the Regulation.[384] Yet it cannot deprive the employee of the mandatory provisions of the law that would have been applicable in the absence of choice, *i.e.* usually that of the place of employment, unless the centre of gravity is in another country.[385]

The European system therefore gives greater scope to the parties' contract by allowing for them to choose the law of a country that is completely unrelated to the issue, but the clauses cannot evade the protective laws of the country whose law would apply had there been no valid choice-of-law clause.[386] Rome I protects the weak whilst keeping a more liberal attitude towards other contracts.[387] It is possibly more discriminatory but more predictable than the Second Restatement.[388]

C. Applicable Regime Absent a Choice of Law

When there is no choice-of-law agreement, the law of the State where the employee works is usually most relevant but issues arise if he works in several countries.[389] The EU attempts to adopt clear rules,[390] and although the American approach addresses this in another way, in practice, the results tend to converge.

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[382] *United Rentals, Inc. v. Pruett*, 296 F. Supp. 2d 220, 233-234 (C. Conn. 2003).

[383] G. RÜHL, Party Autonomy in the Private International Law of Contracts, Transatlantic Convergence and Economic Efficiency (note 279), p. 172; M. ZHANG (note 290), p. 525.

[384] Therefore the choice must respect Rome I, Article 3.

[385] By application of Rome I, Article 8; see also CJEU C□64/12 *Anton Schlecker v Melitta Josefa Boedeker,* [2013] not yet published in ECR, analysed in more detail *infra.*

[386] See Rome I, Article 8. In addition, as argued by Advocate General WAHL at §27 of his Opinion, "in the event that the parties have expressed a choice as to the law applicable to the employment contract, it will be for the court to ensure that that law does not deprive the employee of the legal protection which would be afforded him by the mandatory rules of the law with which the employment contract is most proximate, the law which could be described as «objectively» applicable." See Opinion of Advocate General WAHL (note 13), at §27; G. VAN CALSTER, Wahl AG Offers Substantive Criteria for "Closer Connection" Test for Contracts of Employment (note 223).

[387] S.C. SYMEONIDES (note 339), p. 531.

[388] J. DOLINGER (note 303), p. 355; T.C. HARTLEY (note 139), p. 652; S.C. SYMEONIDES (note 339), p. 531.

[389] D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 366.

[390] G. VAN CALSTER (note 3), p. 127.

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1. European Regulation: Rules and Escape Clauses

In the absence of a valid choice-of-law clause, the primary rule in the EU is that the proper law will be that of the country where the employee habitually carries out his work,[391] and it will not change if he is temporarily employed elsewhere.[392] As discussed with respect to Brussels I, reference should be made to the "effective centre of his working activities"[393] and where no such working centre exists, the "whole duration of the employment relationship" should be taken into account.[394]

It is only then when the applicable law cannot be determined in this way[395] (because there is no one country where or from which the employee habitually carries out his work), that one refers to the law of the country in which the place of business through which the employee was hired, is situated.[396] Both of these rules are reduced to rebuttable presumptions if it appears from all of the circumstances, that the contract is more connected with a country other than that indicated by the rules. The contract is then subject to the law of that other country.[397]

Schlecker provides a good illustration to show that, while the workplace has considerable importance, other criteria determining the "center of gravity of the employment relationship" in another country might trump this criterion.[398] This

[391] Rome I, Article 8(2); P. MANKOWSKI, Employment Contracts under Article 8 of the Rome I Regulation, in F. FERRARI/ S. LEIBLE, *Rome I Regulation,* Munich 2009, p. 177 *et seq*.

[392] Rome I, Article 8(2); Rome I, Recital 36. The Rome Regulation better addresses the factual difficulties linked to employment contracts than was previously the case in the Rome Convention. U. MAGNUS, Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice, in F. FERRARI/ S. LEIBLE (note 391), p. 29. See Case C-29/10 *Heiko Koelzsch v État du Grand-Duché de Luxembourg* [2011] ECR I-1595 at §§45-46.

[393] Case C-125/92 *Mulox v Geels* [1993] ECR I-4075; Case C-383/95 *Rutten v Cross Medical Ltd.* (1997) ECR I-57.

[394] Case C–37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002] ECR I–2013.

[395] Case C–384/10 *Jan Voogsgeerd v Navimer SA.* [2011] ECR I-1595 at §§25-26: "Article 6(2) (now art. 8(2) of the Rome Regulation) sets out the linking factors of the employment contract on the basis of which the *lex contractus* must be determined in the absence of a choice by the parties. Those factors are, first, that of the country in which the employee «habitually carries out his work» (Article 6(2)(a)) or, alternatively, if there is no such place, «the place of business through which he was engaged» (Article 6(2)(b))." See also Case C□64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551 at §32 where the Court considers Article 8(3) of the Regulation (previous article 6(2)(b) of the Rome Convention) as a "secondary criterion."

[396] Rome I, Article 8(3).

[397] Rome I, Article 8(4); Rome I, Recital 20. Such escape clauses are also provided for in other articles of the Regulation, see for example Articles 4(3) and 4(4) of Rome I. They were later defined as "exception clauses" of "general application." Opinion of Advocate General WAHL (note 13), at §52.

[398] Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551 at §36. It refers to the Opinion of Advocate General WAHL (note 13), at §61: "The point here is not that the significant connection criterion generally constituted by the habitual place of performance of the work is marginalised, but rather that the national court is free to

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gives rise to the infamous debate regarding flexibility versus certainty and, even in employment cases, the balance between predictability and *favor laboratoris* must be weighed.[399] In *Schlecker,* Advocate General Wahl explained that courts should apply the law of the place most closely connected to the contract even if it is not always the one that is the most protective of the employee.[400] The CJEU has listed a number of criteria to take into consideration when determining connection.[401] This might answer a number of previous queries.[402]

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disregard that criterion in the event that, in the circumstances of the case, it appears that the centre of gravity of the employment relationship is not located in the country in which the work is carried out. The second part of Article 6(2) of the Rome Convention must be viewed as a safeguard mechanism. It must not obscure the connections referred to in the first part of Article 6(2), especially the strong connection constituted by the law of the place of work, thereby at the same time making the approaches ultimately adopted wholly unpredictable."

[399] P. NYGH (note 11), p. 360 *et seq*. See Opinion of Advocate General WAHL (note 13), at §3: "It seems necessary, in the present case, to adopt an approach which accommodates not only the need for predictability of approach and legal certainty, which governed the adoption of the relevant rules, but also the requirements of proximity and protection for the employee"; Case C□64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551 at §34: "In so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected. However, as the Advocate General pointed out in point 36 of his Opinion, that interpretation must not automatically result in the application, in all cases, of the law most favourable to the worker."

[400] Opinion of Advocate General WAHL (note 13), at §36 and §32: "the principle of protecting the party deemed to be weaker does not require the Court, in applying the criteria under Article 6(2) for determining the applicable law, to compare the substantive content of the mandatory rules of the conflicting laws and to apply the law which, in the light of the particular circumstances of the case, seems to it most favorable to that party. Respect for the principle of *favor laboratoris* is ensured through the application of the mandatory rules of the law, which, among the laws potentially applicable, is most closely connected with the employment contract, and not necessarily through application of the law most advantageous to the employee." See also G. VAN CALSTER, "More Closely Connected" in Employment Contracts – The CJEU in Schlecker Emphasizes Tax and National Insurance (Social Security) (note 223).

[401] Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker,* [2013] ECLI:EU:C:2013:551 at §41. See also G. VAN CALSTER, Wahl AG Offers Substantive Criteria for "Closer Connection" Test for Contracts of Employment (note 223) and also G. VAN CALSTER, "More Closely Connected" in Employment Contracts – The CJEU in Schlecker Emphasizes Tax and National Insurance (Social Security) (note 223).

[402] Certain legal scholars point to a grey area when the law chosen by the parties offers *more* protection to the employee on certain issues than the law preferred by the special provisions. Can the employee choose the law most favourable to certain facts? Or are both systems of law cumulated, offering double protection? See F. POCAR (note 249), p. 382 *et seq.*; P. KAYE, *New Private International Law of the European Community*, Aldershot 1993, p. 213; F. LECLERC, *La protection de la partie faible dans les contrats internationaux,* Bruxelles 1995, p. 574 *et seq.*; D. MCCLEAN/ V. RUIZ ABOU-NIGM (note 18), p. 367.

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2. U.S. Courts: Finding the Centre of Gravity

Traditionally, U.S. courts relied on territorial rules to determine the applicable law of a contract. These pointed to the place of contracting.[403] Many States have since adopted Currie's "governmental interest approach" or follow a similar method.[404] Courts perform a "centre of gravity" or "grouping of contacts" test by weighing the interests of various States connected to the contract[405] and apply the law of the state with the "most significant relationship" to the issue.[406]

There is a presumption that when a contract is both formed and intended to be performed in the same State, that State's law will apply.[407] When this is not the case, most courts give priority to the law of the state of performance.[408] In employment issues, it is often the law of the workplace that operates,[409] similar to Rome I where the law of the place of habitual employment applies, unless there is a closer connection with another country.[410]

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[403] *Miliken v. Pratt,* 125 Mass. 374, 379 (1878); G. LESTER/ E. RYAN (note 75), p. 395.

[404] Currie's approach is reflected in Section 188 of the Second Restatement for example, or see other methods in: *Trans-American Collections, Inc. v. Continental Account Servicing House, Inc.,* 342 F. Supp. 1303, 1305 (D. Utah 1972); *Vantage Tech. LLC v. Cross,* 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999); *Convergys Corp. v. Keener,* 276 Ga. 808, 811, 582 S.E.2d 84, 86 (2003).

[405] To determine which State is deemed to have a predominant "interest" or "relationship" with the issue, Courts usually look to the state where the contract was negotiated and formed, where the object of the contract was to be performed and the place of residence or incorporation of the parties. Second Restatement, Section 188; G. 5/ E. RYAN (note 77), p. 395; D. SIEGEL/ P.J. BORCHERS (note 89), p. 210.

[406] Second Restatement, Section 188; *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E. 2d 99, 101-02 (1954) or a more recent example *Thiesing v. Dentsply Int'l, Inc.*, 748 F. Supp. 2d 932, 940 (E.D. Wis. 2010).

[407] Second Restatement, Section 188 (3); *Universal Winding Co. v. Clarke,* 108 F.Supp. 329 (D.C.Conn1952).

[408] *London Assurance v. Companhia De Moagens*, 167 U.S. 149, 160-61, 17 S. Ct. 785, 789 (1897); *Holland Furnace Co. v. Clarke,* 48 F. Supp 543. 547-548 (E.D. Mo. 1942); *Pruco Securities Corp. v. Montgomery*, 264 F.Supp.2d 862, 868 (D.N.D. 2003).

[409] According to P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 1192 *et seq.*, in employment contracts, Section 196 of the Second Restatement applies. It points to the law of the State where the work is to be performed, and has been codified in some American States such as Texas (see for example *DeSantis v. Wackenhut Corporation,* 793 S.W.2d 670, 679 (Tex.1990)) and Oregon (see Oregon Codification of contractual conflicts law, Section 10(2)(b)); J.A.R. NAFZIGER, Oregon's Conflicts Law Applicable to Contracts, *Williamette Law Review* 2002, vol. 38, p. 391 *et seq.* See also Second Restatement, Section 196, comment a; *Pruitt v. Levi Strauss & Co.,* 932 F.2d 458, 461 (5th Cir. 1991); *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.,* 968 F. 2d 1463, 1467 (1st Cir. 1992).

[410] Rome I, Articles 8(2) and (4).

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The situation is more complicated when performance is due in more than one place or when the place is incidental. The law of the place of performance is sometimes displaced by a more significant relationship to another law such as the law of the place of business of the employer or place of contract formation.[411] Similarly and under certain circumstances, the law of the country where the employer who hired the employee is situated, may govern the contract in Rome I.[412] Therefore a contract formed in Nevada, performed in various States for a California-based employee will usually see Californian law applied to it, unless the courts apply Nevada law or find the law of another state more connected to the contract. Courts in the EU will also apply the law of the place of business of the employer when the employee's habitual workplace (widely construed) cannot be ascertained, yet this is rebutted if another country's law is more closely connected.

This appears to expose the employee because the employer can manipulate the rule to his own advantage.[413] In the EU however, this criterion applies residually[414] and the closer connection test can trump it.[415]

To conclude, both the EU and the U.S. tend to apply the law of the employee's workplace.[416] The criteria set out in Article 8 of Rome I help the courts to find the *centre of gravity* of the contractual relationship – yet it may be rebutted, thereby resembling the U.S. system. The EU escape clause is a necessary response to the rigid rules, and shadows the principle of flexibility advocated in the U.S. system. While it has been noticed that national courts in the EU have not applied the escape clause uniformly,[417] *Schlecker* shows that the CJEU then steps in to clarify the proper interpretation of Rome I. This is not happening in the U.S. where the federal institutions and courts have almost completely withdrawn from the

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[411] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES (note 2), p. 1195. For examples see *Ketcham v. Hall Syndicate, Inc.,* 37 Misc. 2d 693, 236 N.Y.S.2d 206, 211-212 (1962); *Rutas Aereas Nacionales, S. A. (Ransa) v. Robinson*, 339 F.2d 265, 266-67 (5th Cir. 1964); *Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.,* 401 F. Supp. 1102, 1115 (E.D. Mich. 1975); *W. Publ'g Corp. v. Stanley*, No. CIV. 03-5832(JRT/FLN, 2004 WL 73590, at *4 (D. Minn. Jan. 7, 2004); *Delphi Auto. PLC v. Absmeier*, 167 F. Supp. 3d 868, 879 (E.D. Mich. 2016), appeal dismissed (June 16, 2016), modified, No. 15-CV-13966, 2016 WL 1156741 (E.D. Mich. Mar. 24, 2016); *Delphi Auto. PLC v. Absmeier*, 167 F. Supp. 3d 868 (E.D. Mich. 2016).

[412] Rome I, Article 8(3).

[413] P. NYGH (note 11), p. 162.

[414] Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker,* ECLI:EU:C:2013:551 at §31: "the criterion of the country in which the employee «habitually carries out his work», (…) must be broadly construed, whereas the criterion of «the place of business through which [the employee] was engaged» (…) can apply only in cases where the court hearing the case is not in a position to determine the country in which the work is habitually carried out." The CJEU interprets the criteria of habitual place of employment extensively. Case C-125/92 *Mulox v Geels* [1993] ECR I-4075; Case C–37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002] ECR I–2013; Case C-29/10 *Heiko Koelzsch v État du Grand-Duché de Luxembourg* [2011] ECR I-1595.

[415] With the residual test of closer connection provided by Rome I, Article 8(4).

[416] D. SOLOMON (note 308), p. 1713 *et seq.*; J. DOLINGER (note 303), p. 385.

[417] D. SOLOMON (note 308), p. 1720 *et seq.*

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sphere of conflict of laws,[418] and the Supreme Court does not aspire to enforce a common standard amongst the states like the CJEU.[419]

Private international law in Europe deals with unifying various legal orders. Even though the foundation is domestic, the focus is international.[420] The importance of a European public policy has grown; many instruments in Rome I aim at protecting the interests of weaker citizens such as employees, thereby making EU choice-of-law rules instruments of substantive Union policies.[421] In the U.S. however, choice of law is not considered to be universal and instead subject to the State's own substantive law and their underlying interests, and nearly no federal policy is to be promoted through conflict rules.[422] The author of Louisiana's conflicts codification highlighted that the American conflicts approach "seem[s] to perceive the choice-of-law problem as a problem of interstate competition rather than as a problem of interstate co-operation in conflicts avoidance."[423]

For E. O'HARA and L. RIBSTEIN "both systems can learn from each other: Americans can learn about constitutionalized and centralized choice-of-law, especially from CJEU jurisprudence. Europeans can learn how the decentralized state of choice-of-law in the United States may actually favor a market for laws."[424]

IV. Conclusion

Our paper highlights that the European private international law rules have elevated weaker party protection to a fundamental European policy that transcends Member State legislation. In ascertaining both which court is to hear the dispute and which law is to apply to the individual employment contracts, well-defined EU provisions offer specific protective mechanisms. This is not the case in the U.S. system where protecting the weak is not at the heart of the debate. Courts consider a great range of factors when determining the valid jurisdiction and applicable law.

While both systems aim at achieving the most appropriate result in the given circumstance, the respective approach to employee protection is different. The EU *favor laboratoris* rules benefit employees when their case falls within the framework of the Regulation. Otherwise, the national conflicts rules apply, which

[418] J. BASEDOW (note 286), p. 2128.

[419] J. BASEDOW (note 286), p. 2141.

[420] R. MICHAELS (note 289), p. 1614 *et seq*.

[421] H. VAN HOUTTE (note 364), p. 841 *et seq*.; P. NYGH (note 11), p. 200; R. MICHAELS (note 289), p. 1624.

[422] D. SOLOMON (note 308), p. 1615.

[423] Louisiana Civil Code Annotated, West (1994), art. 3515 comment b; S.C. SYMEONIDES, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lesson (note 15), p. 1788.

[424] S.C. SYMEONIDES, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lesson (note 15), p. 1637 *citing* E.A. O'HARA/ L.E. RIBSTEIN (note 11), p. 2161.

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certainly diminishes the predictability and legal certainty of the case. In the US, employees have no certainty that their position of weakness will be admitted and will tip the balance in their favour, yet they do not have to fit within a given mould in order to be advantaged if the judge deems it necessary.

The first chapter discusses jurisdiction in cross-border situations. The EU Brussels I Recast Regulation prescribes the available *fora* in employment disputes depending on whether the employee is in the position of claimant or defendant. The rules are generally predictable *ex ante* but as highlighted in the *Ryanair* case, there are still some areas of uncertainty and the judge is able to take into account the factual circumstances of the case.

In the U.S., courts have more leeway and much depends on their *ex post* appreciation. When there is no choice-of-court clause, claimants, whether employer or employee, have a non-exhaustive catalogue of fora to choose from and the judge will then weigh up the various elements put forward by the claimants to determine whether venue is proper. It is enough to prove sufficient connection between a non-resident defendant and the State where the action is brought to show that the defendant could reasonably anticipate litigation in that court. While this gives employees a chance to drag their employer to their preferred court, it also constitutes a risk that they themselves are hauled into an inconvenient forum. The burden of proof surely weighs more heavily on the employee's shoulders than on the employer, who probably has access to more information and better legal support.

When parties include a choice-of-court clause in the employment contract, they consent in advance to the jurisdiction of a given court. This can disfavour employees who may not be fully aware of the consequences. In the U.S., employees may bring forward reasons why they feel the clause is unreasonable and should be disregarded. To assess this, courts take into consideration if the enforcement of the clause would contravene a strong public policy of the forum; if the clause is invalid for reasons of fraud or overreaching bargaining power; or, if the contractually chosen forum is seriously inconvenient for the action, for example. Lack of bargaining power is only one element measured amongst others and may be trumped by another. In the EU a choice-of-court clause of an employment contract will be upheld when it conforms with Brussels I, *i.e.* if the choice has been made *after* the dispute arises or if the *employee* brings the dispute to additional courts.

The second chapter reviews the applicable law in conflicts cases. Both systems introduce limitations to choice-of-law clauses. U.S. courts verify that there is a substantial or reasonable connection between the chosen law and the contract or parties. The system also provides for a catch-all public policy consideration according to which courts also assess the fairness of the clause. Courts have large discretion in deciding whether the clause should be upheld or not. The EU system is, on the other hand, based on a number of set rules that intervene when it seems most obvious that parties are attempting to circumvent mandatory laws that would otherwise apply. The European rules are targeted and give a greater scope to choice of law.

In the absence of a choice-of-law clause, both U.S. and EU systems give preference to the law of the place of performance of the contract and, if this is

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impossible to ascertain, the law of the place where the business of the employer is located. However on both continents, the judge may consider the contract to be more closely connected to another country.

All in all, the European rules secure a high level of protection to individual employment contracts as far as the scope of the Regulation extends. The rules are fairly straightforward and try to limit the courts' discretion. The European legislator clearly considers weaker party protection to be a central theme and has promulgated a number of provisions to pursue this goal. Courts in the U.S. are given a wide range of options to choose from and the method is more flexible. This can favour employees but it also encourages the development of a market for laws enabling big shot players to find a forum that has a tendency to rule in their favour. In a world ever more globalised, the law may become the worst enemy to those who do not have the means to use it to their advantage.

The European rules are not perfect; they tend to overregulate without providing for many options from which to choose but the drawbacks of an attempt at neutral application of hard rules must be weighed against the legal uncertainty of a case. Blindness to the outcome might lead to inequitable solutions but at the same time might ensure greater certainty and predictability.[425] Yet even in the EU context, it seems like more is left to the appreciation of the judge and to national laws than what was first thought. It seems like *who* decides the case often matters more than *what* standards are relevant.

[425] P. NYGH (note 11), p. 141.

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RECENT DEVELOPMENTS IN THE UNITED STATES*

JURISDICTION IN THE FOURTH RESTATEMENT OF FOREIGN RELATIONS LAW

William S. DODGE**

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I. Introduction

Every generation or so, the American Law Institute (ALI) undertakes to restate the rules of U.S. foreign relations law. The Second Restatement of Foreign Relations

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 143-170
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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Law appeared in 1965,[1] and the Third Restatement in 1987.[2] In 2012, the ALI Council authorized three separate projects under the umbrella of the Fourth Restatement of Foreign Relations Law: Treaties, Sovereign Immunity, and Jurisdiction. As the work authorized in 2012 is nearing completion, it may be appropriate to examine the new restatement's provisions on jurisdiction, particularly as they relate to private international law.[3]

II. Distinguishing Domestic and International Law

"Foreign relations law" seems to be primarily an American phrase.[4] The Third Restatement defined it to include "international law as it applies to the United States" and "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences."[5] The Third Restatement sometimes blended rules of international and domestic law together, drawing criticism from some observers.[6]

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[1] *Restatement of the Law Second, The Foreign Relations Law of the United States*, St. Paul 1965. The Second Restatement had no predecessor. By the time the ALI got around to foreign relations law, it had embarked on the second generation of restatements, and the foreign relations restatement was made part of that series.

[2] *Restatement of the Law Third, The Foreign Relations Law of the United States*, St. Paul 1987.

[3] As of this writing, the jurisdiction sections of the Fourth Restatement are contained in three drafts, each of which has been approved by the membership of the American Law Institute. See *Restatement of the Law Fourth, The Foreign Relations Law of the United States–Jurisdiction* (Tentative Draft No. 1, April 1, 2014); *Restatement of the Law Fourth, The Foreign Relations Law of the United States–Jurisdiction* (Tentative Draft No. 2, March 22, 2016); *Restatement of the Law Fourth, The Foreign Relations Law of the United States–Jurisdiction* (Tentative Draft No. 3, March 10, 2017). Sections 401-409 of Tentative Draft No. 1, which restate U.S. law on the recognition and enforcement of foreign judgments, have been renumbered as Sections 411-419. This essay will cite provisions of the Fourth Restatement by the section number given in the Projected Overall Table of Contents in Tentative Draft No. 3. It is possible that these section numbers may change before final publication.

[4] The foreign relations law of other jurisdictions has recently received more attention. See, *e.g.*, C. MCLACHLAN, *Foreign Relations Law*, Cambridge 2014 (discussing foreign relations law of Commonwealth nations); M. CREMONA/ B. DE WITTE, *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford 2008 (discussing foreign relations law of the EU).

[5] *Third Restatement* (note 2) § 1.

[6] See, *e.g.*, Panel Discussion, H.G. MAIER/ D. VAGTS/ C. OLMSTEAD/ M. LEIGH, The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?, 81 *Proc. Am. Soc'y Int'l L.* 180, 192 (1987) (remarks of M. LEIGH) (criticizing Third Restatement for being "a bit too prone […] to finding new customary international law"); C. OLMSTEAD, Jurisdiction, 14 *Yale J. Int'l L.* 468, 472

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The Fourth Restatement "seeks to distinguish clearly between rules of U.S. domestic law and rules of international law."[7] The formation of customary international law requires not only "a settled practice" but also "a belief that this practice is rendered obligatory by the existence of a rule requiring it."[8] Applying these requirements to jurisdiction, the Fourth Restatement recognizes that "[s]tate choices to restrain the exercise of jurisdiction are not evidence of the limits set by customary international law if they do not result from a sense of legal obligation."[9]

To be sure, customary international law imposes limits on the exercise of jurisdiction to prescribe,[10] jurisdiction to adjudicate,[11] and jurisdiction to enforce.[12] But the Fourth Restatement also notes that many of the rules governing jurisdiction in each of these categories are rules of domestic law. One result is that the Fourth Restatement contains greater coverage of U.S. domestic law than its predecessor, including domestic principles of statutory interpretation, the act of state doctrine and foreign state compulsion, rules of civil and criminal procedure, and rules concerning the recognition and enforcement of foreign judgments. Such internationally oriented rules of domestic law may be grouped together under the general heading of "international comity", which the Fourth Restatement defines as "deference to foreign states that international law does not mandate."[13] This essay will return to the distinction between international law and international comity in the sections that follow.[14]

III. Categories of Jurisdiction

Section 101 of the Fourth Restatement divides jurisdiction into three categories: (1) jurisdiction to prescribe; (2) jurisdiction to adjudicate; and (3) jurisdiction to enforce.[15] Jurisdiction to prescribe is "the authority of a state to make law

(1989) ("[I]t seems implausible that section 403 [of the Third Restatement] rises to the level of [customary international law].").

[7] *Fourth Restatement* (note 3) Introduction.

[8] *North Sea Continental Shelf* (Germ. v. Den.), 1969 I.C.J. 3, 44.

[9] *Fourth Restatement* (note 3) § 101, Comment *a*.

[10] *Id.* §§ 211-217 (restating customary international law rules on jurisdiction to prescribe).

[11] *Id.* § 101, Comment *b* (noting that "[c]ustomary international law on sovereign immunity limits jurisdiction to adjudicate in some instances").

[12] *Id.* § 402 (restating customary international rules on jurisdiction to enforce).

[13] *Id*. § 101, Comment *a*; see also *id* ("As a matter of international comity, states often limit the exercise of jurisdiction to a greater extent that international law requires.").

[14] For further discussion of international comity, see A. BRIGGS, The Principle of Comity in Private International Law, *Recueil des Cours* 2012, vol. 354, p. 65 *et seq.*; W. DODGE, International Comity in American Law, *115 Colum. L. Rev.* 2071 *et seq.*

[15] *Fourth Restatement* (note 3) § 101.

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applicable to persons, property, or conduct."[16] Jurisdiction to adjudicate is "the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals."[17] Jurisdiction to enforce is "the authority of a state to exercise its power to compel compliance with law."[18] The distinctions are important because, as we shall see, the rules of international and domestic law are different for each category.[19]

How to divide jurisdiction – and particularly, whether to recognize a separate category of jurisdiction to adjudicate – has been a subject of debate. Some writers, particularly in the British tradition, recognize only the two categories of jurisdiction to prescribe and jurisdiction to enforce.[20] The Second Restatement of Foreign Relations Law followed the two-category approach.[21] The Third Restatement, by contrast, recognized jurisdiction to adjudicate as a separate category.[22] Dividing jurisdiction into three parts goes back at least as far as the *Lotus* case, in which the Permanent Court of International Justice referred separately to the "application of […] laws" (prescription), the "jurisdiction of […] courts" (adjudication), and the "exercise [of] power" (enforcement).[23] The three-part approach appears to be widely accepted today, both in the United States and elsewhere.[24]

Recognizing a separate category of jurisdiction to adjudicate is helpful in describing what courts do. Of course, courts sometimes exercise jurisdiction to prescribe, for example when a common-law court makes a new rule of law. And courts sometimes exercise jurisdiction to enforce, for example when they order the seizure of property to satisfy a foreign judgment. But the principal activity of courts is not making or enforcing law, but rather *applying* law to determine the rights of the parties before them. The distinctive character of adjudication is most apparent when a court decides a case governed by foreign law. Certainly the court is not exercising jurisdiction to prescribe in such a case, for the law it applies has already been prescribed by a foreign sovereign. Neither is the court exercising

[16] *Id.* § 101(a).

[17] *Id.* § 101(b).

[18] *Id.* § 101(c).

[19] *Id.* § 101, Comment *b*.

[20] See, *e.g.*, F.A. MANN, The Doctrine of Jurisdiction in International Law, *Recueil des Cours* 1964, vol. 111, p. 1 *et seq.*, at 13 (1964); R. O'KEEFE, Universal Jurisdiction: Clarifying the Basic Concept, *2 J. Int'l Crim. Just.* 735 *et seq.*, at 736-737 (2004).

[21] *Second Restatement* (note 1) § 6.

[22] *Third Restatement* (note 2) § 401.

[23] *The Case of the S.S. "Lotus"* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19.

[24] See, *e.g.*, *International Law Commission Report on the Work of Its Fifty-Eighth Session*, Annex E, U.N. Doc. A/61/10 at 517 (2006) (Report of the ILC Secretariat); *Council of Europe, Recommendation R (97) 11 on the amended model plan for the classification of documents concerning state practice in the field of public international law*, 12 June 1997, Appendix, Part Eight (II); R. JENNINGS/ A. WATTS (eds), *Oppenheim's International Law: Volume 1 Peace*, 9th ed., Oxford 1992, p. 456; A. CASSESE, *International Law*, 2d ed., Oxford 2005, p. 49-50; C. RYNGAERT, *Jurisdiction in International Law*, 2d ed., Oxford 2015, p. 9-10.

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jurisdiction to enforce – the court is not compelling compliance with foreign law, and indeed the parties may not have any assets within the court's jurisdiction against which a judgment might be enforced. Rather, the court is applying foreign law, prescribed by another state, to determine the rights of the parties and to render judgment, a judgment that may be enforced at a later time and perhaps in another state.

Adjudication is not just a different kind of activity from prescription and enforcement; it is also governed by different rules. A court hearing a civil case may exercise personal jurisdiction over parties who are not physically present, which would be contrary to the rules governing jurisdiction to enforce. And that court asks whether it has personal jurisdiction over the parties, not whether it has jurisdiction to prescribe on the basis of territory, effects, nationality etc.

Customary international law does not impose many limits on jurisdiction to adjudicate, but it does impose some. The customary international law of state immunity prohibits one state from exercising jurisdiction to adjudicate over another state.[25] Moreover, the customary international law of state immunity expressly distinguishes between adjudication and enforcement.[26] A number of states have also entered treaties or adopted supranational regulations governing the jurisdiction of courts.[27] The existence of such rules of customary and conventional law is proof that international law itself recognizes a separate category of jurisdiction to adjudicate.

One should also say a word about the relationship among these three categories of jurisdiction. The Third Restatement observed that "[t]hese categories of jurisdiction are often interdependent."[28] It further asserted that "[u]nder international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe."[29] The latter statement may be correct with respect to the enforcement of a state's *own* law. But there are clearly circumstances in which a state acts to enforce *another state's* law despite lacking jurisdiction to prescribe the rule in first instance, for example when one state seizes assets to satisfy the

[25] *Jurisdictional Immunities of the State* (Germ. v. It.), 2012 I.C.J. 97, 140 ("The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State."); see also *id.* at 147 (defining jurisdictional immunity "as the right of a State not to be the subject of judicial proceedings in the courts of another State.").

[26] *Id.* at 147 ("The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity […] are distinct, and must be applied separately.").

[27] See, *e.g.*, 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), 2012 OJ (L 351) 1 (Brussels Regulation (Recast)); Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 OJ (L 339) 3 (Lugano Convention).

[28] *Third Restatement* (note 2) Part IV, intro. note.

[29] *Id.* § 431, Comment *a*. The Third Restatement indicated that the relationship between prescriptive and adjudicative jurisdiction was less strict. See *id.* § 421, Comment *a* (observing that a state might have jurisdiction to adjudicate while lacking jurisdiction to prescribe and *vice versa*).

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judgment of a foreign state or arrests and extradites a criminal defendant for trial under a foreign state's law. By the same measure, a state may prescribe rules for its nationals and others abroad, despite lacking jurisdiction to adjudicate or jurisdiction to enforce. And a state with adjudicative jurisdiction over a defendant may decide a case by applying foreign law even if it lacks jurisdiction to prescribe with respect to that defendant and the defendant has no assets within the state against which a judgment may be enforced. In light of these possibilities, the Fourth Restatement makes clear that "a state may exercise one kind of jurisdiction even though it lacks the other kinds."[30]

The Fourth Restatement uses the three categories of jurisdiction as a plan for organizing both the customary international law rules and the U.S. domestic law rules governing jurisdiction. But the Restatement also acknowledges that a single topic may relate to more than one category. Extradition, for example, is covered under the heading of jurisdiction to adjudicate because it is the principal means of obtaining the presence of a criminal defendant so that a court in the requesting state may exercise adjudicative jurisdiction in a criminal case. But the arrest and extradition of a person also constitutes an exercise of jurisdiction to enforce by the requested state and is subject to the limits that domestic and international law impose on enforcement jurisdiction.[31] To take another example of a topic that straddles categories, the recognition and enforcement of foreign judgments is covered under the heading of jurisdiction to enforce because it may result in the seizure of assets. But the recognition of a foreign judgment for purposes of preclusion would constitute an exercise of adjudicative rather than enforcement jurisdiction.[32] With such cautions in mind, we may now turn to consider the Fourth Restatement's treatment of each jurisdictional category.

IV. Jurisdiction to Prescribe

The Fourth Restatement defines jurisdiction to prescribe, in terms very similar to the Third Restatement, as "the authority of a state to make law applicable to persons, property, or conduct."[33] Although prescriptive jurisdiction is sometimes called "legislative jurisdiction," it is not exercised exclusively by legislatures. The Fourth Restatement notes: "Legislative bodies exercise jurisdiction to prescribe when they enact statutes, but so does the executive branch when it makes generally applicable orders or regulations, and so do courts when they make generally

[30] *Fourth Restatement* (note 3) § 101, Comment *d.*

[31] *Fourth Restatement* (note 3) Introduction.

[32] *Id*.

[33] *Fourth Restatement* (note 3) § 101(a). Compare *Third Restatement* (note 2) § 401(a) (defining jurisdiction to prescribe as jurisdiction "to make [a state's] law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

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applicable common law."[34] Consistent with the Fourth Restatement's aim of distinguishing domestic law from international law, the Part on jurisdiction to prescribe begins with five sections on the exercise of prescriptive practice by the United States, followed by seven sections restating the customary international law governing jurisdiction to prescribe, and finally two sections on the effect of foreign exercises of prescriptive jurisdiction.

A. Exercise of Prescriptive Jurisdiction by the United States

Section 201 describes U.S. practice with respect to jurisdiction to prescribe. It parallels the later sections on customary international law, giving examples of prescription by the United States on each of the traditional bases recognized in international law: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction.[35] Section 201 also notes that "[i]n exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity."[36] Legislatures show prescriptive comity by limiting the geographic scope of their laws to a greater extent than international law requires, administrative agencies show prescriptive comity when they issue regulations defining the geographic scope of statutory provisions, and courts show prescriptive comity by applying canons of interpretation like the presumption against extraterritoriality and the principle of reasonableness.[37]

Section 202 notes the U.S. constitutional limits on jurisdiction to prescribe. These constitutional limits are relatively lax. To satisfy the due process clauses of the U.S. Constitution, for example, there must simply be sufficient contacts that the application of federal or state law is "neither arbitrary nor fundamentally unfair."[38] As a general matter, U.S. states may regulate extraterritorially to the same extent as the U.S. federal government.[39] State law may be pre-empted, however, if it conflicts with federal law.[40]

Far more constraining than the U.S. Constitution are the principles of interpretation that U.S. courts use to determine the geographic scope of federal statutes: the presumption against extraterritoriality, the principle of reasonableness, and the *Charming Betsy* canon of construing statutes consistently with international law. The most important of these is the presumption against

[34] *Fourth Restatement* (note 3) § 201, Comment *a*.

[35] *Id.* § 201(a), Comments *e-j* & Reporters' Notes 5-10.

[36] *Id.* § 201(b).

[37] *Id.* § 201, Reporters' Note 3.

[38] *Id.* § 202, Comment *c*.

[39] *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) ("If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.").

[40] *Fourth Restatement* (note 3) § 202, Comment *d*.

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extraterritoriality, restated in Section 203. The Second Restatement included a version of the presumption against extraterritoriality,[41] but the Third Restatement did not. When the Third Restatement was published in 1987, the U.S. Supreme Court had not applied the presumption against extraterritoriality for almost 40 years.[42] The presumption was reborn in the 1991 *Aramco* case,[43] and since then the presumption against extraterritoriality has been the Supreme Court's principal tool for determining the geographic scope of federal statutes.[44]

In restating the presumption against extraterritoriality, the Fourth Restatement draws heavily on the U.S. Supreme Court's recent decisions in *Morrison*[45] and *RJR Nabisco*.[46] These decisions adopt a "two-step framework" for determining the geographic scope of a federal statutory provision.[47] At step one, a U.S. court looks to see if the presumption has been rebutted by "a clear indication of congressional intent."[48] As the Restatement notes, however, "[t]he presumption is not a clear statement rule, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome."[49] At step two, if the presumption has not been rebutted, a U.S. court looks to see if the case involves a domestic application of a statute by determining the provision's focus. A provision may focus on something other than conduct. *Morrison* held that the focus of a provision prohibiting securities fraud was the transaction,[50] while *RJR* held that the focus of the racketeering statute's cause of action was injury.[51] The Restatement explains that "[i]f whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted."[52]

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[41] *Second Restatement* (note 1) § 38 ("Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.")

[42] See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

[43] *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

[44] *Fourth Restatement* (note 3) § 203, Reporters' Note 1 (citing cases).

[45] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

[46] *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

[47] *Id.* at 2101; see *Fourth Restatement* (note 3) § 203, Reporters' Note 6 (discussing two-step framework). Under the presumption against extraterritoriality, geographic scope is determined provision by provision. *Id.* § 203, Reporters' Note 9. The presumption against extraterritoriality applies only to federal statutes, and the geographic scope of state statutes is a question of state law. *Id.* § 203, Comment *a* & Reporters' Note 5.

[48] *Fourth Restatement* (note 3) § 203.

[49] *Id.*, Comment *b*.

[50] *Morrison*, 561 U.S. at 266.

[51] *RJR*, 136 S. Ct. at 2111.

[52] *Fourth Restatement* (note 3) § 203, Comment *c*. The focus of some statutory provisions may be non-geographic. See, *e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1358 (2013) (giving "*non*-geographical interpretation" to provision of the Copyright Act); see also *Fourth Restatement* (note 3) § 203, Reporters' Note 10 (discussing non-geographic provisions).

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There are thus two ways in which a federal statutory provision might be interpreted to reach conduct outside the United States: (1) if Congress has clearly indicated its intent to reach such conduct; or (2) if the focus of the provision is on things other than conduct, like transactions or injuries, that occur in the United States. At each step of the analysis, the version of the presumption against extraterritoriality articulated in *Morrison* and *RJR* is more flexible than prior versions. At step one, the presumption does not operate as a clear statement rule.[53] And at step two, the presumption does not turn mechanically on the location of conduct.[54] This flexibility may make it possible for courts to apply the presumption against extraterritoriality "in all cases" going forward, as the Supreme Court clearly intends.[55]

Two other principles of statutory interpretation supplement the presumption against extraterritoriality. Section 204 states a principle of reasonableness in interpretation, that "U.S. courts may interpret federal statutory provisions to include other limitations on their applicability."[56] Section 204 is based on the U.S. Supreme Court's 2004 decision in *Empagran*, in which the Court stated that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[57] The Fourth Restatement takes the position that the presumption against extraterritoriality "does not preclude courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision."[58] U.S. courts have sometimes considered additional comity limitations after finding that the presumption against extraterritoriality has been rebutted,[59] or to supplement a test developed by applying the presumption.[60]

The interpretive authority that Section 204 recognizes is limited, however. First, it does not apply when Congress has made its intent to apply a particular

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[53] *RJR*, 136 S. Ct. at 2102 (holding that "an express statement of extraterritoriality is not essential"). Compare *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258 (1991) (referring to Congress's "need to make a clear statement that a statute applies overseas").

[54] *Morrison*, 561 U.S. at 266 (holding that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States"). Compare *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (stating that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done").

[55] *Morrison*, 561 U.S. at 261; see also *Fourth Restatement* (note 3) § 203, Reporters' Note 1 (discussing inconsistent application of the presumption in past cases).

[56] *Fourth Restatement* (note 3) § 204.

[57] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

[58] *Fourth Restatement* (note 3) § 204, Comment *c*.

[59] See, *e.g.*, *In re French*, 440 F.3d 145, 151-52 (4th Cir. 2006) (holding that the Bankruptcy Code rebuts the presumption against extraterritoriality but engaging in further comity analysis).

[60] See, *e.g.*, *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014) (*per curiam*) (holding that securities fraud provision did not apply to transaction in United States where defendants were not parties to transaction and claims were predominantly foreign).

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provision clear, "even if doing so would interfere with the sovereign authority of other states."[61] Second, it allows courts to avoid only "unreasonable" interference with the authority of other states, and "[i]nterference with the sovereign authority of a foreign state may be reasonable if such application would serve the legitimate interests of the United States."[62] Third, it does not permit a court to "double-count" foreign interests that have already been considered under the presumption against extraterritoriality.[63] Perhaps most important, Section 204 makes clear that "[r]easonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law."[64]

The Third Restatement also included a principle of reasonableness in its famous Section 403.[65] While the Fourth Restatement continues to recognize reasonableness as a principle of interpretation, it differs from the Third Restatement in two important respects. First, the Third Restatement set forth a non-exclusive list of factors for courts to evaluate reasonableness in each case.[66] The Supreme Court never adopted such a case-by-case approach, and expressly rejected it in the context of antitrust law.[67] The Fourth Restatement does not adopt a single approach to the question of reasonableness, noting that U.S. courts "have construed statutory provisions to include a variety of other comity limitations depending on the text, history, and purpose of the particular provision."[68] Second, the Third Restatement took the position that reasonableness had "emerged as a principle of international law."[69] As discussed further below, the Fourth Restatement concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law."[70] The principle stated in Section 204 is a domestic rule of statutory interpretation based on comity and not a rule of customary international law.[71]

The Fourth Restatement's final provision on statutory interpretation is Section 205, which states that "[w]here fairly possible, U.S. courts construe federal statutes to avoid conflict with international law governing jurisdiction to

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[61] *Fourth Restatement* (note 3) § 204, Comment *a*.

[62] *Id.* § 204, Comment *b*.

[63] *Id.* § 204, Comment *c*.

[64] *Id.* § 204, Comment *a*.

[65] *Third Restatement* (note 2) § 403(1) ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[66] *Id.* § 403(2).

[67] *Empagran*, 542 U.S. at 168 (stating that "this approach is too complex to prove workable").

[68] *Fourth Restatement* (note 3) § 204, Comment *d*.

[69] *Id.* § 403, Comment *a*; see also *id.* ("This section states the principle of reasonableness as a rule of international law.").

[70] *Fourth Restatement* (note 3) § 211, Reporters' Note 3.

[71] *Id.* § 204, Comment *a* ("The U.S. Supreme Court has described reasonableness as a principle of 'prescriptive comity.'" (quoting *Empagran*, 542 U.S. at 165)).

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prescribe."[72] It is a longstanding principle of American law that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[73] Section 205 simply applies this principle – known in the United States as the *Charming Betsy* canon – to prescriptive jurisdiction.[74] In practice, the presumption against extraterritoriality and the principle of reasonableness in interpretation limit the geographic scope of federal statutes to such an extent that violations of international law are unlikely.

B. Customary International Law Governing Jurisdiction to Prescribe

Customary international law imposes limits on a nation's jurisdiction to prescribe, and the Fourth Restatement attempts to restate those limits in Sections 211-217. Section 211 states an overarching principle that "[c]ustomary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate."[75] The traditional bases for jurisdiction to prescribe discussed in Section 212-217 – territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction – are simply reflections of this broader principle.[76] These bases are "not exhaustive," and "multiple jurisdictional bases may combine to establish a genuine connection."[77]

The specific bases for prescriptive jurisdiction set out in the Fourth Restatement are largely the same as those discussed in the Third Restatement.[78] While the discussion of state practice is not intended to be exhaustive, the Fourth

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[72] *Id.* § 205.

[73] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

[74] Section 205's formulation of the rule follows the Third Restatement. See *Third Restatement* (note 2) § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

[75] *Fourth Restatement* (note 3) § 211; see also J. CRAWFORD, *Brownlie's Principles of Public International Law*, 8th ed., Oxford 2012, p. 457 ("If there is a cardinal principle emerging, it is that of genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interest of the state in question."); *Oppenheim's International Law* (note 24) 457-58 (noting a "tendency now to regard these various categories as parties of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection").

[76] *Fourth Restatement* (note 3) § 211, Reporters' Note 2; see also Report of the ILC Secretariat (note 24) at 521 ("The common element underlying the various principles […] is the valid interest of the State in asserting in jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned.").

[77] *Fourth Restatement* (note 3) § 211, Comment *c*.

[78] Compare *id.* §§ 212-217 with *Third Restatement* (note 2) §§ 402 & 404.

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Restatement uses examples from more than 50 different jurisdictions to illustrate the traditional bases of prescriptive jurisdiction.[79]

One change from the Third Restatement concerns passive personality jurisdiction, which the Third Restatement discussed only in a comment.[80] In the Fourth Restatement, this basis is given its own black-letter provision: "International law recognizes a state's jurisdiction to prescribe law with respect to certain conduct outside its territory that harms its nationals."[81] The increased prominence of passive personality jurisdiction in the Fourth Restatement is "because of its increasing use in state practice."[82] The Fourth Restatement notes that a number of countries exercise both active and passive personality jurisdiction based not only on nationality but also on domicile or residence.[83] It is for this reason that the Fourth Restatement uses the phrase "active personality jurisdiction" in place of the more common "nationality jurisdiction." With respect to corporations, the Fourth Restatement recognizes that a state exercising active personality jurisdiction may consider a corporation to be a national based on either its place of incorporation or its center of control.[84]

The Fourth Restatement also continues to recognize universal jurisdiction "with respect to certain offenses of universal concern such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated."[85] The list of universal-jurisdiction offenses differs from the Third Restatement's by adding crimes against humanity and torture, by

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[79] The jurisdictions cited include Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Botswana, Burundi, Canada, China, Colombia, Congo, Costa Rica, Democratic Republic of the Congo, Denmark, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Latvia, Mali, Mexico, Mongolia, Netherland, Niger, Nigeria, Norway, Portugal, Russia, Rwanda, Senegal, Seychelles, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uzbekistan, Venezuela, Zimbabwe, and the European Union. The practice of the United States with respect to jurisdiction to prescribe receives more detailed treatment in Section 201.

[80] *Third Restatement* (note 2) § 402, Comment *g*.

[81] *Fourth Restatement* (note 3) § 215. The phrase "certain conduct" reflects that fact that many states do not exercise passive personality jurisdiction as broadly as active personality jurisdiction. Passive personality jurisdiction is well accepted with respect to terrorist offenses and attacks on a state's own officials, but a number of states exercise passive personality jurisdiction with respect to every type of crime. *See id.* § 215, Reporters' Notes 1-2.

[82] *Id.* § 215, Reporters' Note 3.

[83] *Id.* § 214, Comment *c* & Reporters' Note 3; *id.* § 215, Reporters' Note 1. The United States exercises active personality jurisdiction based on residence, but not passive personality jurisdiction. See *id.* § 201, Reporters' Notes 7-8.

[84] *Id.* § 214, Comment *b* & Reporters' Note 2. The United States also exercises active personality jurisdiction over corporations based on their organization under U.S. law, principal place of business within the United States, or both. See *id.* § 201, Comment *g* & Reporters' Note 7.

[85] *Id.* § 217.

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removing any doubt about terrorism, and by subsuming attacks on aircraft within terrorism.[86] But neither list is exclusive.[87] Like the Third Restatement, the Fourth states that universal jurisdiction is not limited to criminal law, though it also recognizes that exercises of universal civil jurisdiction are rare and have sometimes been more controversial.[88]

The Fourth Restatement notes that "[c]oncurrent prescriptive jurisdiction is common under international law."[89] For example, one state may have jurisdiction to prescribe based on conduct within its territory, while another state may have jurisdiction to prescribe based on effects within its territory.[90] "International law recognizes no hierarchy of bases of prescriptive jurisdiction and contains no rules for assigning priority to competing jurisdictional claims."[91] The Third Restatement suggested that in cases of concurrent jurisdiction, states have an obligation under international law to weigh the reasonableness of exercising prescriptive jurisdiction in each case.[92] The Fourth Restatement, in contrast, concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law."[93] Neither does international law require that a state with jurisdiction to prescribe refrain from exercising that jurisdiction because another state has a stronger interest.[94]

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[86] Compare *Third Restatement* (note 2) § 404 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.").

[87] The list of offenses with respect to which the United States has exercised universal jurisdiction is somewhat different. See *Fourth Restatement* (note 3) § 201(1)(f). The United States has not exercised universal jurisdiction with respect to crimes against humanity and war crimes. *Id.* § 201, Reporters' Note 10. The United States has exercised universal jurisdiction with respect to slavery, forced labor, trafficking in persons, recruitment of child soldiers, and extrajudicial killing, offenses sufficiently similar to those listed in Section 217 and of such universal concern that there should be no doubt about the consistency of these U.S. statutes with customary international law. See *id.*

[88] *Id.* § 217, Comment *d* & Reporters' Note 3. "The United States has relied on universal jurisdiction as the basis for both criminal and civil liability." *Id.* § 201, Comment *j*; see also *id.* § 201, Reporters' Note 10.

[89] *Id.* § 211, Comment *d*.

[90] See, *e.g.*, *The Case of the S.S. "Lotus"* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30-31.

[91] *Fourth Restatement* (note 3) § 211, Comment *d*.

[92] *Third Restatement* (note 2) § 403(3).

[93] *Fourth Restatement* (note 3) § 211, Reporters' Note 3; see *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004) (declining to engage in case-by-case balancing); *A. Ahlstrom Osakeyhtio v. Commission (Wood Pulp)*, 1988 E.C.R. 5193, 19-23 (same).

[94] See *Fourth Restatement* (note 3) § 211, Comment *d* ("There is no general international-law rule that requires one form of prescriptive jurisdiction to give way to another, even if one basis is less common or more controversial than another.").

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C. The Effect of Foreign Exercises of Jurisdiction to Prescribe

The Fourth Restatement also contains two sections on the effect within the U.S. legal system of foreign exercises of jurisdiction to prescribe. Section 221 restates the U.S. act of state doctrine, while Section 222 covers the doctrine of foreign state compulsion. Both doctrines are not required by international law and instead reflect international comity on the part of the United States.[95]

The U.S. act of state doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of an official act of a foreign sovereign performed within its own territory."[96] The Fourth Restatement's formulation of the doctrine is narrower than the Third Restatement's,[97] which reflects the U.S. Supreme Court's 1990 decision in *Kirkpatrick*.[98] *Kirkpatrick* made clear that "[t]he act of state doctrine does not establish an exception [to jurisdiction] for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[99] As the Fourth Restatement explains, the act of state doctrine "operates as a special choice-of-law rule in that it precludes a court from denying effect to an official act on the ground that the act violates the public policy of the forum."[100]

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[95] See *id.* § 221, Comment *a* ("The act of state doctrine is not required by international law, although it does reflect considerations of international comity and a concern about undue interference with another sovereign's acts."); *id.* § 222, Reporters' Note 10 (noting that the doctrine of foreign state compulsion "reflects the practice of states in the interest of comity").

[96] *Id.* § 221(1). In other countries that have adopted an act of state doctrine, the content of the doctrine may differ from that of the United States. In the United Kingdom, for example, one strand of the act of state doctrine applies to extraterritorial acts of state, see *Belhaj v. Straw*, [2017] UKSC 3; *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] AC 888, and all strands of the doctrine contain a public policy exception, see *Belhaj v. Straw*, [2017] UKSC 3; *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] 2 AC 883; *Oppenheimer v. Cattermole* [1976] AC 249.

[97] Compare *Third Restatement* (note 2) § 443(1) ("In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.").

[98] *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990).

[99] *Id.* at 409.

[100] *Fourth Restatement* (note 3) § 221, Comment *a*. The U.S. act of state doctrine is subject to exceptions when the foreign act of state is not fully within its own territory, when the foreign state has waived the doctrine, when a treaty provides a clear legal standard for the court to apply, when the expropriated property or its proceeds have been brought to the United States, and (perhaps) when the State Department has indicated that the doctrine should not be applied in a particular case. See *id.* Comments *e-i* & Reporters' Notes 7, 10-13.

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The doctrine of foreign state compulsion allows U.S. courts "to excuse violations of U.S. law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's law."[101] The Third Restatement stated the doctrine as a requirement of international law.[102] But current state practice does not support such a rule, and the Fourth Restatement makes clear that "[t]here is no general doctrine of international law that requires a sovereign to excuse compliance with its law because of conflict with the law of another state."[103] The availability of the doctrine depends on the U.S. law in question. Some federal statutes expressly provide for a foreign state compulsion defense.[104] When a statute has not expressly addressed the question, "a court must consider the text, history, and regulatory objective of the state."[105] Statutes that give courts a significant role in developing the law or that grant discretionary authority are more likely to allow a defense of foreign state compulsion than statutes designed to oppose foreign laws or policies.[106]

V. Jurisdiction to Adjudicate

The Fourth Restatement also covers jurisdiction to adjudicate in both civil and criminal cases. Jurisdiction to adjudicate is defined as "the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals."[107] As with the sections on prescriptive jurisdiction, the Fourth Restatement's coverage of adjudicative jurisdiction attempts to distinguish carefully between rules of domestic law and rules of international law.[108] In

[101] *Id.* § 222. The person in question must be "likely to suffer severe sanctions for failing to comply with foreign law" and must have "acted in good faith to avoid the conflict." *Id.*

[102] See *Third Restatement* (note 2) § 441. Another section dealt with the particular instance of requests for disclosure of information under U.S. law. See *id.* § 442.

[103] *Fourth Restatement* (note 3) § 222, Comment *a.*

[104] See, *e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(b) (employment discrimination permitted when required by "the law of the foreign country in which such workplace is located"); see also *Fourth Restatement* (note 3) § 222, Reporters' Note 5 (discussing other examples).

[105] *Fourth Restatement* (note 3) § 222, Comment *d*.

[106] See *id.* Foreign state compulsion in the context of court orders to produce evidence is covered specifically in Section 306(3), which is discussed below.

[107] *Id.* § 101(b). This definition emphasizes, to a greater degree than the Third Restatement, the role of the courts in *applying* law. Compare *Third Restatement* § 401(b) (defining jurisdiction to adjudicate as the authority "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings").

[108] The Third Restatement said "it is not always clear whether the principles governing jurisdiction to adjudicate are applied as requirements of public international law or as principles of national law" and attempted to "set[] forth some international rules and

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particular, the Fourth Restatement makes clear that "[w]ith the significant exception of sovereign immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate."[109]

A. Jurisdiction to Adjudicate in Civil Cases

The Fourth Restatement provides an overview of the rules governing U.S. courts' exercise of adjudicative jurisdiction in civil cases, which may be particularly helpful to readers outside the United States. These rules cover subject-matter jurisdiction, personal jurisdiction, service of process, the doctrine of *forum non conveniens*, antisuit injunctions, and obtaining evidence in civil proceedings.[110] The sections on service of process and obtaining evidence discuss the provisions of the Hague Service Convention[111] and the Hague Evidence Convention,[112] respectively. But with those exceptions, the rules restated in these sections are rules of U.S. domestic law.

Section 301 discusses the rules of subject matter jurisdiction, which allocate jurisdiction to adjudicate among the state and federal courts of the United States. Most states in the United States have some courts that are limited to particular subject matters as well as courts of general subject-matter jurisdiction that may hear all kinds of actions.[113] Federal courts, by contrast, are courts of limited subject-matter jurisdiction and may hear an action only if such jurisdiction is permitted by the U.S. Constitution and conferred by an act of Congress.[114] The most common bases for subject-matter jurisdiction in federal court are cases raising questions of federal law,[115] cases between a citizen of one state and a citizen of another state or country,[116] and cases of admiralty and maritime jurisdiction.[117] In many cases, both a state court and a federal court will have subject matter jurisdiction. Generally, an action brought in state court may be removed by the

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guidelines." *Third Restatement* (note 2), Jurisdiction to Adjudicate, intro. note. These bases were quite similar to those permitted under the due process clauses of the U.S. Constitution. See *id.* § 421; see also *id.* § 421, Reporters' Note 1 ("The modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution.").

[109] *Fourth Restatement* (note 3), Part III, Intro. Note; see also *id.* § 302, Reporters' Note 1 (discussing jurisdiction to adjudicate under international law).

[110] Subject-matter jurisdiction and the doctrine of *forum non conveniens* were not covered in the Third Restatement.

[111] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 658 U.N.T.S. 163.

[112] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 847 U.N.T.S. 231.

[113] See *Fourth Restatement* (note 3), § 301, Comment *b.*

[114] See *id.* § 301, Comment *c.*

[115] See *id.* § 301, Comment *d.*

[116] See *id.* § 301, Comment *e.*

[117] See *id.* § 301, Comment *h.*

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defendant to federal court if the action could have been brought in federal court originally.[118]

Section 302 covers rules of personal jurisdiction. In the United States, these rules are predominantly rules of constitutional law, although a state court's exercise of personal jurisdiction must additionally be authorized by state law and a federal court's exercise of personal jurisdiction must additionally be established under a federal rule. The sources of U.S. constitutional rules governing personal jurisdiction are the due process clauses of the U.S. Constitution, which "require sufficient contacts with the forum and that the exercise of jurisdiction be reasonable."[119] A court in the United States may exercise "specific jurisdiction" over claims that are related to or arise out of the defendant's contacts with the forum.[120] A court in the United States may exercise "general jurisdiction" over any and all claims against a defendant if the defendant has sufficient contacts to render it essentially "at home" in the forum.[121] The United States also permits general jurisdiction over a natural person who has been served with process within the forum, although many other countries consider this basis of personal jurisdiction to be exorbitant.[122] Finally, the United States allows parties to consent to personal jurisdiction in advance with a forum selection clause and to waive objections to personal jurisdiction after a suit has been filed.[123]

However, a court in the United States may only exercise personal jurisdiction over a defendant if the defendant has been properly served with process or has

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[118] 28 U.S.C. § 1441; see also *Fourth Restatement* (note 3) § 301, Reporters' Note 1.

[119] *Fourth Restatement* (note 3) § 302(1); see also *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) (formalizing a two-step analysis of minimum contacts and reasonableness).

[120] *Fourth Restatement* (note 3) § 302, Comment *c* & Reporters' Note 6. Specific jurisdiction requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[121] *Fourth Restatement* (note 3) § 302, Comment *c* & Reporters' Note 4. A natural person is considered to be "at home" at its place of domicile, while a juridical person is considered to be "at home" at its place of incorporation and its principal place of business. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-761 (2014). This new test for general jurisdiction is narrower than the now-abandoned "doing business" test. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (looking to see if the defendant had "continuous and systematic general business contacts" with the forum).

[122] *Fourth Restatement* (note 3) § 302, Comment *c* & Reporters' Note 5; see also *Burnham v. Superior Court*, 495 U.S. 604 (1990) (permitting general jurisdiction on the basis of service in the forum).

[123] *Fourth Restatement* (note 3) § 302, Comment *b* & Reporters' Note 3; see also *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (noting that "parties to a contract may agree in advance to submit to the jurisdiction of a given court"); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (noting that "the requirement of personal jurisdiction" can "be waived").

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waived service.[124] Section 303 discusses the means of effectuating service, including the Hague Service Convention. It also notes the U.S. constitutional requirement that the means of service must provide "notice reasonably calculated […] to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[125]

The adjudicative jurisdiction of U.S. courts is moderated in international cases by the doctrine of *forum non conveniens*. Section 304 restates the federal version of that doctrine, which allows a federal court to dismiss a case over which it has subject-matter and personal jurisdiction if "there is an available and adequate alternative forum" and "despite the deference owed to the plaintiff's choice of forum, the balance of private and public interests favors dismissal."[126] Although the doctrine of *forum non conveniens* was first adopted in domestic cases, Congress codified one of its most important domestic applications in a statute allowing the transfer of cases within the federal system.[127] As a result, "the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad."[128] Lower federal courts have developed other doctrines that permit them to decline jurisdiction in favour of foreign courts, including international comity abstention[129] and prudential exhaustion.[130] The Fourth Restatement notes that the Supreme Court has never approved these doctrines and that their status "remains uncertain."[131]

Sometimes, in cases of parallel proceedings, a U.S. court will not decline to exercise adjudicative jurisdiction itself, but will instead order the parties not to pursue the case in a foreign forum. Section 305 adopts a narrow version of the rule on antisuit injunctions, permitting such injunctions only if the foreign proceedings are truly parallel,[132] and emphasizing that antisuit injunctions are "an exceptional

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[124] *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

[125] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[126] *Fourth Restatement* (note 3) § 304. The federal doctrine applies in federal courts, while state courts apply their own versions of the doctrine. *Id.* § 304, Comment *b*. Some states have adopted doctrines that mirror the federal one. See, *e.g.*, *Cortez v. Palace Resorts Inc.*, 123 So. 3d 1085, 1091 (Fla. 2013). But other states have versions of *forum non conveniens* that differ significantly from the federal doctrine. See, *e.g.*, *Martinez v. E.I. DuPont de Nemours and Co., Inc.*, 86 A.3d 1102, 1104 (Del. 2014). See generally *Restatement Fourth* (note 3) § 304, Reporters' Note 2.

[127] 28 U.S.C. § 1404.

[128] *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

[129] See, *e.g.*, *Royal and Sun Alliance Insurance Co. of Canada v. Century Interantional Arms, Inc.*, 446 F. 3d 88, 92-97 (2d Cir. 2006). See generally *Restatement Fourth* (note 3) § 304, Reporters' Note 9.

[130] See, *e.g.*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 856-859 (7th Cir. 2015). See generally *Restatement Fourth* (note 3) § 304, Reporters' Note 10.

[131] *Restatement Fourth* (note 3) § 304, Comment *i*.

[132] *Id.* § 305; see also *id.* § 305, Comment *b* ("An injunction to enjoin foreign litigation normally may not issue unless the parties in the two jurisdictions are the same and resolution of the case before the enjoining court will be dispositive of the action to be enjoined.").

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remedy" appropriate only in limited situations.[133] This version of the rule has been adopted by the Second Circuit Court of Appeals and in several other circuits as well.[134]

Finally, Section 306 discusses the means of obtaining evidence in civil proceedings. Such means include the Hague Evidence Convention, but the U.S. Supreme Court has held that use of the Convention is optional when authority to order the production of evidence exists under U.S. domestic law.[135] U.S. courts have broad authority to order the production of evidence located outside the United States for use in U.S. proceedings.[136] U.S. courts also have authority to order the production of evidence located inside the United States for use in foreign proceedings.[137] A person who fails to comply with an order to produce evidence is subject to sanctions, although a court may moderate the sanctions if the person tried to comply in good faith but was prevented by foreign law.[138]

B. Jurisdiction to Adjudicate in Criminal Cases

U.S. law on jurisdiction to adjudicate distinguishes between civil and criminal cases. As stated in Section 311, various provisions of the U.S. Constitution require the presence of a criminal defendant at the time the trial begins.[139] If a criminal defendant is outside the United States, extradition is the usual means for obtaining his presence. The United States has extradition treaties with a majority of the world's states, and Section 312 covers the details of extradition to and from the United States. On occasion, the United States has seized criminal defendants abroad without resorting to extradition. Such seizures may violate customary international law and the human rights of the person seized, but neither U.S. law nor customary international law forbids the trial of a person whose presence has been acquired unlawfully.[140] Finally, Section 313 discusses the network of Mutual Legal

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[133] *Id.* § 305; see also *id.* § 305, Comment *c* ("An antisuit injunction is an extraordinary remedy and is appropriate only in a limited range of cases.").

[134] See *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987). See generally *Fourth Restatement* (note 3) § 305, Reporters' Notes 2-7 (discussing cases). The Fourth Restatement's rule is also consistent with the Third Restatement, which characterized antisuit injunctions as "exceptional remedies inconsistent with normal relations between states." *Third Restatement* (note 2) § 403, Reporters' Note 7.

[135] *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

[136] See *Fourth Restatement* (note 3) § 306(1) & Reporters' Notes 1-2.

[137] See 28 U.S.C. § 1782; *Fourth Restatement* (note 3) § 306(2) & Reporters' Notes 3.

[138] See *Fourth Restatement* (note 3) § 306(3) & Reporters' Notes 6.

[139] *Id.* § 311 ("A court in the United States may not try a person on criminal charges unless that person is present before the court at the time the trial begins."). Customary international law, by contrast, does not prohibit trials *in absentia*. See *id.* § 311, Reporters' Note 4.

[140] See *id.* § 311, Comment *d* & Reporters' Notes 5-7.

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Assistance Treaties (MLATs) that the United States uses to obtain assistance from and to provide assistance to other states with respect to criminal investigations and prosecutions.

VI. Jurisdiction to Enforce

The Fourth Restatement defines jurisdiction to enforce as "the authority of a state to exercise its power to compel compliance with law."[141] This definition is narrower than the Third Restatement's, which referred to authority "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[142] The Fourth Restatement also makes clear that a state may exercise jurisdiction to enforce not only its own laws but also those of other nations.[143] Finally, while the Third Restatement suggested that a state might lawfully exercise jurisdiction to enforce outside its own territory in some circumstances,[144] the Fourth Restatement adopts the traditional rule of customary international law that "[a] state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state."[145] The strictly territorial limit on jurisdiction to enforce is fully consistent with state practice, so long as the acts constituting jurisdiction to enforce are limited to "compelling compliance with law through the use of force" and the performance of other "governmental functions."[146]

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[141] *Id.* § 101(c).

[142] *Third Restatement* (note 2) § 401(c).

[143] Compare *Fourth Restatement* (note 3) § 101, Comment *d* (noting that a state "may exercise jurisdiction to enforce by arresting and extraditing a criminal accused under the substantive law of another state for trial in that other state" and "may also exercise jurisdiction to enforce the judgment of another state"), with *Third Restatement* (note 2) § 431, Comment *a* ("Under international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe.").

[144] See *Third Restatement* (note 2) § 431(3) (stating conditions for "enforcement measures against a person located outside its territory").

[145] *Fourth Restatement* (note 3) § 402(2); see also *The Case of the S.S. "Lotus"* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial […] ").

[146] *Fourth Restatement* (note 3) § 402, Reporters' Note 1. The Third Restatement may have weakened the territorial limitation to account for measures to "induce" compliance, see *Third Restatement* (note 2) § 431, Comments *b-c* (giving examples of judicial and nonjudicial enforcement measures), measures that the Fourth Restatement would consider exercises of jurisdiction to prescribe or jurisdiction to adjudicate.

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A. Jurisdiction to Enforce in General

The Fourth Restatement's treatment of enforcement jurisdiction begins with two parallel sections on U.S. practice and customary international law. These sections note that customary international law forbids the exercise of jurisdiction to enforce in the territory of another state without the consent of the other state,[147] and that U.S. practice generally follows this rule.[148] When the United States has seized a criminal suspect in the territory of another state without obtaining consent, the other state has protested.[149] The Fourth Restatement emphasizes that "[t]he United States is internationally responsible to other states for violations of customary international law governing jurisdiction to enforce."[150]

It is important to bear in mind, however, the limited view that both U.S. practice and customary international law take of what constitutes enforcement. Examples of jurisdiction to enforce include "the search of a place, the arrest of a person, imprisonment after criminal conviction, and the seizure of property."[151] U.S. courts do not consider orders to parties properly before them to be exercises of enforcement jurisdiction, even if those orders require the parties to take actions outside the United States.[152] Such orders are considered "exercises of jurisdiction to adjudicate rather than jurisdiction to enforce."[153] Customary international law similarly treats not the issuance of a judicial order but only the attempt to execute it as implicating jurisdiction to enforce.[154]

B. Recognition and Enforcement of Foreign Judgments

The exercise of enforcement jurisdiction within a nation's own territory is unproblematic, and one important example is the enforcement of foreign judgments. Sections 411-420 of the Fourth Restatement cover the rules governing the recognition and enforcement of foreign judgments in the United States.[155] With

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[147] *Fourth Restatement* (note 3) § 402(2).

[148] *Id.* § 401, Comment *b*.

[149] See *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (noting Mexico's protest).

[150] *Fourth Restatement* (note 3) § 401, Comment *b*; see also *id.* § 402, Comment *b* ("A state is internationally responsible to other states for violations of customary international law governing jurisdiction to enforce.").

[151] *Id.* § 401, Comment *a*; *id.* § 402, Comment *a*.

[152] See, *e.g.*, *United States v. First National City Bank*, 379 U.S. 378, 384 (1965) (freezing property); *United States v. First National City Bank*, 396 F.2d 897, 900 (1968) (producing evidence).

[153] *Fourth Restatement* § 401, Reporters' Note 2.

[154] See *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, 79 (joint separate opinion of HIGGINS, KOOIJMANS & BUERGENTHAL, JJ.); see also *Fourth Restatement* § 402, Reporters' Note 2.

[155] The first nine sections appeared as Sections 401-409 in Tentative Draft No. 1, but have been renumbered with the addition of the two sections on jurisdiction to enforce in

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limited exceptions, these are rules of state law rather than federal law.[156] The state law rules are fairly uniform because a majority of U.S. states, including the largest states, have adopted either the 1962 Uniform Money Judgments Recognition Act[157] or the updated 2005 Uniform Foreign-Country Money Judgments Recognition Act.[158] The Uniform Acts apply only to money judgments, but U.S. courts regularly recognize other foreign judgments as a matter of comity.[159]

To begin, the Fourth Restatement distinguishes between recognition and enforcement.[160] Recognition is a necessary predicate for enforcement against the judgment debtor's assets,[161] but a foreign judgment may be recognized for other purposes, like preclusion.[162] Section 411 sets forth the basic rule that, subject to certain exceptions, "a final and conclusive judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States."[163] A foreign judgment may be considered final and conclusive, and therefore capable of recognition and enforcement in the United States, even if it is subject to appeal in the foreign legal system.[164] But a U.S. court has discretion to stay recognition, particularly if the foreign appeal seems likely to succeed.[165]

Sections 413 and 414 set forth the grounds for non-recognition of a foreign judgment under U.S. law. Both of the Uniform Acts distinguish between mandatory and discretionary grounds for non-recognition, and the Fourth Restatement does too. But nearly all of the "discretionary" grounds are mandatory in practice, because a U.S. court will not enforce a foreign judgment if it finds one of these grounds to exist.[166] On the other hand, a U.S. court "may exercise its

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general just discussed. Section 420 on judgments denominated in foreign currency was added in Tentative Draft No. 3.

[156] The principal exceptions are that federal law governs the preclusive effect of foreign judgments with respect to federal law claims, see *Fourth Restatement* (note 3) § 417, Reporters' Note 1, and that a federal statute prohibits the enforcement by both state and federal courts of foreign defamation judgments in most instances. See SPEECH Act, 28 U.S.C. §§ 4101-4105; *Fourth Restatement* (note 3) § 413, Comment *h*.

[157] Alaska, Connecticut, Florida, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, and the U.S. Virgin Islands.

[158] Alabama, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Virginia, Washington, and the District of Columbia.

[159] *Fourth Restatement* (note 3) § 411, Comment *b*.

[160] *Id.* § 411, Comment *a*.

[161] *Id.* § 416.

[162] *Id.* § 417. The recognition of a judgment is technically an exercise of jurisdiction to adjudicate. Jurisdiction to enforce is not exercised until a debtor's assets are seized to satisfy the judgment.

[163] *Id.* § 411.

[164] *Id.* § 411, Comment *c.*

[165] *Id.* § 411, Comment *d* & Reporters' Note 3.

[166] See *id.* § 414, Comment *b* ("Only grounds (d) [the judgment conflicts with another final and conclusive judgment] and (f) [in cases where the foreign court's

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discretion to reject a ground for non-recognition if the person opposing recognition had the opportunity to raise the issue in the foreign proceeding, including any appeal, and failed to do so."[167]

A court in the United States will not recognize a foreign judgment if the foreign judicial system "does not provide impartial tribunals or procedures compatible with fundamental principles of fairness."[168] It is very rare for U.S. courts to deny recognition on this ground.[169] The 2005 Uniform Act adds two related grounds for non-recognition that focus on lack of integrity or fundamental fairness *in the specific proceeding*, which avoid the need to condemn the entire foreign judicial system when significant irregularities are found.[170] But the test remains one of fundamental fairness, and a foreign court need not adopt the same procedures as a U.S. court for its judgment to be entitled to recognition in the United States.[171]

A more commonly invoked basis for non-recognition is that the foreign court lacked personal or subject matter jurisdiction.[172] As a general matter, a U.S. court should not look behind a foreign court's finding of personal jurisdiction and subject matter jurisdiction under foreign law.[173] But a U.S. court will also test the foreign court's personal jurisdiction "under the minimum requirements of due process imposed by the U.S. Constitution."[174] Other grounds for non-recognition that are not strictly jurisdictional but relate to the appropriateness of the forum or the fairness of the proceedings include lack of notice,[175] fraud that deprived a party of an adequate opportunity to present its case,[176] inconsistency with a forum selection clause,[177] and jurisdiction based only on personal service if the foreign court was a seriously inconvenient forum.[178]

The Uniform Acts permit non-recognition if the foreign judgment conflicts with another final and conclusive judgment, but they do not offer guidance on which of the conflicting judgments to prefer.[179] The Fourth Restatement takes the position that "a U.S. court should ordinarily recognize the later judgment" if the

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jurisdiction rested only on personal service, the foreign court was a seriously inconvenient forum for resolution of the dispute] appear to be discretionary in actual practice.").

[167] *Id.*

[168] *Id.* § 413a).

[169] *Id.* § 413, Comments *b-d* & Reporters' Notes 2-3.

[170] *Id.* § 414(g) & (h).

[171] *Id.* § 414, Comments *i-j* & Reporters' Notes 9-10.

[172] *Id.* § 413(b).

[173] See *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 441 (3d Cir. 1971); *Fourth Restatement* (note 3) § 413, Reporters' Notes 7-8.

[174] *Fourth Restatement* (note 3) § 413, Comment *f*; see also *id.* § 413, Reporters' Note 5.

[175] *Id.* § 414(a).

[176] *Id.* § 414(b).

[177] *Id.* § 414(e).

[178] *Id.* § 414(f).

[179] *Id.* § 414(d) & Reporters' Note 6.

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court rendering the later judgment "fairly considered" the earlier one.[180] This last-in-time rule rests on the argument that the opposing party should have raised the preclusive effect of the first judgment in the second proceeding.[181] It is also consistent with U.S. practice involving both domestic and foreign judgments,[182] though it differs from the solution of the Brussels Regulation (Recast), which generally grants recognition to the earlier judgment.[183]

A U.S. court need not recognize a foreign judgment if "the judgment or the claim on which the judgment is based is repugnant to the public policy of the State in which recognition is sought or of the United States."[184] The Fourth Restatement makes clear that this ground is to be interpreted narrowly.[185] Foreign defamation judgments, which were sometimes denied recognition on this ground, are now governed by the federal SPEECH Act, which prohibits their enforcement in both state and federal courts unless the rendering jurisdiction provides as much protection for freedom of speech and press as the United States or the defendant would have been found liable for defamation if the case had been tried in the United States.[186]

For the sake of completeness, the Fourth Restatement also lists lack of reciprocity as a ground for non-recognition. Although lack of reciprocity is not included in either Uniform Act, a few states have added it as a mandatory or discretionary ground.[187] Lack of reciprocity is a ground for non-recognition only in those states. The Fourth Restatement notes that "[t]he majority of U.S. States today will recognize a foreign judgment even if the issuing forum would not accord the same treatment to a similar U.S. judgment."[188]

If a foreign judgment is entitled to recognition, then it may be enforced against the judgment debtor's assets in the United States.[189] U.S courts use the same procedures to enforce foreign judgments that they use for domestic judgments.[190] The Fourth Restatement expresses a preference "not to convert the

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[180] *Id.* § 414, Comment *f*.

[181] See R.B. GINSBURG, Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, *82 Harv. L. Rev.*798 (1969).

[182] *Fourth Restatement* (note 3) § 414, Reporters' Note 6.

[183] See Brussels Regulation (Recast) (note 27) art. 45(1)(d). The Brussels Regulation departs from this rule and prefers the later judgment when the later judgment was given by the Member State in which enforcement is sought. See *id.* art. 45(1)(c).

[184] *Fourth Restatement* (note 3) § 414(c).

[185] See *id.* § 414, Comment *e* ("A foreign judgment violates local public policy only if its recognition would tend clearly to injure public health, public morals, or public confidence in the administration of law, or would undermine settled expectations concerning individual rights, whether of personal liberty or private property."); see also *id.* § 414, Reporters' Note 4 (giving examples).

[186] 28 U.S.C. § 4102; see also *Fourth Restatement* (note 3) § 413, Comment *h*.

[187] *Fourth Restatement* (note 3) § 414(i).

[188] *Id.* § 414, Comment *k*; see also *id.* § 414, Reporters' Note 11 (listing jurisdictions with a reciprocity requirement).

[189] *Id.* § 416.

[190] *Id.* § 416, Comment *c*.

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currency used in the foreign judgment into U.S. dollars."[191] When conversion is necessary, because of state law or for some other reason, U.S. courts should use the exchange rate prevailing on the date of the U.S. judgment.[192]

Sometimes U.S. courts recognize foreign judgments not for purposes of enforcement but to prevent relitigation. A foreign judgment entitled to recognition "is given the same preclusive effect by a court in the United States as the judgment of a sister State entitled to full faith and credit."[193] A foreign judgment may preclude relitigation of the same claim between the same parties (claim preclusion or *res judicata*). A foreign judgment may also preclude relitigation of the same issue within the context of a different claim (issue preclusion or collateral estoppel).[194] However, "a foreign judgment will not be given greater preclusive effect in the United States than the judgment would be accorded in the state of origin."[195] This principle limits issue preclusion in particular, since many other countries do not permit issue preclusion.

Sections 418 and 419 of the Fourth Restatement discuss the special cases of foreign injunctions and foreign tax and penal judgments. Foreign judgments granting injunctions are not covered by the Uniform Acts, which apply only to money judgments. But U.S. courts regularly recognize foreign non-money judgments as a matter of comity.[196] The decision whether to grant an injunction, however, is for the recognizing court to make, and a U.S. court will not grant injunctive relief just because the foreign court has done so.[197]

Section 419 states: "Courts in the United States do not recognize or enforce judgments rendered by the courts of foreign states to the extent such judgments are for taxes, fines, or other penalties, unless authorized by a statute or an international agreement."[198] The "revenue rule" and the penal-laws rule developed independently[199] and are widely followed outside the United States as well.[200] Some authorities have expanded these rules into a more general rule against enforcing

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[191] *Id.* § 420, Comment *b*. Section 420 on judgments denominated in foreign currency was added in Tentative Draft No. 3.

[192] *Id.* § 420(2).

[193] *Id.* § 417.

[194] *Id.* § 417, Comment *a*.

[195] *Id.* § 417; see also *id.* § 417, Reporters' Note 4 (discussing cases).

[196] *Id.* § 418, Comment *a*.

[197] *Id.* § 418 & Comment *c.* This is the same rule that U.S. courts apply to injunctions issued by the courts of sister states. See *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998) ("Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.").

[198] *Fourth Restatement* (note 3) § 419.

[199] *Id.* § 419, Reporters' Note 1; see also W. DODGE, Breaking the Public Law Taboo, 43 *Harv. Int'l L.J.* 161 (2002).

[200] See International Law Association, Report of the International Committee on Transnational Recognition and Enforcement of Public Laws, in *Report of the Sixty-Third Conference* 1988, p. 719.

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foreign "public laws."[201] U.S. courts have not done this, however, and instead maintain the revenue and penal-laws rules within their traditional bounds.[202] These rules are subject to modification by statute or international agreement. A number of state statutes in the United States take account of foreign convictions for purposes of habitual offender statutes or double-jeopardy.[203] A few U.S. tax treaties provide for the enforcement of foreign tax judgments, though most do not.[204] Many U.S. Mutual Legal Assistance Treaties (MLATs) provide for the enforcement of criminal forfeitures and fines.[205] And prisoner-transfer treaties allows U.S. nationals convicted abroad to serve their sentences in the United States.[206] It would be a mistake, therefore, to conclude that foreign tax and penal judgments have no effect in the United States.

VII. The Public-Private Distinction

One question that runs through many of the topics already discussed is whether the same rules apply to both public and private law and to both criminal and civil enforcement. The answer depends on the kind of jurisdiction being exercised.

In the area of prescriptive jurisdiction, the Fourth Restatement clearly rejects the public-private distinction. It points out that "the public-private distinction in international law lacks a clear conceptual basis, because different legal systems draw the line in different places" and states that "[t]he better position is that, in principle, customary-international-law rules on prescriptive jurisdiction apply to assertions of public and private law, and to exercises of criminal and civil jurisdiction."[207] As the Restatement explains, this poses no problems for choice of law because "international law permits a wide variety of solutions to conflict of laws problems. Thus, assertions of private law in civil cases normally are disposed of by national law and treaty regimes."[208] U.S. practice with respect to prescriptive

[201] See *Dicey, Morris & Collins: The Conflict of Laws* 107-108 (15th ed. 2012) (Rule 3: "English courts have no jurisdiction to entertain an action […] for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State").

[202] *Fourth Restatement* (note 3) § 419, Reporters' Note 4.

[203] *Id.* § 419, Reporters' Note 8.

[204] *Id.* § 419, Reporters' Note 6.

[205] *Id.*

[206] *Id.*

[207] *Fourth Restatement* (note 3) § 211, Comment *f*. See generally A. MILLS, *The Confluence of Public and Private International Law* (2009); A. LOWENFELD, Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction, *Recueil des Cours* 1979-II, vol. 163, p. 311.

[208] *Fourth Restatement* (note 3) § 211, Reporters' Note 5. The restatements of foreign relations law do not undertake to restate choice-of-law rules. The ALI has recently begun a Third Restatement of the Conflict of Laws, the early drafts of which similarly take the position that choice of law rules are subject to customary international law and that U.S. rules on choice of law are consistent with customary international law. See *Restatement of*

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jurisdiction "generally does not distinguish between public and private law or between civil and criminal enforcement."[209]

U.S. law governing jurisdiction to adjudicate, on the other hand, does distinguish between civil and criminal cases, and the Fourth Restatement reflects that distinction by discussing adjudicative jurisdiction in civil and criminal cases separately. Perhaps the biggest difference is that U.S. law permits courts to exercise personal jurisdiction over defendants who have sufficient contacts with the forum even if those defendants do not appear in court,[210] while U.S. law forbids the trial of a criminal defendant "unless that person is present before the court at the time the trial begins."[211] To take another example, extradition is available in criminal cases,[212] but not in civil cases.

As for enforcement jurisdiction, both U.S. practice and customary international law generally do not distinguish between public and private law or between criminal and civil enforcement. It is as much a violation of customary international law for one country to seize property in another country to satisfy a civil judgment as it is to seize a person in another country for purposes of a criminal trial.[213] The United States generally obeys customary international with respect to jurisdiction to enforce.[214] In the context of the enforcement of foreign judgments, U.S. courts do refuse recognition to foreign tax and penal judgments unless authorized by statute or international agreement.[215] But U.S. courts have not expanded these rules into a more general prohibition against enforcing public law judgments.[216] The Fourth Restatement also makes clear that "[t]he rules precluding enforcement of tax and penal judgments […] are not required by customary international law, and a U.S. statute authorizing the enforcement of a foreign tax or penal judgment would not violate international law."[217]

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the Law Third, Conflict of Laws § 1.02, Comment *e* (Council Draft No. 1, Nov. 11, 2016) ("The rules stated in this Restatement […] conform to the requirements public international law."); see also *Restatement of the Law Second, Conflict of Laws* § 2, Comment *d* (1971) (same).

[209] *Id.* § 201, Comment *d*; see also *id.*, Reporters' Note 4 (discussing U.S. practice). On the other hand, there certainly are methodological differences in the ways U.S. courts treat choice of law in public and private law cases. For discussion see W. DODGE, The Public-Private Distinction in the Conflict of Laws, *18 Duke J. Comp. & Int'l L.* 371 *et seq.* (2008).

[210] *Restatement Fourth* (note 3) § 302.

[211] *Id.* § 311.

[212] See *id.* § 312.

[213] *Id.* § 402(2) ("A state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state."); *id.* § 402, Comment *a* (noting that examples of enforcement jurisdiction include "the arrest of a person" and "the seizure of property").

[214] *Id.* § 401, Comment *b*.

[215] *Id.* § 419.

[216] See *id.* § 419, Reporters' Note 4.

[217] *Id.* § 419, Comment *a*.

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VIII. Conclusion

Any effort to clarify the law necessarily involves drawing distinctions. This essay has tried to expose the critical distinctions that underlie the Fourth Restatement of Foreign Relations Law – Jurisdiction. Perhaps the most important of these is the division of jurisdiction into three categories – jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.[218] In some categories, like adjudicative jurisdiction, a further division between civil and criminal cases is necessary. Because different rules of domestic and international law apply in each of these categories, one cannot identify the applicable rules without categorizing the activity. Courts, for example, exercise many different kinds of jurisdiction: they prescribe when they make new rules of law, they adjudicate when they apply domestic or foreign law to determine the rights of the parties, and they enforce when they order the seizure of property to satisfy a judgment.

Also critical to the Fourth Restatement is the distinction between domestic law and international law. Customary international law marks the limits of each state's lawful authority. A state may not prescribe law unless it has "a genuine connection" to the subject of the regulation;[219] it may not adjudicate cases against a foreign state with respect to certain activities, like those of the armed forces[220]; and it "may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state."[221] Within these spheres of legal authority, states adopt rules of domestic law that restrain their own jurisdiction and recognize the jurisdiction of other states as a matter of international comity.[222] They limit the exercise of prescriptive jurisdiction, adopt interpretive presumptions, recognize foreign acts of state, require sufficient contacts for personal jurisdiction, defer to foreign courts under doctrines like *forum non conveniens*, require the presence of criminal defendants for trial, cooperate on extradition, and enforce foreign judgments. The Fourth Restatement provides a guide not just to the rules of customary international law that mark the outer bounds of U.S. authority but also to the U.S. domestic rules that complete the picture.

[218] *Id.* § 101.

[219] *Id.* § 211.

[220] *Jurisdictional Immunities of the State* (Germ. v. It.), 2012 I.C.J. 97.

[221] *Fourth Restatement* (note 3) § 402(2).

[222] See W. DODGE (note 14) at 2099-2120.

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RECENT DEVELOPMENTS IN U.S. LAW ON FOREIGN SOVEREIGN IMMUNITY

David P. STEWART*

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I. The Foreign Sovereign Immunities Act

Within the U.S. legal system, litigation against foreign states (and their agencies and instrumentalities) is governed by the Foreign Sovereign Immunities Act (FSIA),[1] which was adopted in 1976 and has subsequently been amended several times. That statute provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts and provides that, subject to the treaties in place at the time of

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[1] The Foreign Sovereign Immunities Act is codified at 28 U.S.C.A. § 1602 *et seq*. and 28 U.S.C.A. § 1330(a). It applies in state as well as federal courts.

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 171-194
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Printed in Germany

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the FSIA's enactment in 1976, a foreign state is immune from the jurisdiction of U.S. courts except where expressly permitted in the Act.

In the FSIA, the United States embraced the so-called "restrictive" theory of sovereign immunity. Thus, U.S. courts have jurisdiction only where a foreign state has: (1) waived its immunity; (2) engaged in commercial activity in cases where a commercial activity nexus is met; (3) expropriated property in violation of international law; (4) acquired rights to property in the United States; (5) committed certain torts within the United States; (6) agreed to arbitration of a dispute; or (7) either been designated a state sponsor of terrorism or is responsible for an act of terrorism within the United States and has engaged in certain specific acts rendering it responsible for the terrorist activity. Unless one of these exceptions applies, the foreign state has immunity from trial and the attendant burdens of litigation and not just a defense to liability on the merits.

The FSIA also immunizes foreign state property in the United States from pre-judgment attachment. It contains limited exceptions for post-judgment execution except for state property "used for a commercial activity in the United States." Certain categories of property (including for example funds held in the name of a foreign central bank or monetary authority for its own account, or property of a military character or used for a military activity) are immune from post-judgment attachment and execution. Special rules apply, however, with respect to judgments rendered against designated state sponsors of terrorism.

Although this area of U.S. law has been codified, it remains dynamic and continues to evolve. Several significant developments in FSIA law have occurred over the past several years, both through statutory amendments and judicial interpretation; this chapter describes a number of the most important changes. It also provides a brief description of the FSIA-related provisions of the American Law Institute's Restatement (Fourth), Foreign Relations Law of the United States, which were approved in May 2017. Finally, the chapter introduces the emergent principles of so-called "foreign official immunity," a new field resulting from the U.S. Supreme Court's decision that the FSIA applies only to "states" and not to individual government officials, employees and agents.

While the United States is not party to the 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties,[2] the FSIA was premised on the so-called "restrictive" theory of sovereign immunity reflected in that Convention and many of the judicial decisions under the statute reflect (and contribute to) an appreciation of the relevant principles of customary international law.

[2] United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, available at <https://treaties.un.org/doc/Treaties/2004/12/20041202%2003-50%20PM/CH_III_13p.pdf>. As of May 2017, 21 states were party and 14 more had signed but not ratified or acceded. The treaty will come into force following the deposit of the thirtieth instrument of ratification, acceptance, approval or accession. Generally, see D.P. STEWART, The UN Convention on Jurisdictional Immunities of States and Their Property, 99 *Am. J. Int'l L.* 194 (2005).

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II. Exceptions to Immunity

The most frequently litigated jurisdictional issues under the statute are whether a particular defendant can be classified as a "foreign state" or its "agency or instrumentality," whether it expressly or impliedly waived its sovereign immunity, and whether it has engaged in "commercial activity" with a sufficient jurisdictional nexus to the United States. Important decisions have been rendered in respect of several other exceptions, including those relating to non-commercial torts, enforcement of arbitral agreements and awards, and expropriation and nationalization of property. A substantial number of cases have been pursued under the state-sponsored terrorism provision as well.

A. Scope of Application

The FSIA applies only to "foreign states" and their "agencies and instrumentalities". Because these terms define the entities capable of enjoying foreign sovereign immunity, they play an important jurisdictional role. For FSIA purposes, a foreign state includes both (i) the state itself and its governmental and political subdivisions as well as (ii) agencies or instrumentalities of the state or of its political subdivisions. However, the statute affords different levels of immunity to the two categories in certain respects.

Whether an entity is a "state" for FSIA purposes is a question of statutory interpretation, in which courts are strongly informed by the views of the executive branch. Generally speaking, courts decide whether an entity is a state with reference to criteria from international law and whether the U.S. government recognizes the entity as a state. Under international law, states are generally understood as sovereign independent entities that have a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states.

The term "state" encompasses the components of the national government, including the armed forces and administrative agencies such as departments of defense, foreign affairs, or treasury. It also encompasses that state's embassies, consulates, and permanent missions to international organizations. Political subdivisions include the subordinate units of government including component "states," provinces, cantons, counties, capital districts, cities, and territories.

The statute defines "agency or instrumentality" of a foreign state as an entity that is (i) a separate legal person and (ii) either an "organ" of the foreign state or an organ of a political subdivision, or is majority-owned by a foreign state or political subdivision, and (iii) neither a citizen of the United States nor created under the laws of any third country.[3] The FSIA does not provide a specific test for determining whether an entity is an "organ of a foreign state or political subdivision thereof." U.S. courts generally apply a series of factors to determine whether a given entity qualifies as an "organ" of a foreign state: (1) whether that foreign state created the entity for a "national" (*i.e.*, sovereign) purpose; (2) whether the foreign

[3] 28 U.S.C. § 1603(b).

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state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds "exclusive rights to some right in the [foreign] country"; and (5) how the entity is treated under foreign state law.[4]

One appellate court recently held that the European Community qualified as an organ of a foreign state under the FSIA.[5] The court rejected an argument that an organ of a foreign state must be subordinate to a larger entity and could not be an international organization created by multiple states.

U.S. law also recognizes a "presumption of separateness", meaning that government agencies and instrumentalities established as distinct juridical entities independent from their sovereign should normally be treated as such, so that the foreign sovereign is not typically liable for the acts of its instrumentalities.[6] This presumption can be overcome when the instrumentality is so extensively controlled by the government that a "relationship of principal and agent is created" or when recognition of the instrumentality as an entity apart from the state would work fraud or injustice.[7] In effect, such circumstances override the rule that a foreign sovereign is not amenable to suit based upon the acts of its separate instrumentalities.

B. Specific Exceptions

1. Waiver

Under the FSIA, a foreign state is not immune from suit in U.S. courts in any case in which it has waived its immunity either explicitly or by implication.[8] Explicit waivers are perhaps most commonly encountered in the relevant contract itself, but they must be clear and unambiguous.[9] A foreign state may also waive its immunity by treaty. For example, in *Blue Ridge Investments, L.L.C. v. Republic of Argentina*,[10] the court held that, while the treaty exception must be construed narrowly, Argentina had agreed to an implied waiver of its sovereign immunity by signing the ICSID Convention and in light of its obligations under art. 54 to recognize and enforce ICSID awards. U.S. courts have emphasized that explicit or

[4] *Janvey v. Libyan Investment Authority*, 840 F.3d 248, 259 (5th Cir. 2016).

[5] *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 143 (2nd Cir. 2014), rev'd on other grounds, 136 S.Ct. 2090 (2016). The issue arose in the context of establishing diversity jurisdiction, not immunity.

[6] *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) ("Bancec"). See also *Corporación Mexicana De Mantenimiento Integral v. Pemex–Exploración Y Producción*, 832 F.3d 92 (2nd Cir. 2016).

[7] See discussion at *DRC, Inc. v. Rep. of Honduras*, 71 F. Supp. 3d 201 (D.D.C. 2014).

[8] 28 U.S.C. § 1605(a)(1).

[9] See, *e.g.*, *Firebird Global Master Fund II Ltd. v. Republic of Nauru*, 915 F. Supp. 2d 124 (D.D.C. 2013).

[10] *Blue Ridge Investments, L.L.C. v. Rep. of Argentina*, 735 F.3d 72 (2nd Cir. 2013).

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express waivers must be clear and unambiguous and made by someone who actually has the authority to act on behalf of the foreign sovereign with respect to such a waiver.[11]

Waivers may also be implicit but they are construed narrowly under U.S. law and require clear evidence of the foreign sovereign's intention to dispense with its immunity. They are typically found only when a state agrees to arbitrate in another country or specifies that U.S. law will govern the relevant agreement.[12] However, U.S. courts have also found implicit waivers when a foreign state decides to participate formally in a given judicial proceeding by submitting a "responsive pleading" contesting the substantive allegations once it has been sued, without raising a claim of immunity.[13]

A recent example involved litigation against the French Embassy in Washington by a former employee who claimed that her termination had unlawfully discriminated against her on the basis of national origin, race, religion, and pregnancy. The French government was initially successful in getting some of her claims dismissed for failure to exhaust available administrative remedies. But pretrial litigation proceeded on other claims, in which the Embassy took an active role, including participating in discovery. After several years of litigation, the Embassy sought to dismiss the case by invoking sovereign immunity. The district court denied the motion, finding that immunity had been waived *inter alia* because the Embassy had earlier filed responsive pleadings that failed to assert sovereign immunity.[14]

By contrast, in *Diag Human S.E. v. Czech Republic-Ministry of Health*, the district court determined that filing a motion to dismiss a complaint that did not address sovereign immunity did not necessarily waive sovereign immunity since implied waivers require "a conscious decision" by the sovereign to take part in the litigation.[15]

2. Commercial Activity

The commercial activity exception lies at the heart, of course, of the so-called "restrictive theory" of sovereign immunity. Under the FSIA, U.S. courts have

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[11] *SACE S.p.A. v. Rep. of Paraguay*, 2017 WL 1066564 (D.D.C. Mar. 21, 2017).

[12] *Farhang v. Indian Institute of Technology*, 655 Fed.Appx. 569 (9th Cir. 2016).

[13] See, *e.g.*, *BAE Systems Technology Solution & Services, Inc. v. Republic of Korea's Defense Acquisition Program Administration*, 195 F. Supp. 3d 776 (D. Md. 2016).

[14] *Ashraf-Hassan v. Embassy of France in the U.S.*, 40 F. Supp. 3d 94 (D.D.C. 2014), aff'd on other grounds, 610 Fed. Appx. 3 (D.C. Cir. 2015). U.S. courts have declined to find implied waivers of FSIA immunity for *jus cogens* violations. See, *e.g.*, *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) (dismissal subsequently affirmed on other grounds, 413 F.3d 45 (D.C. Cir. 2005).

[15] *Diag Human S.E. v. Czech Republic-Ministry of Health*, 64 F. Supp.3d 22, 31 (D.D.C. 2014), reh'g denied, 824 F.3d 131 (D.C. Cir. 2016). The court cited *Ashraf-Hassan* (discussed above) as an illustration of the type of activity a foreign sovereign must undertake to implicitly waive sovereign immunity.

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subject matter jurisdiction over suits against foreign sovereigns when the plaintiff's claim (a) is based upon commercial activity and (b) has a sufficient jurisdictional connection with the United States. The overwhelming majority of FSIA cases rest on this exception.

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act" and provides that whether a given activity is "commercial" must be determined by reference to its nature rather than its purpose.[16] The courts have distinguished between commercial and sovereign activity by limiting the latter activity to those acts which private parties would be unable to perform (essentially adopting the distinction between *acta jure imperii* and *acta jure gestionis*).

In *Republic of Argentina v. Weltover, Inc.,* for example, the U.S. Supreme Court rejected Argentina's claim that it enjoyed immunity in connection with its refusal to repay government bonds issued in U.S. dollars and used to stabilize Argentina's currency.[17] The Court held that issuance of the bonds constituted "commercial activity" that caused a "direct effect" in the United States, establishing jurisdiction under the FSIA. It said that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA," so that the issue is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of action by which a private party engages in 'trade and traffic or commerce.'"[18]

Determining what constitutes "commercial activity" is easier to resolve in some cases than in others. For example, the seizure by British police of "undisclosed currency" from an American traveler at Heathrow Airport (and their subsequent investigation to determine whether the funds were forfeitable) was held to be a "quintessentially sovereign act," despite plaintiff's contention that the authorities had profited from the interest that accrued during the fourteen months' interval before the money was returned.[19] But the courts seemed reluctant to hold that a government's failure to pay reward money offered for information about tax evaders was a commercial activity, instead disposing of the case on other jurisdictional grounds.[20] By contrast, the design and manufacture of rifle ammunition was emphatically described as the type of activity "in which private individuals engage" even when the ammunition in question was produced for military use by a state-owned entity affiliated with the government's Ministry of Defense.[21]

In *Ashraf-Hassan v. Embassy of France* (discussed above), a former employee (a French citizen born in Pakistan) sued the Embassy alleging that

[16] 28 U.S.C. § 1603(d).

[17] *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607 (1992).

[18] *Id.* at 614.

[19] *Ezeiruaku v. Bull*, 2014 WL 5587404 (D.N.J. 2014), aff'd 617 Fed.Appx. 179 (3rd Cir. 2015).

[20] *Odhiambo v. Republic of Kenya*, 930 F.Supp.2d 17 (D.D.C. 2013), aff'd 764 F.3d 31 (D.C. Cir. 2014), cert. den. 136 S.Ct. 2504 (2016).

[21] *Rote v. Zel Custom Mfg. LLC*, 2015 WL 570973 (S.D. Ohio 2015), aff'd 816 F.3d 383 (6th Cir. 2016), cert. den. 137 S.Ct. 199 (2016).

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various forms of illegal discrimination under U.S. law had created a "hostile work environment" leading to the unlawful termination of her employment. Because she had worked in a "purely administrative," non-civil service capacity and was not involved in governmental decision-making, the court held that her work was a commercial activity within the scope of the exception.[22]

Under the statute, even if the relevant activity is found to be commercial, it must have a sufficient jurisdictional connection to the United States. This "nexus" requirement can be satisfied when the suit involves (1) a commercial activity carried on in the United States, (2) an act performed in the United States in connection with a commercial activity carried on outside the United States, or (3) a commercial activity carried on outside the United States that has a direct effect in the United States. Many claims falter on this requirement.

The second and third clauses are most frequently litigated. Plaintiffs often claim that business meetings related to the transaction satisfy the requirement for an "act performed in the United States." The courts tend to be unconvinced. In the "reward for information about tax evaders" case mentioned above, for instance, the court held that "mere business meetings" did not create sufficient contact.[23] Similarly, in *Schoeps v. Freistaat Bayern,* the court held that no commercial activity had occurred in in the United States when the meeting did not result in a contract, or even a legally binding offer, to sell a painting, but only an agreement to talk further.[24] By contrast, one court recently found that the defendant had in fact met the requirement when it actively induced the relevant investment by sending its agents to the United States to meet with the plaintiffs and other U.S. investors and by providing information about the securities.[25]

Despite the Supreme Court's statement in *Weltover* that for FSIA purposes, a direct effect must follow "as an *immediate* consequence" of the defendant's activity,[26] the courts continue to struggle with specific situations. In an effort to draw a clear line, one court recently said that "[b]y definition, breaching a contract that establishes the United States as a place of performance will have a *direct* effect here, whereas breaching a contract that establishes a different or unspecified place of performance can affect the United States only *indirectly,* as the result of some intervening event such as the plaintiff's move to this country."[27]

Finally, the statute requires that the plaintiff's claim must be "based upon" the relevant commercial activity. In December 2015, the U.S. Supreme Court reaffirmed the importance of this requirement. In *OBB Personenverkehr AG v.*

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[22] *Ashraf-Hassan v. Embassy of France in the United States*, 610 Fed.Appx. 3 (D.C. Cir. 2015).

[23] *Odhiambo v. Republic of Kenya*, 930 F. Supp.2d 17 (D.D.C. 2013), aff'd 764 F.3d 31 (D.C. Cir. 2014), cert. den. 136 S.Ct. 2504 (2016).

[24] *Schoeps v. Freistaat Bayern*, 611 Fed. Appx. 32 (2nd Cir. 2015), cert. den. 136 S.Ct. 895 (2015).

[25] *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F.Supp.3d 550, 559 (S.D.N.Y. 2104), aff'd on other grounds, 813 F.3d 98 (2nd Cir. 2016).

[26] *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 618 (1992).

[27] *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 38 (D.C. Cir. 2014).

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Sachs,[28] an American tourist who had been seriously injured in Innsbruck while trying to board a train operated by the Austrian national railway brought an action in federal court in California against the state-owned railway. Under the FSIA, she could not claim jurisdiction under the "non-commercial tort" exception since the accident had occurred in Austria (and U.S. law requires that the "entire tort" must have occurred in the United States). Instead, she contended that her claim satisfied the "commercial activity" exception because she had purchased her Eurail pass in California over the Internet from a U.S.-based travel agent acting on behalf of the railway.

The trial court dismissed the action for lack of jurisdictional nexus; the appellate court initially affirmed but then reversed its decision on the ground that Austria had engaged in U.S. commerce through the actions of its agents or subagents in the United States. The Supreme Court overturned that decision unanimously, finding that Mrs. Sachs' suit was "based upon" the injury she sustained in Austria, rather than her ticket purchase in the United States.

Citing its earlier decision in *Saudi Arabia v. Nelson*,[29] the Court said that for FSIA purposes "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit…. All of [Mrs. Sachs'] claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria."[30] Accordingly, because the "gravamen" of her suit had occurred abroad, it found that the commercial activity exception did not apply.

While the Court did not explicitly address the issues, some see in this decision a reluctance (at least in the immunities context) to embrace a "totality of the enterprise" approach to commercial activity as well as an implicit acknowledgment that the pervasiveness of electronic commerce (including the opportunity to buy and sell products and services over the internet) raises increasingly difficult issues about the scope (and limits) of domestic jurisdiction over foreign activities.

3. Expropriated Property in Violation of International Law

The FSIA's expropriation exception[31] removes a foreign state's immunity where "rights in property taken in violation of international law" are in issue, as long as (i) that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (ii) that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

[28] *OBB Personenverker AG v. Sachs*, --- U.S. ---, 136 S.Ct. 390 (2015).

[29] *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

[30] 136 S.Ct. 390 at 396.

[31] 28 U.S.C. § 1605(a)(3).

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In *Smith Rocke Ltd.*,[32] an action was brought under this exception by a British Virgin Islands corporation for damages arising out of the Republic of Venezuela's expropriation of a Venezuelan company and certain of its assets (including *inter alia* bearer notes). While the court concluded that the right to payment under those notes was a "right to property," it found that the taking had not been in violation of international law since the plaintiff's shareholders were Venezuelan nationals and, for purposes of this exception, a sovereign state's taking of property from its own citizens does not constitute a violation of international law.

A more surprising decision, and one with potentially much broader implications, involved the claims by fourteen Hungarian Jewish survivors of the Hungarian Holocaust against the Republic of Hungary and the Hungarian state-owned railway, arising from their participation in and perpetration of the Holocaust, alleging conversion, unjust enrichment, false imprisonment, torture, assault, and violations of international law. The lower court dismissed the suit *inter alia* on the basis that the claims fell within the scope of the 1947 Treaty of Peace with Hungary and were thus precluded by the FSIA's "treaty exception." Because plaintiffs' requests for relief were in essence about the inadequacy of the defendants' compliance with their responsibilities under Article 27 of that treaty, the court said, they should be directed to the Executive Branch, which might seek to resolve them diplomatically.

In *Simon v. Republic of Hungary*,[33] the appellate court reversed. It found that the 1947 Treaty of Peace did not provide the exclusive means of recovery for Hungarian Holocaust victims and that plaintiffs' claims for conversion, unjust enrichment, and restitution placed at issue "rights in property" for purposes of the statute. While acknowledging the "domestic takings rule," it said that the takings and expropriations during the Holocaust had themselves amounted to genocide and thus qualified as takings of property "in violation of international law" within the meaning of the FSIA's expropriation exception.

Moreover, the court found that since the plaintiffs alleged that Hungary and its state-owned railroad had liquidated the property they had stolen, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations, some of which took place in the United States, their allegations were sufficient to satisfy the commercial-activity nexus requirement at this stage of the lawsuit.

While the decision itself only resolves the defendant's jurisdictional objections, rather than the merits of the claims themselves, some concern has been expressed that it significantly broadens the scope of the "expropriation" exception far beyond the intent of Congress and potentially opens U.S. courts to a wide range of "takings" claims by foreigners against foreign states arising from situations of massive human rights abuses and armed conflicts around the globe.

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[32] *Smith Rocke v. Republica Bolivariana de Venezuela*, 2014 WL 288705 (S.D.N.Y. 2014). See also *Arch Trading Corp. v. Republic of Ecuador*, 2015 WL 3443906 (S.D.N.Y. 2015)(domestic takings are "single-nation" problems that do not violate international law or concern U.S. courts), aff'd on other grounds, 839 F.3d 193 (2d Cir. 2016).

[33] *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

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The analysis in *Simon* has since been applied to a case involving the "*Welfenschatz*" or Guelph Treasure, a collection of medieval gilded and jeweled artifacts dating to the 11th century, currently located in the *Kunstgewerbemuseum* in Berlin. Plaintiffs are the heirs of the Jewish owners of a consortium of three art dealer firms who (they allege) were forced to sell the relics under duress, at far below market value, to the State of Prussia in 1935. Later that year, Hermann Goering presented the collection to Adolf Hitler as a "surprise gift" at a ceremony. The trial court recently rejected the German Government's motion to dismiss the claims, finding that plaintiffs had "sufficiently pled [that] the taking of the *Welfenschatz* was part of the genocide of the Jewish people during the Holocaust and, accordingly, violated international law."[34]

In *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co*. decided on May 1, 2017, the U.S. Supreme Court stressed that the expropriation exception must be interpreted consistently with international law.[35] The underlying dispute involved claims by a wholly-owned Venezuelan subsidiary of an American company that supplied oil rigs to entities that were part of the Venezuelan Government, contending that Venezuela had unlawfully expropriated the subsidiary's rigs. Venezuela defended, *inter alia*, on the ground that international law did not cover the expropriation of property belonging to a country's own nationals like the subsidiary (and that the U.S. parent lacked property rights in the subsidiary's assets). The appellate court concluded that a sovereign's taking of its own nationals' property might violate international law if the expropriation had unreasonably discriminated based on a company's shareholders' nationality, and that in this specific instance the issue had been raised in a "nonfrivolous way." The specific issue before the Supreme Court was the technical one about pleading standards, *i.e.*, whether at the early stage of a motion to dismiss, a nonfrivolous argument sufficed to bring the complaint within the scope of the exception.

The Court rejected that standard, holding the nonfrivolous-argument standard to be inconsistent with the FSIA. A case falls within the scope of the expropriation exception, it said, only if the property in which the party claims to hold rights was indeed "property taken in violation of international law." Thus, courts should decide the foreign sovereign's immunity defense at the threshold of the action, resolving any factual disputes as close to the outset of the case as is reasonably possible.

In explaining its reasoning, the Court noted that "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act [an act "*jure imperii*"] that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."[36] Accordingly, under the expropriation exception, the claimant's factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law).

[34] *Philipp v. Fed. Rep. Germany*, 2017 WL 1207408 at *6 (D.D.C. Mar. 31, 2017).

[35] *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co*., 137 S.Ct. 1312 (May 1, 2017), reversing *Helmerich & Payne Intern. Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015).

[36] *Id.* at 1321.

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"The expropriation exception grants jurisdiction, it said, only where there is a valid claim that 'property' has been 'taken in violation of international law.'…A non-frivolous argument to that effect is insufficient."[37]

More generally, the Court observed, the FSIA "for the most part embodies basic principles of international law long followed both in the United States and elsewhere."[38] It is based on "a doctrine that by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the 'restrictive' theory of sovereign immunity…. We have found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles."[39]

The implications of this decision for the broader interpretation adopted in the previously-discussed Hungarian genocide case remain to be seen.

4. Non-Commercial Torts within the United States

The FSIA's non-commercial tort exception abrogates immunity for claims involving personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of a foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.[40] As interpreted by U.S. courts, the *entire* tort – including not only the injury but also the act precipitating that injury – must occur in the United States.

That rule was recently applied to preclude a suit alleging computer espionage by a foreign state. In *Doe v. Federal Democratic Republic of Ethiopia*,[41] the plaintiff, a native of Ethiopia, obtained asylum in the United States in the early 1990's but remained active in the Ethiopian community, working to increase awareness of corruption and human rights issues in Ethiopia. He claimed to have opened an e-mail attachment, originally sent by or on behalf of the government of Ethiopia, that infected his computer and permitted the government to spy on him from abroad. He sued *inter alia* on the basis of the common law privacy tort of "intrusion upon seclusion."

The suit was dismissed on the basis of the long-standing rule that the exception abrogates immunity only for torts occurring *entirely* in the United States. In this situation, the district court said, all of the acts allegedly taken by Ethiopia or

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[37] *Id.* at 1321.

[38] *Id.* at 1318-19.

[39] *Id.* at 1320. In support, it cited the Restatement (Third) of Foreign Relations Law of the United States § 451, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, Res. 59/38, Arts. 5, 10-12, and UNGA Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, Supp. A/59/22 No. 1, pp. 7-11 (Mar. 1-5, 2004).

[40] 28 U.S.C. § 1605(a)(5).

[41] 189 F. Supp.3d 6 (D.D.C. 2016), aff'd, *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7 (D.C. Cir. 2017). Both courts relied in large part on *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014).

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its agents had occurred outside the United States. Whether the political branches may ultimately deem it advisable to permit suits against foreign sovereigns who, without setting foot on American soil, use technology to commit torts against persons located in the United States, the court noted, amending the FSIA is a legislative (not judicial) function. Meanwhile, any remedy for such alleged misconduct must take place at a diplomatic level.

The Court of Appeals affirmed, noting *inter alia* that Congress' primary purpose in enacting § 1605(a)(5) had been to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law. It was thus "unsurprising," the court said, that transnational cyber-espionage should lie beyond the exception's reach.

5. Arbitration Agreements and Awards

The FSIA was amended in 1988 to provide an exception to immunity in actions to compel arbitration pursuant to agreements to arbitrate matters capable of settlement by arbitration under the laws of the United States or to enforce arbitral awards rendered pursuant to such agreements, if (a) the arbitration takes place or is intended to take place in the United States; (b) the agreement or award is or may be governed by a treaty in force for the United States for the recognition and enforcement of arbitral awards; (c) the underlying claim could have been brought under the Foreign Sovereign Immunities Act in U.S. courts absent the agreement to arbitrate; or (d) the foreign state has otherwise waived its immunity.[42]

Most frequently, courts address issues related to enforcement of arbitral agreements and awards under the second provision, in particular those arising under the New York Convention.[43] Where the state has agreed contractually to a arbitrate disputes arising out of or in connection with commercial relationship that may be governed by the Convention, it will not be entitled to immunity under the FSIA.[44]

Agreements governed by other treaties are given similar respect. In *Blue Ridge Investments LLC v. Republic of Argentina*,[45] the Second Circuit Court of Appeals affirmed the lower court's holding that Argentina had waived its sovereign immunity by agreeing to arbitrate pursuant to the International Convention for the Settlement of Investment Disputes (ICSID). The court stated explicitly that "Argentina's agreement to submit its dispute to arbitration under the ICSID Convention constituted a waiver of immunity." In *Stati v. Republic of*

[42] 28 U.S.C. § 1605(a)(6).

[43] 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

[44] See, for example, *Human v. Czech Republic–Ministry of Health*, 824 F.3d 131 (D.C. Cir. 2016) (involving contractual agreement to supply blood plasma technologies and equipment in exchange for a percentage of blood plasma collected rather than through an up-front payment).

[45] *Blue Ridge Investments LLC v. Rep. of Argentina*, 735 F.3d 72 (D.C. Cir. 2013).

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Kazakhstan,[46] the court found that Kazakhstan's agreement to arbitrate disputes arising under the Energy Charter Treaty in Sweden operated as implied waiver of immunity to investors' suit in United States to enforce the resulting award.

The statutory distinction between states and their agencies and instrumentalities can be significant in this context. In *DRC, Inc. v. Republic of Honduras,*[47] the district court conducted an in-depth analysis of the arbitration exception as it relates to government instrumentalities. The plaintiff had obtained an arbitration award against the Honduran Social Investment Fund but sought to enforce the award against the state itself. The state asserted its immunity. The court held that the fund was entitled to a presumption of separateness from the state and that no basis existed for disregarding that separateness. Accordingly, the arbitration exception did not apply to the Republic and the court dismissed the action.

In *GSS Group Ltd. v. Republic of Liberia*,[48] the district court similarly examined whether a state could be held responsible for payment of an arbitration award when its agent had signed the underlying agreement to arbitrate. The plaintiff sought to confirm a $44 million arbitral award rendered against the National Port Authority of Liberia (NPA) by proceeding against the Republic as well as the NPA, claiming latter had acted as Liberia's agent. The court held that NPA should be afforded a presumption of independence, since the plaintiff failed to establish that Liberia dominated the NPA or that the NPA acted as the government's agent. Accordingly, Liberia was entitled to sovereign immunity.

Generally, U.S. courts apply a deferential standard when reviewing arbitral awards, consistent with the broader federal policy in favor of arbitral dispute resolution. In fact, they have little discretion in refusing or deferring enforcement of foreign arbitral awards, even when foreign states are involved. In one recent decision, [49] for example, a contractor succeeded in its action against the Kingdom of Morocco to enforce an award (issued by an ICC arbitral tribunal with its seat in Paris) that ordered Morocco (among other things) to reimburse the contractor for various duties and taxes it had paid throughout the construction process, even though the Moroccan courts had set aside that part of the award on the ground that it fell outside the jurisdiction of the arbitral tribunal. Under article V(1)(e) of the New York Convention, the court said, only the arbitral tribunal in Paris or another competent court in France had the authority to do that, not a "secondary court" such as the Administrative Court of Rabat, much less a U.S. court.

To much the same effect was the decision in *Crystallex International Corporation v. Bolivarian Republic of Venezuela.*[50] There, a Canadian investor in gold deposits sought to confirm a $1.2 billion award rendered against Venezuela resulting from the arbitrary and expropriatory rescission of its mine operating contract in violation of the terms of the 1996 bilateral investment treaty between

[46] *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179 (D.D.C. 2016).

[47] *DRC, Inc. Republic of Honduras*, 71 F. Supp. 3d 201 (D.D.C. 2014).

[48] *GSS Group Ltd. v. Nat'l Port Authority of Liberia*, 822 F.3d 598 (D.C. Cir. 2016).

[49] *Salini Costruttori S.p.A. v. Kingdom of Morocco*, 2017 WL 563956 (D.D.C. 2017).

[50] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 2017 WL 1155691 (D.D.C. 2017).

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Venezuela and Canada. Venezuela sought to vacate the award, contending that the tribunal had exceeded its jurisdiction, but the court held that in consenting in the treaty to proceed under the ICSID Additional Facility rules, Venezuela had clearly and unmistakably assigned the question of arbitrability to the tribunal.

6. Acts of Terrorism

a) State-Sponsored Terrorism

Under the FSIA, a foreign state is not immune from the jurisdiction of U.S. courts in any case not otherwise covered by the commercial activity exception, in which money damages are sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[51]

This exception, initially enacted in 1996, was amended in 2008.[52] It applies only to foreign sovereigns that have been formally designated by the U.S. Department of State as "state sponsors of terrorism" (as well as their agencies and instrumentalities). It permits claims by (or on behalf of) U.S. nationals for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.[53] It precludes claims, however, if the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.

Typically, neither the foreign state nor the individuals (if any) named as defendants in litigation under this section respond to the complaints or otherwise participate in the litigation, so that the vast majority of such cases result in default judgments. Nonetheless, plaintiffs must establish their claims by evidence satisfactory to the court, and courts must ensure that the statutory requirements for jurisdiction are met. For instance, a suit by Iranian *émigrés* seeking recovery for imprisonment, torture, and extrajudicial killing they allegedly suffered at the hands of the Islamic Republic of Iran was dismissed because none was a U.S. citizen at the time the alleged acts occurred in Iran. The court rejected their argument that they qualified because at the time they owed permanent allegiance to the United

[51] 28 U.S.C. § 1605A.

[52] The original "terrorism exception," codified at 28 U.S.C. § 1605(a)(7), simply granted jurisdiction but did not provide plaintiffs with a federal cause of action or permit the award of punitive damages against state sponsors of terrorism.

[53] It also permits actions if the claimant or the victim was, at the time the act, a member of the armed forces, or otherwise an employee of the U.S. Government or of an individual performing a contract awarded by the U.S. Government, acting within the scope of his or her employment. 28 U.S.C.A. § 1605A(2)(A)(ii).

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States, noting simply that manifestations of permanent allegiance do not, by themselves, render a person a U.S. national.[54]

Because many of the rulings under the amended provision draw explicitly on case law interpreting its predecessor, the decisional law is large and complex. One issue that has received particular attention is the statutory requirement that the "personal injury or death" in question must have been "caused" by the prohibited action of the foreign state or its official, employee, or agent. Several courts have concluded that the prohibited activity must have been the proximate (rather than "but-for") cause.[55] Thus, claimants must demonstrate "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered."[56] Suits may be dismissed, for example, when the link between that state's support and the acts in question was "unforeseeable or so attenuated as to constitute fortuity."[57] By contrast, the requirement can be satisfied when the evidence demonstrates that without the state's support, the terrorist acts at issue would "likely not have been possible."[58]

b) JASTA

In September 2016, shortly after the 15th anniversary of the "9/11" attacks on the World Trade Towers and the Pentagon, the U.S. Congress enacted the "Justice Against Sponsors of Terrorism Act" (now known as "JASTA"), changing U.S. law to permit civil suits against foreign states and their officials for aiding and abetting acts of international terrorism.[59]

In broad terms, JASTA made two major changes to existing federal law. First, it amended the statute to remove the immunity of foreign states and their agencies and instrumentalities for certain claims related to acts of international terrorism occurring in the United States, whether or not the states in question have been formally designated as "state sponsors." Second, it amended a related statute (the Anti-Terrorism Act or "ATA")[60] to expose foreign states and their agencies and instrumentalities (as well as private parties) to civil liability for aiding and abetting (and conspiring to commit) acts of terrorism through the provision of material support.

Regarding the first change, JASTA permits suits for money damages against foreign states for claims arising from physical injury, death and damage to property caused by (1) an act of international terrorism occurring in the United States and (2) a tortious act of a foreign state or its officers, employees or agents

[54] *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9 (D.C. Cir. 2015).

[55] *See Rux v. Republic of Sudan*, 461 F.3d 461, 472 (4th Cir. 2006); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127-1128 (D.C. Cir. 2004).

[56] *Roth v. Islamic Republic of Iran*, 2015 WL 349208 (D.D.C. 2015).

[57] *Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138 (D.D.C. 2016).

[58] *Foley v. Syrian Arab Republic*, 2017 WL 1373231 (D.D.C. 2017).

[59] Justice Against Sponsors of Terrorism Act, Pub. L. 114–222, Sept. 28, 2016, 130 Stat. 854, codified at 28 U.S.C. § 1605B.

[60] The Anti-Terrorism Act, 28 U.S.C. 18 U.S.C. § 2333 *et seq*.

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acting within the scope of their office, employment or agency anywhere in the world, (3) whether or not the state in question has been designated as a state-sponsor of terrorism.[61] Importantly, the amendment did not modify the existing "state sponsors of terrorism" exception under § 1605A.[62] Instead, it has in effect broadened the separate non-commercial tort rule under § 1605(a)(5) by eliminating the requirement (in relation to terrorism cases) that the "entire tort" must have taken place in the United States. Accordingly, *any* foreign state (whether or not a designated "state sponsor") may now be subject to U.S. jurisdiction no matter where the alleged supporting tortious acts or omissions (the aiding and abetting) took place – as long as the act of terrorism itself occurred in the United States.

The second change addressed a perceived limitation to the civil provisions of the ATA, which had been interpreted not to permit suits against third parties (such as banks) based claims of civil aiding and abetting through the provision of material support to those committing terrorist acts.[63]

The primary motivation behind these amendments was understandable frustration that victims and survivors of the "9/11" attacks have been unable to recover any damages against the alleged perpetrators despite having obtained final judgments in their litigation under other provisions of law. In addition, repeated allegations of Saudi Arabian support for the perpetrators of the attacks provided a critical political impetus for the necessary Congressional support. As enacted, the new law has potentially much broader application, and its implications are just beginning to be carefully explored.

7. Art Exhibition Activities

Since 1965, federal law has permitted the President to immunize from seizure works of art or other objects of cultural significance when their temporary exhibition or display in the United States is in the national interest.[64] The statute aimed at encouraging the exchange of artwork and objects that otherwise might not be made available for display. In one often-noted case, however, the court held that claims to such works could be pursued under FSIA's expropriation exception when they had been "taken in violation of international law."[65]

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[61] New 28 U.S.C. 1605B provides in relevant part: "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."

[62] Under 28 U.S.C. § 1605A(a)(2), the foreign state must have been "designated as a state sponsor of terrorism at the time the act ... occurred, or was so designated as a result of the act."

[63] *E.g., Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008).

[64] Immunity from Seizure Act, Pub. L. 89-259 (1965), codified at 22 U.S.C. § 2459.

[65] *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007).

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In consequence, a new section was added to the FSIA in December 2016, clarifying that (subject to certain requirements) transnational loans of artwork do not constitute "commercial activity," thus removing them from the scope of 1605(a)(3).[66] Two exceptions apply: one for art allegedly taken by the German (or certain other affiliated) governments between 1933 and 1945, and the other for works taken by a foreign government "as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group" after 1900.

The new statute applies only with respect to works imported for temporary exhibition of display and does not otherwise alter the requirements with respect to suits to recover damages for the wrongful taking of property by foreign governments (including personal property, cultural objects, artworks, religious items, etc.), including demonstrating the requisite commercial activity.[67]

C. Enforcement of Judgments

As a general rule under the FSIA, a foreign state's property in the United States is immune from attachment, arrest, or execution unless a specific exception applies.[68] Pre-judgment attachment is not authorized,[69] and certain categories of property (including, for example, funds held in the name of a foreign central bank or monetary authority for its own account, or property of a military character or used for a military activity) are provided specific statutory immunity.[70]

1. Commercial Property

The main exception for post-judgment execution is for state property used for a commercial activity in the United States and for the commercial activity upon which the claim is based.[71] Under this exception, courts examine whether the actions the foreign state performed with respect to the property were those in which a private party engages in trade and traffic or commerce.

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[66] The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319 (2016), 130 Stat. 1618, to be codified at 28 U.S.C. §1605(h).

[67] See, *e.g.*, *Agudas Chasidei Chabad of United States v. Russian Federation*, 128 F. Supp. 3d 242 (D.D.C. 2015); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (2010).

[68] 28 U.S.C. § 1609.

[69] This includes remedies that are "the functional equivalent of attachment, arrest, and execution such as restraining notices, turnover proceedings, injunctions against sovereign property, or requirements to post prejudgment security that "would create precisely the same result that would obtain if the foreign sovereign's assets were formally attached." See *Thai Lao Lignite (Thailand) Co., Ltd. v. Government of Lao People's Democratic Republic*, 2013 WL 1703873 *3-4 (S.D.N.Y. 2013).

[70] 28 U.S.C. § 1611.

[71] 28 U.S.C. § 1610(a).

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In *Export-Import Bank of the Republic of China v. Grenada*, the Second Circuit Court of Appeals agreed with the Fifth and Ninth Circuits that the analysis under § 1610(a) must focus not on how the state made or obtained the money, but on how it uses it.[72] The plaintiffs in that case were seeking to enforce a judgment against Grenada by attaching funds owed to Grenadian statutory corporations by commercial third parties (such as airlines and cruise lines with United States-based operations). The court held that the source of these funds was irrelevant; rather, the relevant question was "the *use* to which Grenada puts – or clearly intends to put, by virtue of some formal designation or other specific means – the funds at issue." As most funds were used for public functions and the maintenance of facilities and services in Grenada, they failed both the "commercial use" and the "in the United States" prongs of section 1610(a).[73]

In *Rubin v. Islamic Republic of Iran*, the plaintiffs attempted to enforce a $71.5 million default judgment arising from a suicide bombing perpetrated by Hamas on a crowded pedestrian mall in Jerusalem by attaching certain Iranian artifacts in the possession of museums within the United States on the ground that they were used for commercial activity.[74] The court rejected their efforts, holding that while § 1610 does not explicitly require that the commercial activity be carried out by the state, the context demonstrates that it is the sovereign's commercial activities that subject the property to attachment. Additionally, it held that under the circumstances the museums were not agents of Iran whose activity could be attributed to the state, since Iran had no control over their activities and because the museums were acting for their own benefit, not for the benefit of Iran.

2. Terrorism Judgments

Special (and increasingly complex) rules apply with respect to judgments rendered against designated state sponsors of terrorism. The reason is simple. While a number of victims of terrorism have won billions of dollars in default judgments under the terrorism exception, they have found it very difficult to locate assets in the United States against which those judgments can be enforced.

In response, Congress has adopted a number of measures which have in turn raised complicated legal issues. The Terrorism Risk Insurance Act of 2002 (TRIA),[75] for instance, allows plaintiffs to execute their judgments against blocked assets of a terrorist party as well as the assets of an agency or instrumentality of that terrorist party. In one case, plaintiffs sought to attach funds that a foreign central bank had directed JPMorgan to transfer from the central bank's own account to an Iranian engineering firm. The court determined that the statute's

[72] *Export-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75 (2nd Cir. 2014).

[73] *Id.* at 91.

[74] *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), petition for certiorari pending.

[75] The Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (2002), codified in part at 28 U.S.C. §1610.

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broad authorization preempted any statutory immunity from attachment under the FSIA, including central back immunity under §1611.[76]

Some courts have had to analyze whether electronic fund transfers ("EFTs") could be considered blocked assets subject to TRIA. For example, in *Heiser v. Islamic Republic of Iran*,[77] the question was whether Iran had any property interest in EFTs that had been destined for accounts in Iranian banks but were blocked and held in a frozen account in the United States. The court answered in the negative.

Subsequently, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012,[78] which (among other things) made available for post-judgment execution some $2 billion in assets held in New York on behalf of Bank Markazi (the Central Bank of Iran.) Those assets had been restrained in court proceedings in New York.[79] Bank Markazi contended that the blocked assets were not its assets but instead belonged to a financial intermediary which held them in the United States on Bank Markazi's behalf. The statute, however, required the courts to determine that "Iran holds equitable title to, or the beneficial interest in, the assets" and that no other person possesses "a constitutionally protected interest in the assets" under the Fifth Amendment to the Constitution of the United States. Markazi challenged the law on the basis that it impermissibly specified the outcome of the pending judicial proceeding.

In *Bank Markazi, aka Central Bank of Iran v. Peterson*, the U.S. Supreme Court rejected Iran's separation of powers argument.[80] It relied on the long-established principles that legislation may be "particularized," that Congress may "make valid statutes retroactively applicable to pending cases," and that Congress "may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." The Act, it said, simply establishes new substantive standards to be applied by the lower court to the facts as it determines them. A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts."[81]

In response, Iran filed a claim against the United States with the International Court of Justice alleging violations of the bilateral Treaty of Amity, Economic Relations, and Consular Rights, including the denial of "fair and equitable treatment" and "freedom of access to the courts," the application of "unreasonable or discriminatory measures," and the taking of property of Iranian nationals without "prompt payment of just compensation." It also alleged viola-

[76] *Levin v. Bank of New York Mellon*, 2011 WL 812032 (S.D.N.Y. 2011).

[77] *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013).

[78] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258-1260 (2012).

[79] *Peterson v. Islamic Republic of Iran*, 561 Fed. Appx.9 (D.C. Cir. 2014); see also *Hausler v. JP Morgan Chase Bank NA,* 845 F. Supp. 2d 553 (S.D.N.Y. 2012).

[80] *Bank Markazi v. Peterson*, --- U.S. ---, 136 S. Ct. 1310 (2016).

[81] *Id.* at 1325.

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tions relating to the U.S. courts' failure to recognize the "separate juridical status (including the separate legal personality) of all Iranian companies".[82]

3. Post-Judgment Discovery

In 2014, in *Republic of Argentina v. NML Capital, Ltd.*, the U.S. Supreme Court held that the FSIA does not restrict the discovery of a foreign state's extraterritorial assets in aid of post-judgment attachment.[83] The case resulted from an attempt by holders of unpaid bonds issued by the government of Argentina to collect on judgments totaling more than $2.5 billion. Argentina refused to comply with the court's rulings, instead transferring significant assets out of the United States to avoid execution. In response, the judgment creditors sought to attach Argentine assets both in the United States and elsewhere. They also served subpoenas on various banks in an effort to identify the government's accounts and assets wherever located.

Argentina objected on the grounds that such efforts violated the FSIA. Both the district and appellate courts rejected those objections, and the Supreme Court affirmed. Assuming (without deciding) that the discovery NML had requested was within the scope of discovery ordinarily authorized by federal procedural rules, the Court focused on the narrow question whether the Foreign Sovereign Immunities Act actually specifies a different rule for post-judgment discovery when the judgment debtor is a foreign state. It held that the statute does not.

Writing for the Court, Justice Scalia said that the FSIA guarantees two forms of immunity to foreign states: immunity from the jurisdiction of U.S. courts and immunity from attachment of assets in the United States. No provision of the FSIA forbids or limits discovery in aid of execution of a judgment against a foreign state's assets. Without a "plain statement" to the contrary, the statute could not be understood to preclude ordinary federal discovery rules, even if the property in question might eventually be held immune from execution (for example, diplomatic or military property). Concerns about the possible foreign-relations consequences of that fact, he noted, "are better directed to that branch of government with authority to amend the Act," *i.e.*, the legislature.[84]

Justice Ginsburg dissented, arguing among other things that unless NML could prove that other nations would allow unconstrained access to Argentina's assets, U.S. courts should not "indulge the assumption that ... the sky may be the limit for attaching a foreign sovereign's property."[85]

In a related case decided shortly after the Supreme Court's judgment,[86] a federal court of appeals rejected Argentina's further arguments that discovery

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[82] See Certain Iranian Assets (Islamic Republic of Iran *v.* United States of America), proceedings instituted June 14, 2016, at http://www.icj-cij.org.

[83] *Republic of Argentina v. NML Capital, Ltd.*, --- U.S. ---, 134 S. Ct. 2250 (2014).

[84] *Id.* at 2258.

[85] *Id.* at 2259.

[86] *Aurelius Capital Master, Ltd. v. Rep. of Argentina*, 589 Fed. Appx. 16 (2nd Cir. 2014).

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should be disallowed with regard to diplomatic, consular or military property that might be immune from attachment as well as official documents that might be privileged. Insofar as the discovery seeks to reach property that is immune from attachment under the FSIA or international law, the court noted, Argentina should object if and when appellees actually seek to execute on such property. While emphasizing that the potential immunity of property from attachment does not preclude discovery of information about that property, the court stressed that Argentina – like all foreign sovereigns – is entitled to a degree of grace and comity. Those considerations are "of particular weight when it comes to a foreign sovereign's diplomatic and military affairs," it said, and it urged the lower court to consider "closely" Argentina's sovereign interests in managing discovery and to prioritize discovery of those documents that are unlikely to prove invasive of sovereign dignity.[87]

III. Sovereign Immunity in the Restatement (Fourth) of Foreign Relations Law

In U.S. practice "Restatements of the Law" are prepared and published by the American Law Institute (ALI), a private organization of some 3000 elected members (including law professors, attorneys, judges and other professionals) for the purpose of promoting the clarification and simplification of U.S. law, in particular the common (or judge-made) law. Restatements are not themselves primary law but rather analytical commentary designed to identify the rules and trends in various substantive areas. Because they are carefully done, many U.S. courts consider them highly persuasive authority.

The Restatement of Foreign Relations Law addresses issues of international as well as domestic law more specifically, the way in which international law is viewed and implemented by the United States, especially by our courts. The first Restatement in this area was published in 1965 and covered both international law as it applies to and in the United States and domestic U.S. law that has substantial foreign relations or international law consequences. For various reasons, it was called the Second (even though it was actually the first). The next version was logically denominated the Restatement (Third), published in 1987.

Over the past three decades, the Restatement (Third) proved extremely influential in a range of areas, from the formation and content of customary international law to the extent of extraterritorial jurisdiction. Inevitably, with the growth and development in international law and practice, and the ever-expanding range of legal issues and topics relevant to the foreign relations practice of the United States, the Restatement (Third) became dated.

Accordingly, about four years ago, the ALI decided to undertake a revision – the Restatement (Fourth) of Foreign Relations Law - focusing on just three areas in which (i) there have been significant developments and (ii) there

[87] *Id.* at 18.

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appears to be a relative consensus on the state of the law. Those three areas are jurisdiction, the domestic effect of treaties, and sovereign (or state) immunities. Eight reporters were chosen, all professors and many with governmental experience,[88] divided into three teams each covering one of the main topical areas. As of May 2017, work on these three areas was substantially completed and approved by the ALI's membership. It remains to combine the various texts into a single coherent document.[89]

At the most general level, most readers will find the new texts to be somewhat more constrained than the Restatement (Third), both in scope and focus. The prior version covered a wide range of substantive international law topics and was mostly interested in U.S. views on those international law topics. By contrast, the Restatement (Fourth) has focused on just three specific areas thought to be most helpful to judges, academics and practitioners, and in those areas, the emphasis has been more on the relevant domestic law than on international law.

With regard to immunities, it seemed appropriate to focus on U.S. practice in the area of sovereign (or state) immunity, particularly given the significant amount of litigation under, and several legislative amendments to, the Foreign Sovereign Immunities Act. Accordingly the relevant sections lay out in some detail the interpretation and application of the statute by U.S. courts. The new version does not deal with questions of immunities that fall outside the FSIA, such as (i) immunity for heads of state and government (or the relatively new field of "foreign official" immunity discussed below), (ii) treaty-based immunities, including those deriving from the Vienna Conventions on Diplomatic and Consular Relations, or (iii) the immunities of the United Nations and other international organizations. These other areas may be taken up in a subsequent effort.

In the new version, the treatment of foreign sovereign immunity issues has been reorganized and expanded. For example, it seemed logical (and likely more helpful to courts and practitioners) to follow the structure of the FSIA itself and to provide considerably more detail. In consequence, the various exceptions to immunity in the FSIA now each have their own separate sections, and the discussion of issues and decisions is more substantial. As was the case in the Restatement (Third), the relevant content of international law is acknowledged and taken into account, including in some of the "black-letter" statements, especially where it is well-developed or important to the interpretation of the Act. Where there is variation in national practice around the world, it too is taken into account.

In outline, the discussion of sovereign (or state) immunity as applied in U.S. courts reprises the restrictive theory of immunity, states the general rules of U.S. law, covers the definition of a "foreign state" under the Act, and then goes into some detail on each of the particular exceptions to immunity. Attention is focused

[88] Paul Stephan (University of Virginia School of Law) and Sarah Cleveland (University of Columbia Law School) are the overall coordinators. The six other reporters include Professors Bill Dodge (UC Davis Law School), Curtis Bradley (Duke Law School), Ed Swaine (GW Law School), Anthea Roberts (Columbia and Australian National University), Ingrid Wuerth (Vanderbilt Law) and the author.

[89] What been approved so far (labelled "tentative drafts") is generally available online at the ALI website, <www.ali.org>. The final drafts of all three sections – treaties, jurisdiction, and immunities – were approved by the ALI in May 2017.

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primarily on the most-litigated exceptions to immunity under the FSIA, including the commercial activities exception, the exception for claims arising from agreements to arbitrate (§ 458), and proceedings against state sponsors of terrorism (§ 460) and the most recent changes resulting from the so-called "JASTA" law. Additional discussion is included on issues related to pre-trial discovery, default judgments, and post-judgment enforcement proceedings.

IV. Foreign Official Immunity

In 2010, the U.S. Supreme Court ruled in *Samantar v. Yousuf* that the FSIA does not apply to individual government officials.[90] In reaching that decision (and thereby resolving a long-standing disagreement among the lower courts), the Court focused in particular on the precise wording of the statute, which contains no reference to individual officials but defines the terms "state" and "agency or instrumentality" in ways that could not logically be intended to apply to a natural person. While in some circumstances the immunity of the foreign state can extend to an individual for acts taken in his official capacity, it said, that does not mean that Congress intended to codify that particular immunity in the FSIA.[91] Rather, such cases (*i.e.*, where the official is sued in his personal capacity and damages are sought from his own pockets) are properly governed by the common law. Thus, even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law.

In the wake of this decision, the law remains in a state of development. Federal courts have struggled to clarify the content and application of the relevant common law principles for foreign officials and have reached differing results. They have focused on two main issues: (i) how much deference to give statements or "suggestions of immunity" by the executive branch in particular cases and (ii) whether to recognize a *jus cogens* exception to so-called "conduct-based" immunity. Different courts have reached different results.

In *Samantar*, for instance, on remand from the Supreme Court's decision, the court of appeals distinguished cases involving heads of state and government (in which the views of the government are entitled to absolute deference) and instead ruled that in the case of other foreign officials the position of the executive branch, while not controlling, is entitled to "substantial weight."[92] Because Samantar himself was not a current head of state or government but rather a former official of a Somali regime ("a state with no currently recognized government to request immunity on his behalf") who had since become a resident of the United States, and since the case involved acts that allegedly violated *jus cogens* norms,

[90] *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010).

[91] *Id.* at 322. "Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Id.* at 325.

[92] *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012).

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the court found that he was not entitled to "conduct-based official immunity" under the common law.[93]

By contrast, in *Rosenberg v. Pasha*,[94] a different court of appeals ruled that "in the common-law context, we defer to the Executive's determination of the scope of immunity" and that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." It therefore affirmed the lower court's finding of conduct-based foreign official immunity in accordance with the executive branch's statement of interest.

More recently, in a case arising from the death of a U.S. citizen during the 2010 attack by the Israeli Defence Forces on the so-called Gaza Freedom Flotilla,[95] plaintiffs alleged that the defendant (a former Israeli Defense Minister and Prime Minister) had planned and directed the unlawful operation to intercept the *flotilla* and had personally authorized Israeli military forces to use lethal force against those on board, including their son. The trial court embraced the executive's suggestion of immunity and its rejection of a *jus cogens* exception to immunity, noting in its conclusion that "[t]he resolution of this dispute belongs with the Executive Branch, not the Judicial Branch."[96] Interestingly, some months earlier, in another case in the same district, the decision had been to follow the approach of the court of appeals in *Samantar*.[97]

Clearly, the law on these issues remains in flux. It is possible that the U.S. Supreme Court will address the issue in the relatively near future. In 2016, the court of appeals that decided *Samantar* affirmed its approach in another case involving a former officer in Somalia's army who was similarly accused of *jus cogens* crimes and the parties to that proceeding have sought review by the Supreme Court.[98]

[93] *Id.* at 775-78.

[94] *Rosenberg v. Pasha*, 577 Fed. Appx. 22 (2d Cir. 2014).

[95] *Dogan v. Barak*, 2016 WL 6024416 (C.D. Ca. Oct. 13, 2016), app. pending.

[96] *Id.* at *13.

[97] *Mireskandari v. Mayne*, 2016 WL 1165896 (C.D. Ca. Mar. 23, 2016), app. pending.

[98] *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016), petition for certiorari pending.

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RJR NABISCO V. EUROPEAN COMMUNITY AND THE REACH OF U.S. LAW

Aaron D. SIMOWITZ*

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VII. Conclusion

I. Introduction

In 2010, the United States Court of Appeals for the Second Circuit held in *Norex v. Access Industries* that the Racketeering Influence and Corrupt Organizations Act (RICO) did not apply extraterritorially.[1] It was an easy case. The U.S. Supreme Court had just forcefully reigned in extraterritorial application of U.S. laws in *Morrison v. National Bank of Australia*, holding that a U.S. statute would not apply extraterritorially unless it contained a "clear indication" to the contrary.[2]

Four years later in *European Community v. RJR Nabisco*, Judge Pierre Leval, writing for a panel of the same court, stated that the *Norex* Court had *not* held that RICO did not apply extraterritorially. In fact, the prior panel had only

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[1] *Norex Petroleum Ltd. v. Access Indus., Inc.,* 631 F.3d 29, 33 (2d Cir. 2010) (holding that *Morrison* "forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.").

[2] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261, 130 S. Ct. 2869, 2881 (2010) ("Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.").

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 195-210
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Printed in Germany

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held that RICO did not *always* apply extraterritorially. RICO could apply extraterritorially *sometimes*.[3] Judge Leval's colleagues described his opinion as a "new, and potentially far-reaching, judicial interpretation," with "little support in the history of the statute, its implementation, or the precedents of the Supreme Court," that "untethers RICO from its mooring on United States shores."[4] In 2016, a unanimous United States Supreme Court affirmed that aspect of Judge Leval's opinion.[5]

However, the Supreme Court did not quite "untether" RICO from U.S. shores. A narrow majority overruled Judge Leval on a late-breaking issue to the case: whether the presumption against extraterritoriality applied to the provision of RICO creating a private right of action. The majority held that that the presumption did apply and was not rebutted. Therefore the European Community's action failed for want of a domestic injury.[6]

One could plausibly argue that the Court simply continues to stagger through a thicket of its own planting. In *Morrison*, the Court did away with the venerable uncertainties of the conduct-and-effects test in favor of the novel and unexplored uncertainties of the presumption against extraterritoriality. Indeed, the *European Community* decision represents yet another mode of applying the *Morrison* presumption – the third in as many Supreme Court cases. The Court's decision also failed to resolve or even directly address the greatest post-*Morrison* mystery – how U.S. courts should determine whether a particular case with some foreign elements is, in fact, a permissible "domestic" application of U.S. law.

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[3] *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 136 (2d Cir.), reh'g denied, 764 F.3d 149 (2d Cir. 2014), and cert. granted, 136 S. Ct. 28, (2015), and rev'd and remanded, 136 S. Ct. 2090 (2016) ("The district court here construed our rejection in *Norex* of arguments that RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in *any* of its applications (…) This was a misreading of *Norex*.").

[4] *European Cmty. v. RJR Nabisco*, Inc., 783 F.3d 123, 127 (2d Cir. 2015) ("The panel opinion in this appeal is in taut tension with our earlier opinion (…)") (Jacobs, J.), *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 130 (2d Cir. 2015) ("After more than four decades of experience with this complicated statute, a panel of our Court has discovered and announced a new, and potentially far-reaching, judicial interpretation of that statute – one that finds little support in the history of the statute, its implementation, or the precedents of the Supreme Court.") (Cabranes, J.), *id*. at 131 ("In this civil case, a panel of the court untethers RICO from its mooring on United States shores and concludes, for the first time, that the statute reaches overseas.") (Raggi, J.). Judge Lynch was more equivocal, arguing that the panel's, although perhaps correct, should be reviewed by the full court. See *European Cmty. v. RJR Nabisco, Inc*., *id.* at 144 ("[T]he reasoning and result in this case are deeply in tension with the reasoning and result in *Norex,* whether or not those two holdings are ultimately irreconcilable. To the extent, however, that the other dissenters see the panel's approach to RICO and extraterritoriality as deeply disturbing, unprecedented, and inconsistent with *Morrison,* I respectfully disagree.").

[5] *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2105 (2016). ("Applying these principles, we agree with the Second Circuit that the complaint does not allege impermissibly extraterritorial violations of §§ 1962(b) and (c).").

[6] *Id.* at 2108 (2016) ("Nothing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.").

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But perhaps one meaningful principle can be drawn from the *European Community* decision. The Court held, albeit with various doctrinal gymnastics, that where concerns of the reach of U.S. law are implicated, the federal government may step in where private litigants should fear to tread. Not only does this principle make sense – it has been reaffirmed in many cases across various doctrinal areas.

II. The Path to *RJR Nabisco v. European Community*

The extraterritorial application of U.S. law was relatively unexciting for several decades before the *Morrison* decision. In a series of cases mostly involving antitrust and securities law, U.S. courts consistently held that U.S. law could apply where the relevant conduct occurred in the United States or its effects were felt there. The Restatement (Third) of Foreign Relations Law captured the principle nicely, observing that a state has jurisdiction to prescribe law with respect to "conduct that, wholly or in substantial part, takes place within its territory," or "conduct outside its territory that has or is intended to have substantial effect within its territory."[7] The Restatement (Third) further noted that "[e]ven when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable," provided a non-exhaustive list of factors for evaluating unreasonableness, and concluded that "[w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction," and that "a state should defer to the other state if that state's interest is clearly greater."[8]

A. The Conception of the Presumption against Extraterritoriality

In 1991, the Court fired a shot across the bow of the conduct-and-effects test, holding that the federal anti-discrimination law known as Title VII did not govern a suit by a U.S. citizen against a U.S. corporation where the relevant discriminatory conduct had occurred in Saudi Arabia. In *EEOC v. Aramco,* the Court exhumed (or perhaps invented) the "presumption against extraterritoriality" for the principle that, unless "the affirmative intention of the Congress [is] clearly expressed," courts must presume that a U.S. statute "is primarily concerned with domestic conditions."[9] However, *Aramco* seemed poised to be a footnote in the

[7] *Restatement (Third) of Foreign Relations Law* § 402 (1987).

[8] *Id.* at § 403.

[9] *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal citations and quotation marks omitted).

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history of transnational law. Congress overturned the result in *Aramco* with amendments to Title VII.[10] Two years later, the Court itself failed to cite *Aramco* or even refer to the presumption against extraterritoriality in its next decision on extraterritorial application of U.S. law, *Hartford Fire*, in which the Court applied the conduct-and-effects test to the reach of U.S. antitrust law.[11]

But reports of the presumption's death were greatly exaggerated. In 2010, the Court decided *Morrison*, in which Justice Antonin Scalia characterized the pre-existing conduct-and-effects test as "judicial-speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court."[12] Justice Scalia endorsed the view that the results were "unpredictable and inconsistent" and that, "[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[13]

Justice Scalia qualified the presumption in the face of a separate opinion by Justice Stevens, joined by Justice Ginsburg, that argued against throwing off the previous 50 years of jurisprudence. Justice Scalia was careful to state that the presumption was not a "clear statement rule" – rather it requires a "clear indication of extraterritoriality."[14] The Court did not give examples or explain how this "indication" would differ from a "clear statement." However, the Court allowed that "[a]ssuredly context can be consulted."[15] Again, the exact nature of this inquiry was left for others.

The Court doubled down on the presumption in *Kiobel v. Royal Dutch Petroleum*.[16] In *Kiobel*, the Court held that the presumption articulated in *Morrison* also applied to the Alien Tort Statute ("ATS"). The ATS is a bit of an enigma – it was enacted in 1789 and provides, in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[17]

The ATS has much to distinguish it from the Securities Exchange Act of 1934. The ATS quite clearly concerns transnational torts and is, at least in part, a

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[10] Congress amended the definitions of Title VII to include U.S. citizens working overseas. See Civil Rights Act of 1991, § 109(a), 105 Stat. 1077, codified at 42 U.S.C. § 2000e(f) ("With respect to employment in a foreign country," the term "employee" "includes an individual who is a citizen of the United States.").

[11] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

[12] *Morrison*, 561 U.S. at 261.

[13] *Id.* at 260-61.

[14] *Id.* at 265 ("But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule'.").

[15] *Id.*

[16] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) ("[W]e think the principles underlying the [presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS.").

[17] 28 U.S.C.A. § 1350.

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jurisdictional statute[18] – it vests U.S. Courts with the power to hear certain disputes.[19] Many commentators observed that the presumption against extraterritoriality should not apply to a jurisdictional statute and, even if it did, that the plain references to the international disputes should rebut the presumption.

The Court did not agree. It held that the "principles underlying the presumption against extraterritoriality" constrained "courts exercising their power under the ATS."[20] But the presumption was already showing fractures. The Court was plainly unable to cobble together a majority that could support a clear rule to define the reach of the ATS. The Court concluded that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[21] The Court gave no indication of what sort of facts would sufficiently "touch and concern" the United States – stating only the involvement of a U.S. corporate defendant was insufficient. Nor did the Court explain how the particular facts of a given case could alter a principle presented in *Morrison* as a pure "canon of construction." Despite these inconsistencies, *Kiobel* at least went some distance to answering the question of whether the *Morrison* presumption against extraterritoriality would apply beyond the narrow ambit of securities law. The answer was a resounding yes.

B. The (Mis)conception of the "Focus" Test

The greatest evil of *Morrison* and its progeny has not been the revivification of the presumption against extraterritoriality. *Morrison* laid out a "two-step" inquiry. If the presumption is not rebutted, the U.S. courts must then inquire whether the claim asserted merely presents a domestic application of the statute. "But," the *Morrison* Court cautioned, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[22] U.S. courts should not examine any or all domestic contacts, but should rather determine "the 'focus' of congressional concern" and inquire whether that "focus" is within the domestic boundaries of the United States. As an example, the Court stated the focus of Title VII in *Aramco* was not the tortious act or the place of the creation of the employment relationship, but rather the location of the employment – in that case, Saudi Arabia – though both employer and employee were U.S. nationals.[23]

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[18] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) ("The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action.").

[19] See *id.* ("It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.").

[20] See *id.* at 1665.

[21] See *id.* at 1669.

[22] *Morrison*, 561 U.S. at 266.

[23] See *id.* at 266.

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In *Morrison*, the Court rejected plaintiff's argument that the "focus" of the laws regulating securities fraud was the fraudulent act – rather, "we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." The Court explained that "[s]ection 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered'" and that "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude."[24]

The Court characterized this as a "transactional test" inquiring "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."[25] The *result* of this inquiry in *Morrison* itself may well have been correct. The Court cited Linda Silberman and Stephen Choi for the proposition that U.S. securities law should, for exchange-traded securities, be taken to regulate U.S. exchanges, both as a matter of conflict of laws and of deterrence of securities fraud. But the Court's approach left many unanswered questions: whether the "focus" test applied to all statutes; whether the "transactional" test should be the preferred approach to all statutes; and whether statutes could have only one focus, or several. The "focus" test worked well for the Securities Exchange Act of 1934 because, quite simply, that Act had a singular ascertainable focus – the exchange. It would soon become clear, however, that many U.S. laws did not share this important characteristic and that, even for laws with an ascertainable focus such as the Securities Exchange Act, application of the "focus" test would be far from simple.

C. The Reception of *Morrison*

Morrison and *Kiobel* produced clarity only in a few limited areas and arguably exacerbated unpredictability elsewhere. Even in U.S. securities law – the heartland of the *Morrison* opinion – the *Morrison* "two-step" approach has failed to illuminate more ground than it obscured.

The *Morrison* Court held that the exchange is the most sensible focus of regulation when fraud in exchanged-traded securities is concerned. In the Court's words: "And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." However, the Court seems not to have considered that the majority of securities transactions, such swaps or transactions involving privately-held companies, fall into that second category – "transactions in other securities."

U.S. courts were left to their own devices to determine whether these "off-exchange" transactions are "domestic." Unfortunately, modern transactions do not involve two parties meeting in person to exchange a clod of earth – making this inquiry far from trivial. The lower courts splintered off in multiple directions in attempting to pin down the "domestic" off-exchange securities transaction, endorsing tests turning on (among other factors), the place of the broker-dealer, the place

[24] See *id.* at 266-67 (internal citations omitted).

[25] See *id.* at 269–70.

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of closing, the identity of the parties, or the identity of the securities. The United States Court of Appeals of the Second Circuit sought to resolve the question by holding that the court would look to the place where "irrevocable liability was incurred or title was transferred" – whatever that means.[26] The court added that "transactional test announced in *Morrison* does not require" conduct in the United States.[27]

The United States Court of Appeals for the Second Circuit quickly retreated from this allegedly simple test. In *Porsche v. Parkcentral*, the plaintiff alleged a plainly domestic off-exchange securities transactions – a swap turning on the value on Volkswagen stock. The defendant, Porsche, had committed all of its allegedly fraudulent conduct abroad and had no awareness or connection with the swap at issue – apart from the fact that its fraudulent statements had dramatically affected the value of Volkswagen stock. In response, the United States Court of Appeals for the Second Circuit added an important qualification, holding that, "while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that these transactions were domestic would not *suffice* to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic."[28] There seemed to be a role for conduct, after all.

Perhaps inadvertently, the *Porsche* court gave a perfect encapsulation of the profound difficulties – and possible folly – of attempting to reduce this inquiry to a simple "focus" or "transactional" test:

> "The conclusion we have reached on these facts cannot, of course, be perfunctorily applied to other cases based on the perceived similarity of a few facts. In a world of easy and rapid transnational communication and financial innovation, transactions in novel financial instruments – which market participants can freely invent to serve the market's needs of the moment – can come in innumerable forms of which we are unaware and which we cannot possibly foresee. We do not purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial."[29]

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[26] *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68-69 (2d Cir. 2012) ("Accordingly, rather than looking to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States, we hold that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.").

[27] See *id.* at 69.

[28] *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014).

[29] See *id.* at 217.

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III. The *European Community* Decision

In 2000 – nine years after *Aramco* and eleven years before *Morrison* – the European Community filed suit against RJR Nabisco in U.S. court, alleging the RJR had coordinated a transatlantic conspiracy to smuggle cigarettes into the E.U. to evade E.U. taxes. In its first incarnation, the suit was dismissed under the common-law revenue rule – the principle that "no sovereign shall take notice of the tax or penal laws of another." The European Community amended its complaint and restyled the action as seeking redress for an international money laundering and drug trafficking conspiracy, of which cigarette smuggling was a key part. In this manner, the European Community evaded the reach of the revenue rule – but the more significant problem that would later be posed by *Morrison* remained.

The European Community brought suit under RICO, presumably attracted by, among other features, its promise of treble damages. The RICO statute originated in the quest to find new statutory tools to fight organized crime – although it has long since been pressed into service in many different disputes. Among other purposes, the RICO statute seeks to eliminate the need to prove the interconnections that are elements of a traditional conspiracy. Instead, RICO enumerates certain "predicate acts" which must be part of a "pattern of racketeering activity" and then permits liability for these acts to be imputed to all members of the corrupt "enterprise."

Of the many listed predicate acts, fewer than 30 have explicitly extraterritorial scope.[30] In *Norex*, the United States Court of Appeals for the Second Circuit held that the mere incorporation of these extraterritorial predicate acts was insufficient to rebut the presumption against extraterritoriality. The district court in *European Community* followed suit, holding that the European Community's suit must be dismissed.

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[30] In the Court's words:

> "These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when 'the defendant is a United States person,' to offenses that 'tak[e] place outside the United States'." 18 U.S.C. § 1957(d)(2). Other examples include the prohibitions against the assassination of Government officials, § 351(i) ("There is extraterritorial jurisdiction over the conduct prohibited by this section"); § 1751(k) (same), and the prohibition against hostage taking, which applies to conduct that "occurred outside the United States" if either the hostage or the offender is a U.S. national, if the offender is *2102 found in the United States, or if the hostage taking is done to compel action by the U.S. Government, § 1203(b). At least one predicate – the prohibition against "kill[ing] a national of the United States, while such national is outside the United States" – applies *only* to conduct occurring outside the United States. § 2332(a). (*RJR Nabisco, Inc.*, 136 S. Ct. at 2101–02)."

See also *European Cmty.*, 783 F.3d at 125 ("Since 2001, Congress has added additional explicitly extraterritorial crimes to RICO, for a total of nearly 30 predicate racketeering acts that expressly apply to foreign conduct, nearly all of them relating to international terrorism directed against United States interests.").

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The United States Court of Appeals for the Second Circuit reversed. The Court of Appeals held that RICO could apply extraterritorially to the extent that the plaintiff alleged one of the underlying extraterritorial predicate acts – but only in that instance. Extraterritorial application of RICO became of sort of on-off switch: If the plaintiff alleged violations of one of the extraterritorial predicate acts – say, international hostage taking or international money laundering – the various provisions of the RICO statute would click into place even if the hostage taking or money laundering was extraterritorial. But if the alleged extraterritorial conduct at issue was merely covered by a "domestic" predicate act – say, wire or mail fraud – the tools of RICO would not apply. As mentioned above, Judge Leval's colleagues on the Second Circuit characterized this holding as "a new, and potentially far-reaching, judicial interpretation of that statute – one that finds little support in the history of the statute, its implementation, or the precedents of the Supreme Court" that "untethers RICO from its mooring on United States shores" and was "deeply in tension with the reasoning and result in *Norex*."

A late-breaking issue intruded on the case. The panel had considered only the conduct-regulating provisions of RICO. In a petition for rehearing, RJR Nabisco argued that the court had failed to properly apply the presumption against extraterritoriality to RICO section 1964(c), which requires that a private plaintiff must allege an injury arising from racketeering conduct. RJR Nabisco claimed that the presumption applied to this private action provision and was not rebutted. Therefore, the court must look to the focus of 1964(c) – the injury – and require than any alleged injury be domestic. The panel rejected this argument in a footnote.[31] A day after RJR Nabisco filed a subsequent petition for rehearing *en banc*, another panel of the same court issued a conflicting decision concerning a similarly structured statute.[32]

The Court granted certiorari on both issues. The Court unanimously affirmed the principal holding of the lower court, endorsing Judge Leval's novel approach to the *Morrison* presumption. However, the Court overturned the lower court on the application of the *Morrison* presumption to 1964(c), the provision of

[31] *European Community v. RJR Nabisco, Inc.*, 764 F.3d 149, 151 (2d Cir. 2014) ("If an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, we see no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute."). In the same opinion, the panel also ordered an amendment to its original opinion to include a footnote addressing the 1964(c) issue. *Id.* at 151, n.1.

[32] *Loginovskaya v. Batratchenko* applied the *Morrison* presumption to a private civil action under the Commodity Exchange Act (CEA). 764 F.3d 266, 272 (2d Cir. 2014) ("*Morrison* thus simplified and reinforced this canon of construction, and thereby discouraged courts from making fussy distinctions in deciding whether or not the presumption applies.") The panel held that the *Morrison* presumption applied to the private right of action provision of the CEA. The panel therefore required a domestic injury to bring a private action under the CEA and dismissed the case for want of such an injury. Judge Lohier authored a dissent, reasoning that "the presumption has nothing to do with statutory provisions (…) that merely define *who* may assert a private right of action." *Id.* at 274 (emphasis in original) (Lohier, J., dissenting). RJR Nabisco submitted a letter brief to the court, stating that the *European Community* panel's decision now conflicted with both *Loginovskaya* and *Norex*.

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RICO providing for a private of right of action. This secondary holding proved fatal to the European Community's claim as it did not attempt to assert any injury in the United States.

IV. *European Community* and the Complication of the Presumption against Extraterritoriality

The *Morrison* Court justified its demolition of the conduct-and-effects test by promising greater simplicity. The *European Community* decision stands as the latest evidence that, in practice, the operation of the presumption against extraterritoriality is anything but.

The *Morrison* Court proposed one mode of applying the presumption against extraterritoriality: If the presumption applies, look for a "clear indication" that it has been rebutted, bearing in mind that "context can be consulted." If the presumption is not rebutted, determine the "focus" of the statute, then assess whether, under the alleged facts, the focus presented in a particular action is foreign or domestic. The *Kiobel* Court laid out a different mode of applying the presumption against extraterritoriality: Examine whether the facts alleged in particular case sufficiently "touch and concern" the United States. The *Kiobel* approach appears both more flexible and vaguer than the *Morrison* approach. *European Community* lays out yet another approach to the presumption against extraterritoriality. Now, a statute may contain "a clear, affirmative indication" that it applies extraterritorially, and yet apply extraterritorially "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially."[33]

In one sense, this holding of *European Community* may have little impact. Few statutes have RICO's peculiar structure of incorporating a laundry list of predicate acts as elements of the offense. On other hand, some of these statutes are rather important. The whistleblower provisions of the Dodd-Frank Act are one prominent example where the issue of extraterritorial application has already begun to be litigated. The United States Court of Appeals for the Second Circuit had held, prior to *European Community*, that the whistleblower protections of Dodd-Frank did not apply extraterritorially, even though plaintiff argued that those provisions incorporated underlying statutes that could clearly operate extraterritorially.[34]

The principal holding of *European Community* may also have surprising effects in another way – the Court confirmed that the seemingly stringent standard of a "clear and unmistakable" indication of extraterritoriality can be met by statutory language incorporated only by reference. The conduct regulating provisions of RICO contained no indication of extraterritoriality, clear, unmistakable, or other-

[33] *RJR Nabisco, Inc.*, 136 S. Ct. at 2102.

[34] *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 330 (S.D.N.Y. 2013), aff'd sub nom. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014).

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wise. The indications of extraterritoriality were contained only in the predicate acts, which were incorporated by reference.

More broadly, the Court held for the first time in *European Community* that the presumption against extraterritoriality was rebutted by mere "context." However, if *European Community* is to be the bar by which all arguments for "context" are measured, it may be a high bar indeed. The context at issue here were the extraterritorial predicate acts, which were (i) part of the statutory text and (ii) explicitly incorporated by reference. Though *European Community* may have set a high bar, the decision may well shift the ground sharply in favor of extraterritorial application of U.S. law in another high-profile, long-running dispute – the ongoing attempt to claw back assets distributed as part of Madoff Securities $65 billion Ponzi scheme.

For several years, the Trustee for Madoff Securities has been struggling to recover payments made to foreign investors in the Madoff scheme. Many of these foreign investors made their investments through foreign "feeder funds" – foreign affiliates of Madoff Securities typically organized in the British Virgin or Cayman Islands. In turn, they were paid their "profits" through these funds, rendering the transactions, in the view of the district court, foreign. The Trustee therefore argued that Section 550 of the Bankruptcy Code, which empowers him to claw back these funds, applies extraterritorially. The Trustee's argument turns entirely on language incorporated by reference into 550(a)(2), specifically that the "property of the estate" includes, as specified in another section of the Code, "all the following property, wherever located and by whomever held . . . .".[35]

Finally, the language of Justice Alito's opinion may give cause to think that *European Community* is another narrowing of extraterritorial application of U.S. law, following the trend of *Morrison* and *Kiobel*. Where Justice Scalia in *Morrison* required a "clear indication" to rebut the presumption, Justice Alito now requires a "clear and unmistakable" indication. Where the *Kiobel* Court was careful to state that the ATS was not a "pure" jurisdictional statute, but rather a hybrid giving judges license to recognize causes of action found in international law – the *European Community* Court now off-handedly describes the ATS as merely another "jurisdictional statute." Setting aside the looseness of the opinion's choice of words, the Court nonetheless unanimously embraced a novel approach to rebutting the presumption that the lower federal courts did not even envision before Judge Leval authored his *European Community* opinion.

V. Private Actions under U.S. Law after *European Community*

The European Community won on the issue that consumed the vast majority of the lower court's attention – whether the conduct-regulating provisions of RICO applied abroad. And yet, it still lost. The Supreme Court reversed the lower court

[35] 28 U.S.C. 541.

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on the issue that came to the case at the last moment – whether the presumption against extraterritoriality applied to the provision of RICO that merely created a private right of action.

The Court relied on two principles derived from *Morrison* and *Kiobel*: (1) that the presumption against extraterritoriality applies to *all* statutes; and (2) that each provision of a statute must be assessed separately (although, "assuredly context can be consulted"). Justice Ginsburg authored a dissent arguing that the majority was wrongly equating deference to foreign sovereigns with keeping litigation away from U.S. courts and U.S. law. In fact, she argued that foreign sovereigns could just as easily be offended by a refusal to apply U.S. law to U.S. defendants. Indeed, that tension was especially finely drawn in this case, where a foreign authority itself – the European Community – was seeking to apply U.S. law against a domestic defendant.

The majority's response may not have been entirely satisfactory. And yet, the result is defensible. The secondary holding in *European Community* will bar many private plaintiffs from invoking extraterritorial application of U.S. law. In those same cases however, the U.S. government will be able to proceed. This division – that the U.S. sovereign may reach across borders when a private person could not – is endorsed in numerous areas of private international law.

The U.S. Supreme Court has held that the government may obtain extraterritorial asset freezes,[36] when a private plaintiff could not.[37] The Court noted that U.S. courts may "go much farther" in granting relief "in furtherance of the public interest" than when only "private interests are involved."[38] In *Pasquantino v. United States*, the Supreme Court has held that the common-law revenue rule will not apply to bar an action by a U.S. prosecutor, even if the only injuries alleged are to foreign parties, the relief will be for those foreign parties, and the same action by those foreign parties would be barred.[39] A government suit "creates little risk of causing international friction through judicial evaluation of the policies of foreign

[36] See *United States v. First Nat. City Bank*, 379 U.S. 378, 384–85 (1965) ("The District Court reserved power to enter any protective order of that character. And if, as is argued in dissent, the litigation might in time be embarrassing to United States diplomacy, the District Court remains to the Executive Branch, which, it must be remembered, is the moving party in the present proceeding." (internal citation omitted)).

[37] In *Grupo Mexicano v. Alliance Bond Fund*, the Supreme Court distinguished *First National*, noting that the public interest was implicated. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund*, 527 U.S. 308, 326 (1999).

[38] *Id.* at 383. See also A. D. SIMOWITZ, Siting Intangibles, 48 J. *Int'l L. & Pol*. 259, 313 (2015) ("Lastly, the blessing of the Executive Branch lessens concerns associated with the extraterritorial application of laws, either from foreign states into the United States or from the United States into foreign states.").

[39] *Pasquantino v. United States*, 544 U.S. 349, 364 (2005). ("None involved a domestic sovereign acting pursuant to authority conferred by a criminal statute. The difference is significant. An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension, to our knowledge, is unprecedented in the long history of either the revenue rule or the rule against enforcement of penal laws.").

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sovereigns," because one "may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with [other sovereigns], and concluded that it poses little danger of causing international friction."[40]

Lower courts in the U.S. have often used this principle to distinguish between extraterritorial discovery requests sought by the government versus those sought by private parties.[41] Even the *Norex* panel – which held that RICO did not apply extraterritorially – was careful to note that its holding did not apply to government prosecutions.[42]

The U.S. Congress struck exactly this balance after the Supreme Court's decision in *Morrison*. Section 929P(b) of Dodd-Frank explicitly conferred extraterritorial scope on the statute, but only in a limited context. Section 929P(b) amended three statutory sections[43] by adding a new subsection on "Extraterritorial Jurisdiction." Each of the three provisions granted jurisdiction to the federal courts over an "action or proceeding brought or instituted by the Commission or the United States" that alleged a statutory violation involving either (1) "conduct within the United States that constitutes significant steps in furtherance of the violation," even if the relevant transaction or violation occurred outside the United States and involved only foreign investors; or (2) "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[44]

Justifications for this principle vary. Perhaps the government can be counted to balance the relevant interests – for example, giving offense to foreign sovereigns versus prosecuting conduct that arguably takes place in or affects the United States. Perhaps the courts ought not to make the determination themselves for separation of powers reasons – even if the typical assistant U.S. attorney is not much concerned with foreign sovereigns at all. And perhaps that typical assistant U.S. attorney is principally concerned with domestic matters, and therefore a prosecution strongly suggests that the disputed matter has a strongly domestic component.

Although defensible, the Court's holding in *European Community* does make a peculiar discontinuity with *Morrison*. The only reason that this issue did not arise in *Morrison* was that private right of action is implied in the Securities Exchange Act – which is a polite way to say judicially created. It is rather odd to say that Congress creates an additional hurdle to cross-border actions – such as a domestic injury requirement – when it writes an explicit private right of action, but not when that right of action is read into the statute by judges.

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[40] See *id.* at 369.

[41] See*, e.g. Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (noting the difference between a subpoena issued by the government and one issued by a private party).

[42] See *Norex*, 631 F.3d at 33 (holding that civil RICO did not apply extraterritorially, but declining to extend that holding to criminal RICO);

[43] 15 U.S.C. § 77v(a), 15 U.S.C. § 78aa, and 15 U.S.C. § 80b–14.

[44] See generally *Asadi v. G.E. Energy (USA)*, LLC, No. CIV.A. 4:12-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012), aff'd sub nom. *Asadi v. G.E. Energy (USA)*, L.L.C., 720 F.3d 620 (5th Cir. 2013).

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VI. The Continuing Mysteries of the "Focus" Test

European Community is also notable for the issue it failed to resolve – the ongoing confusion surrounding the determination and application of *Morrison*'s focus test. The "rather simplistic 'focus' test adopted by the Supreme Court in *Morrison*"[45] has produced difficulties in two circumstances – first, where a statute does not have a readily ascertainable single focus, and second, where the alleged focus is difficult or impossible to pin down in one location.

The RICO litigation in *European Community* illustrates both problems. The RICO statute requires as elements both a "pattern of racketeering activity" and a criminal "enterprise," as well as injury deriving from the racketeering conduct for a private action. Some courts had held that the focus of RICO was the "pattern of racketeering activity," other that the focus was the criminal "enterprise." Before the Supreme Court, the U.S. government as *amicus curiae* urged that the statute could have multiple *foci* – the pattern, the enterprise, or the injury – distinguishing RICO from a statute with a single focus, as in *Morrison*.

The Supreme Court's holding did not require it to reach the "focus" issue – but it nevertheless spared a few paragraphs to critique RJR Nabisco's theory that the criminal "enterprise" was the focus of RICO.[46] First, the Court noted that a criminal "enterprise" is difficult to locate precisely.[47] Second, the Court observed that, if a method for precisely locating the "enterprise" were devised (for example, the "nerve center" test used in diversity jurisdiction[48]), it would be too easy for racketeers to avoid RICO's reach by locating their headquarters abroad.[49] Third, the Court stated that any "domestic enterprise" requirement would undermine the purposes of RICO by permitting foreign racketeers to operate in the United States without the threat of RICO, and would create tension with the general principle of

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[45] Matter of Warrant to Search a Certain E–Mail Account Controlled & Maintained by Microsoft Corp., 829 F.3d 197, 229 (2d Cir. 2016) (Lynch, J., concurring).

[46] The Court also clarified that the statutory "indication" of extraterritoriality did not have to be found in the section of the statute that constitutes the statute's "focus." See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. at 2103 (2016) ("This argument misunderstands *Morrison* (…). [O]nly at the second step of the inquiry do we consider a statute's 'focus.' Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the 'focus' step.").

[47] See *id.* at 2104 ("It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results (…) RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic.").

[48] *Id.* at 2104–05 ("The nerve center test, developed with ordinary corporate command structures in mind, is also ill suited to govern RICO association-in-fact enterprises, which «need not have a hierarchical structure or a 'chain of command.'»" (citing *Boyle v. United States,* 556 U.S. 938, 948)).

[49] *Id.* at 2104 ("It would exclude from RICO's reach foreign enterprises – whether corporations, crime rings, other associations, or individuals – that operate within the United States.").

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applying U.S. law to persons on U.S. soil.[50] In short, the Court expressed skepticism of proposed *foci* that would be difficult to locate, permit evasion of U.S. regulation, and be in tension with both the substantive statute and the U.S. approach to private international law.

The focus test will continue to cause confusion, forcing future U.S. courts to carefully mine these few paragraphs of *dicta* for guidance. As noted above, *Morrison*'s focus test has fostered uncertainty even in securities fraud law – *Morrison*'s heartland. *Morrison* insisted that the "transaction" was the focus of securities law for "off-exchange" transactions – but determining the location of a complex securities transaction has proved both difficult and unsatisfactory. The Madoff litigation has involved not only the question of whether Section of 550 of the Bankruptcy Code applies abroad, but also, what constitutes a "domestic application" of the Code. Once again, U.S. courts are split as to whether the "focus" of the statute is the ultimate transaction, the initial fraudulent transaction, or the bankrupt's estate. As of this writing, the Madoff Trustee is seeking certification of this issue to the appellate court.

In another much watched case, U.S. prosecutors sought a "warrant" under the Stored Communications Act (SCPA) to obtain information from an e-mail account associated with Microsoft servers in Dublin, Ireland. The main issue was not whether the language of the SCPA rebutted the presumption against extraterritoriality, but rather whether the "focus" of the SCPA was the "place of production" – Microsoft's headquarters in the United States – or the place where the data was allegedly stored – Ireland. The magistrate judge and district judge held that the focus of the statute was where the government reviewed the data – clearly in the United States. The appellate court held that the focus of the statute was "the invasion of privacy." The court oddly equated this "invasion of privacy" with the location of Microsoft's Irish servers. This decision has already been criticized by other U.S. courts, which have declined to follow it,[51] and by other members of the appellate court, who described it as "not marginally more useful than thinking of Santa Claus as a denizen of the North Pole,"[52] and a severe

[50] *Id.* ("Congress, after all, does not usually exempt foreigners acting in the United States from U.S. legal requirements."). See also *Norex*, 764 F.3d, at 138 ("Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.").

[51] In re Search Warrant No. 16–960–M–01 to Google, No. 16-1061-M, 2017 WL 471564, at *9 (E.D. Pa. Feb. 3, 2017) ("In contrast to the decision in Microsoft, this court holds that the disclosure by Google of the electronic data relevant to the warrants at issue here constitutes neither a 'seizure' nor a 'search' of the targets' data in a foreign country.").

[52] Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., No. 14-2985, 2017 WL 362765, at *7 (2d Cir. Jan. 24, 2017) (Jacobs, J., dissenting) ("Localizing the data in Ireland is not marginally more useful than thinking of Santa Claus as a denizen of the North Pole. Problems arise if one over-thinks the problem, reifying the notional: Where in the world is a Bitcoin? Where in my DVR are the images and voices? Where are the snows of yesteryear?").

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restriction on "an essential investigative tool used thousands of times a year [in] important criminal investigations around the country."[53]

VII. Conclusion

The *Morrison* Court promised great simplicity and predictability as the profit of casting off 50 years of prior jurisprudence. These benefits have yet to appear. The *European Community* decision laid out yet another mode of applying the *Morrison* presumption while expanding its reach beyond conduct-regulating statutes to, for example, statutes merely creating a private right of action. Meanwhile, the Court failed to meaningfully clarify application of *Morrison*'s second step – the "focus" test to determine when a U.S. statute has a permissible domestic application.

Nevertheless, the *European Community* decision may be channeling a long-standing principle of U.S. private international law – that the government may step in where private litigants should fear to tread. The post-*Morrison* statutory amendments and the *European Community* decision both indicate a greater comfort applying U.S. law to foreign conduct where the party bringing the suit is the United States itself. The explanatory and predictive power of this theory is already being tested, both in actions brought by the U.S. government, such as the *Microsoft* case, and brought by government appointed entities, such as the Trustee in the *Madoff* case. But perhaps some of the smoke is beginning to clear.

[53] *Id.* (Cabranes, J., dissenting) ("To top this off, the panel majority's decision does not serve any serious, legitimate, or substantial privacy interest.").

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COMITY: THE AMERICAN DEVELOPMENT OF A TRANSNATIONAL CONCEPT

Thomas SCHULTZ* / Niccolò RIDI**

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 211-244
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. Introduction

Throughout much of the world, the concept of comity has played a fundamental role in shaping modern private international law. Sometimes labelled as a "principle", sometimes as a "doctrine", it provided the foundation and informed the evolution of several rules of conflict. Its importance, however, gradually faded as the field of private international law slid into the preserve of the national legislator.[1] Scholarly attention to the subject followed suit, and private international lawyers have, by and large, dismissed it as a historical relic in the name of which courts would sometimes fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of another sovereign state's acts, and restrict themselves from issuing such judgments and orders when to do so would have amounted to an unjustifiable interference.[2] Comity, however, never really vanished: as Lord COLLINS of Mapesbury put it, "comity may be a discredited concept in the eyes of the text-writers, but it thrives in the judicial decisions" – in particular, in those of American courts.[3] This conclusion is not entirely surprising: comity has long been acknowledged as a foundational principle of American conflict of laws.[4] It had a complex and haphazard evolution in the continent, which is partly to blame for modern assessments of the concept as imprecise and confusing.[5] Yet, while the term has come to be employed to refer to a variety of practices, these practices share "certain methods, values, and justificatory rhetoric".[6]

The purpose of this study is to contribute to the elucidation of the notion of comity as it is understood in the United States – the jurisdiction where the greatest importance is attached to the concept. While other studies have examined this topic, they have mostly neglected to consider the phenomenon in a broader dimension and thus properly appraise the peculiarity of the American understanding of comity.[7] It is submitted that this is particularly important insofar as the American understanding has affected the development of legal doctrines

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[1] T. SCHULTZ/ D. HOLLOWAY, Retour sur la *comity*. Deuxième partie: La *comity* dans l'histoire du droit international privé, *Clunet* 2012, p. 593.

[2] A. BRIGGS, The Principle of Comity in Private International Law, *Recueil des Cours* 2012, p. 85–86; T. SCHULTZ/ N. RIDI, Comity and International Courts and Tribunals, *Cornell Journal of International Law* 2017, forthcoming.

[3] L. COLLINS, Comity in Modern Private International Law, in J. FAWCETT (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North*, Oxford 2002, p. 95.

[4] J.R. PAUL, Comity in international law, *Harvard International Law Journal* 1991, p. 78; J.R. PAUL, The Transformation of International Comity, *Law and Contemporary Problems* 2008, p. 19.

[5] M.D. RAMSEY, Escaping "International Comity", *Iowa Law Review* 1997, p. 893.

[6] J.R. PAUL (note 4), at 21.

[7] J.R. PAUL (note 4); D.E.I. CHILDRESS, Comity as Conflict: Resituating International Comity as Conflict of Laws, *U.C. Davis L. Rev.* 2010, p. 11; W.S. DODGE, International Comity in American Law, *Columbia Law Review* 2015, p. 2071.

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elsewhere, and stimulated further reflection on the role of the concept, especially when employed by prominent American scholars.[8] This has in turn prompted the revitalisation of comity as a tool capable of alleviating problems of a global nature.[9]

II. The Problem of Comity: Definitions and Methodology

Nearly all common law courts refer to comity, but there is comparatively little agreement as to what exactly comity is and how it should operate, leading many commentators to be dismissive of the notion.[10] Even among those who are not, views tend to diverge significantly and definitional attempts seem to be doomed at the outset: indeed, one of the most important work on the subject avoids the problem by first explaining what comity is *not*.[11] Such definitions are important: what use could be made of a notion that "invites intuitive adjudication, and hence litigation-inspiring *ex ante* unpredictability"?[12] Such was the wariness towards the indeterminacy of the concept that the reporters of the Third Restatement on Foreign Relations Law preferred to avoid the word altogether.[13]

Most American scholars still anchor the discussion to the definition of comity offered in the early landmark case *Hilton v Guyot*. As Justice GRAY put it, comity

> "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws".[14]

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[8] Above all A.-M. SLAUGHTER, *A New World Order*, Princeton 2004, p. 67.

[9] See for example Y. SHANY, *The competing jurisdictions of international courts and tribunals*, Oxford 2003; E. D'ALTERIO, From judicial comity to legal comity: A judicial solution to global disorder?, *International Journal of Constitutional Law* 2011, p. 394.

[10] J. FAWCETT *et al.* (eds), *Cheshire, North & Fawcett: Private International Law*, Oxford 2008, p. 5. See also generally L. WEINBERG, Against Comity, *Geo. LJ* 1991, p. 53; M.D. RAMSEY (note 5).

[11] A. BRIGGS (note 2), at 87, 180.

[12] M.D. RAMSEY (note 5).

[13] Restatement (Third) of Foreign Relations Law of The United States § 403; A.F. LOWENFELD, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, *American Journal of International Law* 1995*,* p. 52; J.R. PAUL (note 4), at 29.

[14] *Hilton v Guyot*, 159 U.S. 113, 163-64.

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Hilton's definition remains largely accepted and is quite possibly the most celebrated and influential,[15] though some have offered slight amendments: KOH, for example, accepts the above definition, but clarifies that comity "flows from the respect that one sovereign is obliged to give to the sovereign acts of a coequal nation-state", adding that the notion has been increasingly interpreted by American courts "as a reason why they should refrain from independent determination of cases under the law of nations".[16] This definition has the merit of framing the issue in the broader perspective of a discourse on sovereignty and the allocation of regulatory authority, which is, after all, the context in which the principle was developed.[17]

Focusing on what comity does is more helpful than assessing what it is – and comity, to be sure, appears to have some use. According to BRIGGS, "legal thinking in the United States… has found the principle of comity to be of assistance in getting the judge to the point where a case is decided".[18] A cursory overview on any major database reveals that mentions of the principle are easily in the thousands – too many to join with the mourners of the principle's alleged demise. Of course, mentions offer partial answers: sometimes courts refer to "other" comity doctrines (beyond the scope of the present article), which are wholly domestic in nature and arise from the complex relationship between state and federal institutions that inform the law of the United States.[19] This study, instead, focuses on the uses of comity in cases where "cross-border elements are in need of careful treatment".[20] It will thus focus on federal decisions, much more likely to regard disputes with cross-border elements, and thus truly international in nature. Such inevitable constraints, however, must not be perceived as a limitation in a study concerned with the elucidation of a legal concept in a system where federal judges have long been identified as the main interpretive community.[21]

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[15] N.J. CALAMITA, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, *University of Pennsylvania Journal of international Economic Law* 2006, p. 626.

[16] H.H. KOH, *Transnational litigation in United States courts*, New York 2008, p. 19.

[17] "Comity arises from the horizontal arrangement of state jurisdictions": J.R. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford 2012, p. 485; W.S. DODGE (note 7), at 31.

[18] A. BRIGGS (note 2), at 78.

[19] On the topic, see M. WELLS, The Role of Comity in the Law of Federal Courts, *North Carolina Law Review* 1981, p. 59; G. SEINFELD, Reflections on Comity in the Law of American Federalism, *Notre Dame Law Review* 2014, p. 1309.

[20] A. BRIGGS (note 2), at 89. We do not mean to play down the importance of comity in the relations between the federate states: see J. STORY, *Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments*, Boston 1834, § 9. Early reflection on the role of comity in this context is considered to properly explain the history of the principle.

[21] C.R. SUNSTEIN, Interpreting Statutes in the Regulatory State, *Harvard Law Review* 1989, p. 413.

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III. The History of Comity in American Legal Thinking

A. Comity Enters the United States

1. The Sister Notions of Comity and Sovereignty

Comity is closely related with sovereignty: the history of the concept is thus tightly intertwined with the development of the Westphalian system.[22] The consecration of the principles of territorial sovereignty and freedom from interference made personal statuses irrelevant in the face of the territorial law of the state.[23] Sovereign independence and non-interference served as the building blocks of the new world order,[24] but proved to be at variance with the transnational relations that formed the backbone of seventeenth-century European society and commerce.[25]

These transnational relations, commercial and otherwise, were perceived as exceptionally important in the newly-independent Netherlands, and it was there that the concept of comity was developed to mitigate the effects of strict territoriality. Jurists such as the VOETS and Ulrich HUBER developed theories to provide an answer to the question of which law should govern a specific private legal relationship.[26] Their focus, however, was not so narrow: indeed, they did not seek to present their work as mere suggestions to Dutch courts, but rather as a new model with universal validity.[27]

The doctrine was first elaborated in a rather primitive form by Paulus VOET in 1661.[28] It was conceived as a technique for mitigating the adverse effects of the inherent territoriality of statutes: in other words, the doctrine posited that, through courtesy, effect and recognition could be given to transactions concluded outside the borders of the state concerned. VOET appeared to suggest that the operation of the principle was completely discretionary, and mostly restricted to ruling out the exclusive territorial application of the forum State's law.[29] Four decades later, Johannes VOET emphasized that the extension of statutes beyond the territorial

[22] K. LIPSTEIN, *Principles of the Conflict of Laws: National and International*, The Hague 1981, p. 8; T. SCHULTZ/ D. HOLLOWAY, Retour sur la *comity*. Première partie, *Clunet* 2011, p. 863; T. SCHULTZ/ D. HOLLOWAY (note 1), at 571, 574. T. SCHULTZ/ N. RIDI (note 2).

[23] H.E. YNTEMA, The Comity Doctrine, *Michigan Law Review* 1966, p. 10.

[24] H.G. MAIER, Resolving Extraterritorial Conflicts, or There and Back Again, *Virginia Journal of International Law* 1984, p. 10.

[25] R. DE NOVA, *Historical and comparative introduction to conflict of laws*, Leiden 1966, p. 435 *et seq.*; T. SCHULTZ/ N. RIDI (note 2).

[26] A. NUSSBAUM, Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws, *Columbia Law Review* 1942, p. 190.

[27] R. DE NOVA (note 25), at 449.

[28] P. VOET, *De statutis eorumque concursu liber singularis*, Amsterdam 1661, p. 156.

[29] C. RYNGAERT, *Jurisdiction in International Law*, Oxford 2008, p. 150.

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domain of a state was not constrained by any particular rule.[30] In his view, comity served the purpose of preserving "the primacy of the statute real, subject to such concessions as might be made by one nation to another".[31] Its application, in turn, remained discretionary.[32]

It would be injudicious to read the discretionary element as evidence of a rejection of the old, universalist – or "international" – approach to questions of conflict of laws.[33] Ulrich HUBER's *De conflictu legum*, by far the most influential work on the topic, provides arguments against any such claim. One of the leading jurists of his day, HUBER devoted significant attention to the topic of the application of foreign law and formulated an elegant solution using three "axioms", the normativity of which remains a controversial issue. He wrote:

> "(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond. (2) All person within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such governments or of its subjects".[34]

The third axiom has long represented a controversial point. It is not clear what kind of discretion HUBER envisaged for a sovereign and its courts, or what was the nature and cogency of the obligation – if any – to apply foreign law. The controversy, however, has been likely overstated.

First, HUBER never employed the word *comitas*, but restricted himself to choosing an adverbial – and possibly less charged – form, *comiter*, also adopted by Paulus VOET.[35] The Dutch language edition does not even mention any such term, but employs the allegorical image of governments extending a hand to each other.[36] As MCLACHLAN observed, comity constituted in this context the cornerstone of the building: the idea was not to replace law and rules with a form of courtesy, but to use comity as "the basis for the elaboration of a detailed set of positive rules, grounded in practical reality".[37] Reading comity as the conceptual basis of a rather

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[30] J. VOET, *Commentarius ad Pandectas*, The Hague 1698.

[31] H.E. YNTEMA (note 23), at 24.

[32] T. SCHULTZ/ D. HOLLOWAY (note 1), at 579.

[33] R. DE NOVA (note 25), at 449-450. For an analysis of the issues concerning the questions concerning the unity of private and public international law see A. MILLS, *The confluence of public and private international law: justice, pluralism and subsidiarity in the international constitutional ordering of private law*, Cambridge 2009.

[34] E.G. LORENZEN, Story's Commentaries on the Conflict of Laws: One Hundred Years after, *Harvard Law Review* 1934, p. 403.

[35] See for example P. VOET (note 28), at 143, 168; While HUBER's work was published before J. VOET's *Commentarius*, he was undoubtedly familiar with the work of Paulus VOET. See H.E. YNTEMA (note 23), at 29 *et seq.*

[36] T. SCHULTZ/ D. HOLLOWAY (note 3), at 580.

[37] C. MCLACHLAN, *Lis Pendens in International Litigation*, Leiden 2009, p. 223.

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sophisticated set of rules allows to overcome the problem. The modern idea of the doctrine as necessitating exercises of discretion by a court do not follow directly from the essence of the principle.

Second, HUBER's conception of international law was fundamentally a GROTIAN one:[38] his third axiom spells out an international usage – if not an international[39] – whereby "the effects of competent foreign laws are everywhere admitted, except when prejudicial to the forum State or its citizens, through the reciprocal indulgence of the sovereign authorities in each State".[40] Reliance on the *jus gentium* allowed HUBER to universalize his maxims and qualify them as descriptive of current practices, with the normative consequences that followed. In this regard, DICEY's discussion of the application of foreign law having little to do with courtesy between sovereigns fails to make the grade as a subtle critique of HUBER.[41]

This was not, however, the way HUBER's ideas were received in the common law world, where his writings eventually made an impact, due to unique circumstances, on the minds of students and practitioners of the law.[42] The scholar's name became a shorthand to invoke to make a point on the supremacy of the forum's law, in a corruption of the doctrine that was to a great extent a corruption of his legacy.

2. Comity in the United States: Livermore, Kent and Story

An early – and influential – assessment of the doctrine of comity in the United States was offered by LIVERMORE, who described it as an expression that was "grating to the ear when it proceeds from a court of law". According to WATSON, LIVERMORE, an influential attorney of civil-law Louisiana, was resentful towards the Anglo-American reliance on the Dutch jurists.[43] LIVERMORE saw the application of foreign law as conducive to maintaining friendly intercourse, and "the general good", pursuing in the private sphere the same objective that the law of

[38] There is no question that HUBER was familiar with GROTIUS, whom he cites in *De Conflictu Legum* too. See E.G. LORENZEN (note 34). See also T. SCHULTZ/ D. HOLLOWAY (note 1), at 578.

[39] Note the GROTIAN expression *tacito populorum consensu* in § 1 of *De Conflictu Legum*. See the Latin wording in E.G. LORENZEN, Huber's De Conflictu Legum, in E.G. LORENZEN, *Selected Articles on the Conflict of Laws*, New Haven 1947.

[40] H.E. YNTEMA (note 23), at 30.

[41] A.V. DICEY, *A Digest of the Law of England with Reference to the Conflict of Laws*, London/ Boston 1896, p. 10.

[42] L. DAVIES, The Influence of Huber's De Conflictu Legum on English Private International Law, *British Yearbook of International Law* 1937, p. 49; T. SCHULTZ/ D. HOLLOWAY (note 22), at 91.

[43] A. WATSON, *Joseph Story and the comity of errors: a case study in conflict of laws*, Athens 1992, p. 28 *et seq.* See also *Saul v His Creditors*, 5 Mart. 569 (La. 1827).

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nations pursued in the public one.[44] To his mind, the expression "comity" conveyed a sense of excessive discretion.[45]

This understanding influenced Joseph STORY, whose work made comity an important element of the interface between public international law and American conflict of laws. LIVERMORE's treatise, along with the case that prompted its creation, were quoted in the influential work of KENT,[46] to whom STORY felt intellectually indebted.[47] STORY, too, felt that the issue of the application of foreign law was one of central importance for the management of frictions resulting from radically different state policies.[48] The issue of slavery was, of course, a central one.[49]

STORY insisted that no national law could have, in principle, extraterritorial effect, a conclusion that descended from public law principles and found support in VATTEL's writings on the sovereign equality of nations in the field of international law.[50] Further, the application of foreign law was not mandated: "Every nation", he wrote, "must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded".[51] All that remained was an "imperfect obligation, like that of beneficence, humanity or charity".[52] In this regard, STORY's reliance on HUBER's theories, which may well have supported very different conclusions, has been described as the result of a misunderstanding.[53] The rationale of comity thus derived "from mutual interest and utility, from a sense of the inconveniences" – STORY quotes LIVERMORE – "which would result from a contrary doctrine".[54]

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[44] S. LIVERMORE, *Dissertations on the questions which arise from the contrariety of the positive laws of different states and nations*, New Orleans 1928, p. 30; *cf.* R.C. MINOR, *Conflict of laws, or, Private international law*, Boston 1901, p. 5.

[45] J.R. PAUL (note 4), at 21. The expression in question is "something like an obligation upon sovereigns": S. LIVERMORE (note 44), p. 30.

[46] J. KENT, *Commentaries on American Law*, New York 1826. In reality, KENT attributed the work to LIVERMORE with the title "Dissertations on Personal and Real Statutes", a corruption of the title of an earlier work, by the British scholar HENRY, titled "Dissertation on Personal, Real and Mixed Statutes". STORY, however, cites both authorities correctly: J. STORY (note 20).

[47] A. WATSON (note 43), at 27–28.

[48] "To no part of the world is it of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles": J. STORY (note 20), § 9.

[49] See generally P. FINKELMAN, *An Imperfect Union: Slavery, Federalism, and Comity*, Union New Jersey 2013; W.S. DODGE (note 7), at 19. See also STORY's opinion in *Prigg v Pennsylvania*, 41 U.S. 539 (1842).

[50] J. STORY (note 20), § 8.

[51] *Id.* § 33.

[52] *Id.* § 33.

[53] For an in-depth analysis of the issue, see A. WATSON (note 43).

[54] J. STORY (note 20), § 33; S. LIVERMORE (note 44), at 28.

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The forum state's discretion was crucial in STORY's treatment of the issue. His solution was exceptionally elegant, as it managed to universalise conflict and, at the same time, reflect his policy concerns by affirming the primacy of the forum's law; what is more, this thesis was in line with the rise of positivism – a characteristic that helped it survive and further develop in the American setting.[55]

STORY's engagement with the idea of comity has traditionally represented the ideal *dénouement* of an historical analysis of the concept. Upon publication, his *Commentaries* became the main authority on the topic, and STORY's legacy was very much alive 150 years later.[56] But comity – like sovereignty – is inherently context-dependent. Its meaning and implications, as we will seek to elucidate in the next sections, under the lens provided by almost two centuries of judicial decision-making, transformed as a reflection of the changes in the status quo.

IV. The Judicial Evolution of Comity

The principle of comity was thus developed as a flexible mediating principle between a new model of allocation of regulatory authority, based on territoriality, and the need to safeguard commercial interests and relations. Flexibility is a key characteristic of comity, though the term has been denounced as misleading.[57] Rather, comity, is "flexible" because it takes different shapes depending on the goals that need to be accomplished. The following sections seek to elucidate how American courts have taken advantage of this quality.

A. "Legislative" or "Prescriptive" Comity: Restraint and Recognition

1. Comity and the Recognition to the Law and the Acts of Other States

While *Hilton v Guyot* remains the landmark on the issue, statements of the Supreme Court invoking comity to allow the application of foreign law and acts predate it by almost one full century. As early as 1797 the Supreme Court, in *Emory v Grenough,* had qualified the application of foreign law as due to the "concurring consent" of the two governments concerned, so that the "mutual convenience of the two nations… which is the foundation of all these rules" could be attained without prejudicing their sovereignty.[58] A more elaborate discussion was presented in the 1839 case *Bank of Augusta v Earle*, which came even closer to STORY's theories. The decision, which has been called "the original fountain

[55] J.R. PAUL (note 4), at 25.

[56] See the citation of the *Commentaries* in Justice SCALIA's dissent in *Hartford Fire Ins. Co. v California*, 509 U.S. 764, 817 (1993).

[57] A. BRIGGS (note 2), at 87.

[58] U.S. 369 (Dall.), 374. The case contains an extract of HUBER's *De Conflictu Legum* by Alexander DALLAS: see W.S. DODGE (note 7).

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head of the law of foreign corporations in America",[59] and had its drafter privately applauded by STORY himself,[60] referred to the *Commentaries* to strengthen the proposition that foreign companies could, lacking an express prohibition, make business in another state.[61] Most importantly, it clarified that comity and sovereignty were not mutually incompatible – in fact, because of its voluntary nature, it remained inadmissible when prejudicial, but could be welcomed when conducive to "justice between individuals and to produce a friendly intercourse between the sovereignties".[62] The implications of this case were clear in *Canada Southern Railway. Co. v Gebhard.*[63] The case concerned a Canadian railway company that was reorganised through a plan agreed upon by the majority creditors and the Canadian Parliament, which had then passed a statute to bind the minority creditors. Faced with the question of giving effect to it, the Supreme Court reasoned that "the laws of a country have no extraterritorial force… but things done in one country under the authority of law may be of binding effect in another country… Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government".[64]

2. Using Comity to Limit the Reach of American Law

Comity has historically played an important role in limiting the reach of United States law. It has done so by acting as an upper limit to the exercise of jurisdiction or an interpretive canon capable of making sense of ambiguous statutes and treaties,[65] counselling restraint or a degree of intrusiveness depending on the interests and the context at issue. Of course, the principle has evolved and it has been applied to varying measures throughout its history.

Early cases demonstrate a preoccupation to avoid interference with other sovereign nations. For example, in *American Banana Co. v United Fruit Co,*[66]

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[59] G.C. HENDERSON, *The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law*, Cambridge 1918, p. 42.

[60] C.G HAINES, *The Role of the Supreme Court in American Government and Politics 1835-1864*, Boston 1973, p. 75.

[61] *Bank of Augusta v Earle*, 38 U.S. 519, 520 (1839).

[62] *Id.* at 589 and *passim*.

[63] 109 U.S. 527 (1883).

[64] *Id.* at 536. Justice HARLAN, however, dissented, arguing that comity was not a sufficient reason to enable a foreign corporation to "benefit, in our courts – to the prejudice of our own people and in violation of their contract and property rights – of a foreign statute which could not be sustained had it been enacted by congress or by any one of the United States", at 539.

[65] An early example is provided by the *Wildenhus's* case, 120 U.S. 1, at 12 (1887), where the Supreme Court discussed the rationale of this provision by reference to the concept of comity and the "inconvenience that might arise from attempts to exercise conflicting jurisdictions".

[66] 213 U.S. 347 (1909).

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Justice HOLMES defended the idea that legislation was to be presumed territorial, as holding otherwise would result in an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent".[67] On this point, the case had limited legacy: the changed circumstances transnational commerce – and, perhaps, the changed attitude towards jurisdiction in international law[68] – caused a reconsideration of this approach: in *United States v Aluminum Corporation of America ("Alcoa")* it was held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends".[69] No express reference was made to comity – though some echoes may be perceived in the discussion of the issue of extraterritoriality.[70] It is to this case that the "nationalist jurisprudence" that culminated in *Hartford Fire*, based on a growing willingness of American courts to interfere, may be traced back.

Indeed, the significance of comity grows with the potential for interference warranted by grounds of jurisdiction that can be understood as "virtually unbounded in scope".[71] Though in certain areas the presumption against extraterritorial effect of American law continued to operate in the traditional fashion,[72] antitrust cases remained fundamentally different. The new approach was codified in the Ninth Circuit case *Timberlane Lumber Co. v Bank of America,*[73] which established an elaborate test to determine "whether American authority should be asserted in a given case as a matter of international comity and fairness".[74] The *Alcoa* solution was found wanting in that it failed "to consider the interests of other nations in the application or non application of United States law".[75] Relying on comity, the Court added interest-balancing to the picture.[76] This

[67] 213 U.S. 347, at 357, citing *Phillips v Eyre*, L.R. 4 Q.B. 225, 239. It must be observed that this English case introduced a two-limbed test of "double actionability" (or "criminality"), which was applied until a different rule was adopted in *Boys v Chaplin*, [1969] 2 All ER 1085. According to KOH, *American Banana* is as much a result of considerations of comity as it is of the application of rules of conflict, as the acts in question were not prohibited in the states where they had been committed and did not therefore satisfy the English test: see H.H. KOH (note 16), at 60.

[68] *SS "Lotus" (France v Turkey)*, (1927) PCIJ Ser. A, No. 10 253. See also *Id.* at 59–60.

[69] *Id.* at 443.

[70] *Id.* ("Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers"). The statement was quoted to this effect in *Timberlane Lumber Co. v Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976). See also S.D. PIRAINO, Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act, *Hofstra Law Review* 2011, p. 1105.

[71] J.A. MEYER, Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law, *Minnesota Law Review* 2010, p. 151.

[72] See for example the maritime cases *Lauritzen v Larsen*, 345 U.S. 571 (1953); *International Longshoremen's Ass'n, AFL-CIO v Allied Intern., Inc.*, 456 U.S. 212 (1982).

[73] 549 F.2d 597.

[74] *Timberlane*, 549 F.2d 597, at 613.

[75] A. LOWENFELD (note 13), at 44.

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approach was more consistent with existing approaches at the time and was incorporated in the Restatement (Third) of Foreign Relations law. Yet, the Restatement does not mention the term "comity", perhaps "because the reporters believed that comity carries too much of the idea of discretion or even political judgment, as contrasted with the principle of reasonableness, which is conceived of in terms of legal obligation".[77] The approach also came under attack in *Laker Airways Ltd. v Sabena, Belgian World Airlines,*[78] where it was memorably held that "[i]f promotion of international comity is measured by the number of times United States jurisdiction has been declined under the «reasonableness» interest balancing approach, then it has been a failure".[79]

In *Hartford Fire Ins. Co. v California*[80] the Court seized the opportunity to discuss the way comity operates in this context. Often hailed as a "death blow" to the principle[81], the case concerned the conduct taken by American and British reinsurance and co-insurance companies, which had conspired to limit their offering in the United States, with domestic anticompetitive consequences. The reinsurers argued that the Sherman Act did not apply to them, as the activities they had carried out were lawful under the comprehensive legislation of the United Kingdom, which had "a heavy interest in regulating the activity".[82] The Court, however, held that it was not enough for the reinsurers to comply with foreign law when compliance with foreign *and* American law was possible: only a "true conflict" would have imported considerations of comity in resolution of the dispute. As the situation in the case at issue did not amount to one, comity was no ground to decline the court's jurisdiction. Justice SCALIA criticized the decision, correctly observing that it confused two separate issues,

> "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed «prescriptive comity»: the respect sovereign nations afford each other by limiting the reach of their laws… comity in this sense includes the choice-of-law principles that, «in the absence of contrary congressional direction», are

[76] K.J. FLOREY, State Law, US Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of Morrison v National Australia Bank, *Boston University Law Review* 2012, p. 543.

[77] A. LOWENFELD (note 13), at 52. The author does, however, note that "If agreement can be reached or approached on content, it may not be worthwhile continuing to debate the terminology".

[78] *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

[79] *Id.* at 950.

[80] 509 U.S. 764 (1993).

[81] S.W. WALLER, The Twilight of Comity, *Colum. J. Transnat'l L.* 1999, p. 563, 564.

[82] *Hartford Fire*, at 819 (SCALIA J).

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> assumed to be incorporated into our substantive laws having extra-territorial reach".[83]

SCALIA's view was destined to be popular: in *F. Hoffman-La Roche Ltd. v Empagran S.A.,*[84] the Court echoed his words on "principles of prescriptive comity" counseling against construing a statute as "an act of legal imperialism".[85] But *Hartford Fire* did strike a blow to the principle. In *United States v Nippon Paper Indus. Co.,*[86] the First Circuit affirmed that comity was "more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*".[87] In *Empagran* comity served as grounds for the Court to dismiss the claims relating to alleged foreign damages, but not those concerning domestic harmful effects.[88] Though claiming to construe "ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority", it arguably fell short of the mark by allowing for intrusive regulatory interference – rather than helping, as it professed, "the potentially conflicting laws of different nations work together in harmony.[89] On the whole, the "breathtakingly broad" [90] holding of *Hartford Fire* and its reliance on the concept of "true conflict" are responsible for much terminological and conceptual confusion: while later decisions have been more critical of this approach, it is sometimes difficult to tell where disagreement ends and misunderstanding begins.[91]

Outside the antitrust context: comity remained relatively absent from the debate on extraterritoriality in cases not concerning antitrust, though similar notions were often cited.[92] For example, in the 1991 case *EEOC v Arabian*

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[83] *Id*. at 817-8. W.S. DODGE observes – correctly – that this is not what STORY meant, because in his time courts did not have the authority to decline jurisdiction. This is true, but it might be added that, before *International Shoe,* courts did not have extraterritorial jurisdiction anyway (except, of course, in admiralty cases): if this detail is taken into account, GRAY's "rhetorical flourish" does not appear to be inconsistent with STORY's thinking. See W.S. DODGE (note 7), at 2071.

[84] 542 U.S. 155 (2004).

[85] *Id.* at 169.

[86] 109 F.3d 1, 9 (1st Cir. 1997).

[87] *Id.* at 8.

[88] 542 U.S. 155, 159 (2004).

[89] 542 U.S. 156.

[90] 509 U.S. 764, at 820 (SCALIA J).

[91] See for example *Mujica v AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), affirming that the "true conflicts" approach is restricted to prescriptive comity and says nothing about adjudicatory comity (as in the case at issue), only to apply the comity considerations contained in § 403 of the Restatement, which deal with prescriptive comity too. See also R. ALFORD, *The Ninth Circuit's Muddled Comity Analysis in Mujica,* at Opinio Juris, available at <http://opiniojuris.org/2014/11/21/ninth-circuits-muddled-comity-analysis-mujica/>; S.C. SYMEONIDES, Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey, *Am. J. Comp. L.* 2015, p. 299, 312.

[92] See for example *Foley Bros., Inc. v Filardo*, 336 U.S. 281 (1949).

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American Oil Co. (Aramco),[93] the principle was only mentioned in the dissenting opinion of Justice MARSHALL.[94] In deciding whether the 1964 Civil Rights Act applied to a Delaware-registered employer operating in Saudi Arabia, the Court espoused the presumption against extraterritoriality as a guarantee "against unintended clashes… which could result in international discord".[95] In this regard, however, comity operates in the abstract: in *Morrison v National Australian Bank Ltd*,[96] a case concerning securities fraud, the Court held that the presumption against extraterritoriality applied "regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear indication of an extraterritorial application, it has none".[97]

Other cases concerned claims for violation of the "law of nations" under the Alien Tort Statute (ATS).[98] Passed as part of the Judiciary Act of 1789, the ATS had remained largely forgotten until the early 1980s, when the Second Circuit rediscovered it in the landmark case *Filártiga v Peña-Irala,*[99] holding that torture amounted to a breach of the law of nations and that the ATS provided federal jurisdiction.[100] However, *Kiobel v Royal Dutch Petroleum Co.,*[101] a controversial case concerning the alleged complicity of a number of corporations in breaches of international law, the Court traced the evolution of the ATS back to its historical roots[102] and considered the foreign policy implications of extraterritorial ATS jurisdiction in terms of interference with both other sovereign states and the executive as the sole responsible of the United States foreign policy.[103] The Court held that the prosecution of extraterritorial conduct such as piracy would not have interfered with foreign sovereignty, whereas cases such as the one at issue could have prompted resentment.[104] These conclusions are consistent with Justice BREYER's findings in his separate opinion in *Sosa v Alvarez-Machain:*[105] as

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[93] 499 U.S. 244 (1991).

[94] *Id.* at 260.

[95] *Id.* at 248, citing *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963).

[96] 561 U.S. 247 (2010).

[97] *Id*. at 255.

[98] 28 USCA. § 1350. On the increased reliance on custom for suits under the ATS see J. CRAWFORD, *Chance, Order, Change: The Course of International Law, General Course on Public International Law*, The Hague 2014, p. 164.

[99] 630 F.2d 876 (2d Cir. 1980).

[100] *Id.* at 878.

[101] 133 S.Ct. 1659. On the history of the ATS see A.M. BURLEY, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, *American Journal of International Law* 1989; W.S. DODGE, The Historical Origins of the Alien Tort Statute: A Response to the Originalists, *Hastings International and Comparative Law Review* 1995, p. 221.

[102] *Id*. at 1665 *et seq.*

[103] *Id*. at 1663.

[104] *Id.* at 1669.

[105] 542 U.S. 692.

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"universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery", and universal tort jurisdiction threatened "the practical harmony that comity principles seek to protect" and was to be reserved to a limited number of norms.[106] This formulation allowed for some headroom: in fact, BREYER disagreed with the *Kiobel* majority over too strict an interpretation of the ATS.[107]

B. Comity and the Recognition of Foreign Judicial Acts

The doctrine of comity has also provided the basis for the recognition of foreign judgments in the United States.[108] In *Hilton v Guyot*, hailed as "the lodestar for all transnational enforcement doctrines in the U.S", [109] the Court famously held that comity was

> "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws".[110]

The analysis was partly consistent with the theories of STORY and the Dutch writers, and resulted in the rule whereby a judgment was granted recognition unless basic conditions were not satisfied or "by the principles of international law, and by the comity of our own country, it should not be given full credit and effect".[111] This principled framework was somewhat marred by the introduction of an unclear requirement of reciprocity.[112]

Hilton's significance for the recognition of judgments also faded to some degree after the Supreme Court's decisions in *Erie* and *Klaxon*. Indeed, *Hilton* has been considered in contrast to the more efficient rules of state law,[113] and the

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[106] *Id*. at 762.

[107] *Kiobel*, 133 S.Ct. 1659, at 1673-4.

[108] A number of authorities have classified the recognition of foreign judgments under the heading of adjudicative comity. We prefer to privilege the aspects concerning comity as a principle of recognition and treat it separately. For different views see *Ungaro-Benages v Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). See also W.S. DODGE (note 7); D.E.I. CHILDRESS (note 7).

[109] H.H. KOH (note 16), at 206.

[110] *Hilton v Guyot*, 159 U.S. 113, 163-64 (1895).

[111] *Id*. at 205-06.

[112] *Hilton v Guyot*, 159 U.S. 113, 228 (1895).

[113] See for example *Banque Libanaise Pour Le Commerce v Khreich*, 915 F.2d 1000, 1004 (5th Cir. 1990) ("Although comity is not a rule of law, it is more than mere courtesy and accommodation… Under the Texas Recognition Act the rules relating to the recognition of foreign country money-judgments are statutory and therefore more predictable").

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reciprocity rule denounced more or less expressly.[114] In any event, even before *Erie* many American legal minds were aware of the limitations of *Hilton*'s reciprocity. As early as 1925 Judge LEARNED HAND could affirm on circuit that the Court "certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here".[115] Indeed, criticism of such a model was quite widespread,[116] to the point that Judge Cuthbert POUND recognized that the precedent was sometimes departed from quite overtly.[117]

Today, comity as a recognition doctrine has largely faded as Uniform Acts cover the matter and provide more straightforward solutions. Yet, the doctrine has not been sidestepped completely: first of all, comity served as a fallback device as the acts had yet to receive a homogeneous adoption by states;[118] second, it retains a function as a "saving clause" under current legislation, as the Acts allow recognition "under principles of comity or otherwise of a foreign-country judgment not within [its] scope";[119] third, comity informs the statutory construction of the Acts, for example, with regards to the concept of "repugnancy"[120] or the scope of the public policy exception;[121] fourth, comity has been invoked in the context of injunctions, which the Uniform Acts do not cover;[122] finally, it has been argued in at least one case that the demands of comity might be met by requiring that non-enforceable judgments be granted recognition: this might, of course, be a meaningful result on its own – one may think of the *res judicata* effect of such a

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[114] See for example *De la Mata v Am. Life Ins. Co.*, 771 F. Supp. 1375, 1383 (D. Del. 1991) ("[T]he court predicts that the Delaware Supreme Court would no longer regard reciprocity as a precondition for the recognition of a foreign judgment"). *Johnston v Compagnie Générale Transatlantique*, 242 N.Y. 381, 387 (1926) ("Comity is not a rule of law, but it is a rule of «practice, convenience and expediency… It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question».").

[115] *Direction der Disconto-Gesellschaft v U.S. Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924).

[116] *Disconto Gesellschaft v Umbreit*, 208 U.S. 570, 580 (1908).

[117] *Johnston v Compagnie Générale Transatlantique*, 242 N.Y. 381.

[118] *12 Soc'y of Lloyd's v Reinhart*, 402 F.3d 982, at 999 (10th Cir. 2005).

[119] *Id.* § 11.

[120] See *Wolff v Wolff*, 40 Md. App. 168, at 175 (1979) ("Thus the Uniform Foreign Money-Judgments Recognition Act was intended to promote principles of international comity by assuring foreign nations that their judgments would, under certain well-defined circumstances, be given recognition by courts in states which have adopted the Uniform Act"). See also M.P. EPSTEIN, Comity Concerns Are No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption, *Fordham L. Rev.* 2013, p. 2317, 2321.

[121] *Naoko Ohno v Yuko Yasuma*, 723 F.3d 984, at 1002 (9th Cir. 2013), citing *Crockford's Club Ltd. v Si-Ahmed*, 203 Cal. App. 3d 1402, at 1406 (Ct. App. 1988).

[122] 433 F.3d 1199 (9th Cir. 2006).

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judgment – and exemplifies a conclusion that could not be reached by the reading of the acts alone.[123]

In conclusion, *Hilton*'s legacy remains uncontested authority for the view that comity constitutes the basis for recognition doctrines, and comity reasoning still fills the gaps left by and fine-tuning the more detailed regulation of the matter by state sources. Conversely, reciprocity has failed to become an essential element of a comity analysis in this context.[124]

C. Adjudicatory Comity, or "the Comity of Courts"

Comity has also been invoked to justify certain approaches towards adjudication emanating from foreign countries and, to some extent, international courts and tribunals. The notion that the comity may provide the basis for the coordination of the exercise of adjudicatory power is usually assumed as a starting point,[125] but such an assessment belies the complexity of the issue: as MCLACHLAN observes, it is unclear that what the early Dutch writers envisaged could so far as to require ceding adjudicatory power to a foreign court.[126]

Indeed, recognition of acts is one thing, but deference to mere *proceedings* is much closer to judicial abdication. To be sure, this might be truer in some cases than in others.[127] But in all of them comity plays a role: informing doctrines of abstention "deferring to foreign courts by restraining the exercise of U.S. courts' jurisdiction".[128]

1. The Origins of Adjudicatory Comity in Admiralty Courts and the Use of Forum non Conveniens

The origins of adjudicatory comity are to be found in admiralty courts, which were originally the only ones not limited to strictly territorial jurisdiction.[129] This was required by their tasks – relating, for example, to the claims brought by seamen for their wages or injuries suffered during employment.[130] But taking jurisdiction in such cases often meant holding a ship in an American port, which could be

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[123] *Guinness PLC v Ward*, 955 F.2d 875, at 889 (4th Cir. 1992) ("[W]e nonetheless believe that such goal as well as the principles of comity are still sufficiently served by the fact that judgments which are not enforceable might still be entitled, if consistent with the Act's criteria, to recognition.").

[124] *Cunard S.S. Co. v Salen Reefer Servs. AB*, 773 F.2d 452, 460.

[125] N.J. CALAMITA (note 15), at 614.

[126] C. MCLACHLAN (note 37), at 223.

[127] A. BRIGGS (note 2), at 116 *et seq.*

[128] W.S. DODGE (note 7), at 2216.

[129] *International Shoe Co. v Washington*, 326 U.S. 310 (1945).

[130] A.M. BICKEL, Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty, *Cornell L. Q.* 1949, p. 12, 19.

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perceived as an unjustified interference by the flag state.[131] In this regard, a choice to decline jurisdiction echoed concerns – as one early case put it – "of international comity, of delicacy, and of convenience".[132] The common law doctrine of *forum non conveniens* (FNC), the "discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere,[133] was a solution.[134]

The relationship between FNC and comity is particularly complicated – a decision to dismiss local proceedings in favour of a different forum entails an evaluation of a foreign court and may amount to "dumping" cases – that is, telling another court what to do.[135] Indeed, even though American courts swiftly understood the significance of the doctrine, the Supreme Court did not link FNC and comity for a long time.[136] Lower courts, in turn, have sometimes considered the two concepts together, but mainly to distinguish them where ambiguity arose or as alternative grounds for dismissal of the same suit.[137] Indeed, FNC is generally regarded as much narrower a ground for dismissal than comity.[138] Moreover, FNC does not require the same type of sovereign interests analysis: while comity may be taken as the basis of "local interest in having localized controversies decided at home",[139] the two doctrines are best understood as separate.[140]

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[131] *Id.* at 21.

[132] *Davis v Leslie*, 7 F. Cas. 134, 137 (S.D.N.Y. 1848).

[133] P. BLAIR, The Doctrine of Forum Non Conveniens in Anglo-American Law, *Columbia Law Review* 1929, p. 1.

[134] *Am. Dredging Co. v Miller*, 510 U.S. 443, at 464 (1994) (KENNEDY and THOMAS Js dissenting) ("From the beginning, American admiralty courts have confronted this problem through the *forum non conveniens* doctrine.").

[135] A. BRIGGS (note 2), at 119.

[136] *Am. Dredging Co. v Miller*, 510 U.S. 443, 467 (1994) (KENNEDY and THOMAS Js dissenting); *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp*., 549 U.S. 422 (2007); *Daimler AG v Bauman*, 134 S. Ct. 746, 771 (2014) (SOTOMAYOR J concurring).

[137] *Republic of Panama v BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, at 951 (11th Cir. 1997).

[138] *Norex Petroleum Ltd. v Access Indus., Inc.,* 416 F.3d 146, at 159 (2d Cir. 2005).

[139] *Gulf Oil Corp. v Gilbert Storage & Transfer Co.*, 330 U.S. 501, 509 (1947). See also A.-M. SLAUGHTER, Judicial globalization, *Virginia Journal of International Law* 1999, p. 1113.

[140] But see W.S. DODGE (note 7), at 2209–10. "Because the doctrine of *forum non conveniens* allows U.S. courts to restrain their exercise of jurisdiction in deference to foreign courts, it is properly considered a doctrine of international comity."

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2. Comity as a Coordination Device for Pending or Potential Parallel Proceedings

While "[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction",[141] differences and tensions do arise from parallel adjudication of the same or similar disputes in different countries. Comity has served as a powerful tool to resolve these problems by providing exceptions to the "virtually unflagging obligation" of American courts to exercise their jurisdiction.[142]

Traditionally, this has been common in bankruptcy cases, where "American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities".[143] Granting comity to foreign proceedings, however, was soon conditioned to certain requirements of procedural fairness.[144] Moreover, comity could be afforded "to foreign bankruptcies only if those proceedings do not violate the laws or public policy of the United States".[145]

The situation is not largely different outside the bankruptcy context, although the approaches are somewhat less principled. In order to defer to foreign proceedings, courts have normally required, in addition to the satisfaction of demands of fairness and the absence of prejudice to American public policy, an assessment of the "relative strengths" of the two countries' interest to the determination of a dispute.[146] This is a complex analysis, especially because the sovereign parties involved may easily change views,[147] but it has been considered essential: since "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule",[148] "the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention".[149]

Of course, whether or not proceedings are already pending in the foreign country is an important element to consider. In *Ungaro-Benages v Dresdner Bank AG*[150], the Eleventh Circuit drew a line between a "retrospective" and "prospective" application of the comity doctrine, concluding that the latter, applying to situations where proceedings have not been initiated elsewhere, requires "federal courts [to]

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[141] *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984).

[142] *Colorado River Water Conser. Dist. v United States*, 424 U.S. 800, 817 (1976).

[143] *Cunard S.S. Co. v Salen Reefer Servs. AB*, 773 F.2d 452, at 458 (2d Cir. 1985).

[144] *Allstate Life Ins. Co. v Linter Grp. Ltd*, 994 F.2d 996 (2d Cir. 1993).

[145] *Finanz AG Zurich v Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999).

[146] *Turner Entm't Co. v Degeto Film GmbH*, 25 F.3d 1512, at 1521 (11th Cir. 1994).

[147] *Jota v Texaco, Inc.*, 157 F.3d 153, at 160 (2d Cir. 1998) (Ecuador first opposed and then advocated the jurisdiction of United States courts).

[148] *Colorado River Water Conservation Dist. v United States*, 424 U.S. 800, 813 (1976). See W.S. DODGE (note 7), at 2112.

[149] *Royal & Sun All. Ins. Co. of Canada v Century Int'l Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006).

[150] 379 F.3d 1227 (11th Cir. 2004).

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evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum".[151] The case was atypical, as it concerned a suit by a descendant of the heir to a German company against German banks that, the plaintiff claimed, had stolen the stock belonging to Jewish heirs in aryanization processes. The fact that agreement between the United States and Germany had been made to create an exclusive forum for such claims, along with the German government's interests in having that exclusive jurisdiction respected "in its efforts to achieve lasting legal peace with the international community" supported dismissal.[152]

The very act of adjudication of a dispute may sometimes be regarded as an unfriendly act, and "extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum".[153] The other state's opinion is thus of some importance: for example, in *Bigio v Coca-Cola Co.*,[154] the court rejected a plea of dismissal on the grounds of comity stating that the only such issue was whether the exercise of jurisdiction "would offend «amicable working relationships» with the foreign government". The latter, however, had not raised any objections and the Court proceeded with confidence that its judgment would not impact international relations.[155] More politically charged cases, however, may be handled differently: in *Khulumani v Barclay Nat. Bank Ltd.,*[156] a suit brought under the Alien Tort Statute by South African plaintiffs claiming that the defendants had "actively and willingly collaborated with the government of South Africa in maintaining the apartheid regime,[157] the governments of both countries involved had produced statements of interest.[158] The Court, however, eventually held that "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction", in which case only a decision to dismiss could have been warranted, based on interests of the two states.[159] The question was thus centered on whether one such conflict existed

[151] *Id.* at 1238.

[152] *Ungaro-Benages v Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004). For a case in which the *Ungaro-Benages* standard was not satisfied, see *GDG Acquisitions, LLC v Gov't of Belize*, 749 F.3d 1024, 1032 (11th Cir. 2014). A similar standard has been adopted, though perhaps not fully understood, in the Fifth Circuit decision *Perforaciones Exploración y Producción v Marítimas Mexicanas, S.A. de C.V.,* 356 F. App'x 675, 681 (5th Cir. 2009). The Third Circuit has remained skeptical of "prospective comity" analyses: see *Gross v German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006).

[153] *Jota v Texaco, Inc.*, 157 F.3d 153, at 160 (2d Cir. 1998).

[154] 448 F.3d 176 (2d Cir. 2006).

[155] *Id.*

[156] 504 F.3d 254 (2d Cir. 2007).

[157] *Id.*

[158] *Id.* at 259.

[159] *In re S. African Apartheid Litig.,* 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

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between litigation in the U.S. courts and the Truth and Reconciliation Commission process in South Africa.[160]

This was problematic: it was not quite clear from *Hartford Fire* that a true conflict analysis should guide adjudicatory comity cases, and, if it did, it is not clear why it should have focused on sovereign interests.[161] This critical point was discussed in *Mujica v AirScan Inc.*,[162] an ATS action brought by Colombian nationals against an American corporation and its private security firm, for the defendants' alleged complicity in the bombings of their village.[163] No other proceedings were pending elsewhere and the court dismissed the suit on comity grounds: in its analysis, the Court correctly concluded that "*Hartford Fire* does not require proof of a «true conflict» as a prerequisite for invoking the doctrine of comity, at least in a case involving adjudicatory comity".[164] It also expanded on the test developed in *Ungaro-Benages* to formulate its own. While the latter test focused on "the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum"[165], the Court in *Mujica* attempted to clarify the first element through the lens of the prescriptive comity factors which it had previously considered in *Timberlane*, and which made their way into § 403 of the Restatement, holding that they constituted "a general list of indicia to which we may look when weighing U.S. and foreign interests and the adequacy of the alternative forum".[166] This choice has been harshly criticized, and it has been observed that such an analysis seems to be the result of a misunderstanding. It appears, however, that the most important component of the Court's comity analysis might have been the deference granted to the Executive's statement of interest, thus seriously downplaying the significance of the other elements in picture.[167]

3. Anti-Suit Injunctions

Contrary to the English tradition, where "[i]t is easy to take anti-suit injunctions for granted", American courts have on the whole granted the remedy sparingly.[168]

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[160] *Id.* at 285-6.

[161] D.E.I. CHILDRESS (note 7), at 55.

[162] 771 F.3d 580.

[163] *Id*. at 584.

[164] *Id.* at 600.

[165] *Id.* at 1238.

[166] *Mujica v AirScan Inc*., 771 F.3d 580, 605.

[167] *Id*. at 610 ("Accordingly, we «give serious weight to the Executive Branch's view of [this] case's impact on foreign policy», and we conclude that the United States' interest in having the case adjudicated exclusively in Colombia is strong"). The Court cited *Sosa v Alvarez-Machain*, 542 U.S. at 733 (2004); one wonders, however, if *Republic of Austria v Altmann*, 541 U.S. 677, 702 (2004) would have been a more appropriate precedent.

[168] R. FENTIMAN, Anti-Suit Injunctions – Comity Redux?, *The Cambridge Law Journal* 2012, p. 273.

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That federal courts have the power to grant them is not at all controversial,[169] but with the caveat that this power "effectively restricts the jurisdiction of the foreign tribunal and should therefore be used sparingly",[170] as being too liberal would raise serious comity concerns.[171] Indeed, anti-suit injunction have the potential to interfere with the sovereign act of adjudication, albeit to a varying degree, depending on whether a foreign court has been already seised.[172]

Moreover, "[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction".[173] Accordingly, concurrent proceedings represent the rule and seldom suffice, alone, to warrant the remedy, even when their concurrence might produce an "embarrassing race to judgment" or "potentially inconsistent adjudications".[174] In taking such a "drastic step",[175] comity considerations play a major role, going so far as to establish a rebuttable presumption against the issuance of anti-suit injunctions.[176]

The grant of anti-suit injunctions follows the same logic of comity-driven recognition and abstention doctrines.[177] Accordingly, they may be issued if necessary to prevent "an irreparable miscarriage of justice", "protect the jurisdiction of the enjoining court", or to "prevent the litigant's evasion of the important public policies of the forum".[178] A more principled approach has been developed by the Ninth Circuit. *Microsoft Corp. v Motorola, Inc.*[179] clarified that an injunction would likely be consistent with comity where the enforcement of a choice of forum agreement is sought, less so in politically sensitive situations in which foreign relations implications are expected.[180] In midstream cases, the

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[169] See for example *Seattle Totems Hockey Club, Inc. v Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) ("A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country").

[170] *United States v Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985). Of historical interest, see *Peck v Jenness*, 48 U.S. 612 (1849).

[171] *China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

[172] A. BRIGGS (note 2), at 125–6.

[173] *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984).

[174] *China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984).

[175] *Gau Shan Co. v Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992).

[176] *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004).

[177] *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984).

[178] *Id*. at 927.

[179] 696 F.3d 872 (9th Cir. 2012). See also *E. & J. Gallo Winery v Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006)

[180] *Id.* at 887.

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comity analysis should consider elements such as whether the foreign suit has been initiated at a later moment for seemingly abusive purposes.[181]

Here, too, public policy exceptions play a role, though the standard is stricter in recognition of greater potential for interference. An evasion of public policy warranting the remedy cannot thus be found in "the availability of slight advantages in the substantive or procedural law",[182] such as, for example, the unavailability of a treble damages remedy.[183] Interestingly, anti-suit injunctions have instead been granted because they frustrated a United States policy favoring forum selection clauses[184] and "the liberal enforcement of arbitration clauses".[185]

D. "Executive" or "Sovereign-Party" Comity

Some uses of comity have been assigned the confusing label of "executive".[186] The adjective professedly conveys the idea of deference to "the executive acts of foreign countries"[187], and provides the basis for the Act of State doctrine, foreign sovereign immunity and the privilege of foreign governments to bring suit in United States courts. This terminology adds to the confusion stemming from the likely involvement of the Executive branch in the cross-border affairs that normally justify such doctrines, and some alternative formulations, such as "sovereign party comity" have been proposed, though they are not without drawbacks.[188] For reasons of intelligibility, we adopt here the traditional approach.

1. Comity and the Act of State Doctrine

The Act of State doctrine prevents American courts from questioning the validity of an act concluded by a foreign government in its territory. The classical statement of the doctrine is provided in *Underhill v Hernandez*, where the Supreme Court affirmed that

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[181] *Id.*

[182] *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F.2d 909, 932 (D.C. Cir. 1984).

[183] *Gau Shan Co. v Bankers Trust Co.*, 956 F.2d 1349, 1358 (6th Cir. 1992).

[184] *E. & J. Gallo Winery v Andina Licores S.A.*, 446 F.3d 984, 993 (9th Cir. 2006) ("We hold that Andina's pursuit of litigation in Ecuador, in violation of the forum selection clause, frustrates a policy of the United States courts").

[185] *Paramedics Electromedicina Comercial, Ltda v GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004). The opinion cites *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).

[186] See for example D.E.I. CHILDRESS (note 7), at 47; M.W. LIEN, The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios, *Catholic University Law Review* 2000, p. 595.

[187] M.D. RAMSEY (note 5).

[188] W.S. DODGE (note 7), at 2079.

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> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory".[189]

The doctrine is understood to stem from considerations of international comity, as "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations".[190] But what, precisely, does comity require in this context?

It has been suggested that the interests protected by the doctrine have changed, moving from mutual convenience, to respect for sovereignty, and, finally, consideration for the foreign relations interests of the United States and prerogatives of the political branches.[191] These foreign policy concerns are exemplified by *Banco Nacional de Cuba v Sabbatino*, concerning an expropriation to the detriment of an American company by the Cuban government, which also brought the suit.[192] This latter circumstance, along with the alleged illegality of the expropriation under international law, had prompted the defendant to argue that the act of state doctrine could not apply.[193] The Court, however, held otherwise, stating that

> "[t]he doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere".[194]

Comity thus provides a basis of the rule.[195] It must be noted, however, that the deference to foreign sovereignty is also a result of precise policy determinations. Accordingly, deference must also be paid to the branch of government best suited to pursue them: the Executive.[196] The Supreme Court has clarified that that the act

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[189] 168 U.S. 250, at 252 (1897).

[190] *Oetjen v Central Leather Co*., 246 U.S. 297 (1918) at 304.

[191] W.S. DODGE (note 7); J.R. PAUL (note 4), at 31.

[192] 376 U.S. 398 (1964).

[193] Indeed, this hypothesis is now covered by the Foreign Assistance Act of 1964 (amended 2000) (28 U.S. Code § 1605), which exclude the application of the act of state doctrine for declining jurisdiction over confiscations of property violating international law after 1 January 1959.

[194] 376 U.S. 398, at 423.

[195] Though the contention has been made that the Act of State doctrine can be explained without references to comity: M.D. RAMSEY (note 5).

[196] "The act of state doctrine does, however, have «constitutional» underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Sabbatino*, 376 U.S. 398, at 423. According to PAUL, the Court's desire to give the government the widest possible discretion in dealing with communist states prompted the ironic and

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of state doctrine, much like sovereign immunity,[197] was "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government".[198] Such doctrines need to be malleable enough to suit the needs of the Executive: and in *Sabbatino*, the Executive had "expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy".[199]

According to KOH, "by explicitly linking the doctrine to separation of powers, *Sabbatino* implied that determinations regarding the legality of foreign state acts are quasi-political questions, whose decision is appropriately confided in the Executive".[200] Almost twenty years later, the Court partially endorsed this reconstruction in *Kirkpatrick*,[201] arguing that the judiciary's "engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs".[202] Yet, the judgment restricted its operation to situations concerning a specific act having bearing on the outcome of a dispute.[203] In other words, the "embarrassment" of any government does not, in and by itself, constitute a sufficient reason for dismissal.[204]

Kirkpatrick may thus be said to have mitigated the significance of comity for the use of the doctrine – and indeed, as far as its application is concerned, Joel PAUL is absolutely correct in observing that "[t]he risk of embarrassing the executive is a curious rationale for a conflicts principle".[205] The point is that, if "embarrassment" belongs within the semantic spectrum of comity, the contrary is not necessarily true. In fact, the comity that explains the origin of the doctrine – it was through comity that American courts created it in their quest to "accommodate respect for foreign sovereignty with growing American intercourse with other

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contradictory result of replacing deference to party autonomy with deference to the Executive: J.R. PAUL (note 4), at 32.

[197] However, "[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts": *Republic of Austria v Altmann*, 541 U.S. 677, 700 (2004). See also *Samantar v Yousuf*, 560 U.S. 305, at 322 (2010). Most importantly, as Justice MARSHALL pointed out in a dissent, the two "differ fundamentally in their focus and in their operation. Sovereign immunity accords a defendant exemption from suit by virtue of its status. By contrast, the act of state doctrine exempts no one from the process of the court. *Alfred Dunhill of London, Inc. v Republic of Cuba*, 425 U.S. 682, 725-26 (1976).

[198] *First Nat'l City Bank v Banco Nacional de Cuba*, 406 U.S. 759, at 762 (1972).

[199] *Id.* at 767.

[200] H.H. KOH, Transnational public law litigation, *Yale Law Journal* 1991, p. 2362.

[201] *Kirkpatrick & Co. v Evtl. Tectonics*, 493 U.S. 400 (1990).

[202] *Kirkpatrick*, 493 U.S. 400, at 404.

[203] *Id.* at 406.

[204] *Id*. at 410.

[205] J.R. PAUL (note 4), at 32.

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nations"[206] – is very much the same comity that remains relevant for the modern-day life of the institution. In other words, comity, intended as a tool to promote successful political and commercial relations, supports the idea of deference to the Executive, assumed as the branch capable of best pursuing these objectives.

2. Sovereign Immunity

Doctrines of sovereign immunity have long been recognised to be based on comity. A reference to the principle is absent in the early landmark case *The Schooner Exchange v McFaddon*.[207] Delivering the majority opinion, Chief Justice MARSHALL carefully balanced his language, referring obliquely to the language of the law of nations and succeeding in illustrating exceptions to national jurisdiction while reaffirming the absolute nature of sovereignty.[208] Yet, MARSHALL referred to "distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other".[209] Other authorities, too, support a comity-driven reading of the decision.[210]

In the Twentieth Century, this relationship was investigated further. In *Guaranty Trust Co. v United States* comity was understood to require that "foreign sovereigns and their public property [be] held not to be amenable to suit in our courts without their consent",[211] while in *City Bank of New York v Republic of China*, Justice REED found the word appropriate to describe a relaxation of jurisdictional rules – in light of the fact that any such consent could be easily revoked by the sovereign.[212] Finally, in *Verlinden B.V. v Central Bank of Nigeria,*[213] the Court interpreted *The Exchange* as qualifying sovereign immunity as "a matter of grace and comity… and not a restriction imposed by the Constitution".[214] For the

[206] H.H. KOH (note 200), at 2257.

[207] 11 U.S. 116 (1812).

[208] P.C. JESSUP, *Transnational Law,* New Haven 1956.

[209] *The Schooner Exchange*, 11 U.S. 116, at 137.

[210] *The Parlement Belge*, (1880) 5 P.D. 197. See also *Compania Naviera Vascongado v Steamship "Cristina"*, [1938] A.C. 485. The case is remembered as most divisive: see M.N. SHAW, *International Law*, Cambridge 2008, p. 705, (Lord MAUGHAM J "the word «comity», whatever may be its defects in regard to other rules of private international law, has a very powerful significance".

[211] 304 U.S. 126 (1938), at 134-5.

[212] *Cf. La Santissima Trinidad*, 20 U.S. 283, at 352-3 (1822). "But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels": 20 U.S. 283, at 352-3 (1822).

[213] 461 U.S. 480 (1983).

[214] *Id.* at 486. See also, seemingly suggesting that *The Exchange* had generally been interpreted too broadly, *Samantar v Yousuf*, 560 U.S. 305, 311 (2010). See also *Republic of Argentina v NML Capital, Ltd.*, 134 S.Ct. 2250, 2255 (U.S., 2014): ("Foreign sovereign

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Court, this justified deference to the determinations of the executive when deciding whether to exercise jurisdiction against foreign sovereigns and their instrumentalities.[215] Comity thus continues to shape the doctrine of immunity. Not only is it often referenced and discussed at length as the basis of immunity; it is also used to explain what precisely immunity, pursuing the interests of comity, requires.[216]

3. The Privilege of Suit

Finally, comity has traditionally served as the traditional justification for the privilege granted to foreign governments to bring suit in United States courts. The Supreme Court recognized this function as early as 1870, stating that "[a] foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling".[217] One consequence of this approach to granting of the privilege was the ability to preserve "the discretion of the United States to deny it, at least to foreign states that are at war with the United States or not recognized by it".[218] Later decisions have confirmed this approach,[219] but have also highlighted that the treatment of the issue differs significantly from that of immunity: as the Court put it in a later case, "[b]y voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought".[220]

Again, the concept of comity has continued to be relevant: for example, it has been relied on for purposes of statutory interpretation in *Pzifer*, where the Court relied on it to affirm that a sovereign state damaged by anticompetitive conduct could sue for treble damages in United States district courts and could thus, under the Clayton Act,[221] qualify as "persons".[222]

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immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

[215] *Verlinden B.V*, 461 U.S. 480, at 486 (1983). See also *Dole Food Co. v Patrickson*, 538 U.S. 468 (2003) and *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (relying on *Hilton*).

[216] 553 U.S. 851, at 851 (2008) ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine").

[217] *The Sapphire*, 78 U.S. 164, at 167-8 (1870).

[218] W.S. DODGE (note 7), at 2091 citing the authority of *Pfizer, Inc. v Gov't of India*, 434 U.S. 308.

[219] "Although comity is often associated with the existence of friendly relations between states… prior to some recent lower court cases which have questioned the right of instrumentalities of the Cuban Government to sue in our courts, the privilege of suit has been denied only to governments at war with the United States": *Sabbatino*, 376 U.S. 398, at 409.

[220] *Guaranty Trust Co. v United States*, 304 U.S. 126 (1938), at 134-5.

[221] 15 U.S. Code § 12.

[222] 434 U.S. 308, at 311-312.

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It has been argued that comity, the roots of the privilege notwithstanding, has now a much smaller role to play, and that questions concerning suits brought by foreign governments can be resolved by clear-cut – if judge-made – rules (as opposed to standards).[223] But as a less dated Second Circuit decision puts it, reliance on comity highlights "that foreign nations are external to the constitutional compact, and it preserves the flexibility and discretion of the political branches in conducting this country's relations with other nations".[224]

V. United States Experience and the Global Dimension of Comity

In the foregoing sections we have examined the approach American courts and scholars have adopted when dealing with the concept of comity. It is now time to understand its peculiarities and overall fortune in the global discourse on the notion.

A. Comity Doctrines and Comity Reasoning

An analysis of the notion of comity in American law highlights the variety of meanings that are commonly associated with the expression, but also reveals the number of doctrines and rules that in comity find their rationale. The notion thus informs a variety of areas and it is difficult to drive out the impression that, today as in HUBER's time, comity has been to judges "a springboard from which they proceeded to develop a highly organized and sophisticated set of choice of law rules".[225] While American courts have largely lost touch with the conflict of laws roots (and rationale) of the comity doctrine, which would provide "a more principled basis for applying the doctrine in transnational cases by bringing sovereign interests to light" and allowing for a more reasoned mediation between them,[226] comity continues to play a role.

The metaphor of "comity as a springboard" does not fully describe its role in American law anymore, and we need not enter discussions on whether its demands are met by the application of rules or standards.[227] The point is that comity often enters the picture in a more oblique manner than it is generally suggested, and that what we may label "comity reasoning" is as important as the reliance on the "principle" or the "doctrine" of comity.

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[223] W.S. DODGE (note 7), at 2126.

[224] *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002).

[225] C. MCLACHLAN (note 37), at 222.

[226] D.E.I. CHILDRESS (note 7), at 63.

[227] W.S. DODGE (note 7), at 2124.

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One illustration is offered by the numerous references to comity in the context of decisions involving international law. To many commentators, American courts have consistently struggled to distinguish one from the other. Yet, in many cases, it appears that courts have simply used the concept of comity as lens through which they were required to ascertain what exactly international law permitted or required. Indeed, the idea that the interpretation of norms of international law may draw inspiration from comity is not theoretically illogical, especially if comity's theoretical vicinity with the principle of good faith is taken into account.[228] When these aspects are considered, the cogency of comity appears in another light: statements to the effect that "the king is wise and good" clearly work much better in the context of domestic statutory interpretation than they do with regards to international sources.[229] In other words there might be method in the American judiciary's apparent confusion of comity and public international law, in that the former allows to give proper effect to the latter.

B. The Problem of Deference to the Executive

The debate on comity in the United States has often turned into a discussion on separation of powers. Comity, it may be recalled, is largely agent-agnostic in terms of which among the powers exercises it – HUBER's own statement of the doctrine supports as much.[230] It also accords with the rationale of many canons of statutory interpretation, first and foremost the presumption against extraterritoriality, which assumes comity to have been exercised by the legislative branch, the role of the judiciary being limited to an *ex post* recognition of such exercise. Yet, by looking at the instances in which comity has been invoked and the issue of deference to the Executive raised, one would not conclude that the problem of separation of powers fits so neatly in the life of the doctrine. In practice, the most troubling links between comity and deference to the executive stem from sensitive matters arising from cross-border or international disputes.

Comparable occurrences before courts of other nations have not prompted courts to grant the political branches such a substantial degree of deference.[231] More precisely, a more limited number of hypotheses call for this type of deference, which is, conversely, deeply rooted in American legal thinking continues to encourage one of the most unbending "myths" of international

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[228] J. KÄMMERER, Comity, in R. WOLFRUM (ed), *Max Planck Encyclopedia of Public International Law*.

[229] E.S. MORGAN, *Inventing the People: The Rise of Popular Sovereignty in England and America*, New York 1989, p. 29.

[230] E.G. LORENZEN (note 39), at 227. See also *Hartford Fire*, at 813 (SCALIA J).

[231] For example, in the United Kingdom the question of deference to executive power normally arises in the context of political questions and issues of justiciability. For an example concerning the grant of diplomatic protection and the position of the British Court of Appeal that an unreasonable refusal would have been considered justiciable, see *Abbasi*; see also Supreme Court of Canada, *Khadr (No 2)*, 2010 SCC 3, [2010] 1 SCR 44.

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comity.[232] This difficulty has less to do with questions relating to the United States form of government than with certain attitudes of the American judiciary, divided – when dealing with issues of foreign affairs – between the opposed approaches of a "customary" practise of judicial abdication[233] and their constitutional "province and duty… to say what the law is".[234] Further, contrary to obsequiousness to the will of Congress, deference to the executive could also be seen as undermining the principle of democratic accountability, and the advocacy of Executive power in this area has been linked to the growing fear of the "Soviet threat".[235] As Curtis BRADLEY has persuasively observed, the main problem with the hoary problem of deference is that it has been traditionally perceived as a unitary phenomenon, when in fact it cannot be labelled as such.[236]

While there is no reason why a court cannot be invested of an issue having cross-border significance and conduct its comity analysis, where needed, alone, common sense and institutional courtesy limit this kind of behavior. But if deference must be granted to the executive, is it possible to conceptualise a framework for doing so?

It has been suggested that borrowing the doctrine of *Chevron*[237] deference from administrative law could be particularly fruitful.[238] Broadly speaking, the *Chevron* doctrine requires courts to engage in a two-step analysis in the interpretation of statutes, first determining whether Congress has spoken clearly on the question at issue, and then giving deference to the reading put forward by the governmental agency tasked with the administration of the statute itself, insofar as it is permissible.[239] The rationale for this deference is that "[j]udges are not experts in the field, and are not part of either political branch of the Government", while agencies are both better placed and more politically accountable – if only through the Chief Executive.[240]

However, the appropriateness of the Chevron model is highly context-dependent: to defer to the Executive's interpretation of a treaty is not the same thing as relying on its determination as to whether the Act of State doctrine should not be applied,[241] or a foreign head of state granted immunity from jurisdiction.[242] The concept of deference is clearly not unitary.[243] Even worse would be to argue

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[232] W.S. DODGE (note 7), at 2132.

[233] *Jama v Immigration & Customs Enforcement*, 543 U.S. 335, 338.

[234] *Marbury v Madison*, 5 U.S. (1 Cranch) 137,177 (1803).

[235] J.R. PAUL (note 4), at 33.

[236] C.A. BRADLEY, Chevron Deference and Foreign Affairs, *Va. L. Rev.* 2000, p. 649, 659.

[237] *Chevron USA Inc. v Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[238] C.A. BRADLEY (note 236); E.A. POSNER/ C.R. SUNSTEIN, Chevronizing Foreign Relations Law, *Yale Law Journal* 2007, p. 1170.

[239] *Chevron*, 467 U.S. 837, at 842-43, 865.

[240] *Id.* at 865-866.

[241] See *supra*.

[242] *Samantar v Yousuf*, 560 U.S. 305, at 322 (2010).

[243] C. BRADLEY (note 236), at 666.

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that deference to the executive should inform "the core responsibility of the courts to manage their dockets and decide cases".[244]

Beyond this aspect, the involvement of the Executive need not, in and by itself, be considered incompatible with the doctrine of comity. We may consider the role of deference within the broader framework of "foreign relations law" – a legal category that is well-established in the United States, if less so elsewhere.[245] MCLACHLAN, who has devoted considerable attention to the field, describes foreign relations law as performing an "allocative function".[246] As the author contends, this function is an aggregate of two different ones, in that it controls the jurisdiction and applicable law "in the external exercise and control of the public power of states" and contributes to the ordering of "the allocation of foreign affairs competence within the municipal constitution".[247] This function obeys to a conflict of laws logic: however, while conflict involves determinations that follow a "two-dimensional" approach considering two systems of municipal law, foreign relations law implicates a "three-dimensional" judgment on the allocation of institutional competence.[248] In the United States, foreign relations law is a fundamentally internal matter and reflects the American Constitution's structural aspects. It follows that constitutional prerogatives of the Executives make it so that deference is, if not always necessary, justifiable. To this extent, this is compatible with the Courts' "judicial duty to know and to declare" the "comity of our own country" is probably a question.[249]

On the one hand, the Executive may appeal because of its expertise and accountability;[250] on the other hand, there may be questions of legitimacy and fear of being led onto a short-term focused agenda with potentially harmful long-term consequences.[251] But above all, BRADLEY is right in observing that "[e]ach opportunity for deference invites pressure from foreign governments and creates the possibility of diplomatic backlash if the Executive decides not to support their positions".[252] In this regard, the pattern established in limiting the reliance on executive determinations in both the areas of foreign sovereign immunity support the proposition that the "government need not, and should not, speak in every case": as then legal adviser to the Department of State Harold KOH' put it, "[i]n

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[244] W.S. DODGE (note 7), at 2132.

[245] See for example L. HENKIN, *Foreign Affairs and the United States Constitution,* Oxford 1997.

[246] C. MCLACHLAN, The Allocative Function of Foreign Relations Law, *British Yearbook of International Law* 2012, p. 377.

[247] *Id.* at 377.

[248] *Id.* at 380. MCLACHLAN also refers to LAUTERPACHT's own treatment of issues of foreign relations law. See H. LAUTERPACHT, *The Function of Law in the International Community,* Oxford 2011, p. 397.

[249] *Hilton v Guyot*, 159 U.S. 113, 228.

[250] H.H. KOH (note 16), at 150.

[251] D. JINKS/ N.K. KATYAL, Disregarding Foreign Relations Law, *Yale Law Journal* 2007, p. 1262.

[252] W.S. DODGE (note 7), at 2140.

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domestic litigation, [the Department's] ultimate goal is, in fact, not more verbiage, but more silence".

C. Beyond the Domestic: the "Comity of Courts" as a Global Ordering Principle

In 1998, in the wake of *Breard v Greene*[253] and the provisional measures issued by the International Court of Justice (ICJ) in the *Case concerning the Vienna Convention on Consular Relations*[254], Anne-Marie SLAUGHTER penned a seminal essay on the *American Journal of International Law* in which she discussed the implications of the Supreme Court's decision not to accord a stay of execution in compliance with the World Court's order.[255] SLAUGHTER observed that, irrespective of whether the measures issued by the ICJ were binding,[256] the Supreme Court should have nonetheless honored the request "as a matter of judicial comity".[257] SLAUGHTER further observed that the United States judiciary was re-discovering the concept of "judicial comity", building the case on the basis of SCALIA's dissent in *Hartford Fire*. The "comity of courts" terminology left much to be desired, but provided an opportunity to describe comity as "the lubricant of transjudicial relations".[258] SLAUGHTER's understanding of "judicial comity" later evolved as one of the building blocks of the theoretical model she developed in later writings for the construction of a global legal system through the concerted work of domestic courts. In *A New World Order* she described it as providing

> "… the framework and the ground rules for a global dialogue among judges in the context of specific cases. It has four distinct strands. First is a respect for foreign courts qua courts, rather than simply as the face of a foreign government… Second is the related recognition that courts in different nations are entitled to their fair share of disputes – both as co-equals in the global task of judging and as the instruments of a strong «local interest in having localized controversies decided at home». Third is a distinctive emphasis on individual rights and the judicial role in protecting them. Fourth […]

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[253] 523 U.S. 371 (1998).

[254] *Vienna Convention on Consular Relations (Paraguay v United States of America)*, Provisional Measures, Order of 9 April 1998, *ICJ Reports* 1998, p. 248.

[255] A.-M. SLAUGHTER, Court to Court, *AJIL* 1998, p. 708.

[256] There can now be no doubt as to the binding nature of provisional measures in international adjudication. See C. BROWN, *A Common Law of International Adjudication*, Oxford 2007; S. ROSENNE, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford 2005; H. THIRLWAY, The Law and Procedure of the International Court of Justice 1960–1989. Part Eleven, *British Yearbook of International Law* 2001, p. 71.

[257] A.-M. SLAUGHTER (note 255), at 708.

[258] *Id.* at 708.

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> is a greater willingness to clash with other courts when necessary, as an inherent part of engaging as equals in a common enterprise".[259]

To be sure, SLAUGHTER's claims have sometimes been portrayed as vaguely starry-eyed: most notably, while acknowledging that conflict between courts is inevitable, she argues that it is conducive to greater dialogue, and thus comity.[260] As MILLS and STEPHENS have observed, such a claim relies on the questionable notion that "the «special» character of courts" and "a capacity of a free market of legal ideas to avoid distortions caused by inequalities of power" will allow substantive conflict avoidance through agreed procedure.[261] Yet, SLAUGHTER's theory has proved fascinating to many, especially with scholars of public international law. In the context of its "fragmentation" and the proliferation of international courts and tribunals, it has been argued that comity might have the potential of mitigating the resulting problems.[262] The practice of international adjudication and arbitration too seems to provide a number of indications that international adjudicators are conscious of the value of comity, and respect each other's competence and decision-making capacity, displaying an awareness of their status as "co-equals in the global task of judging" and recognising different specializations.[263] This attitude seems to transcend simple institutional dialogue,[264] rather amounting to "an emerging general principle of international procedural law".[265] Indeed, there are indications that comity has served as a valuable tool even when dealing with competing proceedings before courts of different orders.[266]

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[259] A.-M. SLAUGHTER (note 8), at 87; A.-M. SLAUGHTER, A Global Community of Courts, *Harvard International Law Journal* 2003*,* p. 191.

[260] A.-M. SLAUGHTER (note 8), at 89–90.

[261] A. MILLS/ T. STEPHENS, Challenging the Role of Judges in Slaughter's Liberal Theory of International Law, *Leiden Journal of International Law* 2005, p. 30.

[262] See, *inter alia*, J.R. CRAWFORD (note 98), at 210–11; T. SCHULTZ/ N. RIDI (note 2); Y. SHANY (note 9), at 260; Y. SHANY, *Regulating jurisdictional relations between national and international courts*, Oxford 2007, p. 166.

[263] See for example *Ireland v United Kingdom ("MOX Plant Case")* (Order No 3) (UNCLOS Annex VII Tribunal, PCA), where the tribunal relied on "considerations of mutual respect and comity which should prevail between judicial institutions" to justify the suspension of its proceedings in the face of an almost certain involvement of Court of Justice of the European Union. For a critique, see C. MCLACHLAN (note 37), at 455. For a discussion of the meaning and significance of comity in a variety of different international fora, see T. SCHULTZ/ N. RIDI (note 2).

[264] See for example R. HIGGINS, A Babel of Judicial Voices? Ruminations from the Bench, *I.C.L.Q.* 2006, p. 791; C.P.R. ROMANO, Deciphering the Grammar of the international jurisprudential dialogue, *NYU Journal of International Law and Politics* 2008, p. 755. Relying almost exclusively on the concept of comity E. D'ALTERIO, From judicial comity to legal comity: A judicial solution to global disorder?, *International Journal of Constitutional Law* 2011, p. 394.

[265] B. SIMMA, Universality of International Law from the Perspective of a Practitioner, *European Journal of International Law* 2009, p. 287.

[266] See for example *Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6. See also generally Y. SHANY (note 262); T. SCHULTZ/ N. RIDI (note 2).

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Reasons of space and context prevent us from examining these aspects in further detail. We restrict ourselves to observing that the roots of the global comity discourse are, in both its real-world and theoretical dimensions, unmistakably American.

VI. Conclusion

While comity plays a smaller role today than it did two hundred years back, critics of the doctrine have always conceded that it was never really forgotten by the American legal world: in this study we acknowledge as much, but we also demonstrate how its use is as lively as ever. If "the definition of comity may be tenebrous, its importance could not be more clear".[267] True, comity has undoubtedly "transformed".[268] This transformation, though, is not an indication of the doctrine's demise, but rather of its inherently relational logical antecedents, sovereignty and territoriality. Comity, in other words, still represents an unparalleled "springboard" from which a number of inferences relating to regime conflict can be drawn.[269]

[267] *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).

[268] We borrow the expression from J.R. PAUL (note 4).

[269] C. MCLACHLAN (note 37), at 223.

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THE SPEECH ACT AND THE ENFORCEMENT OF FOREIGN LIBEL JUDGMENTS IN THE UNITED STATES

John F. COYLE*

I. Introduction
II. The SPEECH Act and its Origins
III. Case Law Interpreting and Applying the SPEECH Act
IV. Academic Commentary on the SPEECH Act
A. Unilateralism vs. Multilateralism
B. The (Questionable) Efficacy of the Act
V. Conclusion: Legislative Response and the Road Ahead

I. Introduction

The Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act) was enacted by the U.S. Congress in 2010.[1] The Act sought to address the perceived problem of libel tourism, *i.e.* the decision by plaintiffs in defamation suits to sue in jurisdictions with minimal ties to the case but with plaintiff-friendly substantive law.[2] The Act directs U.S. courts to decline to recognize or enforce a foreign defamation judgment if the foreign law that provided the basis for the judgment fails to provide at least as much protection for speech as the law of the United States.[3] In the years since it was enacted, the SPEECH Act has generated considerable discussion and commentary. This chapter first provides an overview of the SPEECH Act. It then reviews the U.S. cases that have interpreted and applied the SPEECH Act. It concludes by surveying the academic commentary relating to the SPEECH Act.

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[1] Pub. L. No. 111-223, 124 Stat. 2380-84, codified at 28 U.S.C. §§ 4101-05. Actions to enforce foreign money judgments in the United States are generally governed by state law rather than federal law. See J.F. COYLE, Rethinking Judgments Reciprocity, 92 *N.C. L. Rev.* 1109, 1111 n.5 (2014).

[2] L. LEVI, The Problem of Trans-National Libel Law, 60 *Am. J. Comp. L.* 507, 507 (2012).

[3] 28 U.S.C. § 1402.

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 245-258
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II. The SPEECH Act and its Origins

Historically, U.S. courts have taken a liberal approach to recognizing and enforcing foreign money judgments.[4] Indeed, some scholars have argued that the very liberality of U.S. law in this area has made it difficult for the United States to conclude judgments treaties with other nations; the United States is so generous in its current policy, so the argument goes, that it has nothing to bargain away.[5] In 2010, however, the U.S. Congress took steps to make it more difficult to enforce one particular type of foreign judgment – a foreign defamation judgment – when it enacted the SPEECH Act.

To understand the origins of the SPEECH Act, it is necessary first to understand that U.S. defamation law is extremely friendly to defendants. In order to prevail on a defamation claim in the United States where the statement addresses a matter of public concern, a plaintiff must prove that the published statement was false.[6] In Canada and England, by comparison, the plaintiff need not prove falsity in order to prevail; these nations merely permit the defendant to assert – as an affirmative defense – that the published statement was true.[7] When the plaintiff is a public figure, moreover, the U.S. Supreme Court has held that he may not recover for defamatory statements relating to his official conduct unless the statement in question was made with "actual malice."[8] The "actual malice" standard has been rejected by courts in other nations.[9] In balancing the free speech rights of defendants against the reputational harms suffered by plaintiffs, U.S. defamation law tends to err on the side of protecting free speech. The outcome is a law of defamation that is pro-defendant in its orientation.

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[4] As a general matter, foreign money judgments are enforceable in U.S. courts save when (1) the rendering court lacked jurisdiction, or (2) the foreign legal system that produced the judgment does not "provide impartial tribunals or procedures compatible with the requirements of due process of law." See *Unif. Foreign-Country Money Judgments Recognition Act* § 4(a)-(b), 13 pt. II U.L.A. 25 (Supp. 2013). U.S. courts also reserve the right to decline to recognize foreign money judgments where the judgment or the cause of action upon which the claim is based is repugnant to the public policy of the United States, among other reasons. *Id.* at § 4(c).

[5] M.H. ADLER, If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments, 26 *L. & Pol'y Int'l Bus.* 79, 109 (1994); S. D. MURPHY, Contemporary Practice of the United States Relating to International Law, 95 *Am. J. Int'l L.* 387, 420 (2001).

[6] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1968); see generally R.A. SMOLLA, Law of Defamation, 2d ed. (updated May 2017), § 5:13.

[7] R.A. SMOLLA (note 6), § 1:9.75.

[8] *Associated Press v. Walker*, 388 U.S. 130 (1967). The term "actual malice" is generally understood to mean either (1) knowledge that the statement was false, or (2) reckless disregard as to its truth or falsity. See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). The "actual malice" standard also applies to certain types of damages in cases involving private figures and matters of private concern. See *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 332-33 (1974); see generally R.A. SMOLLA (note 6), at § 3:17.

[9] See KYU HO YOUM, The "Actual Malice" of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century, 19 *Comm. L. & Pol'y* 185, 207 (2014).

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When a plaintiff believes that he has been defamed by a U.S. national, therefore, he may opt to file suit in a foreign jurisdiction. Historically, the courts of the United Kingdom were perceived as especially attractive due to their willingness to exercise jurisdiction "over defamation actions based on where the defamatory content is accessed rather than where it is produced."[10] In the prototypical case, a plaintiff would bring a defamation claim against a U.S. person in London and, if the suit was successful, seek to enforce the resulting judgment against the defendant's assets in the United States.[11] One case – and the one most frequently cited in the literature recounting the origins of the SPEECH Act – was brought by Khalid bin Mahfouz, a Saudi businessman, against an American journalist named Rachel Ehrenfeld.[12] In a book published in 2003, Ehrenfeld alleged that Mahfouz was channeling money to terrorist organizations.[13] The following year, Mahfouz sued Ehrenfeld for defamation in the United Kingdom. After Ehrenfeld failed to appear to defend the suit, Mahfouz won a default judgment for £110,000, including attorneys' fees.[14] Although Mahfouz never sought to enforce this judgment against Ehrenfeld's assets in the United States, the suit had a chilling effect on book publishers. In the wake of the decision, Random House U.K. decided not to publish a book by an American author about the relationship between the Bush family and the House of Saud.[15] Cambridge University Press withdrew and destroyed all copies of a different book – also written by Americans – on terrorism financing.[16]

The U.S. Congress enacted the SPEECH Act to counteract this chilling effect. In the findings of fact that accompanied the legislation, it observed that "[s]ome persons are obstructing the free expression rights of United States authors and publishers [...] 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

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[10] See D.C. TAYLOR, Libel Tourism: Protecting Authors and Preserving Comity, 99 *Geo. L.J.* 189, 193 (2010).

[11] There does not appear to be any published decision in which a U.S. court has ever recognized or enforced a foreign defamation judgment obtained by a libel tourist. See D.A. ANDERSON, Transnational Libel, 53 *Va. J. Int'l L.* 71, 77 (2012). In the years before the SPEECH Act, several U.S. courts refused to recognize or enforce foreign libel judgments on public policy grounds. See *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995); *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 154 F.R.D. 591, 1994 WL 419847 (S.D.N.Y. 1994); *Bachchan v. India Abroad Publications Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. 1992).

[12] R.L. MCFARLAND, Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism, 79 *Miss. L.J.* 617, 625-27 (2010).

[13] A. LESTER, Two Cheers for the First Amendment, 8 *Harv. L. & Pol'y Rev.* 177, 185 (2014).

[14] *Id.*

[15] D. GREEN, The SPEECH Act Provides Protection Against Foreign Libel Judgments, Litigation News (American Bar Association Section of Litigation), available at: <apps.americanbar.org/litigation/litigationnews//mobile/firstamendment-SPEECH.html>.

[16] *Id.*

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jurisdiction."[17] Congress noted that "[t]hese foreign defamation lawsuits not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit."[18] Finally, Congress stated that "[g]overnments and courts of foreign countries scattered around the world have failed to curtail this practice of permitting libel lawsuits against United States persons within their courts."[19]

The SPEECH Act sought to curtail this practice unilaterally by directing U.S. courts not to recognize or enforce foreign defamation judgments against U.S. persons unless certain conditions were met.[20] Specifically, the Act provides that a U.S. court may not give effect to a foreign defamation judgment unless it first determines that (1) the foreign defamation law provides at least as much protection for freedom of speech and press as does U.S. law, or (2) the defendant would have been liable for defamation if the suit had been brought in the United States.[21] The party seeking recognition or enforcement bears the burden of proving that one of these two conditions has been satisfied.[22] This party also bears the burden of showing that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States."[23] In order to enforce a foreign defamation judgment in a U.S. court, therefore, a judgment creditor must essentially relitigate the merits of the underlying judgment – and the issue of personal jurisdiction – in a U.S. court under U.S. legal standards.

This is not all. Under the Act, a U.S. person has the right to oppose the recognition or enforcement of the foreign judgment even if that person appeared in the foreign court proceeding.[24] A U.S. person opposing the recognition of the foreign judgment is also entitled to reasonable attorney's fees if successful.[25] Finally, the Act provides that a U.S. person may seek a declaratory judgment that a foreign defamation judgment is not enforceable.[26] This last provision permits a U.S. person

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[17] 28 U.S.C. § 4101 note.

[18] *Id.*

[19] *Id.*

[20] The Act defines "defamation" to include "any action for other proceeding for defamation, libel, [or] slander" as well as any "similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress […] or have resulted in criticism, dishonor, or condemnation of any person." 28 U.S.C. § 4101(1). It defines a "U.S. person" as "(A) a U.S. citizen; (B) an alien lawfully admitted for permanent residence to the United States; (C) an alien lawfully residing in the United States at the time that the speech that is the subject of the foreign defamation action was researched, prepared, or disseminated; or (D) a business entity incorporated in, or with its primary location or place of operation in, the United States." 28 U.S.C. § 4101(6).

[21] *Id.* at § 4102(a)(1).

[22] *Id.* at § 4102(a)(2).

[23] *Id.* at § 4102(b).

[24] *Id.* at § 4102(d).

[25] *Id.* at § 4105.

[26] *Id.* at § 4104(a)(1).

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to have a foreign defamation judgment declared unenforceable even if the foreign judgment creditor never moves to enforce it. There are, however, two disadvantages to seeking a declaratory judgment rather than opposing an enforcement action. First, the party seeking the declaratory judgment – the U.S. person – bears the burden of proving that it would not be enforceable.[27] Second, the statute does not grant attorney's fees to plaintiffs who seek a declaratory judgment.[28]

Although the SPEECH Act is ostensibly concerned with the problem of libel tourism, it can and does apply to judgments obtained by individuals who are not libel tourists. The Act does not distinguish between a Saudi suing an American in the courts of the United Kingdom and a Canadian suing an American in the courts of Canada. All foreign defamation judgments are treated the same, regardless of whether the plaintiff sued at home or sought out a more favourable forum abroad.[29]

III. Case Law Interpreting and Applying the SPEECH Act

In the years since the SPEECH Act was enacted, courts in the United States have had the opportunity to apply it on only a few occasions. The most thorough discussion of the Act appears in *Trout Point Lodge, Ltd. v. Handshoe*, a case decided by the U.S. Court of Appeals for the Fifth Circuit.[30] In that case, the plaintiffs were Canadian nationals and the owners of Trout Point Lodge, a hotel located in Nova Scotia, Canada. The defendant was Doug Handshoe, a resident of the State of Mississippi in the United States. Handshoe, an online journalist, blogged about the decision by a Louisiana politician named Aaron Broussard to plead guilty to charges of bribery and theft. Broussard owned property in Canada that was adjacent to Trout Point Lodge. Upon becoming aware of this connection, Handshoe made a series of blog postings in which he alleged that Broussard was linked to Trout Point Lodge and its owners. This series of posts was subsequently characterized by the trial court as "derogatory, mean spirited, sexist, and homophobic."[31]

After these statements were published online, the owners of Trout Point Lodge sued Handshoe for defamation in the courts of Nova Scotia. Handshoe did not appear in Nova Scotia to defend against the suit and the Canadian court rendered a default judgment against him for approximately $425,000. When the

[27] *Id.* at § 4104(a)(2).

[28] *Id.*

[29] See generally testimony of Linda J. Silberman at the Hearings before the Subcommittee on Commercial and Administrative Law of the Committee of the Judiciary, U.S. House of Representatives, 111th Cong., 1st Sess., Feb 12, 2009 (criticizing the overly broad scope of the SPEECH Act).

[30] 729 F.3d 481, 483 (5th Cir. 2013).

[31] *Id.* at 484.

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plaintiffs sought to enforce this judgment against Handshoe's assets in Mississippi, he invoked the SPEECH Act as a defense. Specifically, Handshoe argued that the Trout Point Lodge owners had failed to satisfy their burden of proving that (1) Canadian law provided at least as much protection for freedom of speech and press as U.S. law, or (2) that Handshoe would have been found liable for defamation if the suit had been brought in the United States. The trial court sided with Handshoe and refused to enforce the Canadian judgment. The Canadian plaintiffs then appealed the decision to the Fifth Circuit.

The Fifth Circuit first considered the question of whether Canadian law provided free-speech protection that was "coextensive" with the protection provided by U.S. law. It concluded that it did not. In the court's words:

> "There is no meaningful dispute that the law applied by the Nova Scotia Court provides less protection of speech and press than First Amendment and Mississippi law [...]. The most critical legal difference here is that a Canadian plaintiff – unlike a plaintiff subject to First Amendment and Mississippi state law – need not prove falsity as an element of its prima facie defamation claim. Rather, in Canada, truth is a defense that a defamation defendant may raise and, if so, must prove. Thus, Trout Point cannot satisfy the first prong of the First-Amendment considerations inquiry; that is, the law applied in the Nova Scotia proceeding did not provide at least as much protection for freedom of speech and press as Handshoe would have received under domestic law."[32]

The court then turned to the question of whether Handshoe would have been held liable if the suit had been brought in the United States. After reviewing the Canadian proceedings, the court concluded that he would not have been held liable because the allegations of falsity made by the Trout Point owners were "unaccompanied by any facts that contradict or otherwise undermine the allegedly defamatory statements."[33] The Canadian plaintiffs had, in other words, drafted their Canadian pleadings with an eye to the Canadian legal standard – which permitted defendants to assert truth as an affirmative defense – rather than the U.S. legal standard, which required plaintiffs to prove falsity as an element of their claim. Under the law of Mississippi and the United States, the court noted, it is essential that a plaintiff alleging defamation prove that the statements made by the defendant were false.[34] Since the plaintiffs failed to carry their burden on this point, the court concluded that the Canadian judgment was unenforceable in the United States.[35]

In the wake of his successful defense to the enforcement action, Handshoe asked the trial court to award him attorney's fees.[36] After first determining that

[32] *Id.* at 489-90.

[33] *Id.* at 494.

[34] *Id.*

[35] *Id.* at 496.

[36] *Trout Point Lodge, Ltd. v. Handshoe*, 2013 U.S. Dist. LEXIS 173373 (S.D. Miss. Dec. 11, 2013).

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there were no exceptional circumstances that warranted a departure from the usual practice of awarding attorney's fees under the SPEECH Act, the court ordered the Canadian plaintiffs to pay $48,000 to Handshoe to reimburse him for the fees he had paid to his attorneys.[37]

While there are several other U.S. cases that apply the SPEECH Act, none do so as comprehensively as *Trout Point Lodge*. In *Pontigon v. Lord*, the Missouri Supreme Court reversed a lower court decision registering a Canadian defamation judgment against a Missouri resident on the grounds that that court had failed to consider or apply the Act.[38] In *InvestorsHub.com, Inc. v. Mina Mar Group, Inc.*, a federal district court in Florida concluded that Canadian law did not provide as much protection to speech as U.S. law and entered a declaratory judgment stating that an Ontario defamation judgment was not enforceable in the United States.[39] To date, therefore, it would appear that the principal effect of a law enacted to protect U.S. journalists and publishers from libel tourists in the United Kingdom has been to preclude the enforcement of defamation judgments obtained by Canadian plaintiffs in Canada against U.S. citizens.

IV. Academic Commentary on the SPEECH Act

The reaction to the SPEECH Act among U.S. academics has generally been quite critical.[40] One group of scholars has argued that the problem of libel tourism could be more productively addressed through multilateral negotiations rather than unilateral action. A different group of scholars have argued that the Act is unlikely to achieve its stated goal of counteracting the chilling effects of libel tourism. Each of these two criticisms is explored at greater length below.

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[37] *Id.* It is unclear whether Handshoe ever managed to collect these fees. In November 2014, Handshoe filed a motion for a writ of garnishment against Trout Point Lodge and its affiliated entities in California, Massachusetts, New York, and Washington. See *Trout Point Lodge, Ltd. v. Handshoe*, No. 1:12CV90-LG-JMR, 2014 U.S. Dist. LEXIS 194810, at *1 (S.D. Miss. Nov. 24, 2014). The federal district court denied the motion, however, because none of the garnishees were located in Mississippi. In a bankruptcy filing in September 2016, the law firm that represented Handshoe in his litigation against Trout Point Lodge filed a claim against him for $48,000 in unpaid legal bills. See *In re Slabbed New Media, LLC*, 557 B.R. 911, 913 (Bankr. S.D. Miss. 2016). This filing suggests that Handshoe had not yet managed to collect on his judgment as of that time.

[38] 340 S.W.3d 315 (Mo. 2011).

[39] 2011 U.S. Dist. LEXIS 87566 (N.D. Fla. June 20, 2011).

[40] For one notable exception, see B.D. BROWN/ C. PINTADO, The Small Steps of the SPEECH Act, 54 *Va. J. Int'l L. Dig.* 1, 3 (2014).

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A. Unilateralism vs. Multilateralism

While the SPEECH Act represents one potential solution to the problem of libel tourism, it is not the only solution.[41] There are at least three possible alternatives. First, the nations of the world could negotiate a multilateral treaty that harmonized the substantive law of defamation. Once the substantive law was everywhere the same, the incentives for libel tourism would be greatly reduced. Second, the nations of the world could negotiate a multilateral treaty that harmonized the choice-of-law rules relating to defamation. Once the choice-of-law rules were everywhere the same, the incentives for libel tourism, again, would be greatly reduced. Third, and finally, the nations of the world could negotiate a multilateral treaty that harmonized various procedural rules as applied to defamation cases. If all national courts applied the same jurisdictional rules to defamation cases – or if they all agreed on a set of principles that required defamation cases to be brought in particular *fora* – then the incentives for libel tourism would likewise be greatly reduced.

The thread that unites these various alternative proposals is a preference for multilateral solutions to the exclusion of unilateral solutions. Virtually every U.S. legal scholar who has written about the SPEECH Act has taken issue with the notion that the United States can unilaterally solve the problem of libel tourism. David ANDERSON, for example, has argued that the SPEECH Act amounts to a declaration of war by the United States against the defamation law of other countries.[42] He describes the Act as an attempt by the United States "to insist that American ideas about the relative importance of reputation and free speech be accepted everywhere."[43] The problem with such a unilateral exercise of power, he argues, is that it fails to acknowledge the genuine and deeply felt differences between and among nations as to what speech ought to be protected.[44] In a similar vein, Mark ROSEN has criticized the Act for its parochialism.[45] ROSEN argues that

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[41] Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?, Hearing Before the Senate Committee on the Judiciary, 111th Cong. 2, 130 (2010) (prepared statement of K.A. WIMMER, Partner, Covington & Burling LLP) ("Will legislation within the United States solve [the libel tourism] problem entirely? To be sure, it would only be a step.").

[42] D.A. ANDERSON, Transnational Libel, 53 *Va. J. Int'l L.* 71, 96 (2012).

[43] *Id.*

[44] *Id.* at 98; see, *e.g.*, A. LESTER (note 13), at 192 ("The Supreme Court's First Amendment jurisprudence has lost persuasive influence in Europe because its decisions have afforded too much protection to freedom of expression at the expense of personal privacy. Its judgments have made libel law all but useless to victims of seriously harmful libels and have denied constitutional protection to the victims of gross media intrusion on private lives.").

[45] M.D. ROSEN, The SPEECH Act's Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism, 53 *Va. J. Int'l L.* 99 (2012); see also D. RENDLEMAN, Collecting a Libel Tourist's Defamation Judgment?, 67 *Wash & Lee L. Rev*. 467, 486-487 (2010) ("[The SPEECH Act] is based on the untenable and disrespectful notion that a plaintiff commits a tort by suing an American in another nation on a cause of action that is viable in that nation. Filing a defamation lawsuit in a foreign nation is not tortious misconduct. Its panoptic

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the Act is substantively parochial in that it recognizes only one possible set of rules for protecting speech. He argues further that the Act is procedurally parochial in that it recognizes only one possible set of rules for asserting personal jurisdiction over a defendant. Finally, he argues that the Act is systemically parochial in that applies to more than just libel tourism. ROSEN contends that this parochialism is normatively undesirable, among other reasons, because it runs contrary to widely accepted norms of legal pluralism.[46] ROSEN maintains that the best solution to the problem of libel tourism lies in a multilateral treaty rather than a unilateral action on the part of the United States.[47]

Let us now consider each of the three proposed alternatives to the SPEECH Act. The first is a treaty that harmonizes the *substantive law* of defamation. While this approach is favoured by a number of commentators, it presents obvious difficulties.[48] Perhaps the greatest difficulty is the absence of any international consensus on how to balance free speech interests against reputational interests. If the United States is out of step with other common law nations on this issue – and it is – then the prospects for reaching agreement on a broad multilateral treaty seem dim. Unless and until the United States Supreme Court revisits many of its seminal cases interpreting the First Amendment (an unlikely event) or other nations decide to embrace a more absolutist approach to free speech (also unlikely) there is simply no possibility that a treaty that harmonizes the substantive law of defamation will be concluded. However attractive this possibility may be in the abstract, it does not offer a realistic solution to the problem of libel tourism in practice.

The second possibility is a treaty that harmonizes the *choice-of-law rules* that apply to defamation cases. This approach is also favoured by some commentators.[49] However, it also presents several challenges. One challenge is developing a uniform choice-of-law rule. Even within the United States, there is disagreement on this issue. Some U.S. states apply the law of the place of the wrong.[50] Others apply the law of the place that has the most significant relationship to the conflict or the parties.[51] Still others apply the law of the place whose government has the greatest interest in the outcome.[52] In other parts of the world, plaintiffs are given "a choice between or among the laws of the victim's habitual residence, or the place of injury (subject to a foreseeability proviso) and the defendant's habitual

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rejection of all foreign-nation defamation judgments is both too blunt and too broad. The idea, moreover, that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself a repugnant one.").

[46] M. D. ROSEN (note 45), at 106-111.

[47] *Id.* at 120-125.

[48] H. MALY, Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed, 14 *J.L. & Pol'y* 883, 931-32 (2006); M.D. ROSEN (note 45), at 120-125.

[49] See F. M. MEIER, Unification of choice-of-law rules for defamation claims, 12 *J. Priv. Int'l L.* 492 (2016).

[50] D.A. ANDERSON (note 42), at 79.

[51] *Id.* at 79-80.

[52] *Id.* at 80.

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residence or principal place of business."[53] While the prospect of choosing a single choice-of-law rule relating to defamation may sound simple in concept, it is likely to prove challenging in practice. Even if nations could reach agreement on the choice-of-law rule, moreover, there is no guarantee that the chosen rule would be consistently applied by courts across many different nations. Scholars and commentators have long lamented the fact that the outcome of choice-of-law inquiries can be difficult to predict even when the choice-of-law rule is uncontested.

Still another challenge to the choice-of-law solution relates to public policy. When a choice-of-law analysis directs the court to apply a law that it considers repugnant to its public policy, the court will not apply it. Indeed, in the years before the SPEECH Act, a number of courts in the United States invoked a version of this rationale as a basis for declining to enforce foreign defamation judgments.[54] Even if all the nations of the world were to agree on a choice-of-law rule, therefore, and if all of the courts in these nations were to apply it with perfect consistency, there is the possibility that these courts would decline to apply the law of another nation that strikes a markedly different balance between free speech and reputation by invoking the public policy exception. Consequently, a multilateral approach devoted to harmonizing choice-of-law rules also seems likely to fail unless and until there is greater consensus as to the proper content of substantive defamation law.

The third possibility is a treaty that harmonizes various *procedural rules* that relate to defamation actions. One scholar has suggested that the nations of the world could enter into a treaty that would impose limits on the jurisdiction of particular courts to hear libel actions.[55] Such a treaty might stipulate, for example, that a libel plaintiff could only file a suit in the jurisdiction where the defendant is domiciled.[56] The adoption of such a rule would impose significant limitations on the ability of libel tourists to choose a favourable forum. Another scholar has argued that nations should consider adopting the "single publication rule" that has long been followed in the United States in libel cases. The single publication rule posits that "publication of a defamatory statement gives rise to only one cause of action. That single cause of action usually is held to arise at the time and place of first publication; damages from all subsequent publications of the same statement are recoverable in that one cause of action no matter where the damage occurs, and a judgment in that cause of action is res judicata as to all other claims arising from the same defamatory statement."[57] If the single publication rule were to be adopted across many different nations, it "would make it possible to use the established tools of *forum non conveniens* and choice of law to make rational choices among competing national claims."[58] Although this more procedural approach exhibits

[53] P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES, Conflict of Laws, 5th ed., St. Paul (Minn.) 2010, at 1000.

[54] See *supra* note 11.

[55] See E.J. ALIAS, Nearly Toothless: Why the SPEECH Act is Mostly Bark, With Little Bite, 40 *Hofstra L. Rev*. 235, 266 (2011).

[56] *Id.*

[57] D.A. ANDERSON (note 42), at 92.

[58] *Id.* at 95.

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promise, the recent failure of a project with similar aspirations – the Hague Convention on Jurisdiction and Foreign Judgments – raises questions as to whether a multilateral treaty in this area is realistic at the present time.

It is difficult to quarrel with the contention that, in the abstract, a multilateral treaty represents a superior solution to the problem of libel tourism than the SPEECH Act. In practice, however, the prospects for any sort of multilateral agreement in area are poor. When multilateral channels are unavailable, then states can – and often do – seek out unilateral solutions to international problems. In this case, the United States decided to enact a reciprocity statute in which it announced to the world: "Adopt our free speech law and we will recognize and enforce your defamation judgments! Reject our free speech law and we will refuse to recognize or enforce these judgments!"[59] One goal of a reciprocity statute is to induce another nation to change its law or policy.[60] Here, the United States offered to grant a right – the right to have a foreign defamation judgment enforced in a U.S. court – on the condition that the foreign nation adopt U.S.-style free speech protections. While reciprocity statutes have a long history, the prevailing academic wisdom holds that they are rarely effective in bringing about meaningful change in foreign law.[61] While the enactment of the SPEECH Act does seem to have had a minor impact on the law of the United Kingdom, as discussed below, there is little reason to believe that it will induce other states to adopt free speech laws akin to those currently in operation in the United States.[62]

The other goal of a reciprocity statute, of course, is to protect one's own citizens against perceived mistreatment by foreign nations.[63] Judged in accordance with this metric, there can be little doubt that the SPEECH Act should be viewed as a success. So long as it is in effect, U.S. persons may use it to shield their U.S. assets against foreign defamation judgments. However, the Act does not – indeed, it cannot – operate to protect the non-U.S. assets of defendants. This limitation is explored at greater length below.

B. The (Questionable) Efficacy of the Act

A different critique of the SPEECH Act focuses less on its conceptual *approach* and more on its basic *efficacy*. Lili LEVY has argued, for example, that "[w]hile the absolutism of the SPEECH Act may be overbroad, non-recognition is clearly appropriate at least in the prototypical case of libel tourism where neither the defendant nor the plaintiffs have real ties to the foreign forum."[64] LEVY's principal

[59] See J.F. COYLE (note 1), at 1116-20 (discussing history of reciprocity statutes).

[60] J.R. STARR, Reciprocal and Retaliatory Legislation in the American States, 21 *Minn. L. Rev*. 371, 374 (1937).

[61] J.F. COYLE (note 1), at 1127 (discussing prevailing academic wisdom); *Id.*, at 1132-40 (discussing instances in which reciprocity statutes succeeded in changing foreign state behavior).

[62] See infra Part V.

[63] See J.F. COYLE (note 1), at 1132-35.

[64] L. LEVI (note 2), at 528.

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critique of the Act is that it is unlikely to succeed in achieving its stated objective of promoting free speech. She points out that the Act offers little to U.S. publishers and media companies that possess substantial assets outside of the United States.[65] In her words:

> "Unlike impoverished bloggers who do not wish to travel to the United Kingdom or the rest of the European Union, the large, mainstream, institutional news organizations with the resources to fund hard-hitting accountability journalism must remain extremely concerned about libel judgments. The economic reality of news and media organizations today is that they are often multi-national in character. American media companies maintain extensive operations, agents, and assets in members of the European Union. American publishers as well have world-wide connections and assets. These assets and interests outside the United States would be available to satisfy foreign libel judgments. Ironically, then, regardless of the SPEECH Act, libel tourism will continue to deter precisely the type of responsible news reporting, fact investigation, or expert professional commentary that is most socially beneficial and accurate. An unintended consequence of the statute in operation is that it will be far less protective of the traditional journalist with training in journalistic and editorial standards than of the hypothetical individual blogger with no European assets, no connection with the institutional press, and little if any commitment to mainstream journalism standards. As a practical matter then, the SPEECH Act reserves its highest level of practical protection for speakers most isolated from the international stage."[66]

On this account, therefore, the principal problem with the SPEECH Act is not that it is unilateral in its approach. Rather, the problem is that it is unlikely to achieve its stated goal of counteracting the chilling effects of libel tourism on the speech of large U.S. publishers and media organizations in possession of assets outside the United States.[67]

V. Conclusion: Legislative Response and the Road Ahead

The passage of the SPEECH Act in 2010 did not go unnoticed by reformers in the United Kingdom. One commentator observed that "the fact that Britain's best ally feels the need to protect itself from the English libel courts demonstrates the need

[65] *Id.* at 529.

[66] *Id.*

[67] *Id.*

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for reform."[68] Another described the Act as a "humiliation."[69] Although there was already a movement underway in the United Kingdom to reform its libel laws, the SPEECH Act provided an additional impetus to these efforts. Just a few years later, the British government enacted the Defamation Act 2013, which came into effect on January 1, 2014.[70] The Defamation Act sought to reform the country's libel laws so as to deter potential libel tourists. Among other things, this Act adopted a new rule that placed strict limits on the jurisdiction of English courts to hear libel cases brought against defendants who are not domiciled in the European Union.[71] In this respect, the SPEECH Act may be said to have had a (modest) long-term effect in making the United Kingdom marginally less attractive as a forum for libel tourists seeking to bring claims against U.S. nationals.

These developments notwithstanding, the SPEECH Act remains on the books. Having achieved a small victory in the United Kingdom, in short, the SPEECH Act now appears to have settled in to await the day when the rest of the world conforms its laws relating to free speech to those of the United States. We may be in for a long wait.

Critics of the Act can, however, take some comfort in several facts. First, for all the attention that the SPEECH Act has received, it did not significantly alter the status quo. In the years prior to 2010, a number of U.S. courts had declined to enforce foreign defamation judgments on public policy grounds.[72] While the SPEECH Act formalized this rule, it did not constitute a departure from existing policy. Second, the SPEECH Act gives U.S. treaty negotiators something to bargain away if, in fact, there is revived interest in addressing the problem of libel tourism through a multilateral agreement.[73]

Third, the United States continues to take a liberal approach to enforcing foreign money judgments that are not defamation judgments.[74] In this respect, its practice compares favourably to many nations – including China, Japan, Singapore, and South Korea – which have enacted reciprocity statutes directing national courts not to enforce *any* foreign judgments absent a showing that the

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[68] A. SPILLIUS, US outlaws 'libel tourists' who turn to Britain, *Daily Telegraph*, Jul. 29, 2010.

[69] House of Commons, Culture, Media and Sport Committee, Select Committee Announcement (Feb. 24, 2010), available at <http://www.parliament.uk/business/committees/committees-archive/culture-media-and-sport/cms100224/>.

[70] Defamation Act, 2013, c. 26, available at <http://services.parliament.uk/bills/2012-13/defamation.html>; see also R. WATSON/ R. ROLDAN/ A. FAZA, Toward Normalization of Defamation law: The U.K. Defamation Act of 2013 and the U.S. SPEECH Act of 2010 as Responses to the Issue of Libel Tourism, 22 *Comm. L. & Pol'y* 1 (2017) (comparing the two pieces of legislation).

[71] Defamation Act 2013, § 9 ("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.").

[72] See *supra* note 11.

[73] See *supra* note 5 & accompanying text.

[74] See *supra* note 4 & accompanying text.

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rendering state would do the same if the circumstances were reversed. While there are important differences between these judgments reciprocity statutes and the SPEECH Act, the fact that the latter is of relatively narrow application suggests that its impact will be relatively limited. Fourth, and finally, the SPEECH Act takes the long overdue step of federalizing U.S. law relating to the enforcement of foreign judgments. With any luck, its enactment will pave the way for future federal statutes addressing this topic, thereby bringing much needed uniformity to an area of law that has (inexplicably) been the exclusive province of each of the fifty states for the past 241 years.

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ENVIRONMENTAL CROSS-BORDER TORTS

ENVIRONMENTAL DAMAGES CAUSED BY TRANSNATIONAL GROUPS: ACCESS TO JUSTICE

Laura GARCÍA ÁLVAREZ*

I. Environmental Damages Caused by Transnational Corporations and Access to Justice
II. Main Obstacles and Proposals
A. International Jurisdiction and Extraterritorial Claims
B. The Allocation of Responsibility within Transnational Corporations
C. Environmental Damage, Active Legal Standing to Sue and Collective Actions

I. Environmental Damages Caused by Transnational Corporations and Access to Justice

This paper summarises some of the ideas expounded in our PhD thesis on access to civil justice in the context of environmental damages caused by transnational groups of companies.[1] Specifically, it explores the obstacles faced by the victims of environmental torts in seeking compensation in cases where damages occur in non-EU countries and are allegedly caused by companies belonging to transnational groups with EU-domiciled parent companies. Our interest in these cases stems

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[1] L. GARCÍA ÁLVAREZ, *El acceso a la justicia civil en supuestos de daños ambientales causados por grupos transnacionales de sociedades con matrices europeas*, Tesis Doctoral, Universidad Pablo de Olavide de Sevilla, 2015. Please note that this article is a summary. As such, the cited works and judicial cases, as well as the main arguments, are not exhaustive but merely illustrative.

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 259-288
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Printed in Germany

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from the analysis of several scenarios closely related to globalisation that can have direct consequences for victims accessing civil justice.[2]

First, it is common that companies, organised in commercial groups to maximise profits and limit risk, export their potentially dangerous activities to countries where regulations are not as strict as in their home countries and the risk of facing compensation in the event of damage or abuse is consequently lower.[3] This can be due, among other factors, to the existence of judicial systems with lesser independence in those countries, the weakness of their institutions, widespread corruption, the limited procedural guarantees, the insufficient substantive legislation in the area of extracontractual liability, the absence of economic or technical resources, under-capitalisation of participating subsidiaries, etc.[4] In

[2] This is due to the undeniable link between the expansion of the international economy, the over-exploitation of natural resources (especially of impoverished countries) on which the former is based and, consequently, environmental damage and environmental legislation. See J. CARRASCOSA GONZÁLEZ, Globalización y Derecho internacional privado en el siglo XXI, *Anales del Derecho* 2004, No. 22, p. 17-58, p. 31 and works cited therein (A. KISS/ C. THOMAS/ N. SINH/ O. PAYE/ E. PATTERSON, etc., at note 43). Also, about globalisation's effects on Private International Law, see, among others, H. MUIR WATT, The relevance of Private International Law to the Global Governance, in H. MUIR WATT/ D.P. FERNÁNDEZ ARROYO (eds), *Private International Law and Global Governance*, Oxford 2015, p. 1-17; P.A. DE MIGUEL ASENSIO, El Derecho internacional privado ante la globalización, *Anuario Español de Derecho Internacional Privado* 2001, Vol. I, p. 37-87; N. BOUZA VIDAL, La globalización como factor de cambio del Derecho internacional privado, in J. MARTÍN PÉREZ DE NANCLARES (ed), *Estados y organizaciones internacionales ante las nuevas crisis globales*, 2010, p. 293-306.

[3] Transnational groups have been increasingly involved in environmental tort cases in impoverished countries in recent years. Even in a World Bank report, it was stated that environmental damage was more efficient in the poorest countries, therefore suggesting "more migration of the dirty industries". See L. SUMMERS, The Memo, 12 December 1991, available at <http://www.whirledbank.org/ourwords/summers.html> (14.2.2016). The report was leaked to press in December 1991. For more detail on the report, see M. ANDERSON, Transnational Corporations and Environmental Damage: Is Tort Law the Answer?, 41 *Washburn Law Journal* 2001, p. 399-425, at 402 and works there cited (note 10) and p. 418 *et seq*. However, it would be a mistake to consider that countries in the geographic North host parent companies and those in the South assume the risks, although it was traditionally that way.

[4] L. ENNEKING, Crossing the Atlantic? The political and legal feasibility of European Foreign Direct Liability Cases, *The George Washington International Law Review 40,* 2009, p. 903- 938, at 906. This author also states that the law in the home country is usually more favourable for victims than the law in the host country (p. 930). Also, Amnesty International, France – Pour une législation sur l'obligation de vigilance des entreprises transnationales, SF 14 PA 35, January 2015, p. 18-19. Available at <http://www.amnesty.fr/sites/default/files/pour_une_obligation_de_vigilance_amnesty_international.pdf> (15.12. 2015). With respect to obstacles to access justice, see particularly G. SKINNER/ R. MCCORQUODALE/ O. DE SCHUTTER, *The Third Pillar- Access to Judicial Remedies for Human Rights Violations by Transnational Business*, ICAR – CORE - ECCJ, December 2013, p. 145; L.J. MCCONNELL, Establishing liability for multinational corporations: lessons from Akpan, *International Journal of Law and Management* 2014*,* Vol. 56, Issue 2, p. 88-104; L. GARCÍA ÁLVAREZ, Daños privados por contaminación en el tráfico externo: a propósito del caso Akpan vs. Shell (Nigeria), *Cuadernos de Derecho Transnacional*, Vol. 5,

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impoverished countries, it is often impossible to establish the liability of investor companies, which can result in a denial of access to effective justice for victims of environmental wrongs.[5] According to M. ANDERSON:

> "[…] legal action in the local courts is often ineffective, suffering from the defects of an inadequate liability regime, procedural obstacles or a judiciary unwilling to rule against a powerful multinational. In these circumstances, a tort action in the home country may be the only effective avenue for pursuing the private actions so favoured by policy-makers."[6]

Therefore, successful reparation of personal and collective damage often depends on the success of an extra-territorial lawsuit in another country connected with the damage and where the prospects of obtaining effective judicial protection are higher. The outcome of the process is undoubtedly of international importance as we are all ultimately victims of environmental catastrophes, given the undeniably ubiquitous, global nature of the environment.

Secondly, given that to date, many environmental tort cases have yielded insufficient results,[7] it seems evident that current regulation is unsatisfactory while countless academic discussions remain unresolved. As a consequence, it is necessary to rethink national legal frameworks, which are based on territorial schemes and conceived for very different situations that are no longer relevant today. To this end, it seems reasonable to start analysing the inconsistencies and difficulties in accessing justice in order to subsequently identify new opportunities and propose new solutions.[8]

No. 2, 2013, p. 548-583; G. VAN CALSTER, *European Private International Law*, Oxford 2013, p. 227-240.

[5] Business & Human Rights Resource Center, Annual Briefing, January 2015, p. 3, available at <http://business-humanrights.org/en/business-rights-resource-centre-launches-its-third-annual-briefing-on-corporate-legal-accountability#c109245> (6.12.2015). Also, M. REQUEJO ISIDRO, *Violaciones graves de derechos humanos y responsabilidad civil (Transnational Human Rights Claims)*, Pamplona 2009, p. 108 and J. ZERK, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*, Report prepared for the Office of the UN High Commisioner for Human Rights, 2014, available at <http://www.ohchr.org/Documents/Issues/Business/Domestic/LawRemedies/StudyDomesticeLawRemedies.pdf> 815.03.2017).

[6] M. ANDERSON (note 3), at 409.

[7] Such as *Torrey Canyon, Aegean Sea, Seveso, Sandoz, Bhopal, Chernobil, Prestige, Exxon Valdez, Amoco Cadiz, Chevron, Boliden Aznalcóllar, Bodo, Tranfigura, Shell Nigeria*, *Deepwater Horizon, Erika,* etc. The Organisation for Economic Co-operation and Development (OECD) quarterly collects and documents the cases in this area. The last one is available at <http://www.oecdwatch.org/publications-en/Publication_4202/> (10.2.2017). Also, in B. WINIGER, *et al.*, *Essential Cases on Damage*, The Hague, 2011, p. 961 *et seq*. Most cases mentioned before are thoroughly studied in L. GARCÍA ÁLVAREZ (note 1).

[8] From the Private International Law perspective, some discussion about this specific case study can be found, in the Spanish literature, in M.A. MICHINEL ÁLVAREZ, *El Derecho Internacional Privado en los Tiempos Hipermodernos*, Madrid 2012, p. 101-113; M. VINAIXA MIQUEL, *La responsabilidad civil por contaminación transfronteriza derivada*

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The inherent cross-border character of these cases makes this research fall squarely within the sphere of Private International Law. However, in addressing the question from a multidisciplinary, "horizontal" perspective, issues relating to substantive law, both public and private, also need to be examined.

V. VAN DEN EECKOUT states the following regarding the key role of Private International Law for obtaining judicial relief in human rights cases[9], an issue addressed by the United Nations Guiding Principles in Business and Human Rights:[10]

> "PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm – to be opened or to be kept closed; thus, […] PIL rules are of paramount importance in determining access to specific court and access to a specific legal norm."[11]

As J.C. FERNÁNDEZ ROZAS says regarding the current function of Private International Law:

> "Private International Law can only serve a substantive law purpose, like any other branch of law, which purpose consists in providing a substantively just response to the conflicts of interests arising from those private relationships which are characterized through an international element."[12]

The aim of our study is, therefore, to provide an understanding of the main legal obstacles hindering access to civil justice in order to propose solutions which could

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de residuos, Universidad de Santiago de Compostela, 2006, p. 374 *et seq*.; A. CRESPO HERNÁNDEZ, *La responsabilidad civil derivada de la contaminación transfronteriza ante la jurisdicción estatal*, Madrid 1999, p. 205-218; A.L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, vol. II, 15th ed., Granada 2015, p. 661-662; P. MOSCOSO RESTOVIC, *Competencia judicial internacional para daños civiles asociados a daños ambientales*, PhD Thesis, Universidad Complutense de Madrid, 2014, p. 346-356.

[9] Regardless of whether or not the right to a healthy environment may qualify as a human right, it is undeniable that it is a necessary condition for the full enjoyment of human rights. It is also evident that some human rights are infringed when an environmental catastrophe occurs. See The High Commissioner for Human Rights, Reports of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, docs. A/HRC/8/5, 7/4/2008, No. 51; A/HRC/11/13, 22.4.2009, No. 52; A/HRC/14/27, 9.4.2010, No. 51, available at http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx (10.1.2016).

[10] HR/PUB/11/04, Geneva, 2011, full document available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (4.2.2016).

[11] "The Private International Law Dimension of the Principles. An Introduction", 4/02/2015, available at: http://ssrn.com/abstract=2560268 [Visited: 10/1/2017].

[12] "[e]l Derecho internacional privado sólo puede tener una función material, al igual que la de cualquier otra rama del Derecho, consistente en dar una respuesta materialmente justa a los conflictos de intereses que se suscitan en las relaciones jurídico-privadas que se diferencian por presentar un elemento de internacionalidad: J. C. FERNÁNDEZ ROZAS (note 2), at 8.

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more effectively guarantee that access while contributing directly or indirectly to the protection of the environment. This study is limited to the analysis of civil law aspects – and leaves aside administrative law and criminal law aspects – and this is so for several reasons: limitations of Public International Law in prosecuting multinational companies;[13] evidentiary difficulties and non-generalised criminal liability of corporations in contemporary legal systems; poor development of administrative proceedings in cases of transnational damage caused by private entities and difficulties in implementing those proceedings, etc.[14]

The geographic scope of our study is limited to the European Union. On the one hand, a broader scope would be hardly manageable. On the other hand, it is reasonable to focus our attention on countries exporting capital – which are usually those where parent companies are established – as well as on countries having more advanced legislation on these issues, *i.e.* legislation that is generally more favourable to the victims and grants higher compensation.[15] Those countries include most notably the European Union, the U.S. and Canada. Unsurprisingly, a comprehensive literature on this issue can be found in these countries. As to the EU, focusing on this region is all the more necessary in light of the harmonisation process which is under way with respect to Private International Law.[16] Further-

[13] M. ANDERSON, quoting D.M. ONG, states: "[…] there has been a real failure to address corporate environmental behavior in either international law or comparative company law, leaving the bulk of the regulatory burden to be borne by national systems of civil and criminal liability". See M. ANDERSON (note 3), at 404, note 22 and 410 *et seq.* (IV. *Problems of Access*). While the international community would have the ability to overcome the aforementioned problems through Public International Law rules, the current economic and political system of the international community makes the imposition of legal obligations on transnational groups unfeasible. In fact, all attempts have been to regulate through *soft law*. See M. REQUEJO ISIDRO, La responsabilidad de las empresas por violación de derechos humanos. Deficiencias del marco legal, *Scientia Juris* 1/2011, p. 10-44, at 13; P. MUCHLINSKI, Corporations in International Litigation: Problems of Jurisdiction and The United Kingdom Asbestos Cases, 50 *I.C.L.Q.* 2001, p. 1-25, at 24-25; A. SHINSATO, Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria, 4 *Northwestern Journal of International Human Rights* 2005, p. 186-209, at 198 *et seq*.

[14] In this respect, regarding environmental damages, see C. STAATH/ B. WRAY, Corporations and Social Environmental Justice: The Role of Private International Law, *European University Institute Working Papers, Law 2012/02*, *Towards Social Environmental Justice?,* p. 77-95; G. PALAO MORENO, *La responsabilidad civil por daños al medio ambiente*, Valencia 1998, p. 26 *et seq*.

[15] M. ANDERSON confirms this idea that courts of countries exporting capital (where parent companies are domiciled in most cases) usually respond faster and more efficiently, and provide better compensation. M. ANDERSON (note 3), at 410.

[16] See, among others, M. FALLON/ T. KRUGER, The spatial scope of EU's rules on jurisdiction and enforcement of judgements: from bilateral modus to unilateral universality?, this *Yearbook* 2012, p. 1-37, at 18; I. PRETELLI: Jurisdiction of the European Union and relations with third states, in I. PRETELLI/ L. HECKENDORN (eds), Possibility and terms for applying Brussels I Regulation (recast) to extra-EU disputes, Document requested by the European Parliament's Committee on Legal Affairs, European Parliament, March 2014, p. 38. Available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf> (4.12.2016).

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more, a favourable trend may be seen in some EU countries (*e.g.* the Netherlands, Germany, France) where courts have been willing to deal with extraterritorial cases, maybe given the pressing need for companies to fulfil commitments for the protection of the environment and human rights[17]. In the United States, the opposite is true after the judgment in *Kiobel.*[18] All these reasons together with the author's personal ties with the European Union account for the geographic scope of the research.

Given the transnational relevance of issues such as environmental damage and corporate liability, this paper looks to the most problematic legal issues reported by major academic and third sector studies,[19] as well as those issues raised in landmark or recent judicial cases.[20]

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[17] This, derived from the United Nations Guiding Principles on companies and human rights. Business & Human Rights Resource Center (note 6), at 2, 7, 8; A. CARDESA-SALZMANN, Acceso a los tribunales de los estados miembros de la UE para reclamar por daño ambiental causado en países terceros, in A. PIGRAU SOLÉ (ed), *El acceso a la justicia de las víctimas de daños ambientales. Una perspectiva comparada*, Valencia 2015, p. 305-323, at 314;

[18] S. THORGEIRSSON, Closing the courtroom door: Where can victims of human rights abuse by business find justice?, available at <http://business-humanrights.org/en/closing-the-courtroom-door-where-can-victims-of-human-rights-abuse-by-business-find-justice> (12/1/2017).

[19] Among others, the study by G. SKINNER/ R. MCCORQUODALE/ O. DE SCHUTTER (note 4), at 13, 76 *et seq*., suggests some recommendations to overcome the basic problems to access justice, highlighting the following ones: (1) granting access to courts in the EU for extraterritorial damages, based on the defendant's domicile *forum* and the proximity *forum* together with a *forum necessitatis*; (2) the need of setting a *duty of care* for the parent company regarding their subsidiaries' activities; (3) the importance of improving and developing the collective redress mechanism. Others are also mentioned, such as the extension of legal aid or the choice of the law of the forum State when the foreign law does not guarantee an effective and fair relief (see *infra*). It is also worth mentioning the Annual Briefing of the Business & Human Rights Resource Centre that points to the following key issues: (1) the possibility of claiming in countries where parent companies are domiciled for extraterritorial damages, (2) ways of financing litigation and (3) access to collective redress mechanisms. See Business & Human Rights Resource Center (note 5), at 8, 9.

[20] A paradigmatic case that clarifies the main hurdles is *Akpan vs. Shell*, District Court of The Hague, 30 January 2013, available in English at <https://milieudefensie.nl> (10.6.2017). The case is still pending on appeal. In L.J. MCCONNELL words, "Akpan […] has demonstrated that litigation in the domestic forums of both host and home states is fraught with procedural hurdles which prohibit expedience and devaste substantive claims. It is highlighted the inability and unwillingness of host states to enforce their international obligations in the light of proliferation of powerful private actors upon which they are economically dependent. The export of the Akpan proceeding to The Netherlands demonstrated the major jurisdictional challenges which preclude legal action in the home states of parent corporations concerning the activities of their foreign subsidiaries". See L.J. MCCONNELL (note 4), at 98. Also about this case, L. GARCÍA ÁLVAREZ (note 4), at 548-583.

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(1) The first issue is that of the available fora for the victims,[21] as the determination of the competent authority is "often the greatest hurdle faced by litigants".[22] Jurisdiction over civil matters in the EU depends on the existence of a connection with the country in question, which generally requires the defendant to be domiciled in the EU Member State where the lawsuit is filed. This poses an initial difficulty in the situations where the subsidiary directly responsible for the damage is domiciled in the non-EU country where the damage is suffered.[23] Therefore, the study suggests introducing a forum at the EU Member State of domicile of the parent company even when the damage is extra-territorial. This would make it necessary to focus more on economy-related connections, which promise to provide a better response to contemporary globalised business activity, than on the traditional, purely territorial connections. It is also necessary to review the classical justification underlying the principles of limited liability and of corporate independence which are still prevailing in Company Law. This constitutes a major obstacle when it comes to allocating responsibilities within a business group due to the difficulties experienced in connecting the damages to the parent and, more generally, attributing them to group entities from States where courts are more likely to provide better relief. Indeed, as long as the legislation remains based on territorial criteria and cut off from the "liquid reality" of the current business world, it will be unable to capture and reflect the different forces that operate and the cause-and-effect relations that take place within those corporations. This leaves room for *de facto* and *de iure* immunity and safe heavens, as entreprises make use of that legal fragmentation and loopholes in order to escape accountability.[24]

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[21] Regarding international jurisdiction, L. CARBALLO PIÑERO/ X. KRAMER state that, "one may safely say that never have private international law scholars and practitioners been so closely involved with those focusing on corporate law, human rights and environmental law" (The Role of Private International Law in Contemporary Society: Global Governance as a Challenge, *Erasmus Law Review* 2014, Vol. 3, No. 7, p. 109-113, at 110).

[22] International Civil Litigation and the Interest of the Public Committee (ILA), reunión de La Haya, Draft Report, No. 54, cited by M. REQUEJO ISIDRO (note 13), at 30, note 89.

[23] M. ANDERSON points to the incongruency (note 3), at 402.: "[…] we are left with a seeming anomaly in the international system: the "home" state where the parent company is based lacks the territorial jurisdiction to regulate the activities of subsidiaries located abroad, while the "host" states in which the subsidiaries are located lack the jurisdiction over the parent company where many of the crucial decisions are made. In these circumstances, the MNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order."

[24] V. CHETAIL, The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward, in D. ALLAND, *et al.* (eds), *Unity and Diversity of International Law. Essays in Honour of Prof. Pierre Marie Dupuy*, 2014, p. 105-130; D. AUGENSTEIN, The Crisis of International Human Rights Law in the Global Market Economy, *Netherlands Yearbook of International Law* 2014, p. 41-64; N. JÄGERS, Colloquium on the Liability of Multinational Corporations under International Law, 29 and 30 April 1999, Rotterdam, The Netherlands, *International Law FORUM du droit*

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(2) The contemporay regime regarding capacity to sue – *i.e.* who is entitled to sue, for which damage and against whom? – as well as the lack of collective litigation schemes[25] tend to deter victims from seeking compensation for atomised and widely dispersed damages, which together have the potential of inflicting major environmental, personal and collective harm. The complex nature of environmental tort needs to be examined in order to forge a more suitable regime on legal standing and to enable plaintiffs to make use of collective actions in cases of cross-border environmental torts,[26] although some of the proposed solutions could easily be applied to national damages. Those solutions are intended to allow litigants to overcome procedural obstacles, reduce costs and provide an improved balance of power between the parties at a time when the new realities of transnational damages are "challenging the traditional mechanisms of civil litigation in Europe and worldwide".[27]

These two issues, jurisdiction and capacity to sue, are developed in our study,[28] which is structured as follows.

– The introduction addresses the starting assumptions, the aim and scope of the research, the justification for the topic chosen, and the methodology that has been adopted.

– The first chapter deals with the legal and economic nature of groups of companies, their procedural and substantive treatment and the wide gap that exists between their legal apprehension, on the one hand, and their economic and real behaviour on the other. This analysis is conducted on the basis of both the national and supranational legal instruments. The multifaceted and somewhat fluid concept of environmental damage is also scrutinised and a distinction is made between the ecological damage, the damage to the supraindividual interest to enjoy a healthy environment and the private individual damage which is the one on which traditional private law has almost exclusively focused.

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international, Vol. 1, No. 3, p. 181-183; V.C. NAMBALIA, Global Environmental Liability: Multinational Corporations under Scrutiny, 1 *Warwick Research Journal* 2014, p. 181-204; L. GARCÍA ÁLVAREZ (note 1), at 96-102 and works there cited.

[25] "[…] the availability of mass claim settlement procedures not surprisingly is an important factor shaping also the recoverability of claims against a multitude of potential defendants". See B.A. KOCH, Multiple Tortfeasors in Mass Tort Cases, in W.H. VAN BOOM/ G. WAGNER (eds), *Mass Torts in Europe, Cases and Reflections, Tort and Insurance Law Vol. 34*, Berlin 2014, p .173-197, at 190.

[26] About the different ways of naming the international damages (transnational, international, transborder damages) and the differences in meaning, see T. BALLARINO, Questions de droit international privé et dommages catastrophiques, *Recueil des Cours* 1990-I, p. 289 *et seq*., at 309.

[27] A. NUYTS/ N.E. HATZIMIHAIL, *Cross-border Class Actions, The European Way*, 2014, (*Foreward*), p. V.

[28] L. GARCÍA ÁLVAREZ (note 1).

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– The second chapter is dedicated to the study of jurisdiction from the point-of-view of the Spanish system of Private International Law as well as that of other Member States. The research takes into account the particular nature of the defendant, which is an entity belonging to a transnational group of companies having ties with the EU.

– Finally, the third chapter examines the procedural treatment of the parties involved in environmental tort disputes, with a particular emphasis on the ability for the victims as well as other entities such as NGOs to file law-suits. It further explores the development across the EU of collective redress mechanisms with respect to environmental torts while addressing the existing difficulties that stand in the way of an efficient use of those mechanisms. Some proposals are put forward in order to enhance the benefits flowing from and improve the efficiency of those mechanisms, particularly when it comes to tackling the multitude of the plaintiffs involved.

II. Main Obstacles and Proposals

A. International Jurisdiction and Extraterritorial Claims

The ability for victims to litigate abroad is essential to safeguard the human right of access to justice, as well as to restore, as far as possible, damaged natural resources and to redress collateral personal damage.[29] The connection between the environment, the flow and the localisation of risks and profits, the international commitments on human rights regarding the activity of multi-national companies (mainly within the United Nations Guiding Principles on Business and Human Rights framework), as well as basic ethical principles and common sense, all this imperatively calls for alternatives to ensure reparation of damage and accountability of holding companies. This in turn requires that legal experts search for solutions other than compelling victims to litigate in the country where the damage occured if relief in this country proves unsatisfactory. In other words, the new solutions should prioritise the rights of parties over the sovereignty paradigm which is traditional in Private International Law.[30]

[29] As M. ANDERSON (note 3, at 409) says: "[…] legal action in the local courts is often ineffective suffering from the defects of an inadequate liability regime, procedural obstacles or a judiciary unwilling to rule against a powerful multinational. In these circumstances, a tort action in the home country may be the only effective avenue for pursuing the private actions so favored by policy-makers". In this respect, see V. VAN DEN EECKHOUT, The Private International Law Dimension of the Principles. An Introduction (4.2.2015), p. 2, available at <http://ssrn.com/abstract=2560268> (10.12.2015); G. SKINNER/ R. MCCORQUODALE/ O. DE SCHUTTER (note 4), at 24-25; A. CARDESA-SALZMANN (note 17), at 310-312.

[30] For more in this respect, see D.P. FERNÁNDEZ ARROYO, Limitation de la compétence judiciaire et accès à la justice, in *AA.VV, Les relations privées internationales,*

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In the search for jurisdictions in which litigating is likely to yield better prospects of success, it appears that the country presenting the stronger claim is that of the parent company's place of domicile because this is the country where the parent is likely to benefit from the damage-causing activity. However, is this, by ordinary standards, a sufficient connection which would make that forum a reasonable, non-exorbitant forum?[31] In order to answer this question, it is necessary to further look into corporate structures and the allocation of intra-group liability as well as to analyse the extent to which a sufficient link exists between the damage directly caused by the foreign subsidiary and the actions of the EU-domiciled parent company. It is also necessary to study both the national and supranational jurisdiction-selecting rules which are in force within the EU.

It is safe to conclude – all material and data gathered in our study show this beyond reasonable doubt – there is indeed a significant connection between the domicile of the parent company and the transnational damage caused by its affiliates and subsidiaries to the extent that, on the one hand, a dependency relationship or centralised management exists, and, on the other, the harmful activity produces a direct impact on the European market, the profits generated by the harmful activity being likely to be channelled into this market and invested in it. However, given the absence of substantive rules providing for the liability of the parent company – whether strict or negligence-based liability or liability arising from the position of the parent as guarantor for the debts of its subsidiaries –, proving the causation between the conduct of the parent company and the damage can quickly become an impossible task and may ultimately call into question the parent's domicile as a reasonable forum in the absence of other connections with that country.

An analysis of the current jurisdictional regime in Spain and other EU countries reveals that considerable obstacles stand in the way of the victims of environmental damage when suing subsidiaries and parent companies.

With respect to the *conventional supranational instruments*, specific treaties exist relating to nuclear damage and damage caused to seawater by hydrocarbons:[32]

Mélanges en l'honneur du Professeur Bernard Audit, Paris 2014, p. 285-306, at 287 and works cited therein.

[31] About this issue of exorbitant forum, see, C. KESSEDJAN, International jurisdiction and foreign judgements in civil and commercial matters, Preliminary document of April 1997, num. 7 for the attention of the Special Commission of June 1997 on the question of jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters, No. 138, Hague Conference of Private international Law), available at <http://www.hcch.net/upload/wop/jdgm_dp8.pdf> (9.11.2015); 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* 1993, p. 2-7, at 2; O. STRUYVEN, Exorbitant jurisdiction in the Brussels Convention, *Jura Falconis* 1998-1999, Vol. 35, No. 4, p. 521-548, available at <http://www.law.kuleuven.be/jura/> (10.6.2015); L. MARI, Jurisdiction of the European Union and third states; theoretical points of reference, in I. PRETELLI/ L. HECKENDORN (note 16), at 6. The eventual problem regarding recognition and enforcement of resolutions based on an exorbitant forum, which could also lead to a denial of justice, cannot be underestimated.

[32] General conventions are studied therein: see, L. GARCÍA ÁLVAREZ (note 1), at 271-276.

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the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and, regarding oil pollution, the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969),[33] together with the subsequent Protocols, supplementary conventions and amendments. The jurisdiction rules applicable to oil pollution are fairly uncertain due to their complexity and the high number of competing provisions. While the 1969 Convention does a good job establishing a faster procedure as well as a mechanism to make it easier for shipowners to assess the risk,[34] the liability regime regarding the amount of compensation that the Convention lays down seems insufficient and the practical difficulties faced by plaintiffs are regrettable. All of this can lead ijured people to try and litigate in countries that are not bound by the Convention and for which there is no cap on the amount of compensation that they may claim,[35] whereas the shipowner will usually attempt to litigate in a signatory State.[36] When it comes to multinational corporations, although their involvement in these kinds of accidents is frequent,[37] the absence of specific rules has led to difficulties in recognising the

[33] International Convention on Civil Liability for Oil Pollution Damage (CLC), Brussels, 29 November 1969. Entry into force: 19 June 1975; Being replaced by 1992 Protocol, 27 November 1992; Entry into force: 30 May 1996. Further information at <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx> (2.2.2016).

[34] C. ZILIOLI, *Il risarcimento del danno derivante da incidenti industriali transnazionali*, Milano 1995, p. 143.

[35] For further information on this topic, among others see, W. CHAO, Pollution from the carriage of oil by sea: liability and compensation,The Hague 1996, especially p. 37-382; M. REQUEJO ISIDRO, Sistema de los Convenios de responsabilidad y del FIDAC, in M.P. GARCÍA RUBIO/ S. ÁLVAREZ GONZÁLEZ (eds), *La responsabilidad por los daños causados por el hundimiento del Prestige*, Madrid 2007, p. 139-166, at 140; C. ZILIOLI (note 34), at 215 *et seq*.; G. PALAO MORENO (note 14), at 50; R. RODIÈRE, Les tendences contemporaines du droit privé maritime international, *Recueil des Cours* 1972-I, p. 328 *et seq*.; E. DU PONTAVICE, *La pollution des mers par les hydrocarbures (à propos de l'affaire du Torrey Canyon)*, Paris 1968; A. KISS/ D. SHELTON, *International Environmental Law,* New York/ London 1991, p. 288 *et seq*.; J.J. ÁLVAREZ RUBIO, *Los foros de competencia judicial internacional en materia marítima*, San Sebastián, Servicio Central de Publicaciones del Gobierno Vasco, 1993, p. 147-148; M.A. MICHINEL ÁLVAREZ, The Prestige in Courts, 21 *Australian and New Zealand Maritime Law Journal* 2007, p.171-177, at 173-174; L. LUCCHINI, Le renforcement du dispositif conventionnel de lutte contre la pollution des mers, *Clunet* 1974, p. 755-793.

[36] This was the case in the *Torrey Canyon* case. See, A. CRESPO HERNÁNDEZ (note 8), at 209, 243-244; S. ÁLVAREZ GONZÁLEZ, Caso Prestige. Las demandas ante los distintos tribunales de justicia: realidad, intereses y alternativas, in M.P. GARCÍA RUBIO/ S. ÁLVAREZ GONZÁLEZ (note 35), at 277-279. See also, E. DU PONTAVICE, Affaire "Droit de l'environment versus Droit maritime" ou la décision rendue le 18 avril 1984 concernant L'Amoco Cadiz, *Annuaire de Droit Maritime et Aérien* 1985, Vol. VIII, p. 14-16; T. SCOVAZZI, Industrial accidents and the veil of transnational corporations, in F. FRANCIONI/ T. SCOVAZZI (eds), *International Responsibility for Environmental Harm*, London 1991, p. 395-427, at 416.

[37] *E.g.*, *Amoco Cadiz, Torrey Canyon, Exxon Valdez, Deepwater Horizon, Erika, Atlantic Empress, ABT Summer, Morris J. Berman, Jakob Maersk*, etc. All of them are among the 22 most serious accidents according to number of tons spilled.

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responsibility of companies other than the shipowner.[38] With respect to nuclear liability, the 1960 Paris Convention allows for a concentration of actions and increases the ability to predict which court has the power to settle the dispute, which is a good thing. However, numerous shortcomings and loopholes within this instrument end up encouraging victims, whenever possible, to resort to ordinary courts under the general regime.[39] This would lead to Regulation 1215/2012.[40]

In the absence of conventional supranational rules, the supranational tool *par excellence* across the EU is indeed Regulation 1215/2012. In most cases however – and environmental torts are no exception – the Regulation requires the defendant to be domiciled in an EU Member State in order to applicable. After studying each of the fora that may come into play when it comes to environmental damage,[41] a whole bunch of challenges are easily identifiable when it comes to figuring out the best procedural strategy.

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[38] Some successful attempts in the *Amoco Cadiz, Erika* and *Exxon Valdez* cases. For detail about these cases, see L. GARCÍA ÁLVAREZ (note 1), at 240-247 and works cited therein. Regarding corporate networks and their implications: J.W. BARTLETT, In re oil spill by the Amoco Cadiz - Choice of law and a pierced corporate veil defeat the 1969 Civil Liability Convention, *Tulane Maritime Law Journal* 1985, p. 1-24, at 5; T. SCOVAZZI, Amoco Cadiz, in J. JUSTE RUIZ/ T. SCOVAZZI (eds), *La práctica internacional en materia de responsabilidad por accidentes industriales catastróficos*, Valencia 2005, at 23-35; T. SCOVAZZI, in F. FRANCIONI/ T. SCOVAZZI (note 36), at 413-421.

[39] J. HANDRLICA, The Brussels I Regulation and responsibility for nuclear damages, *Nuclear Law Bulletin* 2010/2, No. 86, p. 29-48; *Id.*, Exclusive Jurisdiction vs. Forum Shopping in European Nuclear Liability Law, *International Journal of Nuclear Law* 2010, Vol. 3, No. 2, p. 96-111; B. MCRAE, La Convention sur la réparation complémentaire des dommages nucléaires et l'harmonisation du régime de responsabilité civile nucléaire dans l'Union européenne, *Bulletin de Droit nucléaire* 2011/1, No. 87, p. 83-100; J.P. PIÉRARD, *Responsabilité civil, energie atomique et droit comparé*, Bruxelles, 1963, p. 105-131; A. CRESPO HERNÁNDEZ (note 9), at 220 *et seq*.; N. PELZER, La responsabilité civile dans le domaine nucléaire au lendemain de l'accident de Tchernobyl : un point de vue allemand, *Bulletin de Droit Nucléaire* 1987, No. 39, p. 69-80, especially p. 76; J.J. ÁLVAREZ RUBIO, (note 35), at 89 *et seq*.; G. PALAO MORENO (note 14), at 50; P. BOUREL, Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environment, in *AA.VV., L'internationalisation du Droit, Mélanges en l'honneur de Yvon Loussouarn*, Paris 1994, p. 93-106; C. STOIBER/ A. BAER/ W. TONHAUSER/ N. PELZER, *Handbook on Nuclear Law, International Atomic Energy Agency*, Vienna 2003, p. 115 *et seq*.; P. GALIZZI, Questions of Jurisdiction in the Event of a Nuclear Accident in a Member State of the European Union, *Journal of Environmental Law* 1996, p. 71-97, at 96; G. BETLEM, *Civil Liability for Transfrontier Pollution, Dutch Evironmental Tort Law in International Cases in the Light of Community Law*, London 1993, p. 83-84.

[40] 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 (L 351, 12 December 2012), applicable since 10 January 2010 (known as Brussels I recast).

[41] Maily the following articles: 4, 7.2, 7.3, 7.5, 8.1, 25, 26, 35. About the Regulation in this respect, among others: U. MAGNUS/ P. MANKOWSKI (eds), Brussels I Regulation, 2nd rev. edn., Munich, 2012; B. HESS/ Th. PFEIFFER/ P. SCHLOSSER, *Report on the application of Regulation Brussels I in the Member States*, September 2007, Study JLS/C4/2005/03; F. CADET, Le nouveau Règlement Bruxelles I ou l'itinéraire d'un enfant gâté, *Clunet* 2013,

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– *Suing parent company and subsidiary*. How can a lawsuit be filed against the subsidiary involved? As the subsidiary is *ex hypothesis* not domiciled in a EU Member State, Regulation 1215/2012 does not apply to the action against it. By contrast, the parent company is domiciled in a EU Member State and is therefore amenable to jurisdiction in the country of domicile based on Article 4. Since it is not possible to lift the corporate veil to confer jurisdiction on the courts of that Member State with respect to the non-domiciled subsidiary any more than it is possible to rely on Article 8.1 concerning related actions or Article 7.2 for extra-contractual liability, both of which are not applicable to non-EU defendants,[42] the amenability of the subsidiary to jurisdiction in the EU will ultimately depend on the domestic, "residuary" rules on international jurisdiction prevailing in each Member State. A variety of approaches can be observed on the domestic level, which yield varying results depending on the country. It goes without saying that the ensuing economic distortions and unequal judicial treatment of companies and potential victims are undesirable.

– *Suing only the subsidiary*. What would the connection with the State of the forum (*i.e.* the *home state* of the parent) be? Apparently, there would be no such connection, and this possibility would be doomed to failure unless it is based on a residuary jurisdiction rule that dispense with this connection. Any such forum is likely to be characterized as "exorbitant" under EU standards, which may trigger problems at the recognition and enforcement stage. An example of this kind of forum could be the *forum necessitatis* upheld by the Dutch courts, which seems not to require a particular connection with the Netherlands.[43]

– *Suing only the parent company*. Since the damage is not directly attributable to an active (mis)conduct of the parent company, and given the absence of any specific substantive rules providing for the liability of the parent, major problems may be encountered in establishing capacity to be

No. 3, p. 765-790; K.M. MESSEEN (ed), *Extraterritorial Jurisdiction in Theory and Practice*, London 1996.

[42] 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, 14.10.2010 and the thorough study about the issue of jurisdiction in D. AUGENSTEIN & N. JAGERS, Judicial remedies: the issue of jurisdiction, in J.J. ÁLVAREZ RUBIO & K. YIANNIBAS (eds), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*, New York, Routledge, 2017, p. 7-37 (for proposals, see p. 36-37). Also, A. BORRÁS RODRÍGUEZ, La aplicación del reglamento Bruselas I a los domiciliados en terceros estados: los trabajos del Grupo Europeo de Derecho internacional privado, *Anuario Español de Derecho Internacional Privado* 2010, Vol. X, p. 795-814; B. CAMPUZANO DÍAZ, Las normas de competencia judicial internacional del Reglamento 1215/2012 y los demandados domiciliados fuera de la UE: Análisis de la reforma, *Revista Electrónica de Estudios Internacionales* 2014, No. 28, p. 1-35.

[43] A. NUYTS, *Study on residual jurisdiction*, General Report, 2007, European Commission Study JLS/C4/2005/07-30-CE)0040309/00-37, available at <ec.europa.eu/civil justice/news/docs/study_residual_jurisdiction_en.pdf> (20.5.2017).

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sued or proving such liability: investigation into control or management of the subsidiary, participation in the damage through acts or omissions, etc. Without specific rules alleviating the burden of proof from the shoulders of the claiming parties or establishing some form of strict liability of the parent based on objective standards, at least under certain circumstances, either as payment guarantor or as the party directly liable, this option holds little chance of success.

In view of the problems identified, and despite the rather positive general assesment that the regime established by Regulation 1215/2012 and its predecessors have received in academic circles, some modifications to Regulation 1215/2012 are desirable. These modifications should not obstruct the access to justice based on the domestic jurisdiction rules if those rules happen to provide for the jurisdiction of the relevant Member State in a way which is consistent with the principles of international law. The proposed rules should rather allow EU Member State to hear an action based on extraterritorial environmental damage against two defendants, the parent company and its subsidiary.

To be sure, the main stumbling block is the allegedly insufficient connection with the EU. However, a thorough analysis belies this statement. Does the fact that a company is domiciled and has its operating headquarters in a given country where it usually receives the entire profits generated through a business activity that has caused environmental damage elsewhere, truly constitute a negligible and therefore unreasonable connection? Doesn't it fall within the jurisdiction of a State to regulate its market, market which clearly can no longer be held to be restricted to its own territory, especially when it comes to the activity of multinational companies? How can one ignore that profits from extraterritorial activities have an impact on the national income? Aren't the facts of such cases manifestly connected with the market and the risk-for-profit harmful activity, as well as with the subsidiary directly responsible for the damage and 100% owned by the parent? Isn't joint assessment of related claims more efficient on a global scale? Shouldn't the EU Member State where the parent company is domiciled require from latter a duty of care over its subsidiaries, when such important legal rights are at stake, even more so when its own market and the entities operating within it benefit directly from the company's extraterritorial activities? Based on the values and principles of our legislation and those pursued by the international community, can we permit in good conscience that what we would not do in our own State occurs in another, reaping only the benefits of this activity without facing the costs? How can one overlook that the responsibility flows from the risk which is in turn the basis for profits? Shouldn't the focus on protecting rights, even extraterritorially, of the EU nationals and residents, be coupled with the focus on obligations of EU nationals and residents? Shouldn't the weaker party be given the chance to choose, among the relevant fora, the one which promises to be the most favourable to its interests?

In essence, it seems increasingly apparent that the classic points of connection, which are for the most part territorial in character, ought to evolve in these situations into more "liquid" points of connection so as to better reflect the real economic activity, which is often distant from that reflected in formal

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legislation.[44] This would improve the protection of individual rights at stake. As G. BETLEM puts it, "an assertion of jurisdiction, […] is never simply a legal judgment, but a socially embedded, meaning-producing act".[45] And this idea should lead us to consider whether "Westphalian" jurisdictional rules should not be reviewed in the light of the new realities brought about by globalisation. In this sense, P.S. BERMAN is entitled to ask: "[…] what are we to make of the fact that our current jurisdictional system seems to correspond so poorly to contemporary social conceptions of space, distance, borders, and community? The challenges posed by the rise of online communication and more generally by the forces of globalization have brought this question to the fore".[46]

Modern business realities today are hardly constrained within a given territory. In addition to the physical place where activity is carried out, other activity-related locations play a significant role, such as the place producing capital or technology, the place reaping he profits from the *risk* which eventually materialises as damage, the place where strategical decisions are taken, the place which determines the fiscal legislation applicable to the business, etc. This is why it seems illogical to have a single State – typically the one where the damage occurs – to be the sole competent for judging any lawsuit on environmental issues relating to the business, the non-EU defendant's home address being no longer an alternative. Understandably, M. ANDERSON notes that "[…] MNCs defy our fundamental assumptions about the mapping of legal persons to territorial jurisdiction".[47]

The economic argument, which has been used to avoid extraterritorial jurisdiction, should also be reconsidered. It seems important to analyse the potential for economic distortions that may result from legal policies adopted in this respect. This is important to assess both the feasibility and the efficiency of a proposed reform. The competitiveness of the common market is a priority for European legislators and is what ultimately drives, and shapes, jurisdictional innovations. Although it might be true that some parent companies may be tempted to move their headquarters to countries where jurisdiction or liability are not recognised, they are unlikely to actually succumb to this temptation as this would mean relinquishing the legal certainty and fiscal advantages offered by the EU States. The risk to face liability is but one of the many factors on which the decision to invest in a specific country is generally based. The solution would require an economic analysis to ensure that complying with relevant laws and regulations is more profitable for parent companies, while still respecting legal criteria for the reparation of damage and protection of the environment. There should also be a reasonable degree of predictability as regards "due care" criteria, which should be as verifiable and objective as possible. This should clearly be in relation to the

[44] As P. MUCHLINSKI (note 13), at 920, notes: "[*there is*] a mismatch beteween the territorial scope of state regulatory jurisdiction and the globally integrated organisation of MNE". Therefore, a "jurisdictional veil" is created that together with the corporation veil are used to limit risk and avoid jurisdiction.

[45] G. BETLEM (note 39), at 23.

[46] P.S. BERMAN, The globalization of jurisdiction, *University of Pennsylvania Law Review* 2002, Vol. 151, No. 2, p. 311-529, at 527.

[47] See M. ANDERSON (note 3), at 424.

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study of compensation imposed, as it will be the result of cost-and-benefit analysis that will determine in practice whether regulation will act as a deterrent and an incentive for environmental protection or whether it will fall short.

In addition, the possibility of litigating in the State of domicile of the parent company (*home state*) promises to incentivise economic efficiency. Far from discouraging allocation of resources to less developed countries, it would, quite on the contrary, promote long-term investments and economic, social and human progress. It would not restrain the business opportunities for companies abroad nor trigger competitive disadvantages any more than it would affect investment in the States of domicile of the parent companies. The opposite would be the case as amenability to jurisdiction in the place of their headquarters would offer an economically efficient deterrent for violations of universally recognised principles of international law.[48] Nor would the higher cost of an extraterritorial claim constitute an impediment to the actual availability of the proposed forum. The costs have to be analysed as a whole, considering both the social and environmental costs, together with the pure economic ones. On the other hand, profits should not be overlooked. That is, the cost of an extraterritorial claim has to be calculated taking into account the expected benefits of each procedural strategy according to the applicable law as determined by the Private International Law of the forum.

In a nutshell, allowing victims to sue both the parent company and the subsidiary in the EU Member State in which the parent is domiciled would offer a number of advantages, including the following: enabling them to take advantage of a more independent judicial system, offering greater guarantees; offering the victims the benefit of conflict law rules – typically Article 7 of Regulation 864/2007[49] – which make it possible for them to choose the law which is most favourable to them;[50] ensuring a higher degree of reparation of the harm done to the environment; permitting the victims to take advantage of procedural rules which are more favourable to their interests, such as empowering NGOs and use of collective actions; raising awareness among the public and civil society of the acti-

[48] See the brief of J.E. STIGLITZ as *amicus curiae* in support of petitioners in the case *Esther Kiobel et al. vs. Royal Dutch Petroleum Co. et al.*, United States Court of Appeals for the Second Circuit, Legal Printers LLC, Washington DC, available at <http://harvardhumanrights.files.wordpress.com/2012/01/brief-of-joseph-e-stiglitz.pdf> 12.1.2017.

[49] 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 199/40, 31 July 2007.

[50] About this article's interpretation and its aims, see L. ENNEKING (note 4), at 928; M. VINAIXA MIQUEL, El levantamiento del velo en el Derecho internacional privado: Una problemática común en los casos de daños por contaminación causados por sociedades multinacionales, *Anuario de Derecho Marítimo*, Vol. XXV, 2008, p. 265-296, at 282; V. VAN DEN EECKHOUT (note 29), at 15; L. GARCÍA ÁLVAREZ (note 1), at 51-58. *Contra*, A.G. CASTERMANS/ J. VAN DER WEIDEN, The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights, 2009, p. 50-53, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626225> 12.12.2016; G. VAN CALSTER (note 4), at 240; K. FACH GÓMEZ, The Law Applicable to Cross-Border Environmental Damage: from the European Autonomous System to Rome II, this *Yearbook* 2004, p. 291-318, at 315.

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vities and misdemeanours of multinational companies abroad; to a greater chance to execute compensations and prevent undesirable outcomes such as in the *Chevron-Texaco* case in Ecuador;[51] contributing to the creation of a EU market with fewer negative externalities and a safer, more equitable and coherent European legal area with fewer asymmetries and distortions that prompt opportunistic behaviour or judicial limbo that enables abuse of rights.

Given the above, we consider it advisable that parent companies and subsidiaries be tried jointly, if the plaintiff so chooses, either at the place of the damage or at the place of domicile of the parent company, which will generally be more beneficial to the victims. This would be easier to the extent that a specific duty of care of the parent company is recognised. As far as jurisdiction is concerned, here is a list of reforms which may be introduced in Regulation 1215/2012's fabric[52]:

(a) The forum for related actions under Article 8.1 should be extended to subsidiaries which are not domiciled in the EU but are codefendants with the parent company domiciled in a EU Member State, provided there exists a sufficient connection with the EU market and the group of companies involved. Several procedural presumptions may be introducted in order to facilitate the proof of these elements.

(b) A *forum necessitatis* mechanism should be incorporated into Regulation 1215/2012 in order to prevent inequalities in accessing justice and to encourage suppression of exorbitant fora. Availability of this forum should be made conditional upon plaintiff's ability to prove he or she does not stand a chance of securing effective judicial protection in another State having a stronger connection with the dispute.[53] International "courtesy" or "comity of nations" is no longer a sustainable argument for refusing to uphold *forum necessitatis* into the Regulation, given that access to justice is a human right and, as such, must take precedence over considerations of State-to-State relationships.

(c) Article 7.2 should be made avaible against non-domiciled defendants.[54] This could be helpful in the absence of a related-action jurisdiction applicable to

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[51] M. REQUEJO ISIDRO, Aguinda v. Texaco en la fase de exequátur: análisis del primer tropiezo, *Dereito* 2013*,* Vol. 22, p. 581-597; B. JAGGER, Víctimas ecuatorianas luchan por hacer justicia frente a Chevron, *Diario El País,* 22.10.2013.

[52] For the literal version of the proposed text for each article and further justification, see L. GARCÍA ÁLVAREZ (note 1), at 373-396. In the same direction with various proposals, see A. CRESPO HERNÁNDEZ (note 9) at 293.

[53] See A.G. CASTERMANS/ J. VAN DER WEIDE (note 50) at 46; A. NUYTS (note 43), at 40. This is also suggested, limited to the existence of "reasonable proximity", in Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4 (28.4.2017).

[54] Also suggested in similar ways by I. PRETELLI/ L. HECKENDORN (note 16), at 46; A. NUYTS (note 43), at 156; Joint Amnesty International and European Coalition for Corporate Justice (ECCJ) submission on the Green Paper on the Review of Council

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non-domiciled defendants to the extent that the place of the harmful conduct generating the damage may be interpreted as pointing to the domicile of the parent company. To be sure, it would be desirable for the court to be permitted to take cognizance of all damages, whoever are the victims. Allowing joinder of claims would improve procedural efficiency. However, it may not be necessary to expressly provide for this if Article 8.1 is allowed to operate with respect to non-domiciled defendants, the place of domicile of the defendant essentially overlapping under this scenario with the place of harmful conduct.

(d) Alternatively, a new forum may be crafted which would specifically apply to the protection of victims of environmental damage caused by entities which are part of transnational groups. This forum ought to be in keeping with Article 7 of Regulation 864/2007, which embraces the *favor laesi* principle,[55] as well as with the right to benefit from an effective judicial protection and principles governing interplay of human rights, companies and the environment.[56] The aggrieved parties would then be able to choose between litigating in the domicile of the EU-domiciled controlling company and litigating at the place of the damage.[57] In all cases it should be permitted to combine into a single proceeding all claims for all damages against all the defendants. A rebuttable presumption should be laid down such that a group of companies is presumed to exist based on the control of the parent company where there is, for instance, a majority of stock capital or an important role in the business of the subsidiary if there exists a commercial relationship and/or certain indicators are verified (for example, if the parent company in question receives over 50% of the subsidiary's profits, if those

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Regulation (EC) No. 44/2001 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters, June 2009, p. 5, available at <http://www.corporatejustice.org/IMG/pdf/AI_ECCJ_Joint_Submission_Brussels_I_0609.pdf> (10.12.2015); A. CRESPO HERNÁNDEZ (note 9), at 313.

[55] "It is clear that favouring one party does not always mean an unreasonable forum, since there may be cases in which such favouritism is requiered by superior values in the legal system". D.P. FERNÁNDEZ ARROYO, Exorbitant and exclusive grounds of jurisdiction in European Private International Law: Will they ever survive?, in *Festschrift für Erik Jayme*, European Law Publishers 2004, p. 169-186, at 171.

[56] O. DE SCHUTTER, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, 2006, available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (19.11.2015). See, also, J.A. KIRSHNER, Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses, *Northwestern Journal of International Human Rights*, vol. 13, no. 1, 2016, p. 1-27.

[57] Also in C. STAATH/ B. WRAY (note 14), at 85; V.VAN DEN EECKHOUT (note 29), at 20, note 92. The possibility of including a general forum for human rights violations (including environmental damages) is considered in C. KESSEDJIAN/ J. VAN DE VELDEN/ E. HO, International Law Association, Final Report on International Civil Litigation for Human Rights Violation, Sofia Conference, August 2012, available at <http://www.ila-hq.org/download.cfm/docid/D7AFA4C8-E599-40FE-B6918B239B949698> (10.5.2015).

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profits are linked to common codes of conduct, if the management board of the subsidiary is made up of expatriates, etc.) and providing the defendants cannot disprove these facts).[58] As to the connection with the European market, any of the following may be sufficient to establish it: the parent is a EU-based company and holds over 50% of the subsidiary's capital, the profits made by the subsidiary go to the EU and taxes are paid there.

(e) Prorogation of jurisdiction should be limited.[59] The possibility of a specific agreement after the damage occurs should be accepted but with certain precautions, including one or more of the following: court's intervention to uphold the validity of the agreement; showing that the weak party has been informed about the effects of the agreement; offering facilities to invalidate the agreement or to limit its effects if it were to restrict access to justice on the part of the victims; participation of an institution (NGO, judge or public body) acting as a guarantor for the validity of the agreement, etc. Regarding implied submissions, the judge must ensure that the weak party is aware of the effects of entering appearance and the possibility it has to challenge jurisdiction.

(f) Judicial cooperation in civil matters should be enhanced following the guidelines of the International Law Association.[60] This may include measures such as providing a framework through which a court may contact the authorities of other States involved in order to avoid additional expense, increase efficiency, and facilitate the progress of the procedure and future enforcement of the judgment. This is of critical importance where damages materialise in multiple places and jurisdictions, which is a fairly common scenario in environmental damage cases.

Regarding *domestic legal instruments*, and with a particular focus on Spain, it is worth noting the Spanish Organic Law on Judicial Power, as recently amended,[61] includes several provisions that are especially relevant to our hypothesis. We would like to emphasize two of them: First, in cases with multiple defendants, the Spanish courts will have jurisdiction to the extent that at least one of them is domiciled in Spain, provided that proceedings are based on a single action, or on several actions which are related through title or cause and whose joinder is

[58] This is based on the analysis made in previously cited works about corporate structure and the flow of risks and benefits within the corporations and also on precedents in EU Competition Law. See ECJ, 14 July 1972, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69, Decision number 133; ECJ, 25 October 1983, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Case 107/82, Decision number 50. See A. MICKONYTE, Joint Liability of Parent Companies in EU Competition Law, *LSEU* 2012, Vol. 1, p. 33-69.

[59] About non-judicial remedies, see K. LUKAS, B. LINDER, A. KUTRZEBA y C. SPRENGER, *Corporate Accountability. The Role and Impact of Non-Judicial Grievance Mechanisms*, Edward Elgar Publishing, Cheltenham-Massachusetts, 2016.

[60] C. KESSEDJIAN/ J. VAN DE VELDEN/ E. HO (note 57), at 42.

[61] Organic Law 6/1985 of the Judiciary Power, 1st July, modified by the Organic Law 7/2015, 21st July (BOE No.174, 22 July 2015).

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advisable in the interests of the administration of justice (Article 22.3*ter*). Second, a *forum necessitatis* has finally found its way into our legislation, even though the relevant provision may have been drafted more clearly and effectively.

These provisions, despite their shortcomings, should improve the access to justice by bringing Spanish rules on residual jurisdiction closer to those available in other EU countries such as the Netherlands or Portugal. In particular, the analysis of residuary jurisdiction rules of the EU Member States[62] reveals that the claims against both a company domiciled in the EU and a company domiciled in a third State could be tried jointly in 21 of the 28 Member States, albeit subject to varying requirements. In the seven remaining Member States (Denmark, Finland, Germany, Greece, Malta, Poland, Sweden), this depends on the existence of other fora applicable to the subsidiary, as the court must have independent international jurisdiction over each of the defendants considered individually. As regards *forum necessitatis,* it is only admissible in nine of the 28 Member States, albeit subject to varying requirements. This discrepancy in the national jurisdictional approaches generates legal uncertainty and greater expense for the plaintiff, who must go through greater efforts to gain access to all those domestic law provisions. In addition, this can result in unequal legal and economic treatment. In fact, determining international jurisdiction has clear repercussions for potential plaintiffs and defendants while affecting business decisions, including those taken within the EU and its common market, and having the potential of distorting such basic rights as access to justice.

Besides concrete proposals in the context of globalisation, it is essential for the rules of Private International Law to seek maximum economic and social efficiency. In addition, it is preferable for Private International Law and substantive law rules to have the greatest uniformity possible. In the specific context of the EU, this harmonisation is intended to prevent inequalities within the single market, deter opportunistic behaviours and overcome the persistent uncertainty and lack of precedent which affect a significant number of situations. This harmonisation could further assist in buttressing the role of the EU when it comes to safeguarding human rights and preserving the environment against the activities of corporations that have a strong linkwith Europe, regardless of whether the physical location of the damage stretches beyond strict national sovereignty. This is based on the "reasonable proximity" criteria and a common sense interpretation of the rules favouring the interests of the parties, the proper administration of justice, the special protection of human rights and the environment as universal rights and interests.

However, jurisdiction is not the only problem faced by the aggrieved parties. In fact, when the controlling corporation is domiciled in a EU Member State and the plaintiffs wish to sue in this Member State, a number of additional problems arises even if the court of this Member States does affirm jurisdiction to hear the case. These problems include an unfavourable cost-benefit analysis due to the non-existence of collective litigation mechanisms; the heavy burden of proving the corporate dependence and responsibility of the parent company; the ability to

[62] Based on the following study (completed for each country with other works): A. NUYTS (note 43).

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litigate exclusively for private damages; the lack of legal recognition for NGOs and their inability to file claims for environmental damages or to merely intervene in the proceedings, etc. Those challenges mainly flow from (i) the regime for allocating responsibility within transnational corporations and the burden of proof regime before the courts handling the case; and, (ii) the specific nature of environmental damage, legitimation to litigate and the availability of collective litigation mechanisms. The main conclusions for each of these two issues analysed are stated in the following.

B. The Allocation of Responsibility within Transnational Corporations

The analysis of substantive law relating to such questions as the allocation of liability among the entities of a group regarding third parties, the principle of limited liability and its boundaries, the axiom of corporate independence, the burden of proof, *etc.*, is essential not only because those questions will ultimately determine the outcome of the litigation, but also because they are closely linked with traditional Private International Law and the issues raised in this study. For instance, how to invoke a connection with the EU without admitting that the EU-domiciled parent company is directly responsible for the damaging activity?

It seems clear that the regime under which corporations operate internationally, and through which their responsibility is established, leaves much to be desired. Lifting the corporate veil is not sufficient to solve the problems at stake. A reform of the substantive law should be introduced and that reform inevitably entails calling into question, theoretically and practically, the dogmas of limited liability and rigorous separation of legal persons that are part of the same multinational group where profits flow easily and quickly across borders while liability associated with the generated risk is extremely difficult to detect and to allocate. This means:

– Creating a uniform and broad concept of corporations, allowing vertical and horizontal groups to be designated as dynamic realities and units (with respect to both rights and obligations, on the one hand, and to profits, on the other) in order to ensure their coherent conceptualisation in different areas of law.[63]

[63] About the structure, nature and procedural treatment of groups of societies and their consideration in Private International Law regarding access to justice, see among others: P.I. BLUMBERG, *Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, New York City 1993; J.M. EMBID IRUJO, Trends and Realities in the Law of Corporate Groups, *European Business Organization Law Review* 2005, Vol. 6, No. 1, p. 65-91; J.A. ENGRÁCIA ANTUNES, *Liability of corporate groups. Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law*, Boston 1994, p. 64 *et seq*.; M. EROGLU, *Multinational Enterprises and Tort Liability*, 2008; L. GARCÍA ÁLVAREZ (note 1), at 98-206; F.H. EASTERBROOK/ D.R. FISCHEL, Limited Liability and the Corporation, *The University of Chicago Law Review* 1985, Vol. 52, No. 1, 1985, p. 89-117; C.D. WALLACE, *The Multinational Enterprises and Legal Control. Host State Soverignity in an Era of Economic Globalization*, The Hague 2002, p.13 *et seq*.; P.T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford 1999; C. STAATH/ B. WRAY (note 15), at 77-95; Résolution

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– Establishing minimum duty-of-care standards to be strictly implemented by the EU-domiciled parent companies as far as their extra-European activities are concerned. Falling short of those standards would trigger liability *vis-à-vis* the victim of the parent's negligent behaviour. When it comes to evidence, shifting the burden of proof seems to offer an appropriate measure: the plaintiff would have to prove prejudice while the parent company would have to establish its diligence in order to rebut the presumption of negligence.

– Regardless of the above, in cases where the parent company exercices a high degree of management control, the parent may be considered guarantor for the subsidiary's obligations, without prejudice to the parent's right of recovery as against the subsidiary. In order to prevent delaying tactics and to counterbalance inequalities between the parties, a joint guarantee is probably the best option. For example, effective control may be presumed (rebuttably) when at least 51% of the shares of the subsidiary are held or the entirety of the profits are received by the parent, directly or through shell companies or other vehicles. These presumptions are based non only on empirical evidence as to the accessibility of evidence but also and perhaps more importantly on basic common sense that recommends balancing the parties' powers and making it possible to tear down the seemingly unassailable but questionable wall of corporate independence.

– Allowing the lifting of the corporate veil should be a last resort measure[64] to attribute to the parent direct responsibility for the damage rather than simply blaming the parent for negligent behaviour and breach of duty of care. Although it falls upon the plaintiff to prove prejudice and causality, it should be the responsibility of the parent to prove independence between the entities of the group. In order to prevent ambiguity and ensure a certain degree of harmony of solutions internationally, it would be helpful to establish minimum requirements to lift the corporate veil. This should be reflected in an instrument laying down uniform substantive law to be ratified by as many States as possible, although the variety of legislation and practices across the world leaves little hope that such an agreement is realistic in the foreseeable future.

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de l'Institut de Droit international (IDI), Obligations of Multinational Enterprises and their Member Companies, Lisbon, 1st September 1995, available at <http://www.idi-iil.org/idiE/resolutionsE/1995_lis_04_en.PDF> (16.12.2015). About this document, see P. KLEIN, La soixante-septième session de l'Institut de Droit International, *Revue Belge de Droit International* 1996/1, p. 267-292, at 272-274.

[64] D.S. BACKST, Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: the case for the Proposed Civil Liability Directive, *Boston College International and Comparative Law Review* 1996, Vol. XIX, No. 2, p. 344-347; R. MCPHERSON/ N.S. RAJA, Corporate justice. An empirical study of piercing rates and factors courts consider when piercing the corporate veil, *Wake Forest Law Review* 2010, Vol. 45, No. 3, p. 39.

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Let us emphasize once again that, without a reform, substantively and procedurally, of the liability regime of the parent company[65], it is unlikely that the right to benefit from an effective judicial protection will be satisfied, even in the situations where EU Member States recognise their international jurisdiction.

C. Environmental Damage, Active Legal Standing to Sue and Collective Actions

The question of access to justice for plaintiffs in cross-border environmental lawsuits is complex due to the violation of multiple rights, the difficulties in characterising the different types of losses caused by those violation ("pure" environmental damage, damage to supraindividual interests and private damage) as well as the variety of the competing interests involved.[66] As showed by a comparative law analysis, current regulations on this point are heterogeneous, fragmented and, on an international scale, insufficient. The uncertainty and endless scholarly debate on the nature of those violations and the ensuing damages as well as on how best to deal with them have stood in the way of the practical possibility of providing satisfactory means of protection. Here is a breakdown of the main existing obstacles, depending on the type of the damage in question.

– When it comes to *environmental damage*, the biggest challenges flow from its controversial characterization within the framework of civil proceedings,[67] the inadequate provisions that exist today with respect to

[65] Be it subsidiary or joint liability, strict or fault-based, as guarantor or directly in charge of payment, through negligence in the obligation for care or based on direct actions (or, when needed, through the use of presumptions to justify the link between the supposed "parent company" liable and the event generating the damage).

[66] See for an in-depth analysis on this issue, among others: A. RODRÍGUEZ BENOT, La responsabilidad civil por contaminación transfronteriza: aspectos de derecho internacional privado, *Cursos de Derecho Internacional de Vitoria-Gastéiz* 2013, p. 311-370; P. GUTIÉRREZ DE CABIEDES E HIDALGO DE CABIEDES, *La tutela Jurisdiccional de los Intereses Supraindividuales: Colectivos y Difusos*, 1999; A. RUDA GONZÁLEZ, El daño ecológico puro. La responsabilidad civil por daños al medio ambiente, Universitat de Girona 2005; M.P. CAMPROUX-DUFFRÈNE, Essai de dialectique sur une responsabilité civile en cas d'atteinte à l'environnement, in *AA.VV., Pour un droit économique de l'environnement, Mélanges en l'honneur de Gilles Martin*, 2013, p. 105-129; A. GIDI/ E. FERRER (eds), *La tutela de los derechos difusos, colectivos e individuales homogéneos: hacia un código modelo para Iberoamérica*, 2nd edn., México D.F. 2004; B. JONES, Deterring, Compensating and Remedying Environmental Damage, in P. WETTERSTEIN (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, Oxford 1997, p. 11-27. The brilliant work in Swiss law by A.S. DUPONT, *Le dommage écologique. Le rôle de la responsabilité civile en cas d'atteinte au milieu natural*, Genève 2005, deserves special attention.

[67] In general, pure ecological damage is kept out of civil proceedings. However, there are some countries that recognise the legal standing of NGOs to claim for compensation or reparation, and even ecological damage is considered grounds for civil responsibility, as analysed in L. GARCÍA ÁLVAREZ (note 1), at 396-577. A paradigmatic court decision in that sense is that of the *Erika* case, in France: "*Lorsque ces faits*

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administrative liability in cases of cross-border damage caused by private companies abroad, the exclusive power of the State to act on behalf of the environment and to take care of the judicial protection of it, with little or no role played by the citizenry, the lack of efficiency of the administrative liability regime under domestic legislation, such as the Spanish Law 26/2007 on environmental liability and other domestic rules which transpose the EU Directive 35/2004 on environmental liability.

– With respect to damage to *supra-individual, collective interests* to rely on a healthy environment, what is problematic is the lack of explicit recognition of those interests and the reluctance to envisage a suitable protection for them. This reluctance is in turn based on the liberal and individualistic approach which is traditional in civil law but inapt to take due account of those collective interests.

– Regarding *private damages*, the existence of a significant number of injured parties, the "atomised" nature of the damage and the insufficient development of environmental "class actions" in many EU States[68] all too often lead to situations where justice is virtually non-existent, or slow or insufficient, and much damage remains without redress. The consequence is that the Sta-

constituent une infraction aux dispositions législatives relatives à la protection de la nature et de l'environnement, à l'amélioration du cadre de vie, à la protection de l'eau, de l'air, des sols, des sites et paysages ou ayant pour objet la lutte contre les pollutions et les nuisances, les associations auxquelles la loi confère la faculté d'exercer des droits reconnus à la partie civile, conformément aux premier et second alinéa de l'article L. 142-2 du code de l'environnement, peuvent demander réparation, non seulement du préjudice matériel et du préjudice moral, directs ou indirects, causés aux intérêts collectifs qu'elles ont pour objet de défendre, mais aussi de celui résultant de l'atteinte portée à l'environnement, qui lèse de manière directe ou indirecte ces mêmes intérêts qu'elles ont statutairement pour mission de sauvegarder". See *Arrêt n° 3439 du 25 Septembre 2012 (10-82.938) de la Chambre Criminelle de Paris*, p. 191.

[68] For collective actions regime in the EU, see among others: E. LEIN/ D. FAIRGRIEVE/ M. OTERO CRESPO/ V. SMITH, *Collective Redress in Europe: Why and How?*, British Institute of International and Comparative Law, 2015; V. HARSAGI/ C.H. VAN RHEE (eds), *Multi-party Redress Mechanisms in Europe: Squeaking Mice?*, Ius Commune: European and Comparative Law Series, Vol. 133, Amberes 2014; D. FAIRGRIEVE/ E. LEIN (eds), *Extraterritoriality and Collective Redress*, Oxford 2012; L. CARBALLO PIÑERO, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa*, Universidad de Santiago de Compostela, 2009; M. CLOUGH QC, *et al.*, Statement of the European Law Institute on Collective Redress and Competition Damages Claims, 2014, available at <http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf> (27.12.2014); A. NUYTS, The consolidation of collective claims under Brussels I, in N. HATZIMIHAIL/ A. NUYTS, *Cross-border Class Actions, The European Way*, Munich 2014, p. 69-84; J.G. BACKHAUS/ A. CASSONE/ G.B. RAMELLO (eds), *The Law and Economics of Class Actions in Europe: Lessons from America*, 2012; L. GARCÍA ÁLVAREZ, Las acciones colectivas en los litigios internacionales por daños ambientales, *Revista Electrónica de Estudios Internacionales* 2015, No. 30 available at <http://www.reei.org/index.php/revista/num30/articulos/acciones-colectivas-litigios-internacionales-danos-ambientales> (29.12.2015).

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te, *i.e.* ultimately the taxpayers, have to sustain the costs for cleaning or repairing. These costs are the "other side" of the profits generated by risky activities and appropriated by the private company, those profits often ending up and being put to fruition in markets of countries other than those where the activities were effected.

An investigation on behalf of Spanish law and the law of other European countries into the categories of persons who currently have standing to file action for environmental damages as well as into the collective redress schemes available in those countries has revealed the following main obstacles to access to justice:

– A conceptual uncertainty when it comes to identifying the assets, rights and interests affected by environmental catastrophes and the rigid separation between public and private spheres[69] which fails to capture the multifaceted reality triggered by environmental damages, which mash pure environmental damages, traditional private damages and supra-individual interests injured.

– The competing criminal, civil and administrative liability and their fragmentation into different proceedings governed by different laws and for which different countries claim jurisdiction, all of which contributes to discourage legal action and to encourage inaction, thereby "socialising" the costs of hazardous activities which yielded private profits.

– The wide variety of regimes and the different levels of evolution in EU States when it comes to standing to sue, collective litigation instruments, protection of supraindividual interests, together with the absence of uniform supranational regime, lead to profound inequalities among citizens in accessing justice with respect to as basic a value as the environment, which is considered a human right by a significant part of the legal doctrine and civil society at large. In addition, the current situation increases unpredictability and fosters *forum shopping* in the search for the most beneficial forum,[70] which usually favours the party with the best technical, financial

[69] About the need for overcoming this traditional separation in some global problems, see S.L. KARAMANIAN, Public international law versus Private international law: Reconsidering the distinction, in *XL Curso de Derecho Internacional, Comité Jurídico Internacional de la Organización de los Estados Americanos*, Washington 2014, p. 33-46, at 36 and 44; M. CAPPELLETTI, La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile), *Revue internationale de droit comparé* 1975, Vol. 27, No. 3, p. 571-597; A. GIDI, *Las acciones colectivas y la tutela de los derechos difusos colectivos e individuales en Brasil. Un modelo para países de derecho civil*, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica, No. 151., México D.F. 2004. Also, as a consequence of the human rights perspective and its influence on Private International Law, see H. MUIR WATT, Future Directions?, in H. MUIR WATT/ D.P. FERNÁNDEZ ARROYO (note 2), at 382; A. BONFANTI, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato*, Milano 2012.

[70] E. LEIN, Cross border collective redress and jurisdiction under Brussels I: a mismatch, in D. FAIRGRIEVE/ E. LEIN (eds), *Extraterritoriality and Collective Redress*, Oxford 2012, p. 129-140.

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and legal resources, *i.e.* the multinational company. The risk of parallel proceedings and problems in cross-border enforcement of decisions also tend to increase, as does the opportunistic behaviour of companies when it comes to deciding where to establish their place of domicile.

– The territorial limitations of the scope of activities, and of the power of representation, of NGOs.[71]

– The lack or inadequacy of proper schemes and mechanisms for citizens to actively participate in the protection of the environment, which in turn flows from an imbalance between parties in accessing the court's jurisdiction.[72]

The transnational dimension of environmental problems requires supranational intervention to achieve truly efficient responses. It is considered advisable, in particular:

– To expressly recognise the right of all citizens to enjoy a healthy environment and to characterize this right as a human right in the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.

– To recognise the civil aspects of damages done in breach of this supraindividual interest as distinct from other associated types of damage, such as those caused to health or property, in a way that is similar to what happens with consumer rights or gender equality rights.

– To provide the environmental associations and interested individuals with the power to file both civil law and administrative law claims against private third parties, particularly in cross-border cases.

– To introduce the possibility to file collective lawsuits before the courts of EU Member States against companies domiciled in the EU for harmful activities towards the environment that have been carried out outside the EU. Many advantages would be gained from expanding standing to sue and harmonised collective actions as a tool to empower civil society groups and allow them to make their voice heard: a more efficient use of private economic power, levelling the playing field among negotiating parties, incentivising litigation when individual damage is small but overall damage is big.

– At a later stage, it could be appropriate to entrust civil, administrative and criminal jurisdiction with specialised environmental courts (as is the case in no less than 41 countries as of 2009) which are capable of comprehensively

[71] N. DE SADELEER/ G. ROLLER/ M. DROSS, *Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal*, Groningen 2005, p. 24 *et seq.*

[72] M. ELIANTONIO/ Ch.W. BACKES/ R. VAN RHEE/ T. SPRONKEN/ A. BERLEE, *Standing up for your right(s) in Europe: Locus Standi, A comparative study on legal standing before the EU and member states' courts.* European Parliament's Committee on Legal Affairs, 2012, p. 54-60.

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and rapidly assessing the complexity of environmental damage and the multiple prejudices, in nature and magnitude, which result from it. This should help to ensure that the right to a healthy environment does not become a right devoid of content or protection.

Specifically regarding collective actions, whose regimes vary greatly across the EU, as revealed once again by a comparative law analysis, it is proposed that those regimes are harmonised through a Directive, rather than regulating them in Regulation 1215/2012 as suggested in some circles. In the light of the diversity of the legal traditions within the EU, harmonisation is indeed more realistic than uniformity. Given that the number of procedural aspects involved make it a far less complex exercice than a jurisdiction-allocating exercice, the incorporation into Regulation 1215/2012 runs the risk of posing an excessive burden and hinder its proper application. Regarding the proposed Directive, it is suggested that the following points be included:

(a) allowing the choice between an *opt in* or *opt out* system depending on the circumstances of individual cases[73];

(b) including the possibility of seeking injunctions and filing preventative actions, in addition to compensatory actions, both against both public authorities and private individuals;

(c) avoiding damages caps on environmental damages caused by illegal activities, including strict liability cases and cases where liability arises out breach of duty of care;

(d) granting mutual recognition of NGOs which, through administrative or judicial means, *ex ante* or *ad hoc* depending on the circumstances, are characterized as sufficiently *representative* and empowered to act on behalf of collective interests in their States of origin; providing for the legal standing of NGOs meeting the requirements of Article 11 of the Aarhus Convention to bring actions before the European and supranational courts;

(e) favouring agreements between the EU and third party States where EU-domiciled companies carry out economic activities that are potentially dangerous for the environment;

(f) granting the right to act in the proceedings as "representative" associations to those that are independent, not-for-profit, give sufficient guarantees to suitably defend their institutional objectives and demonstrate coherence between their goals and the specific case;

[73] In the "opt in" model, it is necessary for the individual affected to make an explicit request to be considered "party" in a collective action after service of the proceedings, whereas in the "opt-out" model, all individuals involved in the case will be considered "party" in the proceedings unless they give notice to the contrary, so the judgment will affect all of them. See JOHNSON, A., "To 'Opt-in' or to 'Opt-out'-That is the question", in E. LEIN/ D. FAIRGRIEVE/ M. OTERO CRESPO & V. SMITH (note 68), p. 61-66.

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(g) envisaging mechanisms preventing agency problems[74]. Among other circumstances, these problems could arise when the representative association allowed to act in the legal process does not wish to file a lawsuit or when it is granted the exclusivity to any public body or any bodies funded with public money to initiate collective actions. Therefore, it would be appropriate to provide the possibility for individuals directly affected to act *ad hoc* when these situations arise.

(h) basing the admissibility of the action on formal, objective and pre-established criteria;

(i) allowing for a measure of judicial discretion over allocation of costs depending on the individual circumstances of the losing party as well as the circumstances of the case;

(j) as to jurisdiction, relying on Regulation 1215/2012 but providing for the possibility in cases of mass damage affecting several countries that a collective action for the entirety of the damage may be tried both in the courts of the defendant's domicile and in the place of the damage, or part of the damage (rejecting the "mosaic theory"), provided that connection with that country is reasonable and sufficiently foreseeable for the defendant;[75]

(k) proposing flexible criteria allowing joinder of related actions (Article 30 of Regulation 1215/2012) to avoid inconsistent or conflicting decisions;

(l) establishing an efficient information and notification system;

(m) allowing third-party funding or offering free legal assistance for victims whose cases, when relevant, are connected with EU-domiciled companies under the jurisdiction of European courts in accordance with Regulation 1215/2012, based on Article 81.2.e of the Treaty on the Functioning of the European Union.[76]

(n) providing for alternative conflict resolution methods on a voluntary basis and supervised by the competent judicial authority; and,

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[74] That is, those problems arising when people or entities (the agents) entrusted to look after the interests of others (the principals) do not use that authority or power for the benefit of the agents but for their own benefit instead. In relation to the EU civil process and collective litigation: R. MONEY-KYRLE, "Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating. Common Standards and Access to Justice?" in B. HESS/ M. BERGSTRÖM/ E. STORSKRUBB: *EU Civil Justice. Current Issues and Future Outlook*, Hart Publishing, 2016, chapter 12.

[75] In the case of transnational environmental damage verified in States where subsidiaries are domiciled or where the corporation has any activity with a direct, non anecdotal link, this predictability is presumed to exist.

[76] Provisions could also be made for the creation of a supranational fund to this effect or the possibility of regulated crowdfunding.

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(o) promoting training programmes for judges charged with overseeing collective action cases.[77]

It is vital that until European Recommendation on collective redress mechanisms[78] are reviewed, an in-depth study be carried out to make progress in forging a key instrument for the effective application of legislation in the 21st century, which will undoubtedly require the collective to face changes in human and legal relationships due to economic and social factors.

With respect to Spanish legislation, and taking into account the difficulty of reaching homogeneous solutions on a supranational level on an issue such as the environment, several points are proposed:

(a) Regarding environmental damage, relevant provisions may be included in the Civil Code, as proposed in France[79] or, if this is not possible, recognition may be awarded to class action for environmental damage caused by the administration or private third parties. A strict liability regime is envisioned for risky activities, as well as for different types of reparation, with priority being given to primary or *in natura* reparations. Standing to sue should be awarded to environmental associations, alongside the Ministry of Finance, territorial communities and public administrations. The civil regime would be the alternative to the administrative regime under the Spanish Law 26/2007 on environmental liability.

(b) It is proposed that infringement of supraindividual interests be explicitly recognised and that judicial protection be articulated in what could be Article 11*ter* of Spanish Law 1/2000 on Civil Procedure, drafted in the *lege ferenda* proposals including provisions for those having legal standing and collective actions available (type of action, notification system, right to free judicial assistance, type of reparations possible, etc.).

Without a doubt, in order to pay rigorous, ethical and fair attention to the reality of the transnational activity of corporations, significant reforms of different areas of law are required. The study of these fields of law should be as inclusive, transdisciplinary and international as possible, in order to reach more efficient and just solutions. Regrettably, it seems that economic and business interests are still more important to political agendas than guaranteeing access to justice. It would be naïve to expect a course correction in this respect unless awareness of these situations and public pressure increases, especially in connection with the environment.

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[77] These programmes could use the European Judiciary Network as a starting point.

[78] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), Official Journal of the European Union, 26.7.2013 (L 201/60).

[79] About the pending law proposal in France on the inclusion of ecological damage in the Civil Code, see Y. JEGOUZO *et al.*, *Pour la réparation du prejudice écologique*, *Rapport du groupe de travail installé par Madame Christiane Taubira*, Garde des Sceaux, Ministre de la Justice, 17 September 2013, available at <http://www.justice.gouv.fr/art_pix/1_rapport_prejudice_ecologique_20130914.pdf> (20.10.2015).

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In the meantime, some change in the current legislation, even minor, may have a considerable impact on the practice of access to justice, not least because they would show that breaking free from the trap of abstract juridical dogma and moving away from the current regime, which is in many ways obsolete, is possible.

There is much to be done before legislation can provide a fair, robust and efficient response to the challenges created by globalisation.

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CROSS-BORDER ENVIRONMENTAL DAMAGE IN CONFLICT OF LAWS

Aurélie PLANAS*

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I. Introduction

Throughout history, humans have caused large environmental disasters, forcing States to question their legal systems and, in particular, the rules on how to address these cases and impose liability on those responsible. Many States have enacted

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 289-320
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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substantive law rules regarding environmental liability,[1] there are also significant international treaties,[2] as well as regional legal instruments.[3]

However, at the international level, there is currently no private international law instrument regarding cross-border environmental damage. Yet, the need for common conflict rules in this matter has been emphasized for many years, in particular by the Permanent Bureau of the Hague Conference on Private International Law.[4] This necessity is also widely acknowledged among the international community.

Environmental harm is transnational by nature, because it rarely follows borders and occurs just in one State. Disputes touch more than one State, thus determining a conflict of laws and/or a conflict of jurisdiction, that needs to be solved through private international law rules. The case of atmospheric pollution caused by slash and burn agriculture in Indonesia is a typical example of this issue. In the autumn of 2015, wide forest and agricultural land fires ravaged the islands of Sumatra and Kalimantan as a consequence of slash and burn agriculture. The inhabitants of these Indonesian islands use this method as a means to deforest and fertilize tropical areas. The process involves draining of peatland in order to extend plantations, in particular for oil palm trees. This method increases the risk of peat fires, which are difficult to control and cause a massive release of greenhouse gases, since peatlands store great quantities of carbon. The nefarious effects of these fires were notably felt in Malaysia, Singapore and Thailand. There were consequences on the health of the affected populations (respiratory issues), but

[1] In Switzerland, for instance, there are many laws regulating the protection of the environment (Federal Act on the Protection of the Environment of 7 October 1983; Federal Act on the Protection of Waters of 24 January 1991, etc.).

[2] For instance, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 or the Stockholm Convention on Persistent Organic Pollutants of 2001.

[3] As an example in this matter, we can mention Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage. On this Directive, see L. DEMEZ, Directive 2004/35/CE du Parlement européen et du Conseil du 21 avril 2004 sur la responsabilité environnementale, in Centre d'Etudes du Droit de l'Environnement, Facultés Universitaires Saint-Louis (eds), *La responsabilité environnementale, Transposition de la directive 2004/35 et implications en droit interne*, Louvain-la-Neuve 2009, p. 11-63; N. DE SADELEER, La directive 2004/35/CE relative à la responsabilité environnementale: avancée ou recul pour le droit de l'environnement des Etats membres, in G. VINEY/ B. DUBUISSON (eds), *Les responsabilités environnementales dans l'espace européen, point de vue franco-belge*, Bruxelles 2006, p. 731-777.

[4] Under the auspices of the Hague Conference on Private International Law, several notes have been drawn up: "Note on the law applicable to civil liability for environmental damage", Permanent Bureau, Prel. Doc. No 9 of May 1992, in Proceedings of the Seventeenth Session (1993), Tome I, Miscellaneous Matters, The Hague 1995, p. 187-211, "Note on the question of civil liability for environmental damage", Permanent Bureau, Prel. Doc. No 3 of April 1995, in Proceedings of the Eighteenth Session (1996), Tome I, Miscellaneous Matters, The Hague 1999, p. 73-89, "Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?" by Ch. BERNASCONI, 2000, available at <https://assets.hcch.net/upload/wop/gen_pd8e.pdf>.

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also on the economy (cancellation of flights, school closures, decrease in tourism) and on the environment itself.[5] This is a typical case of atmospheric pollution, where the consequences reach across the borders of the State in which the damaging activity occurs.

This example, together with the numerous judicial precedents on the topic, demonstrate the need for specific connecting factors in matters of cross-border environmental damage, as the existing regulations are not sufficient to tackle this issue. The "Rhine lawsuit" against the Potash mines of Alsace lasted about fifteen years, with a disappointing outcome.[6] The lawsuit of the Amoco Cadiz oil spill victims resulted in insufficient awards, following proceedings that lasted over ten years. Moreover, the damages awarded didn't actually take into account the damage done to the environment itself.[7] In the Bhopal case, the compensation was far below the damages incurred.[8] The Chernobyl disaster led to compensation on different levels, but the persons who were truly responsible didn't attract any liability for their actions. In Switzerland, for instance, it was the Confederation that eventually compensated some groups of persons who were injured by this catastrophe.[9] These few chosen examples demonstrate that we need to determine if it is possible to propose specific connecting factors that might be adopted at the international level.

The legal instruments that have been adopted to date relate to public international law and are, therefore, insufficient to protect and/or indemnify the victims of environmental damage, because of the unilateral approach of the States.[10] In the absence of specific regulations for this type of wrongdoing, there is also a major risk that the perpetrators remain unpunished. In fact, where State mechanisms of liability are weak or non-existent, the victims of such injuries will face great difficulties in obtaining remedies in court. This could lead unethical

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[5] There are many news articles on this topic. See in particular <http://geopolis.francetvinfo.fr/indonesie-la-culture-sur-brulis-fleau-pour-lenvironnement-et-la-sante-81875>; <http://www.lemonde.fr/planete/article/2015/10/11/l-aide-internationale-arrive-pour-lutter-contre-les-feux-de-forets-en-indonesie_4787133_3244.html>; <http://www.bbc.com/news/world-asia-34242311>.

[6] About the Rhine pollution and the different judicial proceedings, see H.-U. JESSURUN D'OLIVEIRA, Le bassin du Rhin, sa pollution et le droit international privé, in *Travaux des XIIIes Journées d'études juridiques Jean Dabin organisées par le Département de droit international Charles De Visscher*, *La réparation des dommages catastrophiques, Les risques technologiques majeurs en droit international et en droit communautaire*, Bruxelles 1990, p. 161 *et seq*.

[7] A. KISS, "Tchernobâle" ou la pollution accidentelle du Rhin par les produits chimiques, *Annuaire français de droit international* 1987, p. 725.

[8] About the Bhopal disaster, see U. BAXI, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, Bombay 1986.

[9] "Arrêté fédéral du 18 décembre 1987 concernant les indemnités allouées par la Confédération à des personnes lésées par la catastrophe de Tchernobyl".

[10] For example, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 or the Stockholm Convention on Persistent Organics Pollutants of 2001.

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businesses or even individuals to take advantage of lax legal systems in order to expand their activities in foreign countries with no regard for the environment or the local populations.[11] Unfortunately, these situations are a reality and are still way too frequent. An international instrument in private international law would therefore help to limit this kind of behaviour and provide victims with the opportunity to take real and tangible judicial steps.

The need for an international treaty on civil liability for cross-border environmental damage has long been recognized.[12] However, the implementation of such an instrument requires the adoption of connecting factors that can be accepted on an international level. In fact, an international treaty concerning cross-border environmental damage would have a strong political dimension. Therefore, it is of utmost importance to identify common rules that could meet the approval of a majority of states; otherwise, this instrument would be useless.

The purpose of the research on which this article is based was to analyse, through a comparative study of the European, Swiss and U.S. private international law systems, as well as of some specific international treaties on environmental matters, the existing rules that apply to this topic in order to assess the possibility of defining common connecting factors that could be proposed in the drafting process of a convention on civil liability for cross-border environmental damage. That study examined the conflict of jurisdiction rules, the conflict of law rules and the rules on the recognition and enforcement of foreign judgments.

This article will depict the main results of that research and the proposals that were made. First, we will briefly discuss the concepts of environmental harm and civil liability. Then we will conduct a legal qualification of this type of harm, before we study the connecting factors provided by the legal systems mentioned above, which might be chosen for the drafting process of an international treaty.

[11] M. WILDE, *Civil Liability for Environmental Damage, Comparative Analysis of Law and Policy in Europe and the US*, 2nd ed., Alphen aan den Rijn 2013, p. 182 and p. 188.

[12] In 1994 already, Professor P. BOUREL said, about the adoption of a treaty on liability for cross-border environmental damage: "*Instrument à la fois de règlement des conflits de lois et de coopération judiciaire ou administrative inter-étatique, le nouvel accord, dont on peut souhaiter qu'il voie le jour rapidement, se verrait ainsi doté d'une dimension conforme à l'internationalisation croissante du droit de l'environnement*" [an instrument of conflict of laws resolution as well as of inter-state judicial ou administrative cooperation, the new treaty that we wish will soon see the light of day, would thus be endowed with a dimension in line with the increasing internationalization of environmental law] (Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environnement, in *L'internationalisation du droit: mélanges en l'honneur de Yvon Loussouarn*, Paris 1994, para. 20, p. 106).

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II. Cross-Border Environmental Damage

A. The Concept of Environmental Damage and its International Character

The concept of environmental damage is captured by different notions: environmental injury or damage, ecological damage, pollution damage, etc.[13] The concept of ecological injury, by which we mean unlawful harm done to the environment, appears in many national legal systems,[14] as well as in some international instruments. Many sources within administrative law or civil law tackle the damaging effects of harm done to the ecological balance and, in consequence to human beings and their possessions.[15]

It is particularly difficult to give a strict definition to environmental damage,[16] since many indeterminate concepts are used in this field.[17] In general, the main difficulty is that there is no definition, in the internal law of States, of a specific concept of liability for environmental damage.[18] However, this is not an obstacle to the creation of an independent type of unlawful acts for international environmental damage.

In environmental liability matters, one usually distinguishes between compensation for personal injury and compensation for purely ecological harm. This dichotomy can be found in the law of some States.[19] Regarding personal

[13] B. QUEFFELEC/ J. HAY, L'évaluation du préjudice environnemental en droit international, in A. CUDENNEC/ C. DE CET BERTIN (eds), *Mer et Responsabilité*, Actes du colloque de Brest, 16 et 17 octobre 2008, Paris 2009, p. 121. In this article, these concepts will be used indifferently, their meaning being equivalent.

[14] P. WESSNER, Rapport général (Le préjudice écologique), in ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, *L'indemnisation: journées québécoises*, Paris 2008, para. 9, p. 287.

[15] P. WESSNER, Les responsabilités environnementales et l'appréhension des risques de développement, in F. BOHNET/ P. WESSNER (eds), *Mélanges en l'honneur de François Knoepfler*, Bâle/ Genève/ Munich 2005, para. 1, p. 449.

[16] G. HAFNER, *Le contexte particulier de la responsabilité dans le droit international de l'environnement*, in INSTITUT DES HAUTES ETUDES INTERNATIONALES DE PARIS, *Droit international 5*, 2000/2001, Paris 2001, p. 15, considers that: "[…] *face à une définition extrêmement vaste de l'environnement, on peut douter de l'utilité de toute tentative de trouver une telle définition. Par conséquent, l'approche la plus appropriée en ce qui concerne le régime de conséquences juridiques d'une atteinte à l'environnement au sens large est certainement celle qui consiste à se borner à définir seulement le dommage*" [given the very large definition on the environment, we can doubt that any try to find such a definition is useful. Therefore, the most appropriate approach regarding the system of legal consequences to environmental harm is certainly to define only the damage].

[17] T. BALLARINO, Questions de droit international privé et dommages catastrophiques, *Recueil des cours*, t. 220, 1990, para. 3, p. 303 *et seq*.

[18] P. BOUREL, (note 12), p. 98.

[19] O. FUCHS, *Le dommage écologique, Quelles responsabilités juridiques?*, Paris 2011, p. 20 *et seq*., who considers that two observations can be made regarding the extent of foreign law: on the one hand, the legal systems who define the ecological damage as harm

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injury first, the damage can appear in relation to the nuisances suffered by human beings after harm is done to the environment. In this case, damage manifests itself through an injury suffered by a person due to environmental damage. With this concept, the damage that results from environmental damage is just a specific form of the classical injury.[20] In this case, the internal substantive rules on extra-contractual or civil liability will make it possible to resolve this type of dispute.[21]

As for purely ecological damages, they are damages done to the environment in a narrow sense, which cause the destruction of natural resources, thus assigning a value to "nature" itself. In this second definition, the damage is considered to be harm done directly to the natural milieu, regardless of its subsequent consequences on human beings.[22] The relevant literature uses the phrases "purely ecological damage"[23] and "ecological damage in the narrow sense".[24] Air or water pollution or the destruction of a biotope will be subsumed under this concept. In that type of case, damage is done to the environment without individuals necessarily being harmed. This type of harm isn't covered by the classical concept of damage, which is defined as a patrimonial loss and, therefore, it is not directly covered by the rules of liability, unless explicitly stated otherwise.[25] Some States have regulated this field by passing specific laws in environmental matters, mainly based on the "polluter pays" principle.[26] This is also the case at the European level.[27]

This second approach goes beyond the scope of private international law since the latter concerns the relationships between individuals, physical and legal

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done to persons and goods (e. g. Germany, Finland) and, on the other hand, those countries who also include environmental harm in this damage (e. g. Italy, the U.S.A., some international and European legal rules).

[20] B. CHAPPUIS, Quelques dommages dits irréparables, réflexion sur la théorie de la différence et la notion de patrimoine, *Semaine Judiciaire* 2010 II 166-220, para. 30, p. 175.

[21] For developments on civil liability for environmental harm, see notably A.-S. DUPONT, *Le dommage écologique: le rôle de la responsabilité civile en cas d'atteinte au milieu naturel*, Genève/ Zurich/ Bâle 2005, p. 140 *et seq*.

[22] P. JOURDAIN, Le dommage écologique et sa réparation, Rapport français, in G. VINEY/ B. DUBUISSON (eds), *Les responsabilités environnementales dans l'espace européen, Point de vue franco-belg*e, Bruxelles 2006, para. 2 s., p. 144 *et seq*.

[23] P. WESSNER (note 14), para. 6, p. 286.

[24] B. CHAPPUIS (note 20), para. 31, p. 175.

[25] I. ROMY, L'européanisation du droit de la responsabilité civile pour les dommages de pollutions, in F. WERRO (eds), *L'européanisation du droit privé, vers un code civil européen?*, Fribourg 1998, p. 469.

[26] For instance, there are the Federal Act on the Protection of the Environment of 7 October 1983 and the Federal Act on the Protection of Waters of 24 January 1991.

[27] At the European level, we can mention the adoption of two texts: the Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 21 June 1994 and the Directive of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30/04/2004, p. 0056 – 0075.

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persons. Therefore, our discussion will be limited to the environmental damage that has direct consequences for human beings.

In regard to the drafting of an international conflict of laws treaty on cross-border environmental damage, the concept of "environmental damage" needs to have a wide definition. Indeed, the purpose is for the treaty to cover the greatest possible number of cases in order to avoid a situation where the perpetrators of such acts remain unpunished. Therefore, the concept of environmental damage must include all components that surround human beings and influence their lives. These are the natural and artificial elements that constitute their living conditions, in other words, their natural environment.[28] The thus defined damage must cause direct damage to a human being, be it to their physical integrity or to their assets.

This type of damage is only of interest, in the scope an international conflict of laws treaty, if it has an international character. Environmental damage typically does have an international character since it often extends beyond state borders. The international character of environmental damage can result from various circumstances. First of all, the vector of pollution may bring it across international borders, namely in the case of air and water pollution. In these circumstances, the damage may be the result of an act carried out in a different State. This often happens, unfortunately, with radioactive clouds. The international character of the damage can also derive from the consequences of the activity of a legal person. Indeed, the damage resulting from a corporation's activities can often be felt in another State than the one where the harmful act was done.[29] And finally, and too often, the transnational character of the damage derives from the fact that the multinational business doesn't have its seat on the production site liable for the harmful act. The cases where businesses exploit favourable foreign regulations to implant their activities in these countries are far too frequent. This delocalization of production can be the source of ecological disasters without measure.[30] Thus, situations with an international character are numerous in environmental matters, which is why it is necessary to intervene through private international law.

[28] P. JOURDAIN (note 22), para. 3, p. 144; P. STEICHEN, La proposition de directive du Parlement européen et du Conseil sur la responsabilité environnementale en vue de la prévention et de la réparation des dommages environnementaux, *Revue juridique de l'environnement* 2/2003, p. 182, states "[o]n sait que la notion d'environnement est une notion à contenu variable, dont le noyau originel: l'air, l'eau, le sol, la faune et la flore, et l'interaction entre ces différents éléments, s'est peu à peu enrichi pour intégrer d'autres éléments, tels que le climat, les paysages ou encore les biens qui composent l'héritage culturel" [It is known that the concept of environment has a variable scope and that its original nucleus: air, water, soil, fauna and flora, and the interaction between these elements, have gradually been supplemented to integrate other elements, such as the climate, landscape or the goods that constitue the cultural heritage].

[29] T. BALLARINO (note 17), para. 7, p. 311.

[30] As an example, we can mention the Citarum river case, on the Island of Java in Indonesia. It is the most polluted river in the world. The pollution is notably caused by toxic products that are directly discharged into its waters by textile companies.

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B. The Civil Liability of the Author of the Damaging Act

In the course of the standardisation process of the conflict of law rules in a convention on environmental damage matters, it will be necessary to establish an outline of the concept of liability. Liability shall only mean civil liability.[31] Moreover, most States[32] and international instruments[33] apply civil liability rules to resolve disputes based on environmental damage.

Civil liability law encompasses all the rules that allow a person to claim for indemnification of the injury she suffered. The main function of civil liability is the compensation of damages. Furthermore, this liability also pursues preventive purposes.[34]

Civil liability differs from public liability as a result of the different nature of the legal relationships at stake. It concerns private relationships and therefore excludes public authorities and even States on an international level. Moreover, we must stress that public liability is not a private international law matter, but resorts to public international law, unless the State or public agency acts as a private person. As for criminal liability, it mainly protects interests of a public nature and is "restricted" to the sanctions that are attached to the offence provided by substantive law. In contrast, under civil liability, the victims can obtain compensation, which would be the purpose of a regulation on cross-border environmental damage, even if the act is not necessarily criminally deterred.

In the drafting process of an international convention, the concept of civil liability should have the widest possible interpretation. Since national rules can differ on the matter, some basic concepts must be defined in the future convention. In fact, a simple reference to the *lex causae* would lead to insufficient uniformity of the rules. This is particularly the case with respect to the type of liability that shall be covered. From this point of view, it is of prime importance to include only a strict liability in an international convention on cross-border environmental damage, excluding any concept of fault from the person who made the act.[35] This

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[31] Civil liability is however understood in the broad sense of extra-contractual liability. It can also be expressed as "delict". In this sense, O. FUCHS, *Pour une définition communautaire de la responsabilité environnementale, Comment appliquer le principe pollueur-payeur?*, Paris 2003, p. 34, who insists, though, on the fact that environmental liability is not a classical civil liability because of its specific features; Ch. MÜLLER, *La responsabilité civile extracontractuelle*, Bâle 2013, para. 2, p. 3; F. WERRO, *La responsabilité civile*, 2nd ed., Berne 2011, para. 1, p. 3.

[32] See, on this matter, the excellent analysis made by Ch. BERNASCONI, *La responsabilité civile pour dommages résultant d'une atteinte transfrontière à l'environnement: un cas pour la Conférence de La Haye?*, <http://www.hcch.net/upload/wop/gen_pd8f.pdf>, La Haye, p. 16 *et seq*.

[33] We can mention, for instance, the Paris and Vienna Convention in nuclear matters; the Bruxelles Convention on oil pollution; the Geneva Convention on the carriage of goods; the Council of Europe Convention on activities dangerous to the environment.

[34] Ch. MÜLLER (note 31), para. 1 to 5, p.3 *et seq.;* F. WERRO (note 31), para. 1 to 6, p. 3.

[35] In favor of strict liability in environmental matters, see for instance H. BOCKEN, Achievements and proposals with respect to the unification of liability law for particular

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type of liability is even more justified because the wrongdoer, who takes profit from a dangerous activity, should also bear its consequences,[36] in line with the famous "polluter pays" principle. In general, international conventions in environmental matters provide strict liability for the wrongdoer, irrespective of any fault.[37] We consider that this system is essential because, in its absence, there would be some situations where the wrongdoer will not be punished if there was no fault. This approach is even more necessary in relation to the sensitive issue of administrative permits given to businesses whose operations bear risks for the environment; this would be the case, for instance, for some nuclear plants.

The claims that can be brought before courts must also have a wide scope, covering actions for damages in the narrow sense, which result in damages paid to the injured persons, but also pre-emptive actions, which aim at an injunction or the prohibition of the contentious activity.

C. The Legal Qualification of Environmental Harm in Conflict of Laws

To our knowledge, there is no set of generally recognized rules on cross-border environmental damage in private international law anywhere in the world. In any event, such rules certainly do not exist in European, U.S. or Swiss law. However, some national legal texts provide specific dispositions taking into account a few environmental damage situations.[38]

Beyond that, there is no set of rules in private international law with an "accomplished" regime that provides the rules that shall apply to conflict of jurisdiction, conflict of laws and recognition and enforcement of foreign decisions and is strictly based on the matter of cross-border environmental damage.

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types of operation, in Ch. VON BAR (eds), *Internationales Umwelthaftungsrecht I, Auf dem Wege zu einer Konvention über Fragen des Internationalen Umwelthaftungsrechts, Tagung des Instituts für Internationales Privatrecht und Rechtsvergleichung des Fachbereichs Rechtswissenschaften der Universität Osnabrück am 8. und 9. April 1994 in Osnabrück*, Köln/ Berlin/ Bonn/ München 1995, p. 38 *et seq.*; A. HARMATHY, Liability of state organs and civil law liability for environmental damage, in Ch. VON BAR (eds), op. cit., p. 13; A. PIPERS, The Lugano Convention on Civil Liability for Damage resulting from Activities dangerous to the Environmental and the Intents of the Euoprean Union with Regard to Reinstatement of the Environment, in Ch. VON BAR (eds), op. cit., p. 16 and 22.

[36] I. ROMY (note 25), p. 464. For example, the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 and the Brussels Convention on Civil Liability for Oil Pollution Damage of 1969 lay down a regime of strict liability with some possible exemptions.

[37] For a review of the different international conventions in environmental matters that provide a strict liability mechanism, see L. BERGKAMP, *Liability and Environment, Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, The Hague 2001, p. 33 *et seq*.

[38] In this regard, we can mention art. 130 PILA for damages caused by a nuclear installation or by the transportation of nuclear substances, art. 138 PILA regarding the choice of the applicable law for damaging nuisances originating from real property, and art. 7 Rome II Regulation in environmental damage matters.

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On the other hand, it is widely agreed that environmental harm can be a delict and can trigger the liability of the person who committed the wrong.[39] It follows from this qualification that the private international law rules applicable to delict will apply to litigation in environmental harm matters.

This qualification stands to reason. In general, private international law systems distinguish two large categories of acts in the law of obligations: those that resort to contractual law and those that resort to delict, or extra-contractual law, depending on the terminology. In principle, cross-border environmental damage cannot be based on contract because it will obviously not derive from a pre-existing relationship between the wrongdoer and the person who suffers damage. In very exceptional circumstances though, it could happen that there is a pre-existing contract or relationship between the parties; in that case, characterisation of the damage may be problematic since liability in contract and in tort may arise simultaneously.

To the extent that cross-border environmental damage causes a damage for which the harmed person will claim for compensation, the act of the wrongdoer will be addressed only in application of delictual rules as opposed to liability on a contractual basis. The Court of Justice of the European Communities used the same logic to define the concept of tort, delict and quasi-delict as covering all

[39] See for instance P. BOUREL (note 17), para. 14, p. 101; L. DE LA FAYETTE, The Concept of Environmental Damage in International Liability Regimes, in M. BOWMAN/ A. BOYLE (eds), *Environmental Damage in International and Comparative Law, Problems of Definition and Valuation*, Oxford/ New York 2002, p. 150; Y. DONZALLAZ, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*, vol. III, Berne 1998, para. 5074, p. 352; B. DUTOIT, *Guide pratique de la compétence des tribunaux et de l'exécution des jugements en Europe. Les Conventions de Bruxelles et de Lugano, le Règlement "Bruxelles I"*, Genève 2007, para. 69, p. 24; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe, Matières civile et commerciale, Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, 5th ed., Issy-les-Moulineaux 2015, para. 215 and 216, p. 275 *et seq.*; D. A. HOFMANN/ O. M. KUNZ, BSK-LugÜ, 2th ed., Bâle 2016, ad art. 5 CL, para. 475, p. 242; INTERNATIONAL LAW ASSOCIATION, Transnational enforcement of environmental law, second report, Berlin conference 2004, and Resolution nr. 6/2006 on transnational enforcement of environmental law, chap. 2.1; F. KNOEPFLER/ PH. SCHWEIZER/ S. OTHENIN-GIRARD, *Droit international privé suisse*, 3rd ed., Berne 2005, para. 538, p. 289; J. KROPHOLLER/ J. VON HEIN, Europäisches Zivilprozessrecht: Kommentar zu EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO, und EuGFVO, 9th ed., Frankfurt a.M. 2011, ad art. 5, para. 74, p. 204; P. MANKOWSKI, ad art. 5 and art. 35-36 RB, in U. MAGNUS/ P. MANKOWSKI (eds), *Brussels I Regulation, European Commentaries on Private International Law*, 2nd ed., Munich 2012, para. 200, p. 237; P. OBERHAMMER, ad art. 5 CL, in F. Dasser/ P. Oberhammer (eds), *Kommentar zum Lugano-Übereinkommen* (LugÜ), 2nd ed., Bern 2011, ad art. 5, para. 109, p. 132; E. REHBINDER, Extra-territoriality of Pollution Control Law from a european Perspective, in G. HANDL/ J. ZEKOLL/ P. ZUMBANSEN (eds), *Beyond Territoriality, Transnational Legal Authority in an Age of Globalization*, Leiden/ Boston 2012, p. 145; CH. VON BAR, Environmental Damage in International Private Law, *Recueil des cours*, t. 268, La Haye 1997, p. 329; M. WANDT, Deliktsstatut und internationales Umwelthaftungs-recht, *Revue suisse de droit international et de droit européen* 1997, p. 149 *et seq.*; M. WILDE (note 11), p. 8.

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actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of art. 5(1) of the Brussels Convention/ Regulation.[40]

III. The Connecting Factors in Conflict of Jurisdiction

A. The European System

In conflict of jurisdiction matters, the relevant European legal instruments are mainly revolved around the 2007 Lugano Convention[41] (thereinafter CL), on the one hand, and the Brussels I[42] (thereinafter BR) and Brussels I*bis*[43] (thereinafter BR*bis*) Regulations, on the other hand. These legal instruments first provide a general jurisdiction criterion based on the domicile of the defendant in the sense of art. 2 CL/BR and art. 4 BR*bis*.[44] Pursuant to these rules, persons domiciled in a State bound by the Convention or in a EU Member State shall be sued in the courts of that State. The concept of domicile of natural persons hasn't been defined in these legal instruments.[45] The authors of these regulations rather chose to rely on a conflict rule to determine if a person is, or isn't, domiciled on the territory of a State bound by the Convention or a EU Member State.[46] Therefore, the court seised shall apply its internal law to determine whether the person is domiciled in the Member State whose court is seised, as provided in art. 59(1) CL/BR and art. 62(1) BR*bis*. Inversely, an autonomous concept was provided for the domicile of

[40] ECJ, Judgment of 27 September 1998, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, case 189/87, Rep. 1988 05565, para. 17.

[41] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, concluded in Lugano on 30 October 2007, Official Journal of the European Union, 21.12.2007, L 339/3.

[42] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

[43] Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

[44] A. BUHR, Zur Funktionsweise der Brüssel I-Verordnung im internationalen Rechtssystem, Drittstaatenbezug, Restzuständigkeiten, Notzuständigkeiten, Anerkennung und Vollstrekung von Drittstaatenentscheiden, in A. BONOMI/ CH. SCHMID (eds), *La révision du Règlement 44/2001 (Bruxelles I), Quelles conséquences pour la Convention de Lugano?*, Actes de la 23e Journée de droit international privé du 8 avril 2011 à Lausanne, Genève/ Zurich/ Bâle 2011, p. 24.

[45] M. BOGDAN, *Concise Introduction to EU Private International Law*, 2nd ed., Groningen 2012, p. 42.

[46] P. JENARD, La Convention de Bruxelles sur la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, *Annuaire suisse de droit international* 1987, vol. XLIII, p. 86.

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companies or other legal persons or associations of natural or legal persons (art. 60(1) CL/BR and art. 63(1) BR*bis*),[47] in order to improve the transparency of the common rules and to avoid conflicts of jurisdictions.[48] Pursuant to these provisions, a company or other legal person or association of natural or legal persons are deemed to be domiciled at the place where they have their statutory seat (lit. a) or central administration (lit. b), or principal place of business (lit. c). Thus, a company can potentially be domiciled in different places if the central administration, the principal place of business or the statutory seat are in different States bound by the Convention. These criteria are equal, which means that the claimant can bring the company before the court of the jurisdiction of his choice.[49]

Along with these general rules, these legal instruments provide specific jurisdictions in matters relating to tort, delict and quasi-delict, which will also apply in case of cross-border environmental damage.[50] They are art. 5(3) CL/BR and art. 7(2) BR*bis*. According to these provisions, a person domiciled in a State bound by the Convention, or an EU Member state, may, in another State bound by the Convention or the Regulation, be sued in the courts for the place where the damaging event occurred or may occur. These rules derive from the *forum loci delicti principle*.[51] Liability for tort, delict or quasi-delict is traditionally defined by opposition to contractual liability.[52] In fact, the Court of Justice found that the concept of "matters relating to tort, delict or quasi delict" relied on two conditions, the first being the absence of an agreement freely entered into between one party and the other and the second being that the claimant is seeking to establish the liability of the defendant.[53] Furthermore, the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept in order to ensure a uniform application in all the States bound by the Convention or the EU

[47] F. GUILLAUME, ad art. 60 CL, in A. BUCHER (ed.), *Loi sur le droit international privé, Convention de Lugano*, *Commentaire romand*, Bâle 2011, para. 3, p. 2076.

[48] Recital 11 of the preamble to the Brussels 1 Regulation.

[49] H. GAUDEMET-TALLON (note 39), para. 88, p. 98.

[50] The ECJ issued a topical judgment on cross-border environmental damage matters in 1976 and applied art. 5(3) in the case *Handelskwekerij G. J. Bier BW v. Mines de potasse d'Alsace SA*, case 21/76, Rep. 1976 01735.

[51] This connecting factor links to the general conflict of laws rule in this matter, the *lex loci delicti*, established by the majority of European States, see J. LOOKOFSKY/ H. KETILBJØRN, *EU-PIL, European Union, Private International Law in Contract and Tort*, Copenhague 2008, p. 66.

[52] See not. ECJ, judgment of 20 January 2005, *Petra Engler v. Janus Versand GmbH*, case C-27/02, Rep. 2005 I-00481, para. 29; ECJ, judgment of 11 July 2002, *Rudolf Gabriel*, case C-96/00, Rep. 2002 I-06367, para 33; ECJ, judgment of 26 March 1992, *Mario Reichert*, *Hans-Heinz Reichert et Ingeborg Kockler v. Dresdner Bank AG*, case C-261/90, Rep. 1992 I-02149, para. 16; ECJ, Judgment of 27 September 1998, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer*, Hengst and Co. and others, case 189/87, Rep. 1988 05565.

[53] ECJ, Judgment of 27 October 1998, *Réunion européenne SA and others v. Spliethoff's Bevrachtingskantoor BV and the master of the vessel "Alblasgracht V002"*, case C-51/97, Rep. 1998 I-06511, para. 17 and 22.

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Member states.[54] This characterisation is "autonomous" since it is independent from the law of the court seised (*lex fori*), and from the substantive law applicable to the claim (*lex causae*), which will be determined in application of the conflict of law rules of the jurisdiction State.[55]

The purpose of the action based on art. 5(3) CL/BR and art. 7(2) BR*bis* will generally be to order the defendant to pay damages, or to prevent the perpetration of a damaging action by means of a preemptive action.[56] In an issue relating to cross-border environmental damage, an action could also aim at the rehabilitation of a polluted site, or be brought in a preemptive purpose, for instance if there is a risk that an industrial activity could be harmful to the environment.

The expression "place where the harmful event occurred or may occur" used in art. 5(3) CL/BR and art. 7(2) BR*bis* was interpreted in a great number of precedents of the Court of Justice.[57] This Court has ruled that the concept of "place where the harmful event occurred" must be understood as being intended to cover both the place where the damage occurred and the place of the event which gave rise to and is at the origin of that damage.[58] The claimant can choose between these two jurisdictions.[59] However, the Court of Justice put in place some limitations to avoid a too wide interpretation of this concept. For instance, it found that this expression only covered main and direct damages brought by a person who suffered such damages.[60] Damages suffered by indirect victims as a consequence of the harm suffered by the direct victims cannot be taken into account.[61]

It follows that, in application of the Lugano Convention and of the Brussels I and Brussels I*bis* Regulations, the claimant who suffered damages as a consequence of cross-border environmental damage can potentially bring his

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[54] ECJ, *Kalfelis* judgment (note 40), para. 16; ECJ, Judgment of 17 September 2002, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, case C-334/00, Rep. 2002 I-07357 para. 19.

[55] A. BUCHER/ A. BONOMI, *Droit international privé*, 3rd ed., Bâle/ Genève/ Munich 2013, para. 1121, p. 315; J. KROPHOLLER/ J. VON HEIN (note 38), ad art. 5, para. 72, p. 200.

[56] On the different types of tort claims, cf. D. A. HOFMANN/ O. M. KUNZ (note 39), ad art. 5 CL, para. 516, p. 254 *et seq*.

[57] On this matter, see A. PLANAS, *La responsabilité civile pour les atteintes trans-frontalières à l'environnement. Etude de droit international privé comparé en vue de l'élaboration d'une convention internationale*, Bâle 2016, para. 112, p. 50.

[58] ECJ, Judgment of 30 November 1976, *Handelskwekerij G. J. Bier BW v. Mines de potasse d'Alsace SA*, case 21/76, Rep. 1976 01735, para. 19; ECJ, Judgment of 7 March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL et Chequepoint International Ltd contre Presse Alliance SA*, case C-68/93, Rep. 1995 I-00415, para. 32.

[59] D. A HOFMANN./ O. M. KUNZ (note 39), ad art. 5 CL, para. 456, p. 238.

[60] CJCE, *Dumez* judgment, para. 20.

[61] G. C. CHESHIRE/ P. NORTH/ J.J. FAWCETT, *Private International Law*, 14th ed., Oxford 2008, p. 256 *et seq*.; B. DUTOIT, *Droit international privé, Commentaire de la loi fédérale du 18 décembre 1987*, 4th ed., Bâle 2005, ad art. 129, para. 5*bis*, p. 450 *et seq*.; B. DUTOIT (note 38), para. 74, p. 26; H. GAUDEMET-TALLON (note 39), para. 217, p. 280; J. KROPHOLLER / J. VON HEIN (note 39), ad art. 5, para. 93, p. 233; P. MANKOWSKI (note 38), para. 236, p. 255.

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action before three jurisdictions, either the jurisdiction of the domicile of the defendant in accordance with art. 2 CL/BR and art. 4 BR*bis*, or the jurisdictions of the place where the harmful event occurred, in accordance with art. 5(3) CL/RB and art. 7(2) BR*bis*.

B. The Swiss System

The Swiss private international law rules have a similar system. They are based on the Private International Law Act of 1st January 1989 (hereafter, PILA). Like the Lugano Convention and the Brussels I and Brussels I*bis* Regulation, art. 2 PILA provides a general jurisdiction at the domicile of the defendant. However, unlike the European instruments, this general provision is only subsidiary in nature, not alternative to the specific jurisdictions provided in this act.[62] This is the case, in particular, for delict.

Art. 129 PILA, which applies to delict, provides three alternative connecting factors, among which the claimant can choose.[63] First of all, jurisdiction is given to the Swiss courts at the domicile or, in the absence of a domicile in Switzerland, at the habitual residence of the defendant (art. 129 para. 1, 1st sentence PILA). Art. 20 para. 1 lit. a PILA states that the domicile of a natural person is in the State where she resides with the intention of establishing permanent residence. Thus, this concept consists of two criteria: effective residence of the concerned individual in a specific place, on the one hand, and the intention of the individual to establish permanent residence there, on the other hand.[64] In the absence of a domicile, art. 129 PILA provides a connection to the place of habitual residence of the natural person. It is the place where this individual lives for a certain time, even if the duration of his or her stay seems limited, at first.[65] It implies the physical presence of the person in a given place and corresponds to the place where she has the centre of her personal and professional relationships. The distinction between habitual residence and domicile lies in the fact that, for the habitual residence, it is necessary that the person be present at this place.[66] The "domicile" of companies is defined in art. 21 par. 1 PILA, which provides that the registered office of a company equates to the domicile. In addition, the registered office of a company is deemed to be located at the place designated in the articles of incorporation or in the articles of association (statutory office); the place where the company is administered is, in fact, only a subsidiary

[62] F. GUILLAUME, *Droit international privé, Principes généraux*, 3rd ed., Neuchâtel 2013, para. 43, p. 55.

[63] B. DUTOIT, *Droit international privé, Commentaire de la loi fédérale du 18 décembre 1987*, Supplément à la 4ème éd., Bâle 2011, ad art. 129 LDIP, para. 2, p. 222.

[64] See ATF 119 II 167, para. 2b; ATF 136 II 405, para. 4.3; ATF 137 II 122, para. 3.6.

[65] Swiss Federal Court (thereinafter TF), judgment of 2 March 2009, 5A_607/2008, para. 4.4.

[66] A. BUCHER, *Loi sur le droit international privé, Convention de Lugano, Commentaire romand*, Bâle 2011, ad art. 20 PILA, para. 31, p. 297.

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criterion pursuant to art. 21 para. 2 PILA. In cross-border environmental damage matters, a first connecting factor can be identified, in accordance with art. 129 PILA at the jurisdiction of the place of domicile or habitual residence of the defendant.

Similarly to the Lugano and the Brussels I and Brussels I*bis* Regulations, art. 129 al. 1 PILA, 2nd sentence, states an alternative jurisdiction at the place where the act or the results occurred. The Swiss Federal court interpreted the concept of "jurisdiction at the place of where the act occurred" in light of art. 5(3) CL. Thus, this concept covers the place where the unlawful activity took place, the place where the event causing the damage occurred and the place of the generating event.[67] In other words, it covers any place where an event, which caused the damage, occurred.[68] The concept of the place where the result of the unlawful act occurred must also be interpreted in light of the precedents set by the Court of Justice.[69] Thus, it covers the place where direct harm occurred, namely the place where the protected legal good was damaged. Therefore, it is at the place where the first unlawful damage was done to this good,[70] that is, the place where the initial damage materialized.[71] In cross-border environmental damage matters, the claimant would therefore have the choice of either acting before the jurisdiction of the place where the act was done or at the place of its result.

Lastly, art. 129 par. 1, 2nd sentence *in fine* PILA provides a jurisdiction for the courts at the place of business to entertain actions pertaining to the operation of the place of business in Switzerland. It is an alternative connecting factor to the other jurisdictions stated in this provision. This rule corresponds to art. 5(5) CL/BR and art. 7(5) BR*bis*. Pursuant to art. 20 para. 1 lit. c PILA, an individual has his or her place of business in the State where the centre of his or her professional or commercial activities is located. And art. 21 al. 4 PILA provides that the place of business of a company is located in the state where its registered office is located or in any state where one of its branches is located. This means the place where the company is active.[72]

A specific head of jurisdiction – resulting in an exception to art. 129 PILA – has been established for damages caused by a nuclear installation or by the transportation of nuclear substances.[73] Art. 130 al. 1 LDIP gives jurisdiction to the Swiss courts at the place where the event causing the damage occurred to entertain actions relating to damages caused by a nuclear installation or by the transportation

[67] ATF 131 III 153, para. 6.2.

[68] ATF 125 III 346, para. 4c/aa; ATF 131 III 153, nr. 6.2; TF, judgment of 15 June 2003, 4C.98/2003, para. 2.2; TF, judgment of 10 December 2014, 4A_28/2014, nr. 4.1 and the mentioned precedents.

[69] ATF 131 III 153, para. 6.2; A. BONOMI, ad art. 129 PILA, in A. BUCHER (ed.), *Loi sur le droit international privé, Convention de Lugano*, Commentaire romand, Bâle 2011 para. 25, p. 1100; B. DUTOIT (note 63), ad art. 129 PILA, para. 5*bis*, p. 452.

[70] TF, judgment of 10 December 2014, 4A_28/2014, para. 4.1.

[71] ATF 125 III 103, para. 2 and 3.

[72] F. GUILLAUME (note 47), ad art. 21 PILA, para. 11, p. 304.

[73] S. OTHENIN-GIRARD, Droit international privé, Les actes illicites (art. 129-142 LDIP), *Fiche Juridique Suisse* n° 710 (mise au point 1er novembre 2002), p. 5.

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of nuclear substances. This rather unique provision is of considerable significance in cross-border environmental damage matters and doesn't have a parallel in Europe or the U.S.A.

The Swiss lawmaker provided two other subsidiary connecting factors in art. 130 para. 2 PILA, in the event that the place of the harmful event cannot be identified. If the liability lies with the operator of a nuclear installation, the action can be introduced before the Swiss courts at the place where this installation is located (art. 130 para. 2 lit. a PILA). However, if the liability lies with the holder of a transportation permit, the injured person must bring the action before the Swiss courts at the place where such permit holder is domiciled or at their elected domicile (art. 130 par. 2 lit. b PILA). In the more or less near future, these subsidiary connecting factors will not exist in such terms anymore, after the passing of modifications to art. 130 PILA, which will directly integrate the Paris Convention in nuclear matters.[74]

The Swiss system of conflict of jurisdiction rules that applies to cross-border environmental damage is very similar to those laid out in the Lugano Convention and the Brussels I and Brussels I*bis* regulations. The American system, however, is somewhat different. In fact, the private international law rules are subject to state legislation[75]. Therefore, each U.S. state has its own set of rules in this matter[76]. Nevertheless, some general principles can be identified regarding unlawful acts, based on which we can define the rules that shall apply to cross-border environmental damage.

C. The U.S. System

In conflict of jurisdiction matters, the main criterion that the U.S. States use links jurisdiction to the domicile of the defendant.[77] This concept of domicile means the place where a person lives and where their familiar, social and civil centre of life

[74] On this matter, A. PLANAS (note 57), para. 273 *et seq.*, p. 108 *et seq*.

[75] This is what the Second Restatment points outs in its § 2: "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state".

[76] S.C. SYMEONIDES, *The American Choice-of-Law Revolution: Past, Present and Future*, Leiden 2006, p. 2. The regulations on environmental matters and their consequences in terms of civil and criminal liability are also mainly subject to State legislation; on this matter, see: P. HAY, Environmental Protection and Civil Liability in the United States, in CH. VON BAR (ed.), *Internationales Umwelthaftungsrecht I, Auf dem Wege zu einer Konvention über Fragen des Internationalen Umwelthaftungsrechts*, Tagung des Instituts für Internationales Privatrecht und Rechtsvergleichung des Fachbereichs Rechtswissenschaften der Universität Osnabrück am 8. und 9. April 1994 in Osnabrück, Köln/ Berlin/ Bonn/ München 1995, p. 131, 132 and 139.

[77] It must be pointed out that the U.S. States rather use the concept of "residence" than the one of "domicile" in their laws. These concepts are considered to be roughly equivalent. On this topic, AMERICAN LAW INSTITUTE, *Restatement of the Law Second, Conflict of Laws 2d*, Vol. 1, §§ 1-221, St. Paul 1971 (Minnesota), ad § 11, p. 45.

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is.[78] When speaking of this connecting factor, the U.S. courts use the terms "general jurisdiction".[79] In this way, the courts are competent to rule disputes concerning persons who are domiciled on the territory of their jurisdiction, irrespective of the place where the damage occurs. This power also extends to individuals who are momentarily absent from the state at issue.[80] Companies can be sued before the courts of the State of incorporation, but also the courts of the State where their main operations are. In this matter, the Supreme Court initially considered that the defendant company must have a continuous and systematic activity in the State in question in order to be subject to its general jurisdiction.[81] That first connecting factor, which is based on the competence of the courts at the defendant's place of domicile, is the result of a purely territorial conception. In two subsequent cases[82], the general jurisdiction was restricted by the Supreme Court and is only founded if the defendant can be considered "at home" in the State of the forum.

The Supreme Court has relaxed this position by adopting the "minimum contacts" theory in its famous *International Shoe* judgment.[83] Based on this precedent, the States have jurisdiction to render judgments concerning persons that are not domiciled in their territory if there are "minimum contacts" between them and the forum state. By virtue of the "specific jurisdiction" the court can only have jurisdiction to render judgment in a litigation concerning a defendant who is not domiciled on the territory of the jurisdiction State if this defendant has minimum contacts with that State.[84] These connecting factors provided by the Supreme Court also apply to unlawful acts, and therefore to cross-border environmental damage.

We will, in particular, mention the existence of the *Second Restatement*, a legal instrument which was elaborated under the supervision of the American Law Institute. A great number of States have adopted its provisions, or used them as inspiration. The *Second Restatement* contains many conflicts of jurisdiction rules in its §§ 27 to 40. In a broad sense, it accepts the following connecting factors[85]: presence on the territory of a U.S. State (§ 28), domicile (§ 29), residence (§ 30), nationality and citizenship (§ 31), consent (§ 32), voluntary appearance before a

[78] Pursuant to § 11 of the Second Restatement: "(1) Domicil is a place, usually a person's home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place. (2) Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicile at a time".

[79] See for instance *Helicopteros Nacionales v. Hall* (1984), p. 466 U. S. 419, footnotes 8 and 9, and the mentioned precedents.

[80] M.H. HOFFHEIMER, *Conflict of Laws: Examples & Explanations*, New York 2010, p. 33.

[81] *Helicopteros Nacionales* (note 79), p. 466 U. S. 416.

[82] *Goodyear Dunlop Tires Operations S.A., v. Brown*, 564 U. S. 915 (2011); *Daimler AG v. Bauman*, 571 U. S. (2014).

[83] *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

[84] *International Shoe*, p. 326 U. S. 316. The Supreme Court stood by its precedent in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 U. S. 2780 (2011).

[85] On this matter, A. PLANAS (note 57), para. 333 *et seq.*, p. 130 *et seq*.

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court (§§ 33 and 34), doing business in state (§ 35), doing an act in state (§ 36), causing effects in state by act done elsewhere (§ 37), ownership, use or possession of tangible thing in state (§ 38), other relationships (§ 39) and partnerships or other unincorporated associations (§ 40).

The provisions of §§ 36 and 37 of the *Second Restatement* ("Doing an act in state", "Causing effects in state by act done elsewhere") are of prime importance in cross-border environmental damage matters, since they apply to unlawful acts. The give the claimant the possibility to sue the defendant either before the courts of the State where the act took place (§ 36),[86] or before the courts of the State where the effects of the act appear (§ 37).[87] These factors, which can apply in cross-border environmental damage matters, are similar to the ones laid out by the Swiss and the European lawmakers.

When speaking of cross-border environmental damage, one must mention the Alien Tort Claims Act (thereinafter ATCA) because it may provide a ground for jurisdiction.[88] Since the 1980s, U.S. courts have interpreted this instrument in a very broad way, finding that it gave U.S. courts jurisdiction to rule on any litigation between opposing parties, irrespective of their nationality, for acts that could have been done outside U.S. territory.[89] First, it was found that ATCA gave competence to an U.S. court even if the claims made didn't have any significant link with the U.S.A. provided that the defendant's presence, even for a limited time, on U.S. territory could be proved.[90] However, the Supreme Court has recently dramatically reduced the scope of ATCA in the *Kiobel case*.[91] It found that this act did not have any extraterritorial effects and that the litigation must have minimum contacts with the U.S.[92] Future cases will allow us to grasp the implications of this new Supreme Court precedent.

[86] AMERICAN LAW INSTITUTE (note 77), ad § 36, p. 147 *et seq*.

[87] AMERICAN LAW INSTITUTE (note 77), ad § 37, p. 156 *et seq*.

[88] ATCA contains a single sentence: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of United States" (28 U.S.C.S § 1350).

[89] See in particular the New York Court of Appeals Judgment in 1980, in the *Filártiga v. Peña-Irala* case, 630 F.2d 876 (2d Cir.1980).

[90] I. MOULIER, Observations sur l'Alien Tort Claims Act et ses implications internationales, *Annuaire français de droit international* 2003, vol. 49, p. 134

[91] *Kiobel v. Royal Dutch Petroleum Co*., 81 U. S. (2013).

[92] A. BUCHER, La compétence universelle civile, in *Recueil des cours*, Tome 372, La Haye 2015, p. 27; L. ENNEKING, The Future of Foreign Direct Liability?, Exploring the International Relevance of the *Dutch Shell Nigeria* Case, *Utrecht Law Review* 2014, vol. 10, p. 49; S. C. SYMEONIDES, Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey, *American Journal of Comparative Law 2014*, vol. 62, p. 81.

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IV. The Connecting Factors in Conflict of Laws

A. The European System

On the European level, we can in particular mention the Rome II Regulation in non-contractual obligations.[93] This instrument first of all gives great significance to the parties' freedom of choice, in art. 14. In fact, this provision gives them the opportunity to elect the law by which their dispute shall be governed. They can choose any law, even if it does not have any link to the case at hand.[94] However, the choice of law can only be made after the event giving rise to the damage occurred, except in commercial matters.[95] When acting based on cross-border environmental damage, the parties could then opt for the applicable law in conformity with art. 14 Rome II Regulation. In the absence of a choice of law agreement, this legal instrument provides a specific connecting factor in environmental matters in art. 7. This provision applies to non-contractual obligations arising out of environmental damage or damage sustained by persons or property as a result of environmental damage.[96] Pursuant to this provision, environmental damage "should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms".[97] Therefore, the harm must necessarily result, at least in part, from human activity.[98]

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[93] It is Regulation (EC) 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, 31.7.2007, p. 40–49.

[94] The parties can also choose the law of a third state not bound by the Rome II Regulation. This opinion is expressed by A.-L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, *Las obligaciones extracontractuales en derecho internacional privado: El reglamento "Roma II"*, Granada 2008, p. 98.

[95] Cf. B. DUTOIT, Le droit international privé des obligations non contractuelles à l'heure européenne: le Règlement Rome II, in G. VENTURINI/ S. BARIATTI (eds), *Nuovi strumenti del diritto internazionale privato, New Instruments of Private International Law, Nouveaux instruments de droit international privé, Liber Fausto Pocar*, Milano 2009, p. 313, who criticizes the use of the "commercial activity" factor, which he deems too narrow, because it refers to "traders". In his opinion, it would have been more appropriate to use the term "professionals" as opposed to "consumers".

[96] J. VON HEIN, Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung, *Zeitschrift für Europäisches Privatrecht* 2009, p. 30.

[97] Recital 24 of the Rome II Regulation preamble.

[98] B. DUTOIT (note 95), p. 319, who considers that environmental damages resulting from a natural disaster can be subsumed under art. 7 Rome II Regulation if they can clearly, or at least mostly, be traced back to a given polluter. *Contra:* S. VRELLIS, The Law applicable to the Environmental Damage, some Remarks on Rome II Regulation, in J.-J. FORNER DELAYGUA/ C. GONZÁLEZ BEILFUSS/ F. RAMÓN VIÑAS (eds), *Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del Derecho internacional privado: "liber amicorum" Alegría Borrás*, Madrid 2013, p. 876, who considers that it is

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Art. 7 Rome II Regulation establishes a connection to the law that applies at the place of the damage, thus explicitly referring to the general provision of art. 4(1), except if the claimant chooses to base his claim on the law of the country where the act which caused the damage occurred. Thus, pursuant to this provision, the person who suffered the damage can choose between the application of the law of the place where the damage appeared, or the law of the State where the generating fact, namely the unlawful act, was done.[99]

B. The Swiss System

Similarly to the European system, the Swiss lawmaker also gives the parties the opportunity to mutually elect, after the damaging event occurred, that the law of the jurisdiction will apply (art. 132 PILA). Thus, a choice of law is possible in matters relating to tort, and therefore to cross-border environmental damage, pursuant to this provision. In contrast to the Rome II Regulation, the choice of law provided by the PILA is much stricter, since the parties can only choose to apply Swiss law as the law of the jurisdiction. In the absence a choice of law, the general conflict of law rules in unlawful act matters, set forth in art. 133 PILA, will apply. This provision uses a cascade of connecting factors.[100]

Firstly, art. 133 par. 3 PILA provides that when an unlawful act breaches a legal relationship existing between the wrongdoer and the injured party, claims based on such act are governed by the law applicable to the legal relationship. This connecting factor overrides the other factors of art. 133 PILA.[101] It allows contractual and tortious obligations to be ruled by the same law, which avoids sensitive characterisation issues. The legal relationship can be of any nature and can notably fall within the scope of contract law, family law or even corporate law.[102] However, for this connecting factor to operate, the unlawful act must violate an obligation resulting from the legal relationship between the parties.[103]

In the absence of a pre-existing legal relationship between the parties, art. 133 par. 1 PILA provides that when the wrongdoer and the injured party have their habitual residence in the same State, claims for tort are governed by the law

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not necessary that the damage be the result of human activity in order for art. 7 Rome II Regulation to apply.

[99] TH. KADNER GRAZIANO, The Law applicable to Cross-border Damage to the Environment, A Commentary on Article 7 of the Rome II Regulation, this *Yearbook* 2007, vol. 9, p. 75.

[100] Schematically, the connecting factors sequence is the following: art. 132 - 133 para. 3 - 133 para. 1 - 133 para. 2 PILA.

[101] F. KNOEPFLER/ PH. SCHWEIZER/ S. OTHENIN-GIRARD (note 39), para. 539, p. 290.

[102] A. BUCHER/ A. BONOMI (note 55), para. 1162, p. 327; B. DUTOIT (note 61), ad art. 133 LDIP, para. 7, p. 464; A.-C. IMHOFF-SCHEIER/ P. M. PATOCCHI, *Torts and Unjust Enrichment in the New Swiss Conflict of Laws, L'acte illicite et l'enrichissement illégitime dans le nouveau droit international privé suisse*, Zurich 1990, p. 50; F. KNOEPFLER/ PH. SCHWEIZER/ S. OTHENIN-GIRARD (note 39), para. 539, p. 290.

[103] Swiss Federal Council Message on PILA, p. 411 (french version).

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of that State. This provision thus refers to the law of the common social environment of the author and the injured party. In fact, the Swiss lawmaker assumed that the delict had the closest connection to the State where the wrongdoer and the injured party have their habitual residence.[104]

Finally, if the parties are not bound by a pre-existing legal relationship and if their habitual residence is not in the same State, art. 133 par. 2 PILA provides two more connecting factors in torts. Art. 133 par. 1, 1st sentence PILA creates a connection to the *lex locus delicti*, namely to the State in which the unlawful act was done. However, for distant delicts, where the result occurs in another State from that in which the unlawful act was done, art. 133 par. 2, 2nd sentence PILA provides that preference should go to the State in which the result occurs. This last connecting factor only applies, though, if the wrongdoer should have foreseen that the result would occur there. If this is not the case, the law of the State in which the unlawful act was done will apply. Unlike the provisions in the Rome II Regulation, PILA imposes an additional condition of predictability in order for the law of the State in which the result occurs to apply.[105] We understand the "place of the act" to be the place where the wrongdoer engaged in a behaviour that caused the damaging result to occur.[106] The place of the result is the place where the protected legal good was harmed. It must be direct harm to a legally protected good or a legally protected interest.[107]

In accordance with its conflict of jurisdiction rules (art. 130 PILA), the Swiss lawmaker provided a specific rule on environmental liability matters in art. 138 PILA. This provision states a series of connecting factors in case of cross-border nuisances[108], such as air pollution, smoke or gas emissions or even nuclear fallout.[109] Pursuant to this provision, claims arising out of damaging nuisances originating from real property are governed at the option of the injured party by the law of the State in which the real property is located or by the law of the State in which the result occurred. The injured party has an option between these two locations. Art. 138 PILA applies only to damaging nuisances originating from real property. This term must be understood in a broad sense and applies to any immovable property, irrespective of the presence of a building. Thus, damaging nuisances originating from agricultural activity on a given land or from the

[104] A.-C. IMHOFF-SCHEIER / P.M. PATOCCHI (note 102), p. 47.

[105] The Rome II Regulation adopted a simpler regime in its art. 4 par.1 by providing that the applicable law is always the law of the State in which the damage occurred, even if the tortfeasor couldn't foresee that result.

[106] B. DUTOIT (note 61), ad art.133 PILA, para. 6, p. 464.

[107] ATF 113 II 476, para. 3; ATF 125 III 103, para. 2b/aa.

[108] M. WANDT (note 39), p. 152.

[109] B. DUTOIT (note 1), ad art. 138 PILA, para. 1, p. 494; A.-C. IMHOFF-SCHEIER/ P.M. PATOCCHI (note 102), p. 72; F. KNOEPFLER/ PH. SCHWEIZER, Tchernobyl, Action ouverte en Suisse, for et droit applicable, in B. DUTOIT (et al.) (eds), *Pollution transfrontalière = Grenzüberschreitende Verschmutzung: Tchernobyl, Schweizerhalle*, Revue de droit suisse 1989, p. 44; S. OTHENIN-GIRARD (note 73), p. 23.

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operation of an airport will also be subsumed under art. 138 PILA.[110] The concept of damaging nuisances must be interpreted according to the *lex fori*, namely Swiss law. The damage covers environmental damage (purely ecological damages) as well as damages to persons or goods.[111]

C. The U.S. System

The conflict of laws rules provided in the Swiss system are obviously close to the ones laid out in the Rome II Regulation. Some similarities can also be drawn with the conflict of law rules in U.S. law. In broad terms, there are presently eight conflict of laws systems in use in the U.S., namely the traditional approach resulting from the First Restatement, the Second Restatement – namely the "most significant relationship" theory –, the "interest analysis" or "governmental interest analysis", the "better law" or the "choice-influencing considerations", the *lex fori*, the "significant contacts" and, finally, the "combined modern approach". In tortious matters, the *First Restatement* provides a purely territorial connecting factor, which refers to the place of the tort, i. e. the *lex loci delicti.*[112] At the time of writing, ten states apply the connecting factor provided by the *First Restatement*.

The rules of the *Second Restatement* are based on the "most significant relationship" theory. Pursuant to this theory, the law of the state with which the parties and the litigation have the most significant relationship must be applied.[113] In the *Second Restatement*, the conflict of law rules for torts are laid out in chapter 7, in particular in § 145. This provision refers to the law of the place which has the most significant relationship to the occurrence and the parties. This state must be determined according to the principles stated in § 6 of that legal instrument. The connecting factors to be taken into account by the competent jurisdiction are the following: the place where the injury occurred (a), the place where the conduct causing the injury occurred (b), the domicile, habitual residence, place of incorporation and place of business of the parties (c), and the place where the relationship, if any, between the parties is centred (d). The law of any of these places may meet the most significant relationship condition with regard to the dispute. A large majority of U.S. states (24 states) apply this theory in order to determine the applicable law with respect to tort issues.[114]

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[110] A. BONOMI (note 69), ad art. 138 PILA, para. 3, p. 1153; F. DASSER, ad art. 138 LDIP, in H. HONSELL/ P. VOGT NEDIM/ A.K. SCHNYDER/ S.V. BERTI (eds), *Internationales Privatrecht, Basler Kommentar*, 3rd ed., Bâle 2013 para. 4, p. 1227; A. HEINI, ad art. 138 PILA, in D. GIRSBERGER (et al.) (eds), *Zürcher Kommentar zum IPRG: Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987*, 2nd ed., Zurich 2004, para. 3, p. 1561.

[111] A. BONOMI (note 69), ad art. 138 PILA, para. 2, p. 1152.

[112] G. B. BORN, *International Civil Litigation in United States Courts*, 3rd ed., The Hague 1996, p. 616; E.A. O'HARA/ L. E. RIBSTEIN, Conflict of Laws and Choice of Law, *George Mason University School of Law 9600* (1999), p. 632.

[113] R. L. FELIX/ R.U. WHITTEN, *American Conflicts Law*, 6th ed., Durham (North Carolina) 2011, p. 377.

[114] S. C. SYMEONIDES (note 92), p. 282.

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The third system, which is applied only by two U.S. states, uses a qualified approach of the "governmental interest analysis" theory.[115] According to this approach, the law of the State in which both parties have their domicile shall apply to their issue. If the parties indeed have their domicile in the same State, it is deemed to be the only one to have interest in settling their dispute. As a general matter, the majority of U.S. states apply this rule in practice, even if they do not follow this theory.[116] The "better law" theory is based on five "choice-influencing considerations", such as the predictability of the applicable law, the taking into account of interests of other states in the issue or the law that appears most fit to apply the particular case.[117] At the present time, five U.S. states use this approach in torts.[118] The *lex fori*, namely the application of the law of the jurisdiction, is the relevant connecting factor for torts in two states.[119] As for the theory of the "signifi-cant contacts", its purpose is to identify the state with the most significant contacts with the case and the parties, which are considered to be the gravity centre of the dispute.[120] This theory is very similar to the one provided in the *Second Restatement*. Three states apply it at the time of writing in torts.[121] Finally, the "combined modern approach" "combines" the application of several of the aforementioned theories. This type of approach is currently in use in six American states.[122]

The various systems applied by the U.S. states in conflict of laws matters show similarities with the Rome II Regulation and PILA. This is true, in particular, for the *Second Restatement*, which is in use in the majority of states. In fact, the general rule of this legal instrument provides connecting factors that are also found in the European and the Swiss legal systems.

V. The Connecting Factors in Matters of Recognition and Enforcement of Foreign Judgments

A. The European System

The Lugano Convention and the Brussels I Regulation state a simple and quick procedural system for the recognition and the enforcement of foreign judgments, in

[115] R. L. FELIX/ R. U. WHITTEN (note 113), p. 192.

[116] S. C. SYMEONIDES (note 92), p. 282.

[117] R. LEFLAR/ L.L. MCDOUGAL/ R.L. FELIX, *American Conflicts Law*, 4th ed., Charlottesville 1986, p. 277-279 and p. 389-391; R. L. FELIX/ R. U. WHITTEN (note 111), p. 194-201.

[118] S. C. SYMEONIDES (note 92), p. 282.

[119] E. A. O'HARA/ L. E. RIBSTEIN (note 112), p. 635; R. U. WHITTEN, U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited), *Texas International Law Journal* 2002, vol. 37, p. 570 *et seq*.

[120] S. C. SYMEONIDES (note 76), p. 99.

[121] S. C. SYMEONIDES (note 92), p. 282.

[122] S. C. SYMEONIDES (note 92), p. 282.

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order to promote the free movement of judgments inside the EU. The Brussels I*bis* Regulation gets even closer to this goal. This legal instrument may only apply, though, to legal proceedings instituted on or after 10 January 2015, in accordance with art. 66 par. 1 BR*bis*. Therefore, all recognition and enforcement of foreign judgment requests issued before this date are subsumed under the Brussels I Regulation.[123]

Pursuant to these legal instruments, the concept of "judgment" for which the recognition or enforcement is sought must have an autonomous interpretation.[124] It refers to any judgment given by a court or tribunal of a state party to the Lugano Convention, or a EU member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.[125] Consequently, this concept has a very broad interpretation. However, the judgment must enter the scope of application of these legal instruments, which means that it must have been issued in a civil or commercial matter.

Furthermore, the Court of Justice specified that provisional and protective measures in the sense of art. 31 CL/BR could fall within the scope of art. 32 CL/BR if the defendant was enabled to arrange its defence effectively.[126] Based on this last condition, the decision for which recognition is requested must have been made at the conclusion of contested proceedings.[127] The Brussels I*bis* Regulation codified the precedent set by the Court of Justice by specifying in art. 2 lit. a that the word "decision" also includes provisional, including protective, measures. The concept of "jurisdiction" must also be understood in a broad sense and includes not only judges, but also persons who are invested with judicial functions.[128]

The Lugano Convention and the Brussels I Regulation contain similar provisions regarding the recognition of foreign decisions in art. 33 to 37. Pursuant to art. 33(1) CL/BR a judgment given in a State bound by the Lugano Convention, or

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[123] F. GASCÓN-INCHAUSTI, La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I *bis*, in E. GUINCHARD (ed), *Le nouveau règlement Bruxelles I bis: Règlement n°1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, Bruxelles 2014, p. 215.

[124] P. WAUTELET, ad art. 32, para. 4, p. 622, *in* U. MAGNUS/ P. MANKOWSKI (eds.), *Brussels I Regulation, European Commentaries on Private International Law*, 2ème éd., Munich 2012.

[125] ECJ, Judgment of 2 April 2009, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, case C-394/07, Rep. 2009 I-02563, para. 22.

[126] ECJ, Judgment of 14 October 2004, *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, case C-39/02, Rep. 2004 I-09657, para. 50 *et seq*., and the cited precedents.

[127] ECJ, Judgment of 21 May 1980, *Bernard Denilauler v. SNC Couchet Frères*, case 125/79, Rep. 1980 01553, para. 17; ECJ, Judgment of 2 April 2009, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, case C-394/07, Rep. 2009 I-02563, para. 22 *et seq*.

[128] F. POCAR, *Rapport explicatif de la Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale signée à Lugano le 30 octobre 2007*, Bruxelles 2009, para. 130, p. 107, who gives the example of the decision on the determination of costs or expenses by an officer of the court.

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an EU Member State, shall be recognised in the other States by the Convention, without any special procedure being required. These legal instruments are based on the principle of automatic recognition of foreign judgments, or recognition in its own right.[129]

This automatic recognition principle is based on the idea of mutual trust between the States bound by the Lugano Convention, or the EU Member States. This trust is reflected in the absence, in principle, of review of the grounds on which the court of origin based its jurisdiction in recognition matters, in accordance with art. 35(3) CL/BR.[130]

As regards to enforcement, the Lugano Convention and the Brussels I Regulation also provide a simple and quick procedure. In fact, the *ex parte* enforcement application leads to a declaration of enforceability after a purely formal review by the judge of the State in which enforcement is sought.[131] This declaration is quasi-automatic, since the party seeking enforcement must merely produce the documents required pursuant to art. 53 CL/RB. Hence, the review of possible refusal grounds is pushed back to a second stage, if one or the other party lodges appeal; in this case, the procedure becomes contradictory.[132] The decision must be enforceable in the State of origin in order to be enforced in the State in which enforcement is sought, in accordance with art. 38(1) CL/BR.[133]

Since the declaration of enforceability is based on a purely formal review by the court before which it is sought (art. 53 CL/BR), these legal instruments provide a means of appeal in art. 43(1) and (5) CL/BR. And finally, the States may offer a second appeal against the judgment given on the appeal (art. 44 CL/BR).

The appeal procedure pursuant to art. 43(1) CL/BR is *inter partes* and the court with which the appeal is lodged shall review the grounds for refusal of recognition that are invoked. If one of the grounds specified in art. 34 and 35 CL/BR is given, the court before which enforcement is sought shall not recognise nor declare the enforceability of the foreign decision. Art. 34 CL/BR provides three categories grounds of refusal, namely: the foreign decision is contrary to the public policy of the State in which recognition is sought (nr. 1); the protection of the rights of the defendant who was in default (nr. 2); and the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought (nr. 3), or even irreconcilable with a judgment given in another Member State or in a third State (nr.4). Finally, we must mention that by virtue of art. 36 CL/BR, under no circumstances may a foreign judgment be reviewed as to its substance.

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[129] A. BUCHER (note 66), ad art. 33 CL, para. 1, p. 2011.

[130] B. DUTOIT (note 39), para. 230, p. 72.

[131] H. BOULARBAH/ A. NUYTS/ N. WATTÉ, Le règlement "Bruxelles I" sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Journal des Tribunaux, droit européen*, septembre 2002, para. 91, p. 170.

[132] F. POCAR (note 128), para. 129, p. 106.

[133] K. KERAMEUS, ad. art. 38 RB, in U. MAGNUS/ P. MANKOWSKI (eds), *Brussels I Regulation, European Commentaries on Private International Law*, 2nd ed., Munich 2012, para. 17, p. 751.

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As for the Brussels I*bis* Regulation, it brought major modifications, mainly regarding the enforcement of foreign judgments. In fact, the Regulation does not feature significant changes regarding recognition compared to the Brussels I Regulation. The main aspect of the recast of the Brussels I*bis* Regulation is related to the removal of the enforcement procedure such as provided by the Lugano Convention and the Brussels I Regulation. Art. 39 BR*bis* states, as a principle, that a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. In order to do so, the judgment must be enforceable in the State of origin. Contrary to the Brussels I Regulation, the party seeking the enforcement of a foreign judgment is no longer required to file a unilateral request in order to obtain approval from the competent authority in the addressed State. This is called the direct enforcement of foreign judgments principle.[134]

Art. 41(1), 2nd sentence RB*bis* then states as a principle that the foreign decision is deemed equal to a judgment of the addressed State. In other words, the foreign judgment shall be executed in the addressed State under the same conditions as a judgment given in that State. Therefore, the judgment must be treated as if it originated from the addressed State. The formal conditions that a foreign judgment must meet in order to be enforced in another EU Member State are clearly provided in art. 42 *et seq.* BR*bis*.

Pursuant to the Brussels I*bis* Regulation, a defendant seeking to contest the enforcement can submit an application for refusal of enforcement to the court of the addressed State. In this application, the defendant can only invoke the refusal of enforcement grounds provided by the Convention, such as: the enforcement is contrary to public policy; the judgment has been issued in violation of the rights of the defendant; the judgment is irreconcilable with a judgment issued in the addressed State or with a judgment of another Member State or a third State. In principle, the indirect international jurisdiction of the judge of origin shall not be reviewed.[135] These grounds are the same as the grounds of refusal of recognition provided by the Lugano Convention and the Brussels I Regulation.

In conclusion, the Lugano Convention and the Brussels I and Brussels I*bis* Regulations provide a quick and simple recognition and enforcement system for foreign decisions, the purpose being to guarantee the freedom of movement of judgments in the Party States, being the EU Member States.

[134] A. NUYTS, Bruxelles I *bis*: présentation des nouvelles règles sur la compétence et l'exécution des décisions en matière civile et commerciale, in A. NUYTS (eds), *Actualités en droit international privé*, Bruxelles 2013, p. 79.

[135] H. GAUDEMET-TALLON/ C. KESSEDJIAN, La refonte du règlement Bruxelles I, *Revue trimestrielle de droit européen* 2013, p. 450; A. NUYTS, La refonte du règlement Bruxelles I, *Rev. crit. dr. int. pr.* 2013, para. 19, p. 30.

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B. The Swiss System

The system in use in Swiss private international law is different from the European legal instruments. Art. 25 *et seq.* PILA regulate the conditions of recognition and enforcement of foreign judgments.

PILA does not define the concept of "judgments". The Swiss federal court found that it was sufficient that the judgment was rendered after any proceedings with an official character in the state of origin.[136] Thus, these proceedings can be judicial, administrative or even religious. The terms used in the State of origin (decision, judgment, action, injunction etc.) or the designation of the authority which made the decision (court, commission, authority, officer of the court etc.) do not matter, as long as the decision for which recognition is sought concerns a matter covered by PILA, namely a civil matter.[137] This concept of judgment also covers foreign provisional measures, on the condition that they were ordered after a contradictory procedure and that the decision is no longer subject to appeal.[138]

The general conditions for the recognition of foreign judgments are laid out in art. 25 LDIP. These provisions are completed by particular rules in the various chapters of the specific part of the act; they indicate the cases in which the foreign indirect international jurisdiction of the foreign authority is admitted. In contrast to the Lugano Convention and the Brussels I and Brussels I*bis* regulations, PILA does not provide an automatic recognition system for foreign judgments. In fact, the court must particularly examine the indirect international jurisdiction of the authority of origin.

Art. 25 PILA contains a comprehensive list of the conditions that must be met for the recognition of a foreign judgment. First of all, the judgment must have been rendered by an authority which had jurisdiction in the State of origin. The jurisdiction of said authority must be examined in light of the international indirect jurisdiction rules provided in PILA.[139] Art. 26 PILA specifies the cases in which such jurisdiction is given.[140] Pursuant to art. 26 lit. a PILA foreign authorities have jurisdiction if it derives from PILA or, failing such a provision, if the defendant was domiciled in the State in which the judgment was rendered. In torts, such as cross-border environmental damages, PILA features a specific provision regarding indirect international jurisdiction in art. 149. Pursuant to this provision, foreign judgments shall be recognized in Switzerland if they were rendered in the State of the defendant's domicile (lit. a), or if they were rendered in the State of the defendant's habitual residence, insofar as the claims relate to an activity carried out in such state (lit. b).

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[136] ATF 126 III 327, para. 2a.

[137] ATF 129 III 683, para. 5.1; ATF 135 III 127, para. 3.3.3.

[138] However, this topic is highly controversial, and its analysis would go beyond the scope of this study. For a summary on this issue, see A. BUCHER (note 66), ad art. 25 PILA, para. 24 *et seq.*, p. 331 ss.

[139] F. GUILLAUME (note 62), para. 23, p. 25.

[140] A. BUCHER (note 66), ad art. 26 PILA, para. 31, p. 343; B. DUTOIT (note 61), ad art. 70 PILA, para. 3, p. 237; K. SIEHR, ad art. 70 PILA, ZK-IPRG, para. 17, p. 706 *et seq*.

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Art. 149 para. 2 PILA provides some specific indirect jurisdictions for certain, in particular tortious, matters. Pursuant to this provision, a foreign judgment shall be recognized if it was rendered at the place where the act or the result occurred, and the defendant was not domiciled in Switzerland. In cross-border environmental damage matters, this means that a foreign judgment shall be recognized if it was rendered by the court of the domicile of the defendant, the court of the place where the act was done or, finally, the court of the place where the result occurred.

The second condition that must be met for the recognition of foreign judgments is laid out in art. 25 lit. b PILA, which provides that the foreign judgment can only be recognized if it is no longer subject to any ordinary appeal or if it is a final decision. The concept of ordinary appeal must be understood in a broad sense. Thus, it encompasses any means of appeal that is part of the regular procedure.[141] As for being final, this implies that the judgment terminates the procedure and regulates the effects of the legal relationship between the parties.[142] This condition refers to the cases in which there is no ordinary appeal in the addressed state.[143]

Lastly, art. 25 lit. c PILA provides that there must be no ground for denial within the meaning of art. 27 PILA. These grounds relate to incompatibility with Swiss public policy. There is incompatibility if the recognition and the enforcement of a foreign judgment would violate the Swiss concept of justice in an intolerable way, by trampling the basic principles of the Swiss legal system, the foreign judgment being totally irreconcilable with the latter.[144] In fact, PILA provides various grounds for denial of recognition based on the fact that the judgment is irreconcilable with substantive public policy (art. 27 para. 1 PILA) or formal or procedural public policy (art. 27 para. 2 PILA). Procedural public policy can be violated if the defendant did not receive proper notice (art. 27 para. 2 lit. a PILA), in case of a violation of procedural rules (art. 27 para. 2 lit. b PILA) or, finally, if the judgment cannot be reconciled with a judgment that has already been rendered in Switzerland or with a judgment rendered in a third State that has already been recognized in Switzerland (art. 27 para. 2 lit. c PILA).

PILA features only a general provision regarding the enforceability of a foreign judgment (art. 28). According to this provision, a judgment that is recognized pursuant to art. 25 to 27 PILA shall be declared enforceable upon request of the interested party. The enforcement procedure in a strict sense is regulated by Swiss internal law, in particular art. 335 *et seq.* CPC (Swiss code of civil procedure). According to art. 28 PILA, the one and only condition for the enforceability of a foreign judgment in Switzerland is that it has been recognized pursuant to art. 25 *et seq.* PILA.

In conclusion, the Swiss recognition and enforcement of foreign judgments system is different from the one in the Lugano Convention and the Brussels I and Brussels I*bis* Regulations, in particular regarding the systematic review of the indirect international jurisdiction of the authority of origin, on one hand, and

[141] B. DUTOIT (note 61), ad art. 25 PILA, para. 9, p. 99.

[142] A. BUCHER/ A. BONOMI (note 55), para. 247, p. 65

[143] P. VOLKEN, ad art. 25 PILA, ZK-IPRG, para. 12, p. 355

[144] See not. ATF 111 Ia 12, para. 2a; ATF 116 II 634, para. 4; ATF 119 II 264, para. 3b; ATF 126 III 101, para. 3b.

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regarding the review of possible grounds of refusal, which happens at the level of the first instance court under PILA, on the other hand.

C. The U.S. System

In the U.S.A., the systems for recognition and enforcement of foreign decisions are different depending on whether the decision was rendered in another U.S. state (a "sister state") or in another, non U.S. State. As for the conflict of jurisdiction and the conflict of law rules, the U.S.A. does not have a unified and uniform system in matters of recognition and enforcement of foreign judgments.[145] The rules in this matter are subject to state law.[146] However, the state systems are based on common general principles, which allow us to draw some general conclusions.

In general, the rules regarding the recognition and enforcement of judgments made in a sister state are governed by two important constitutional provisions: the "Full Faith and Credit" clause and the "Due Process" clause. Pursuant to the first of these provisions, "Full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state".[147] This constitutional guarantee forces the States to give to a judgment issued by a sister state the same effects it would have on the territory of the state of origin.[148] This "same effects" rule has limits, though. In fact, the judgment rendered by a sister state must be valid and enforceable in the State of origin. Under this rule, it will not be considered valid, for instance, if the authority who issued it didn't have jurisdiction to do so. Furthermore, even if the judgment is enforceable in the state of origin, it could violate some rule of the addressed state, such as public policy or some "statute of limitations" the

[145] Furthermore, we can mention that in the U.S.A., the distinction between recognition and enforcement is not as strict as in the continental private international law system, which could be a source of confusion. See, J. H. SYLVESTER/ R. J. GRAVING, Is the Uniform Foreign Money-Judgments Recognition Act Potentially Unconstitutional? If So, Should the Texas Cure Be Adopted Elsewhere?, *The George Washington International Law Review* 1991, vol. 25, p. 756, point out that, although their meaning is different, "the terms «recognition» and «enforcement» are often used interchangeably".

[146] L. J. DHOOGE, *Aquinda v. Chevrontexaco:* Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States, *Journal of Transnational Law & Policy 2009*, vol. 19, p. 3; W. S. DODGE, Breaking the Public Law Taboo, *Harvard International Law Journal* 2002, vol. 43, p. 197; L. J. SILBERMAN/ A. F. LOWENFELD, A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute, *Indiana Law Journal* 2000, vol. 75, p.636.

[147] The Full Faith and Credit Clause is established in art. IV § 1 of the U.S. Constitution.

[148] In its *Hampton* judgment of 1818 (16 U. S. 234), the Supreme Court established the following "black letter", which is still valid: "A judgment of a state court has the same credit, validity, and effect, in every other court within the United States which it had in the state where it was rendered, and whatever pleas would be good to a suit thereon in such state, and none others, can be pleaded in any other court within the United States".

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addressed state may have, and which could bar the recognition of the foreign judgment.[149] The latter, the "Due Process" clause, is based on the "fairness" principle.[150] In that sense, this clause forbids the recognition, and hence the enforcement of a judgment that was made by an authority which didn't have jurisdiction. The indirect international jurisdiction is reviewed by the court before which the recognition request is made, in accordance with its own conflict rules.[151] Thus, the system is the same as the one provided in PILA. Recognition and/or enforcement of the foreign decision will also be refused if the procedural requirements, such as proper notice of the parties and respect of the right to be heard, have not been met. The procedure in a sister state must also have been fair from a general point of view.[152] In summary, a judgment rendered in a sister state shall be recognized in another U.S. state if it has been made by an authority with jurisdiction, if it is final, and if it has definitively settled a matter of substantive law.[153] Furthermore, it must not have been obtained by fraud. If these conditions are met, the judgment made by a sister state shall be recognized and executed.

The rules relating to the recognition and enforcement of foreign judgments, *i.e.* of judgments made outside the U.S.A., are mainly governed by state law. In fact, the differences between the approaches chosen by the States are small. A vast majority of them are inspired by the rules established by the Supreme Court in its famous *Hilton* judgment regarding the recognition and enforcement of foreign judgments.[154] It this judgment, the Supreme Court found that a foreign decision must meet the following criteria in order to be recognized: respect of the rights of the defendant, indirect international jurisdiction of the foreign court, compliance with the rules of procedure, impartial rendering of justice and absence of fraud.[155] At the present time, some States still apply a reciprocity criterion and refuse to recognize judgments coming from a State that doesn't recognize foreign decisions itself.[156] The enforcement procedure for foreign judgments is also determined by the law of the addressed state, which can vary from one State to another.[157] In principle, as is the

[149] R. L. FELIX/ R.U. WHITTEN (note 113), p. 139.

[150] It is mainly embodied in the 5th and the 14th Amendments to the U.S. Constitution.

[151] C. KESSEDJIAN, *La reconnaissance et l'exécution des jugements en droit international privé aux Etats-Unis*, Paris 1987, p. 267.

[152] B.R. PAIGE, Foreign Judgments in American and English Courts: A Comparative Analysis, *Seattle University Law Review* 2003, vol. 26, p. 602 *et seq*.

[153] M.H. HOFFHEIMER, (note 80) p. 381.

[154] *Hilton v. Guyot*, 159 U. S. 113 (1895).

[155] *Hilton*, p. 159 U. S. 202 *et seq*.

[156] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Taming Tort Tourism, The Case for a Federal Solution to Foreign Judgment Recognition*, Washington 2013, p. 6; Y. ZEYNALOVA, The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?, *Berkeley Journal of International Law* 2013, vol. 31, p. 158.

[157] D.P. STEWART, Recognition and Enforcement of foreign Judgments in the United States, this *Yearbook* 2012, p. 179-199, p. 192.

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case under Swiss law, the foreign judgment must have been recognized before it can be executed.

Various specific legal instruments in matters of recognition and enforcement of foreign decisions have been elaborated in the U.S.A. They are mainly the Uniform Foreign Money-Judgments Recognition Act 1962 (UFMJRA) and the Uniform Foreign-Country Money Judgments Recognition Act 2005 (UFCMJRA). The former has been adopted by the great majority of States. It applies to the recognition of foreign judgments granting the recovery of a sum of money. In order for a foreign judgment to be recognized, this legal instrument provides that the court of the addressed state must review the indirect international jurisdiction of the judge of origin who issued the judgment. Furthermore, different grounds for refusal of recognition can be invoked, such as: the defendant did not receive notice or received notice in an inadequate manner; the judgment was obtained by fraud; the judgment conflicts with another final judgment; a choice of jurisdiction agreement vas violated or the foreign court is a seriously inconvenient forum.[158]

The American Institute of Law also conceived two legal instruments that are important in matters of recognition and enforcement of foreign judgment, the Second Restatement and the Third Restatement.[159] § 92 of the Second Restatement lays out the conditions for the recognition of a foreign judgment. The indirect international jurisdiction of the authority of origin must be reviewed, the defendant must have received notice and the rights of the defendant must have been respected. As for the Third Restatement, it states that the foreign judgment must be final in order to be recognized. This legal instrument also provides grounds that would allow the court of the addressed State to refuse the recognition of a foreign decision whenever: the judge lacked international indirect jurisdiction; the defendant did not receive notice of the proceedings in sufficient time to prepare his defence; the judgment was obtained by fraud; the judgment violates public policy; the judgment conflicts with another judgment; the judgment is contrary to a choice of jurisdiction agreement.[160] Finally, § 481 of the Third Restatement provides the conditions by which a foreign judgment can be enforced in the addressed State after having been recognized. If the procedural and formal requirements are met, the judgment can be enforced.

VI. Conclusion

Based on the reviewed legal systems, it is possible to identify common, or at least convergent, connecting factors. Thus, these factors are likely to be greeted favourably and accepted by different States in the drafting process of a convention in cross-border environmental damage matters. The adoption of such a legal instrument would ultimately offer the advantage of giving a clear framework to the States bound by the convention, which would improve the protection of people

[158] UFMJRA § 4.

[159] Restatement Third of the Foreign Relations Law of the United States 1987.

[160] Third Restatement § 483 para. 2.

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suffering from such damages, on one hand, and the protection of the environment, on the other hand.

In matters of conflict of jurisdiction rules, the Lugano Convention, the Brussels I and Brussels I*bis* Regulations, PILA and the U.S. system have similar connecting factors. After studying these various legal models, four common heads of jurisdiction can be retained in torts, delict and quasi-delict, and thus in cross-border environmental damage matters: the domicile or the habitual residence of the defendant; the place where the act causing damage was carried out; the place where the damage occurred and the place where the installation is located. These criteria should be alternative and the person who suffered damage should have the option of electing the most favourable.

The legal instruments under review also provide convergent connecting factors in matters of conflict of laws rules. However, none of these factors offer a satisfying solution *per se*. Therefore, these connecting factors shall be provided as alternatives in a convention on cross-border environmental damage, and the person who suffered damage should be able to choose among them. The options shall be the following: the law of the State in which both parties have their residence or their domicile; the law of the State where the act causing damage was carried out; the law of the State in which the damage occurred. A safeguard clause allowing the damaged person to require the application of the law of the State with which the issue has the closest links should also be provided.

Finally, as regards recognition and enforcement of foreign judgments on civil liability for cross-border environmental damage, it seems important that the requested judge reviews, of its own authority, the indirect international jurisdiction of the court of the State of origin, the respect of substantive public policy and the final character of the decision for which recognition is sought. The review of the indirect international jurisdiction of the court of origin allows the court to verify that the jurisdictions provided by the convention are abided by. Then, the judge will verify that there is no other ground for refusal if the party against which recognition and/or enforcement is sought requests it. These grounds shall be the following: the decision violates formal public policy of the addressed State; the fundamental guarantees of procedure were not met, in particular the defendant's rights; the decision conflicts with another decision rendered previously in the addressed State; or the decision for which recognition is sought conflicts with a decision rendered previously in another State bound by the convention.

In conclusion, a comparison among the private international law regimes analysed reveals the existence of common principles. This finding is a positive sign in view of the drafting of a multilateral convention on cross-border environmental damage matters.

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NATIONAL REPORTS

RECOGNITION OR NON-RECOGNITION OF FOREIGN CIVIL MARRIAGES IN ISRAEL

Yitshak COHEN*

I. Introduction
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The State of Israel determined by legislation that matters of personal status including marriage and divorce are subject to personal law, namely religious law. Since the applicable law is personal and not territorial, it varies from person to person and is not uniform as under civil law. This simply means that Israel has no separation of religion and state in matters of divorce and marriage. Religion is the only determining factor in these matters. Thus, marriages prohibited by religious law do not take place in Israel. This is true of all four major religions in Israel: Christianity, Islam, the Druze religion, and Judaism. The discussion under Israeli law should have ended here with regard to civil marriage performed in a foreign country, especially marriage prohibited by Jewish law such as marriage between spouses only one of whom is Jewish, or marriage of a same-sex couple. Prohibited marriage has no place in a state in which religious law prevails in matters of status.

However, the Israeli courts, unlike the legislature, have more of a civil orientation than a religious one. They look for ways to bridge the gap between religious law and the rules of private international law that seek to recognize or respect civil legal actions carried

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 321-340
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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out in a foreign country. In some cases, the courts have recognized the status of civil marriages even where such marriages are prohibited by state law. In order to avoid the serious conflict between religious law and the domestic rules of private international law, the court has explained that this is not a matter of personal status but rather an administrative question which purely concerns the Population Registry. For example, same-sex couples can today be registered as married couples in the Population Registry if they were married in a civil ceremony in a foreign country.

The decisions made in these matters are greatly disputed and reflect the constant prevailing tensions regarding Israel not only as a Jewish state (characterized by religious law), but also as a democratic state (characterized, among other factors, by recognition of the rules of private international law). Although the Basic Laws stipulate that Israel is both, in practice these values conflict and often collide. This tension is clearly reflected in, and may be analyzed through, the issue of civil marriages performed in a foreign country and prohibited by religious law in Israel.

I. Introduction

When the State of Israel was established in 1948, it decided to adopt some of the legislation enacted by the British government which had ruled the country prior to its independence. One such example is The Palestine Order in Council, 1922–1947. Article 51 states that

> "[...] matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship [...]"[1]

Article 47 sets forth that

> "The Civil Courts shall further have jurisdiction […] in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law, ordinances or regulations that may here after be applied or enacted and subject thereto according to the personal law applicable."[2]

This Order in Council has not since been annulled. The law in matters of personal status is personal law that varies depending upon the individual. Personal status law is not territorial and it is not identical for every person in Israel. The courts have also determined that the applicable personal law is that of the religion of the litigant, not of his citizenship or his residency.[3] Thus the law of the church applies to Christians;[4] Jewish law is the applicable law for Jews; Sharia law applies to

[1] Article 51 of The Palestine Order in Council, 1922 also referred to as King's Order in Council in III Laws of Palestine, 2569.

[2] Article 47 of The Palestine Order in Council, 1922, III Laws of Palestine, 2580.

[3] CA 26/51 *Kotik v. Wallfson*, 5 PD 1341 (1951) (Isr.).

[4] Regarding the different Christian communities in Israel, see the following Israel Ministry of Foreign Affairs website. There are ten Christian denominations that as "recognized" communities are granted jurisdiction in matters of personal status: Y. ELDAR, Focus on Israel: The Christian Communities of Israel, Israel Ministry of Foreign Affairs

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Muslims; and the Druze religious law is applicable for the Druze people. These are the four major religions in Israel, and the only religions that are legally recognized.

Five years after Israel's establishment, Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953 set forth more explicitly: "Marriage and divorce of Jews in Israel will take place according to Jewish religious law."[5] This means that Israel has no separation of religion and state in matters of personal status. The entities responsible for marriages are the religious institutions themselves. Spouses belonging to the same religion are subject to its exclusive authority, both in their marriage and in their divorce.[6] Marriage prohibited by religion cannot take place in Israel. For example, a non-Jew cannot marry a Jew. Accordingly, a man or woman may not marry someone of the same sex because it is not permissible under any of the four legally recognized religions in Israel.

In the United States and in European countries where there is a separation of church and state, rulings and decisions can be determined by the civil courts rather than by religion. However, in Israel the applicable law in family matters is religious personal law. Thus prohibited marriages such as a marriage between spouses only one of whom is Jewish, or a marriage between same-sex spouses, should not be recognized. Surprisingly, and inconsistent with religious personal law, the courts have allowed their civil perspective to shape their decisions to recognize legal protections and rights for those couples.

Concurrent with the authority given to religions over the institution of marriage and the prohibition of marriage between certain individuals, the Israeli courts, in contrast to the legislature, began developing alternatives to religiously-sanctioned marriage. Among these alternatives are private marriage,[7] civil marriage,[8] and common law marriage.[9] Of course, nobody referred to them as such, blurring the distinction between these alternatives and religious marriage that all became included under the umbrella term "marriage." Everything was done under the cloak of specific solutions to the plight of privacy and humanity. However,

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(May 1, 2014), available at <http://www.mfa.gov.il/mfa/aboutisrael/people/pages/focus%20on%20israel%20-%20the%20christian%20communities%20of%20isr.aspx>.

[5] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, § 2, 165 LSI 72 (1953) (Isr.).

[6] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, § 1, sets forth: "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the Sate, shall be under the exclusive jurisdiction of rabbinical courts." See <https://www.knesset.gov.il/review/ReviewPage2.aspx?kns=2&lng=3.>.

[7] See*, e.g.*, HCJ 51/69 *Rodnizki v. The Supreme Rabbinical Court*, 24(1) PD 704 (1969) (Isr.); HCJ 80/63 *Gorfinkel v. The Supreme Rabbinical Court*, 17 PD 2048 (1963) (Isr.).

[8] CA 8256/99 *Anonymous v. Anonymous*, 58(2) PD 213 (2003) (Isr.) (Regulating the civil support between spouses married abroad in a civil ceremony); HCJ 2232/03 *Anonymous v. The High Rabbinical Court*, (Nov. 21, 2006), Nevo Legal Database (by subscription, In Hebrew) (Isr.) (Regularizing the status of spouses who were married abroad in a civil ceremony and states that they are married under the laws of the nations of the world).

[9] See*, e.g.*, CA 52/80 *Sha'ar v. Friedman*, 38(1) PD 443 (1980) (Isr.); CA 4385/91 *Salem v. Carmi*, 51(1) PD 337 (1991) (Isr.).

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these specific solutions have created an entire area of civil law in Israel which, in certain respects, is even more developed than in countries in which civil law applies. This article analyzes the development of this civil law with regard to civil marriage.

Another way that prohibited marriage has found recognition in Israel is through the Population Registry. People who are not permitted or have no desire to marry according to religious law may choose to marry abroad. Upon returning to Israel, they are then registered in the Population Registry as married.[10] How is this registration consistent with the law stating that only religious law determines marriage? Article 3 of the Population Registry Law, 1965 provides that, "Registration […] will be prima facie evidence of the correctness of registration except for the details of nationality, religion, marital status, and spouse's name."[11] As a result, registration of such details appears to be of no effect. As a matter of fact, this acts to avoid disputes concerning ideology, fundamental principles, and religion upon the arrival of new immigrants to the country. Figuratively speaking, such matters are not under discussion "at the border."

The provision in Article 3 has helped Israeli law or perhaps stated more precisely, the Israeli nation, to avoid potential ideological arguments in relation to the registration of marriages forbidden by religion, such as marriages between spouses only one of whom is Jewish.[12] The argument is that registration does not in any case provide prima facie evidence of marriage.[13] However, this provision of law[14] has also resulted in the registration of certain matters which most certainly fell outside the scope of what was intended by the legislature.[15]

This article focuses on the registration and validity of marriages performed abroad and prohibited by the laws of the State of Israel. It is written in a gradual manner. The first chapter addresses the issue of registration of marriage between a man and a woman, only one of whom is Jewish. The second chapter deals with the more complex question of the validity of civil marriage in Israel, beyond the

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[10] Article 17 of the Population Registry Law 1965 states that every resident must in fact register any changes in status within thirty days.

[11] Population Registry Law, 5725–1965, 270 Laws of the State of Israel (LSI) 85, § 3 (1965) (Isr.).

[12] HCJ 143/62 *Schlesinger v. The Minister of the Interior*, 17 PD 225 (1963) (Isr.).

[13] *Id.* at 249.

[14] Population Registry Law, 5725–1965 § 3, 270 LSI 85 (1965) (Isr.).

[15] See*, e.g.*, HCJ 264/87 *Shas Movement v. Director of the Population Administration*, 43(2) PD 723 (1987) (Isr.) (It was determined that the registry clerk is required to register the conversion of a person on the basis of a document attesting to conversion by a Jewish community in a foreign country. This ruling applies even if the clerk believes that the conversion process is not valid according to religious law in Israel); HCJ 2888/92 *Goldstein v. The Minister of the Interior*, 50(5) PD 89 (1987) (Isr.) (The Supreme Court ordered the registration of a marriage held at the Brazilian Embassy in Israel despite the fact that foreign ambassadors lack the authority to conduct marriage ceremonies in Israel); HCJ 5070/95 *Na'amat v. The Minister of the Interior*, 56(2) PD 721 (1995) (Isr.) (The Supreme Court ordered the registration of individuals who underwent a Reform conversion in Israel or in Jewish communities in foreign countries, even though Reform conversions performed in Israel are not valid).

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question of registration. It is divided into three subsequent sections. The first concerns the simpler case in which a couple were residents of a foreign country when they married there. The second section deals with the case in which a couple who were residents of Israel travelled to a foreign country with the sole purpose of marrying. The third section examines a dramatic precedent in the last decade that recognized civil marriage entered into in a foreign country. The third chapter provides history and background of the recognition of same-sex couples in Israel. The fourth chapter takes an additional step further and considers the registration of same-sex marriages that take place in a foreign country. This form of marriage is more difficult to recognize than that of a marriage between a man and a woman, in which only one spouse is Jewish.

II. The *Schlesinger* Case – A Marriage between a Jewish Man and a Non-Jewish Woman

The most fundamental ruling with regard to registration of a prohibited marriage that was entered into in a foreign country was decided in the *Schlesinger* case. In Cyprus, a Christian woman who was a citizen of Belgium married a Jewish resident and citizen of Israel. She requested registration of her marriage in the Population Registry of the State of Israel. The registry clerk refused to register them. He asserted that under the laws of the State of Israel the couple was not married and he was therefore exempt from registering them. She appealed to the Supreme Court to instruct the registry clerk to register them as a married couple.

As stated above, the applicable law in family matters is the religious personal law, according to which this marriage is not valid.[16] However, under Article 64(ii) of The Palestine Order in Council, which was incorporated into Israeli law, and according to the relevant private international law, the validity of the marriage of a foreigner should be determined by his own national law.[17] Since the woman is Belgian, her status should be determined by Belgian law, under which there is nothing wrong with a marriage between a Christian and a Jew. In contrast, the status of Mr. Schlesinger is to be determined by the laws of the State of Israel. Therefore, under his law he is unmarried and single, while under Belgian law the woman is married to him.

Justice ZILBERG argued in a dissenting opinion that, while indeed it is absurd for a woman to be married to a man who is single, in this "fragmented and divided area, full of contrasts and contradictions within private international law, such wondrous creatures also exist."[18] In his opinion, under religious family law in Israel the couple is not married and that does not contradict the views of the

[16] Babylon Talmud, Marriage (*Kidushin*) 68.

[17] Article 64(ii) of The Palestine Order in Council, 1922, states: "The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile, in which case the latter shall be applied."

[18] *Schlesinger* (note 12), at 233.

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general Israeli public. Due to the conflict with Israeli public policy, he determined that the marriage is invalid for both partners, and therefore the registry clerk has no duty to register their invalid marriage.[19]

The majority opinion determined otherwise. Justice ZUSSMAN relied upon the guidelines for registry clerks, according to which a citizen who appears before an administrative authority is presumed to speak truthfully. The registry clerk does not have the authority or tools to check the truth of the citizen's statement, thus the clerk must register what the citizen asks him to register. In his opinion, the Population Registry is neither evidence nor proof of anything.[20] In his view, when the registry clerk is presented with prima facie evidence, such as a marriage certificate from Cyprus, he must register it; otherwise, he would be intervening in an area beyond his administrative authority.[21] The registry clerk is not a judge and does not rule on matters, but only registers them.[22] If there were any need for a legal determination, then the clerk would moreover have to be an expert in the rules of private international law and conflict of laws, which are among the most complicated rules of jurisprudence.[23]

Justice ZUSSMAN argued that the registry clerk is not authorized to determine the validity of the marriage.[24] He also ruled that the registry clerk collects statistical material as to whether or not a wedding ceremony took place. The clerk may refuse to register it only if there is an "obvious inaccuracy."[25] An example of a document that is obviously incorrect is a foreign public document indicating that an adult is five years old.[26] Certainly, the registry clerk would not be compelled to enter such information into the registry.

Justice ZUSSMAN commented on a principle which is of fundamental importance in Israel with regard to the recognition of foreign legal actions:

> "Any country that wants to live together in the family of nations must for that purpose relinquish the implementation of some of its rules when a foreign element arises and intervenes in a legal action [...] and we, just as we demand that other nations recognize Israeli law, we do not rule out a transaction only because the applicable foreign law is different from ours. To the extent that the rules of conflict of laws refer us to foreign law, the Israeli law steps back [...] and only when foreign law will be contrary to the sense of justice and morality of the Israeli public will we have to invalidate it [...]. The fact that Jewish religious law invalidates intermarriage (between

[19] *Id*, at 238.

[20] In 1965, an amendment to the Population Registry Law determined in Section 3 that certain information regarding personal status does not constitute *prima facie* evidence of its correctness, as explained in the Introduction.

[21] *Schlesinger* (note 12), at 249.

[22] *Id*, at 246.

[23] *Id*, at 251.

[24] *Id*, at 251.

[25] *Id*, at 243.

[26] This example is explicitly cited in the judgment. See *id,* at 243.

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> individuals only one of whom is Jewish) does not necessarily lead to the conclusion that when determining a matter according to foreign law, we will invalidate the marriage because it is an intermarriage."[27]

The court further stated that neither English law nor U.S. law rules out the validity of a marriage because the couple went to a foreign country where they were married in a ceremony that could not be performed in their own country.[28]

The significance of the *Schlesinger* ruling is that if spouses who are residents of Israel (i) were married in a civil ceremony in a foreign country as provided by its laws; and (ii) submitted certification of that marriage, they will be registered in the Population Registry as "married," even if they are not actually married under Israeli law.

Many judges and scholars have criticized the *Schlesinger* decision.[29] Some saw it as turning a blind eye.[30] Justice ENGLARD once wrote:

> "If it is only a matter of statistics that lack substantive meaning, why are there continued struggles over registration? […] The truth is, of course, that the symbol here is of the essence, and without a certain worldview there is no determination in the question of registration in the Population Registry, and there are no statistics."[31]

III. The Validity of Civil Marriage

A. The *Skornik* Case – The Validity of a Marriage with Regard to Maintenance

The question of civil marriage registration was decided in the *Schlesinger* case, but the more important question is whether a civil marriage performed abroad may be deemed valid under Israeli law, for example for the purposes of maintenance.

The leading judgment on the matter is the *Skornik* case. The case dealt with a Jewish couple who were residents of a foreign country (Poland) when they married in a civil ceremony. Only afterwards did they immigrate to and become citizens of Israel.[32] The wife then filed a claim in Israel against her husband for maintenance. Her husband claimed they were not married, because a civil ceremony does not comply with marriage under religious law. In addition, they did not ever intend a religious marriage, even though it would have been possible in

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[27] *Id*, at 256.

[28] *McDonald v. McDonald* (1936), 58 P (2D) 163, 104 *A.L.R.* 1290; *Simonin v. Mallac* (1860), 2 L.T. 327, 330.

[29] M. SHAVA, Registration and recognition of a foreign adoption order within lesbian family, 1 Kiryat Ono L. Rev. 103, 132 (2001).

[30] HCJ 5070/95 *Na'amat v. The Minister of the Interior*, 56(2) PD 764 (1995) (Isr.).

[31] *Id,* at 757.

[32] CA 191/51 *Skornik v. Skornik*, 8 PD 141, 179 (1951) (Isr.).

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Poland. The district court held that under Jewish religious law applicable in Israel, where they then resided, they should not be considered married. However, according to the principles of English private international law that were adopted in Israel, the applicable law is Polish law, which is the law of their place of residence at the time of their marriage. Therefore they were to be regarded as married.

The Supreme Court agreed and added:

> "The question of the validity of the status that a person acquired for himself is determined by the law applicable to the person at the time he acquired that status, and he does not lose it with a change in his residence or his nationality, when he becomes subject to another law."[33]

The court further stated:

> "There is a conflict between secular civil law which has an effect limited by national borders, and therefore recognizes and applies another law in relation to the status of a person before he resided in the country – as compared with religious law that does not know borders and restrictions and applies to a person from his birth until his death without any relevance to the place or time in which an event happened."[34]

The court held that in this conflict of laws regarding spouses who were residents of a foreign country when they married in a civil ceremony, the personal law in Israel will be subordinated to the rules of private international law, and their status will be determined as a married couple. If the law applicable to the spouses at the time of the marriage recognizes the validity of the marriage, the Israeli civil law will recognize it.[35] Maintenance is thus required by the personal law of Israel. This in effect combines religious law (maintenance) with civil law (the marriage status).

Justice AGRANAT, in the majority opinion, added that the obligation of maintenance is so universally accepted that the wife, who acquired her marital status under a foreign law, should not be required to prove that maintenance is granted by that system. Even if the court were to say that she did indeed have to identify the relevant foreign law, it is reasonable to assume that the foreign law is like the domestic law and thereby recognizes the right of a wife to receive maintenance from her husband.[36]

Prof. SHAVA states in his book that,

> "From the time that the parties acquired the status of being married under their national law, every change in their personal rights that will afterwards take place due to a change in their citizenship, will not deprive them of their status of married people."[37]

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[33] *Id*, at150.

[34] *Id*, at 158.

[35] *Id*, at 167.

[36] *Id*, at 172.

[37] M. SHAVA, *The Personal Law in Israel* (Vol. 1, 4th edn., 2001), 80.

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B. Three Approaches for Examining the Validity of a Marriage

The more difficult question is the validity of a civil marriage performed in a foreign country between Israeli residents. In such circumstances, the couple decided not to marry according to religious law in the religious institutions of the state. They chose instead to travel abroad, marry there, and return back to Israel with an official foreign marriage certificate. Israeli case law includes three main approaches to this question.

According to one approach, in examining the validity of a marriage that includes a foreign element, one should refer to the English rules of private international law,[38] adopted into Israeli law through Article 46 of The Palestine Order in Council, 1922. With regard to the validity of the form of the marriage (referred to as formal validity), the applicable law is the law of the location in which the marriage was performed (*lex loci celebrationis*). With regard to the legal capacity of the parties to marry (referred to as essential validity), the applicable law is the law of the domicile at the time of entering the marriage (*lex domicilii*) or the law of the location where the parties intend to live when they are married (hereinafter referred to as the English approach).[39]

Therefore, the validity of a civil marriage between Jews who are residents of Israel and have the legal capacity to marry each other according to their Jewish personal law will be examined according to the law of the location in which the marriage took place. Assuming that a civil wedding ceremony is a valid form of marriage where the marriage took place, such marriage will also be recognized under Israeli law. However, if the couple lacks the legal capacity to marry under Israeli law, the foreign marriage will not be recognized as valid, although the couple will be registered as married according to the *Schlesinger* decision referred to above.

The second approach rejects the applicability of the English rules of private international law (that distinguish between content and form) in favor of the personal law. With respect to residents and citizens of Israel, the validity of the marriage will be decided by applying the personal laws of the couple at the time of entering into the marriage, even if the marriage involves a foreign element.[40] Therefore, if religious law does not recognize the marriage, then it is completely invalid under Israeli law. This is indeed the approach of Justice ZILBERG in the dissenting opinion in the *Schlesinger* case (hereinafter also referred to as the approach of Prof. SHAVA).

The third and most liberal is the approach taken in the United States. The questions of both legal capacity and form are examined according to the location of the marriage ceremony.[41] Thus, a marriage in Cyprus between a Jewish man and a non-Jewish woman is valid in Israel because it is valid where the ceremony was performed. In contrast, in both the English approach and the approach of Prof. SHAVA such a marriage is not valid in Israel.

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[38] *Skornik* (note 32), at 179.

[39] DICEY & MORRIS, *Conflict of Laws* (13th edn., 2000), 651, 675.

[40] M. SHAVA (note 29), at 554.

[41] *Schlesinger* (note 12), at 253.

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C. The *Anonymous* Case – The English Approach

A determination was not made among these approaches for decades. However, in 2006 the High Rabbinical Court of Israel ruled on the issue for the first time. In the *Anonymous* case, Jewish spouses who were citizens and residents of Israel married in a civil ceremony in Cyprus.[42] Upon their return to Israel, and on the basis of the Cypriot marriage certificate, they were registered in the Population Registry as married. At a later time, the husband filed for divorce in the religious court and it was determined that the couple had never actually been married. Their registration in the Population Registry as a married couple was deemed not to constitute proof of the validity of their marriage, as stated above. The husband insisted on receiving an additional statement permitting him to marry someone else, as an unmarried individual. This statement was necessary because even if he was not religiously married, he was still registered as married from the civil perspective. If he married another woman he would violate the law against bigamy in the Penal Law.[43] In a surprising step, the rabbinical court annulled the civil marriage. The wife appealed to the High Rabbinical Court, arguing that a religious court does not have the authority to annul a civil marriage performed in a foreign country.

The High Rabbinical Court set a precedent that "from the perspective of civil law, the parties entered a civil marriage, and they are considered a married couple all over the world, including in Israel."[44] The High Rabbinical Court further stated that rabbinical courts have the exclusive jurisdiction to dissolve a marriage. However, a court cannot annul it since it should be recognized by Israeli law as valid. Nevertheless, the court did not grant the marriage the same status as a marriage performed in accordance with the requirements of Jewish religious law. The wife appealed to the Supreme Court.

The Supreme Court adopted the determination of the High Rabbinical Court and stated further:

> "Recognition of the validity of the marriage can be concluded from the rules of private international law, which constitute an integral part of Israeli law and were adopted in the past from the English law. Accordingly, when a marriage includes a foreign element, it must be taken into consideration. Private international law supersedes any municipal law which is purely internal.[45] Hence the validity of a marriage entered into by a Jewish couple outside of Israel, even if both spouses were at the time residents and citizens of Israel, will be determined while taking into consideration the rules of conflict of laws generally accepted in Israel. Accordingly, the marriage is valid

[42] *Anonymous*, 2232/03 (note 8).

[43] Penal Law, 5737–1977 § 178, 1246 LSI 62 (1977) (Isr.).

[44] Appeal, High Rabbinical Court 4276/63 *H.S. v. H.Y.*, (Feb. 5, 2003), Nevo Legal Database (by subscription, In Hebrew) (Isr.).

[45] *Skornik* (note 32), at 179.

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> in form (foreign law) and in substance (Jewish law), and is therefore valid in Israel."[46]

The Supreme Court added that this result would adequately reflect the nature of modern Israeli society. Thousands of Jews who are citizens and residents of Israel seek to enter into civil marriages outside of Israel. The willingness to recognize the validity of personal status acquired by Jews under foreign law and not in conflict with public policy in Israel is reinforced by the significance of the right to marriage and family life. The court ultimately accepted the English approach, which remains the prevailing approach in Israel with regard to the validity of civil marriage. However, the rabbinical court emphasizes that it does not view the spouses as a fully married couple under Jewish law, but rather regards their marriage as a "marriage of the nations of the world." Thus the marriage is not intrinsically invalid. Spouses are thus not permitted to remarry others without dissolution of prior marriage. Dissolution takes place through a divorce judgment, as is common in civil law in many countries. The judgment for divorce is a divorce in every respect – without requiring a *Get* (divorce certificate) as is necessary under Jewish law.[47]

The grounds for divorce will not be determined under the law of the location where the civil marriage ceremony took place (a foreign country). In the opinion of the Supreme Court, the rules of private international law require the recognition of foreign personal status, but they do not require recognition of all manifestations of the same status under foreign law. Therefore, if the lives of the couple are centered in Israel, there is no fault in applying the views of Israeli society concerning the right to divorce.[48] Thus, the appropriate ground for divorce is that of irreconcilable differences.[49]

The rabbinical court further ruled that recognition of marriage denotes partial recognition, only extending to the "external aspect" of the marriage which concerns the prohibition of marriage to a third party as long as the marriage is not dissolved. However, recognition does not extend to the "internal aspect" of marriage dealing with the mutual obligations between the spouses. Thus the marriage does not create obligations of maintenance and property division between the spouses. The Supreme Court rejected this divided position and therefore determined that the exclusive jurisdiction concerning maintenance and property division belongs to the civil courts rather than their religious counterparts. The applicable law is civil law rather than Jewish religious law. This differs from the actual divorce proceedings in which the rabbinical court has exclusive jurisdiction.[50]

It is important to note that although this determination is indeed a tremendous innovation in Israeli law, it relates only to spouses who have the legal capacity to marry. There is still no ruling concerning the validity of prohibited civil

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[46] *Anonymous*, 2232/03 (note 8), at section 26.

[47] *H.S.* (note 44), at 8.

[48] *Anonymous*, 2232/03 (note 8), at section 35.

[49] *Id*, at section 36.

[50] *Id*, at section 31.

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marriage, such as a marriage between a Jewish man and a non-Jewish woman, or a same-sex marriage. In these cases, the three different approaches remain as described above.

IV. The Dispute Concerning Recognition of Same-Sex Couples

This section begins with some background information in order to further clarify both the difficulty and the innovation in the recognition of civil marriages of same-sex couples who are residents of Israel. A marriage between same-sex couples, and even sexual relations between them, are absolutely prohibited according to religious law. Nevertheless, the civil courts in Israel have circumvented the religious law and developed recognition of the rights of same-sex couples.

The legislature in Israel has taken some action with regard to same-sex couples. Nevertheless, the small handful of amendments made to Israeli law have not aimed to recognize same-sex couples or grant rights to such couples, but rather to prevent injury or penalty. Three amendments have been made to Israeli statutory provisions: In 1988, the legislature abolished the criminal prohibition against homosexual relationships;[51] in 1992, the legislature banned employment discrimination at work on grounds of sexual orientation;[52] and in 1993, the Army Ordinances were amended to prohibit discrimination due to sexual orientation.[53]

However, the courts have gone much further than the legislator. The ground-breaking decision concerning same-sex couples in Israel is undoubtedly *EL AL v. Danilovich*.[54] In this case, the Supreme Court ruled that a legal provision conferring a benefit on common law spouses but not on same-sex spouses is discriminatory in light of the Equal Opportunities Act 1988.

Justice BARAK wrote in the majority opinion:

> "Equality is a fundamental value in Israeli law. Today the principle of equality is established in the Basic Law: Human Dignity and Liberty.[55] The test for equal or discriminatory treatment is a question of whether the difference in sex is relevant."[56]

Justice KEDMI wrote in the minority opinion:

[51] Penal Law (Amendment No. 22), 5748–1988 § 2, 1246 LSI 62 (1992) (Isr.).

[52] Equal Employment Opportunities Law (Amendment), 5752–1992 § 2, 1377 LSI 37 (1992) (Isr.).

[53] The Army Ordinances, 1993.

[54] HCJ 721/94 *EL AL v. Danilovich*, 48(5) PD 749 (1994) (Isr.).

[55] The State of Israel has no comprehensive Constitution but from time to time enacts Basic Laws, which have higher normative status than ordinary law.

[56] *EL AL* (note 54), at 783.

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> "'Spousal has since the beginning of humankind and up until today indicated the union of two individuals of opposite sexes. So, too, as stated in the Bible, «And God created man […] male and female he created them».[57] An essential element for two individuals becoming a «pair» according to the meaning of the Hebrew word, is conceptually in their ability to reproduce."[58]

The ruling in *EL AL* did not address the principal discussion. Justice BARAK restricted the holding of the decision to the employee's social rights and nothing more. He nevertheless provided an open door for his successors. Lower courts were divided on the issue. Some tried to fend off any attempt to recognize same-sex spouses. Others followed the *EL AL* path and recognized them.

There is an ongoing policy debate between Chief Justice AHARON BARAK and Deputy Chief Justice MENACHEM ELON. Section 1(a) of the Basic Law: Human Dignity and Liberty states, "The purpose of this Basic Law is to protect human dignity and liberty in order to establish in a Basic Law the values of Israel as a Jewish and democratic state."[59] Chief Justice BARAK wrote:

> "The language of the Basic Law refers to two resources of values that the State of Israel draws upon: Judaism and democracy. In order to avoid a possible conflict between them we have to raise the value of Judaism to a high level of abstraction, so that these values will be drawn upon only on their universal abstract level."[60]

Elsewhere Chief Justice BARAK stated a more moderate position balancing the values of Judaism with those of democracy and wrote:

> "Israel's values as a Jewish state might conflict with its values as a democratic state. The criterion of the «enlightened public» will serve as a guide.[61] The «enlightened community» and the «reasonable person» are only metaphors […] they are a personification of the proper balance among the values, the principles and the competing interests."[62]

Justice ELON criticizes this approach:

> "Since we achieved the enactment of the Basic Law: Human Dignity and Liberty, it is inappropriate to introduce an element such as

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[57] Genesis 1:26.

[58] *EL AL* (note 54), at 770.

[59] Basic Law: Human Dignity and Liberty, 5752–1992, § 1, 1391 LSI 150, (1992) (Isr.).

[60] A. BARAK, The Constitutional Revolution: Protected Fundamental Rights, 1 Law and Government L. Rev. 9, 30 (1992).

[61] The "enlightened public" refers to an objective test of the reasonable public. The test for acceptance of a norm is whether the enlightened public in Israel accepts it. This is an open norm that can be given broad interpretation meaning that implementation of the test can be problematic.

[62] HCJ 7074/93 *Suissa v. Attorney-General*, 48(2) PD 749, 781 (1994) (Isr.).

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> «views of the enlightened public in Israel». This Basic Law includes values that have been extensively interpreted as well as worldviews, so that a vague concept such as «enlightened» will add uncertainty. The views of the «enlightened public» do not determine the scope, content and nature of the supreme value of «human dignity».”[63]

The position of Chief Justice BARAK reflects an approach that tends to place the values of democracy over the values of Judaism. Deputy Chief Justice ELON fought for many years against these perceptions. This difference of opinion has many implications for the subject of this article. Does religious law supersede international law?

Professor PROCACCIA provides further support for Justice ELON'S position:

> “A fundamental value of the people and the state cannot be changed. It also cannot be dependent on the opinion of others, even if the others are enlightened nations. It is important that the legal system be able to develop and to invent suitable answers to a changing society. But that includes a danger that the change will not always be in the direction of progress and increased protection of human rights, because sometimes society is in a state of ideological regression.”[64]

Magistrates Court Justice GERMAN adds to this discussion in the *Steiner* case[65] and writes that prohibitions against incestuous relationships also include sexual relations between men.[66] According to Jewish law, it is one of the three exceptional sins for which one should die rather than transgress. Homosexuality and Judaism are incompatible.[67] These relationships contradict the values of the country “as a Jewish state” and therefore they should not be recognized as relationships that establish a family.[68]

My analysis of judgments that oppose the granting of rights to same-sex couples[69] reveals the existence of five basic standpoints:

(a) Linguistic aspect: The phrase “man and wife” and the term “family members” can include only couples that potentially could have children, and this is the desirable structure for a family unit.

(b) Social aspect: Same-sex relationships are not socially acceptable.

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[63] CA 506/88 *Shefer v. State of Israel*, 48(1) PD 87, 103 (1988) (Isr.).

[64] U. PROCACCIA, Reflections on Charges of Fundamental Values in Law, 15 *Tel Aviv U. L. Rev.* 377, 378 (1990).

[65] FA (Family Appeal) (Tel-Aviv) 8/94 *Steiner v. Compensation Officer, Israel Defense Forces*, (Aug. 13, 1995), Nevo Legal Database (by subscription) (Isr.).

[66] Leviticus 18:22.

[67] *Steiner* (note 66), at section 5.

[68] *Id*.

[69] *E.g. Steiner* (note 65); File No. 016610/04 Family Court, *Anonymous v. Attorney-General*, (May 8, 2005), Nevo Legal Database (by subscription) (Isr.).

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(c) Separation of powers: It is the work of the legislature, not the courts, to create new concepts in the law.

(d) Morality: The basic values of the state reject recognition of a matter that conflicts with a Jewish value.

(e) Precedents: Previous rulings did not recognize the rights of same-sex couples.

Surprisingly, other courts have adopted the same reasoning to *recognize* the granting of rights to same sex couples. In *A.M.*, two men had been living as a couple for approximately forty years.[70] The question under discussion was whether they would inherit each other's property. The majority opinion argued that the purpose of Section 55 of the Law of Succession 1965 was to provide common law spouses with the inheritance rights granted to married couples.[71] However, common law couples who are unable to marry under Jewish law are those individuals primarily assisted by Article 55.[72] The majority opinion also argued that the rights of common law spouses have been expanded in other areas. It indicated that today's normative regime increasingly recognizes freedom of human sexual orientation.[73] This recognition is afforded due to the combined influence of amendments to Israeli legislation. Thus the interpreter is also required to examine the text according to the purpose of the law.[74] In accordance with these arguments, the majority opinion decided that a same-sex couple could inherit each other's property.

The recognition of the rights of same-sex couples[75] is based on the same five arguments as those adopted by opposing courts:

(a) Linguistic aspect: The interpreter is required to examine the text according to the purpose of the law.

(b) Social aspect: A change in public perception cannot be ignored.

(c) Separation of powers: The legislature left the matter open by choosing ambiguous language.

(d) Morality: In accordance with fundamental values, same-sex couples have a right to equality.

(e) Precedents: Previous judicial decisions have recognized such rights.

Ultimately, any division which occurs among decisions in the civil courts is due to the presiding judge and his personal worldview. Orthodox Jewish judges have not

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[70] File No. 3245/03 Civil Appeals (Naz'), *A.M. v. General Custodian*, (Nov. 11, 2004), Nevo Legal Database (by subscription) (Isr.).

[71] *Id*, at section 4 of Justice MAMAN'S opinion.

[72] *Id*, at section 5.

[73] *Id*, at section 8.

[74] *Id*, at section 15.

[75] *A.M.* (note 70); File No. 6960/03 Family Court, *Z & M*, (Nov. 21, 2004), Nevo Legal Database (by subscription) (Isr.).

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granted rights to same-sex couples, while non-religious Jewish judges have done so. In reality, judges decide similar cases and interpret the same legislative terms, yet they reach completely different conclusions. One supports social change and another seeks to block it. More decisions have recognized same-sex spouses than those that have not. In fact, very few judgments do not recognize same-sex spouses. This could indicate that on a financial level, even religious judges do not refrain from granting social benefits to same-sex couples.

Every judge that has granted rights to a same-sex couple has tried to explain that he was not changing the world order, but only resolving a specific difficulty – the personal distress of individuals.[76] However, in practice these small modifications have resulted in a significant change in Israeli law. This change is contrary to what has been the legislature's approach, as seen in its dismissal of every bill to change the law and broaden the meaning of family member. However, in these circumstances, the courts have gone further than the legislature and brought about social change.[77]

V. The *Ben Ari* Case – Registration of Same-Sex Civil Marriage

Thus far the discussion in Israel has dealt with economic and financial rights such as inheritance, social rights in the workplace, and so on. However, registration of civil marriage is a public policy decision that in some sense is more controversial and more a matter of principle.

The most significant decision of the Supreme Court of Israel on this issue is the *Ben Ari* case.[78] The case deals with five petitions by five different same-sex male couples. Though the individual spouses were all Israeli citizens, they were married in civil marriage ceremonies in Canada and subsequently requested to be registered as married couples in Israel's Population Registry. Their request was denied.

In order to understand the discussion in this matter, it is necessary to refer to the *Schlesinger* case, where the court ruled that the registry clerk is not authorized to determine the validity of a marriage.[79] *Schlesinger* also ruled that the registry clerk collects statistical material as to whether or not a wedding ceremony

[76] See, *e.g.*, Justice BARAK, *EL AL* (note 54) and Justice MAMAN, *A.M.* (note 70).

[77] In Israel, the courts interpret the law and can indeed interpret it differently from the way in which the legislature intended. The legislature can change the court's interpretation through new legislation clarifying its intent. The legislative process is long, and certainly not as short as the process of judicial decision-making.

[78] HCJ 3045/05 *Ben Ari v. Director of the Population Administration*, (Nov. 21, 2006), Nevo Legal Database (by subscription) (Isr.).

[79] *Schlesinger* (note 12), at 251.

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took place. The clerk may refuse to register a marriage only if there is an "obvious inaccuracy."[80]

The state's argument in the *Ben Ari* case was that the term "married" in the registry means marriages that are consistent with the basic legal template under Israeli law regarding marriage. This format only referred to marriage between a man and a woman. Justice BARAK wrote the majority opinion rejecting the state's argument:

> "The question brought before us is not an application to recognize a marriage of a same-sex couple performed outside of Israel. When this question will arise, it will be examined according to our usual rules of private international law. The only question brought before us is the question of registration – registration rather than recognition – of marriage of same-sex couples performed in a foreign country. The approach of the state that we should reject the petitions because the marriages entered into by the petitioners are not a recognized «legal template» in Israel is an approach that requests to take a position on the question of status. It is an approach that requests the court take a position on a controversial social question.[81]

Justice BARAK continued:

> "It is not appropriate that every time there is a change in the leadership of the ministry in charge of population registration, there will also be a change in policy. These questions deserve to be decided by the people through their representatives in the Knesset. As long as the Knesset has not spoken, it is fitting that these ethical decisions do not fall within the scope of the Population Registry."[82]

Justice BARAK explained further that an "obvious inaccuracy", as referred to in the *Schlesinger* case, represents factual inaccuracy.[83] In contrast, the court determined that the state had incorrectly argued that the term referred to inaccuracy with respect to the law.[84] Justice BARAK added that it was neither a question of whether same-sex couples can marry in a civil ceremony in Israel, nor a question of whether they are married. These questions should be left to the legislature. The only question which is relevant before the court is whether the registry clerk must register the marriage performed in a foreign state.[85] Justice BARAK gave an instruction to register it. Five judges agreed with him.

The position of Chief Justice BARAK is difficult to accept in that it is not the minister who should determine the ministry's policy. In a properly functioning democratic system, the minister is chosen as the representative of the people and is

[80] *Id*, at 243.

[81] *Ben Ari* (note 78), at section 22.

[82] *Id*, at section 14.

[83] *Id*, at section 21.

[84] *Id,* at section 21.

[85] *Id*, at section 22.

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responsible for determining policy. Indeed, the right to establish new policy exists every time a new minister is elected. This is the essence of democracy and the essence of the concept of the rule of the people. A judge is not entitled to say, "The legislature is silent, so I will lead the change." The silence of the legislature says something. It might say that there is no need to change the law and that the current situation is desired.

Justice RUBINSTEIN, who sat in the "religious justice seat,"[86] argued in the minority opinion that the Population Registry is not only a statistical registry but also a social and public symbol.[87] It is the "gateway" to Israeli legal reality.[88] He explained that this court must give its opinion, even regarding the question of how far it distances itself from social consensus.[89] Justice RUBINSTEIN cites passages from two books written by Justice BARAK:

> "The judge must consider the degree of social consensus with social values and the legal norms derived from them. It is desirable to avoid choosing an option that sharply opposes the fundamental perceptions of the public […] The reason for this approach lies in democratic considerations, the considerations of separation of powers and the need to ensure public trust in the judicial system […]"[90] "A judge does not have to be the flag bearer of new social consensuses. He must give expression to fundamental values recognized in his society rather than create them."[91]

Justice RUBINSTEIN referred to these citations and said that one should examine these matters not only from the perspective of individual justice, but also from the perspective of a broad common denominator which extends as much as possible among the parts of a divided Israeli society, while avoiding extremes. An issue regarding a public symbol in Israel should justifiably be determined by the legislature. The registration is an official approval of the state to create a family unit, which is recognized by only a small minority of the countries in the world.[92] Therefore, Justice RUBINSTEIN suggests that the petitions should be rejected.

It is important to mention that in December 2006, Justice RUBINSTEIN wrote in his opinion that only six out of 192 states recognize same-sex marriage, and therefore, the State of Israel should not lead this trend, especially as a country that

[86] The State of Israel has a procedure which states that among fourteen Supreme Court justices it is important to have at least one religious judge. This is not set forth in provisions of law, but determined in accordance with internal guidelines.

[87] *Ben Ari* (note 79), at section 9 in Justice RUBINSTEIN'S opinion.

[88] Indeed the religious parties in Israel are fighting for the leadership of the ministry in charge of the Population Registry.

[89] *Ben Ari* (note 79), at section 16.

[90] A. BARAK, *Judicial Discretion* (1987), 289.

[91] A. BARAK, *The Judge in a Democracy* (2004), 47.

[92] *Ben Ari* (note 78), at section 10 in the opinion of Justice RUBINSTEIN.

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defines itself as a Jewish and democratic state. However, following the *Obergefell* decision[93] this is undoubtedly no longer a strong argument.

Justice BARAK does not want to address or determine the questions of whether a same-sex marriage is a family unit and whether it is valid in Israel. He only makes a determination regarding the authority of the registry clerk and whether he should register each of the couples as married. All the parties agree that each of the marriage certificates submitted to the registry clerk is valid and legal in Canada; the marriages are valid in Canada; and all the information detailed in in each certificate is correct. Therefore, the registry clerk must register the parties as married couples in the Israel Population Registry and this is the new ruling in Israel.

VI. Conclusion

In Israel, where there is a separation of religion and state, marriage is governed exclusively by religion. It is therefore against all expectations that we have witnessed the recognition of prohibited marriage such as the marriage of same-sex couples that contrasts with marriage in all recognized religions in Israel; or the marriage between spouses only one of whom is Jewish; or indeed any marriage performed in a foreign country and not permitted under Israeli law. The conflict is between religious law on the one hand, which is not limited by the borders of a country and does not recognize the rules of private international law, and civil law on the other hand, which desires to become part of the family of nations. Civil law seeks to respect legal actions taken under foreign law, even if contrary to local state law.

Nevertheless, Israeli law, as interpreted in the decisions of the Supreme Court, has developed to overwhelmingly recognize the rights of couples married in civil ceremonies outside of Israel. This process began with the registration in Israel of a marriage between a Jewish woman and a non-Jewish man (the *Schlesinger* case), as well as with recognition of standard spousal obligations. Included among such obligations are property division and maintenance with respect to a couple married abroad before becoming citizens and residents of Israel (the *Skornik* case). Such recognition is part of the development of Israeli civil law rather than religious law. This civil law is designed to respond to the dynamics of life and the personal distress of individual partners.

The question which poses greater difficulty than that of registration concerns the validity of civil marriage between Israeli residents who travelled to a foreign country, entered into a marriage under its laws, and returned to Israel. Israeli case law includes three main approaches to this question: the English approach, the approach of Prof. SHAVA, and the U.S. approach. However, in 2006, the rabbinical court unexpectedly recognized the validity of such civil marriages,

[93] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). This Supreme Court decision set a precedent in ruling that the Constitution of the United States requires same-sex marriage. Therefore all fifty states within the United States are obliged to allow it.

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albeit stating that they do not yield property rights. This was sufficient for the Supreme Court to then recognize foreign civil marriages with respect to all aspects of the domestic law, including property rights.

However, this decision applies only to marriage permitted under Jewish religious law. It does not relate to prohibited marriages performed in a foreign country. With respect to such marriages, religious law very much conflicts with private international law. In the *Ben Ari* case, the Supreme Court ruled that the registry clerk should register the marriages of same-sex couples performed in a foreign country. While it seems not to have fully addressed the issue, the court explained that the question of registration is not one of status but rather only an administrative question concerning the authority of the registry clerk. Although the court did not determine the validity of the marriage, it *de facto* preferred private international law over personal religious law.

Some critics argue that the law in Israel, whereby marriage is determined only by an individual's religious personal law, has now become meaningless. The decisions described above reflect the constant prevailing tensions regarding Israel not only as a Jewish state but also as a democratic state. Although the Basic Laws stipulate that Israel is both, in practice these values conflict and often collide. This is clearly reflected in the issue of civil marriages performed in a foreign country and prohibited by religious personal law.

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AN OVERVIEW OF VIETNAMESE PRIVATE INTERNATIONAL LAW

Ho Huong PHAM* / Ngoc Bich HOANG**

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 341-370
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. An Introduction to Vietnamese Private International Law

As a result of Vietnam's policy of international integration, civil, commercial and investment relations in Vietnam involving a foreign element have dramatically developed in both width and in depth. The export-import turnover has risen each year, reaching 327.76 billion USD in 2015 and 350.74 billion USD in 2016 (a 7.1% increase in 2015).[1] As of 2012, there were 4.5 million Vietnamese people living, working and studying in 103 countries and territories all over the world. Each year, Vietnamese people living abroad make around 500,000 return visits, among them experts, professionals and also investors.[2] The number of Vietnamese people going overseas for study, work and medical care and the number of foreigners visiting Vietnam for various reasons have both surged in recent years. For example, the number of foreign tourists visiting Vietnam between 2013 and 2015 reached nearly 8 million per year and rose to more than 10 million in 2016.[3] The number of Vietnamese laborers working abroad stood at 126,296 people in 2016.[4]

In parallel with the strong development of these civil and commercial relations, many judicial cases have been emerging which require the attention of the Vietnamese authorities. For example, between 2005 and 2014, the Ministry of Justice approved 10,000 adoption cases where Vietnamese children were adopted into foreign families; according to the statistics of the Supreme People's Court during the period covering 2010-2014, on average the district People's courts and provincial People's courts (most cases are heard before the provincial People's courts) solved 3,500 to 4,000 civil cases per year involving a foreign element.[5]

Due to the accumulative development of civil relations involving a foreign element and foreign civil cases, a suitable mechanism in private international law is now required to govern these issues. Even though the seed of private international law was planted into the soil of Vietnamese law in medieval times,[6] the birth of Vietnamese private international law is considered to have taken place more

[1] Available at <http://www.customs.gov.vn>, last visited on 10 April 2017.

[2] See the statistics presented at the Second Meeting of Overseas Vietnamese organized by Ministry of Foreign Affairs on September 27, 2012 in Ho Chi Minh City, available at <http://vietnamnet.vn/vn/chinh-tri/90272/hon-4-5-trieu-nguoi-viet-song-o-nuoc-ngoai.html>, last visited on 15 March 2017.

[3] See <http://vietnamtourism.gov.vn/index.php/items/13104>; <http://vietnamtourism.gov.vn/index.php/items/14759>, last visited on 15 March 2017.

[4] Available at <http://www.nhandan.com.vn/xahoi/tin-tuc/item/28645002-gan-116-nghin-lao-dong-di-lam-viec-o-nuoc-ngoai.html>, last visited on 15 March 2017.

[5] The statistics were provided in the Proposal of the Ministry of Justice on the potential to develop a Private International Law Code, submitted to the Vietnamese Government on 21 March 2017.

[6] V.Đ. ĐỖ/ H.Q. MAI (eds), *Tư pháp quốc tế Việt Nam, Quan hệ dân sự, lao động, thương mại có yếu tố nước ngoài* (Private international law in Vietnam: Civil, employment, commercial relations involving foreign elements), National Political Press 2010, p. 56-59.

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than 70 years ago[7] when the Democratic Republic of Vietnam declared its independence. Since then, private international law rules have been scattered around different acts of legislation. In 1995, for the first time private international law rules, particularly the rules on conflict of laws, were codified in the first Civil Code of the Socialist Republic of Vietnam. Following this, other key elements of private international law (jurisdiction, international civil procedure and the recognition and enforcement of foreign judgments) were set out in the Civil Procedure Code in 2004. After this, provisions of private international law were continuously maintained and developed in the subsequent versions of the Civil Code and Civil Procedure Code as well as in other statutes.

Until now, private international law rules in Vietnam have come from the following sources: (i) legislation; (ii) international treaties, and (iii) customs and precedents.[8]

(i) *Legislative sources*. Private international law rules in Vietnam are scattered across various legal instruments of differing character. Based on preliminary research, we can conclude that, discounting the wealth of Decrees and Circulars, there are about 30 Laws and Ordinances which contain provisions relating to private international law (among them 15 instruments containing conflict of laws rules).[9] However, the fundamental rules of modern Vietnamese private international law concentrate in Part V (Law applicable to civil relations involving a foreign element) of the Civil Code 2015 (hereinafter, CC 2015) and Parts 7 and 8 of the Civil Procedure Code 2015 (hereinafter, CPC 2015).[10]

Part V of CC 2015 provides general and basic principles for the determination of civil relations involving a foreign element; the application of Vietnamese law, foreign law, treaties and international customs to civil relations involving a foreign element; specific rules on conflict of laws, *etc*. In addition to this, many other legal instruments also contain conflict of laws rules such as the Maritime Code 2015, the Law on Credit Institutions 2010, the Law on Technology Transfer 2006, the Law on Investment 2014, the Law on Companies 2014, the Law on

[7] See T.T. NGUYỄN, Tư pháp quốc tế Việt Nam trong chặng đường 60 năm bảo vệ, xây dựng và phát triển đất nước (Vietnam's private international law in the 60-year period of protectionism, construction and development of the country), *State and Law Magazine* 2005.

[8] For the purposes of this Paper, private international law means a set of legal rules governing civil relations involving a foreign element in a broad sense, covering civil matters, marriage and family, labor, and civil procedure with foreign elements. In general, private international law deals with three main questions: the conflict of laws (designation of applicable law in civil relations involving a foreign element), the conflict of jurisdictions (designation of jurisdiction in civil cases involving a foreign element and *lis pendens*), and the recognition and enforcement of foreign judgments/decisions and foreign arbitral awards.

[9] Statistics (note 5).

[10] The Civil Code 2015 was adopted by the National Assembly on 24 November 2015; The Civil Procedure Code 2015 was adopted by the National Assembly on 25 November 2015. An English version of the Civil Code 2015 is available at <http://thuvienphapluat.vn/van-ban/Quyen-dan-su/Bo-luat-dan-su-2015-296215.aspx> and the Civil Procedure Code 2015 is available at <http://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Bo-luat-to-tung-dan-su-2015-296861.aspx>. Login is required.

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Vietnamese Civil Aviation 2006 (amended in 2014), the Law on Marriage and Family 2014, the Law on Insurance Businesses 2000 (amended in 2010), the Law on Adoption 2010, the Law on Commerce 2005, the Law on Commercial Arbitration 2010, and also in the guiding documents of these instruments.

International jurisdiction and civil procedures involving a foreign element are principally governed by the CPC 2015 (Chapter XXXVIII, Part 8), which sets out concurrent jurisdiction, exclusive jurisdiction, *perpetuatio fori*, declining jurisdiction and stay of proceedings in some special situations such as parallel proceedings, including arbitration proceedings. Rules relating to international jurisdiction are also found in other specialized laws such as the Maritime Code 2015, the Law on Marriage and Family 2014, the Law on Investment 2014, the Law on Technology Transfer 2006, the Ordinance on Ship Arrest Proceedings 2008, the Law on Vietnamese Civil Aviation 2006 (amended in 2014), the Ordinance on Aircraft Arrest Proceedings 2010, the Law on Bankruptcy 2014.

Recognition and enforcement of foreign judgments, decisions and foreign arbitral awards are mainly provided in Part 7 of the CPC 2015. Furthermore, provisions on the formal requirements of foreign marriage, family matters, and registration of international adoption are provided in the Law on Marriage and Family 2014 and Decree No. 123/2015/ND-CP dated 15/11/2015 on Rules of Interpretation and Implementation of the Law on Civil Status, and Decree No. 19/2011/ND-CP dated 21/03/2011 on the Interpretation of the Law on Adoption.

(ii) *Treaty sources.* Vietnam is a signatory to a number of treaties which govern civil relations involving a foreign element such as bilateral agreements on mutual legal assistance, agreements on adoption, treaties on the promotion and protection of investment, treaties on trade, treaties on consular affairs, the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention 1958), the United Nations Convention on Contracts for the International Sale of Goods, the Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol, *etc*. In general, these treaties contain both substantive rules and conflict of laws rules which govern civil relations involving a foreign element and establish mechanisms to solve the cases arising from these relations. However, amongst these treaties, only the New York Arbitration Convention 1958 and bilateral agreements on mutual legal assistance contain provisions focusing on private international law rules. Although all 17 agreements on mutual legal assistance have provisions on the recognition and enforcement of foreign judgments, there are 11 of them containing provisions on conflict of laws.

(iii) *Sources in customs and binding precedent.* It is very hard to find a proper answer for the position of customs in private international law. Is there any custom which may come into play when it comes to determining which law should be applied to a case involving a foreign element? This is a very difficult question to answer. It can at least be agreed that several substantive customs are employed in civil relations involving a foreign element, especially in international commerce.

In the past, binding precedents were practically unknown to the Vietnamese legal system even though the Supreme People's Court usually relied on its major decisions when issuing guidelines to lower courts. However, following the

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promulgation of the new Law on the Organization of the People's Court 2014 and the new Civil Code and Civil Procedure Code 2015, the first binding precedents have been published by the Supreme Court as of 2016. According to these statutes, precedents have to be relied on in analogous cases but only when there is no legal provision on such issue. Moreover, according to Resolution No. 03/2015/NQ-HDTP of the Judges' Council of the Supreme People's Court dated 28/10/2015 on the Applicable Procedure, Publication and Application of Precedents, precedents may also serve to clarify legal provisions which carry several possible interpretations. However, until now, there has not been any precedent published in the field of private international law.[11]

Although Vietnamese private international law comes from various sources, the following sections of this paper shall focus solely on private international law rules found in legislation, especially in the CC 2015 and the CPC 2015 due to the limited scope, content and effect of other sources mentioned above. Private international law rules in other legal instruments besides the CC 2015 and the CPC 2015 will occasionally be mentioned as a general background for analysis.

II. Rules on Private International Law in the Civil Code 2015 and Civil Procedure Code 2015

A. Rules on Private International Law in the Civil Code 2015

Private international law rules in the CC 2015 are concentrated in Part V (Law applicable to civil relations involving a foreign element). In comparison with the previous Civil Code, Part V of the CC 2015 aims to an even greater extent to (i) ensure international integration and selective absorption of common legal standards which are widely recognized by the international community; (ii) affirm the priority and special role of conflict of laws rules in Part V and (ii) promote the flexibility of the provisions by adopting the closest connection principle and expanding party autonomy in choice of law.

Part V is divided into 3 Chapters: Chapter XXV: General provisions; Chapter XXVI: Law applicable to natural and legal persons and Chapter XXVII: Law applicable to proprietary and non-proprietary relations.

[11] Amongst published precedents, cases No. 02/2016/AL and No. 05/2016/AL are civil cases involving a foreign element in conformity with the definitions provided by the CC 2015 and the CPC 2015 (involved parties are oversea Vietnamese living abroad) but the rules on subject matters established in these cases are not matters of private international law and there is no information, analysis or comment to ascertain jurisdiction of the Vietnamese court or applicable law. A Vietnamese version is available at <http://www.toaan.gov.vn/portal/page/portal/tandtc/9758900/143562023/153801172>, last visited on 10 April 2017.

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1. General Provisions

The major changes brought about by the CC 2015 are in Chapter XXV (General provisions), which sets fundamental principles for conflict of laws in Vietnam.

a) Scope

It is clearly stated in the first subsection of Part V that "[T]his Part provides for applicable law to civil relations involving foreign elements".[12] This provision emphasizes that Part V of the CC 2015 focuses on the designation and application of law to civil relations involving a foreign element, which means that this Part covers conflict of laws rules and principles on application of law rather than substantive rules.

As there are many other legal documents such as the Maritime Code, the Law on Vietnamese Civil Aviation, the Law on Commerce, and the Law on Investment which also contain conflict of laws rules and bearing in mind the likelihood of further development of such rules in specialized areas, the CC 2015 sets forth that the principles provided in Part V (from Articles 664 to Article 671) are fundamental ones and also clarifies the relationship between these principles and the rules on private international law as found in other statutes.[13]

The definition of "civil relations involving foreign elements" is provided under Article 663(2). According to this provision, a foreign element is present in the following circumstances: (i) at least one of the parties is a foreign natural or legal person; (ii) the reason for the creation, modification or termination of such relation arose in a foreign country (*e.g.* the relationship between two Vietnamese people who marry and register their marriage before the competent authority of a foreign country); (iii) the subject matter of such relation (property or work) is located in a foreign country.

In drafting Part V of the CC 2015, a proposal was put forward aiming to remove the definition of civil relations involving foreign elements because the definition is both over-inclusive and under-inclusive. Moreover, there is no evidence from well-developed legal systems that such definition is required. "Foreign element" might be any element involved in the specific relation which is or might be relevant at the time of proceedings. However, given the importance of distinguishing the civil relations involving a foreign element from pure domestic civil relations and the key issue in application of this Part, the drafters of the CC 2015 eventually decided to maintain the definition of what constitute a civil relation involving foreign elements and modified it to eliminate the drawbacks that had

[12] Article 663(1) of the CC 2015. The unofficial English version is available at <http://thuvienphapluat.vn/van-ban/Quyen-dan-su/Bo-luat-dan-su-2015-296215.aspx>, last visited on 10 April 2017.

[13] Article 663(1) of the CC 2015 provides that "If any rule of law envisaging the law applicable to civil relations involving foreign elements complies with Article 664 through Article 671 of this Code, it shall prevail; if it does not comply with those Articles, Part Five of this Code shall prevail".

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been identified. The drafters also discovered that although China had decided to omit the definition, the Supreme Court of China had then to fill the gap by providing a definition in a series of guidelines.[14]

b) Designation of the Law Applicable to Civil Relations Involving Foreign Elements

The principle which designates the law applicable to civil relations involving foreign elements is based on the legal norms of conflict of laws which are stipulated in treaties to which Vietnam is a party or in the Vietnamese law provisions (Article 664(1)). Parties to a civil relation involving a foreign element have the right to choose the applicable law to the extent that it is so permitted by the treaties to which Vietnam is a party or by the Vietnamese law provisions. This wording is designed to put an end to a long debate which had arisen from ambiguous provisions in the former Civil Code concerning the situations in which parties can choose the applicable law.[15] Article 664(3) is particularly worth mentioning in this context which provides that "[I]f [Article 664] fails to designate the applicable law as prescribed in subsections 1 and 2 [...], the applicable law is the law of the country which is the most closely connected with the civil relations involving foreign elements". The principle of closest connection is thereby introduced, which is widely used in the private international law of many countries to make their law more flexible.[16]

c) Application of Designated Applicable Law

Articles 665, 666 and 667 provide for the application of different norms following the designation of a law. Concerning application of international treaties, the principle of prevailing effect of international treaties as derived from the 2013

[14] Chinese Supreme People's Court Private International Law Interpretation 2012. See J. HUANG, New Perspectives on Private International Law in the People's Republic of China, in J. BASEDOW/ K.B. PISSLER (eds), *Private International Law in Mainland China, Taiwan and Europe*, Tübingen 2014, p. 12.

[15] Article 759(2) of the Civil Code 2005 specified that "Foreign laws shall also apply in cases where the parties have so agreed upon in contracts, if such agreement is not contrary to the provisions of this Code and other legal documents of the Socialist Republic of Vietnam." Article 769 of the 2005 Civil Code provided that "[1.] The rights and obligations of the parties to a civil contract shall be determined in accordance with the law of the country where the contract is performed, unless otherwise agreed upon. A civil contract entered into force and performed entirely in Vietnam must comply with the law of the Socialist Republic of Vietnam. In cases where a civil contract does not specify the place of performance, the determination of the place of performance of the contract must comply with the law of the Socialist Republic of Vietnam.2. Civil contracts relating to immovable properties in Vietnam must comply with the law of the Socialist Republic of Vietnam."

[16] See further S. SYMEONIDES, *Codifying Choice of Law around the World. An International Comparative Analysis*, Oxford 2014, p. 171.

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Constitution[17] is specified in the Law on Promulgation of Legal Instruments 2015 (several Articles such as Article 5, Article 156) and in the Law on Treaties 2016 (Article 6). However, there are two different kinds of norms in private international law: substantive norms which directly point out the rights and obligations of parties in civil relations and conflict-of-law norms which refer to the applicable law. Article 665 of the CC 2015 does not distinguish any order or hierarchy between treaties but tries to reach a practical solution in cases where both kinds of norms could apply in the same situation. In these cases, the substantive norms shall prevail to simplify the identification and application of legal provisions.

Article 666 of CC 2015 prescribes the application of international customary practices, which were once provided merely as a measure of last resort to deal with civil relations involving a foreign element in the former Civil Code when other sources were not applicable. But recently, international customary practices have been increasingly adopted or codified into the laws of many countries. It means that this source of rules are widely acceptable. Thus, this Article affords parties the right to choose international customary practices – a set of non–State norms – as an applicable law. Even though there is no definition or clarification of international customary practices, international commerce customs like INCOTERMs (International Chamber of Commerce Rules for the Use of Domestic and International Trade Terms) or UCP (Uniform Customs and Practice for Documentary Credits) are considered to fall under its scope.

Amongst the principles of application of law, the principle of application of foreign laws has been newly introduced in Part V. This principle was intended to stop some judges from illegitimately interpreting foreign law in line with Vietnamese law. Therefore, Article 667 sets the rule "[W]here the application of foreign law is subject to different interpretations, the application must follow the interpretation of the competent authority in that foreign country". It should be noted that in Vietnam, the power to interpret the law does not officially belong to the court. Laws and resolutions of the National Assembly and ordinances of its Standing Committee may only be interpreted by the Standing Committee of the National Assembly. However, it is possible that foreign countries do not have any such equivalent authority as the Standing Committee of the National Assembly in Vietnam. Hence, the meaning of this provision is simply to state that the foreign law must be interpreted and applied in the same manner as provided in the State of origin. Another reason may be the relation between this Article and the analogous provision of the CPC 2015 (Article 481) on identifying and applying the content of foreign law.[18]

Renvoi is also an important issue that is governed by this Chapter. Article 668 provides the relevant scope of the law. Item 1 of this Article explains that both substantive and conflict of laws norms can be covered by the conflict of laws rule designating the applicable law; item 2 mentions two situations where the

[17] Article 12 of the 2013 Constitution provides that "…Vietnam… conforms to the Charter of the United Nations and international treaties to which Vietnam is a member".

[18] Article 481 of the CPC 2015 relates to the designation and application of foreign law for the Court to apply in the settlement of civil cases involving foreign elements.

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substantive law of Vietnam applies: (i) when the Vietnamese conflict of laws rules refer to Vietnamese law (Vietnamese law is the applicable law according to Vietnamese conflict of laws rules) and (ii) when foreign conflict of laws rules refer back to Vietnamese law (the foreign law is the applicable law according to Vietnamese conflict of laws rules) (*renvoi I*). Where foreign conflict of laws rules (foreign law is the applicable law according to Vietnamese conflict of laws rules) refers to the law of third country, the substantive law of that third country will be applied (*renvoi II*) (Item 3). No renvoi exists in the case that parties are entitled to choose the applicable law (Item 4).

Article 669 on the application of the law of foreign countries which have multiple legal systems, typically federal states, is added to supplement an analogous provision in the previous Government Decree No. 138/2006/ND-CP dated 15/11/2006 on Guidelines for Various Provisions of the Civil Code on Civil Relations Involving a Foreign Element (Article 4(3)). Distinct from the old provision which allowed the parties to choose the legal system which had the closest connection to the citizen's rights and obligations, in order to avoid "law shopping", the new CC 2015 provides that if there is reference made to the law of a country which has multiple legal systems, the applicable law will be designated according to the rules prescribed by such country's law.

One of the most important, and innovative, provisions is Article 670. It stipulates two situations in which foreign laws are referred to but will not be applicable: (i) when the consequences of its application are inconsistent with the fundamental principles of the law of Vietnam; or (ii) when the content of the foreign law is not identifiable regardless of the adoption of necessary measures prescribed by procedural law. In these situations, Vietnamese law will be applied. The first situation is the same as provided in the former Civil Code 2005 but the wording of the provision was revised to make it clearer that this situation only occurs in the later stage of application but not in the stage of designation of the applicable law. The "consequences" here are what we can expect when a foreign law is applied. When drafting this provision, there were various debates on whether the term "fundamental principles of the law of the Socialist Republic of Vietnam" should be changed to "public policy". Many commentators believed that since this part deals with civil relations involving a foreign element, the provision should be simple and common and a term should be used which is easy to understand. On the other hand, others argued that many countries have to face problems explaining what "public policy" is. The final and balanced decision was to maintain the reference to the "fundamental principles".[19] Thus the change still leaves this concept open to interpretation. Until now, the only interpretation we have is from Resolution No. 01/2014/NQ-HDTP of the Judges' Council of the Supreme People's Court dated 20/3/2014 on Guidelines for Various Provisions of the Law on Commercial Arbitration, which explains that "fundamental principles

[19] German law also uses this standard. Article 6 of the Introductory Act to the Civil Code of Germany: "A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights." English version is available at <https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0038>.

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of the law of the Socialist Republic of Vietnam"[20] means "the basic rules which have overall effect in development and application of the Vietnamese law"… [so that the infringement of these principles] "severely violates the interests of the State, the rights and legitimate interests of one or all involving parties or third party". In practice, "fundamental principles" are construed as the rules in the Constitution and frequently as basic principles which are frequently entitled "General provisions" in a particular statute or Code. The second situation is the new issue added to untie the knot created by the lack of legal grounds to apply Vietnamese law when the content of foreign law cannot be identified.

The provision on limitation periods applicable to civil relations involving foreign elements is nearly unchanged in comparison to the former Civil Code. Limitation periods will be determined according to the law applicable to the substance of the relation at stake. Minor modifications have been made to cover all types of limitation periods not only for suing before court but also the periods of establishment of rights or discharge of obligations.

2. Specific Rules on Conflict of Laws

a) Law Applicable to Natural and Legal Persons

With regard to the law applicable to natural and legal persons, the law of nationality is frequently applicable. The nationality of a legal person will be determined according to the law of the country in which such legal person was established. The law of nationality governs the legal capacity and civil behavioral capacity of natural persons, determination of missing or dead status of a natural person and all important issues relating to legal status of a legal person including legal capacity, name, legal representatives, organization, restructuring, dissolution, relations between a legal entity and its members, liability of the legal entity and its members arising out of their obligations. There are some exceptions:

(i) A foreigner in Vietnam shall have legal capacity in the same manner as provided for a Vietnamese citizen, unless otherwise provided by the law of Vietnam (Article 673(2)). This provision hereby states that a foreigner is to be treated like a Vietnamese national, and thus hold the same rights and bear the same obligations.

(ii) Where a foreigner establishes or performs civil transactions in Vietnam, his/her legal capacity shall be determined in accordance with the law of Vietnam (Article 674(2)). This provision was made to allow the competent Vietnamese authorities to apply the law and maintain the stability of daily civil transactions in Vietnam.

(iii) The determination of a legally incapacitated person, a person with limited cognition or behavior control, or a person with limited legal capacity in Vietnam shall be made in accordance with the law of Vietnam (Article 674(3)). This provision has to be read in conjunction with Article 470 of

[20] Article 14(2)(đ) of the Resolution.

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CPC 2015 on the exclusive jurisdiction of the Vietnamese courts. The relevant court's orders have important ramifications, especially in designating the guardian or trustee for the incapacitated persons, persons with limited cognition or behavior control, or persons with limited legal capacity. Those orders also have a major impact on the rights and obligations of the parties concerned. Since it is necessary to resolve such issues and to adopt the relevant measures in an efficient and timely manner, this provision allows the competent Vietnamese authorities to apply Vietnamese law. A similar rationale underlies Article 675(2) which states that "[T]he determination of a disappeared or deceased person in Vietnam shall be in accordance with the law of Vietnam."

(iv) Where a foreign legal person establishes or performs civil transactions in Vietnam, its legal capacity shall be determined in accordance with the law of Vietnam. This provision has the same purpose as the similar provision on natural persons.

Since the concept of nationality or *lex nationalis* is invoked as the key connecting factor for the legal status of natural person, the CC 2015 specifies how such nationality is to be determined in the case of stateless persons and persons with multiple nationalities. In these cases, residence is used as a subordinate connection. For more complicated cases when those persons have multiple residences or their residence is unidentified, *etc.*, the applicable law will be the law of the country with which the person is most closely connected.[21] If one of their nationalities is Vietnamese, the applicable law is the law of Vietnam.

b) Law Applicable to Property

Lex situs is the law applicable to property, including classification of property as moveable or immovable property and right *in rem* (ownership rights and other property-related rights). There are two exceptions to this principle: (i) the ownership rights with respect to moveable property in transit shall be determined in accordance with the law of the country of destination (*res in transitu)*, unless otherwise agreed and (ii) the intellectual property rights shall be determined in accordance with the law of the country where the intellectual property rights are required to be protected.

The first exception has been maintained from the previous Civil Code of 2005. In regard to moveable property in transit, the place of the property constantly changes so the suitable applicable law should be the law of the place of destination, where the property will stay at least until the owner decides to move it again. The second situation concerns intellectual property. Since the principle of

[21] Article 672 of the CC 2015. Note that Article 672 applies to all cases which have *lex nationalis* as the connecting factor (not only in the case of legal status of natural persons).

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territoriality is so prominent in the field of ownership of intellectual property,[22] Vietnamese scholars do not admit the existence of a conflict of laws in this field. Until now, this has remained a controversial issue.[23]As a consequence, rules on the law applicable to intellectual property are simply the product of the results of research and reference to foreign private international law (from countries such as China, Belgium, Switzerland) and some model laws and other relevant materials on this issue.[24] The applicable law shall regulate the existence, validity, registration, scope and time limit of protection of intellectual property rights.

c) Law Applicable to Inheritance

Lex patriae retains its role in governing matters relating to inheritance. The applicable law is the law of the country of which the decedent held nationality right before his or her death. However, in order to inherit an immovable property, the law of the country where such immovable property is located has to be complied with.[25]Let us assume that Mr. X died in Vietnam as national of country A leaving among other assets an apartment in Vietnam. His heirs seek distribution of that asset before the Vietnamese court. The law applicable to the inheritance is the law of country A. That law will determine *e.g.* who the heirs are, what are the assets of the estate and what proportion of that estate accrue to each heir. Once the heirs and the relevant shares in the estate have been determined, the heir(s) shall have the right to inherit the apartment in Vietnam. However, whether a particular heir can seek registration of his or her ownership right on the apartment itself or only receive the value of the apartment is based on the Vietnamese law *qua* law of the country where the immovable property is located.

If the inheritance is based on a will, *lex patriae* will be applied to the capacity to create, alter or revoke the will. In order to cut down on situations where the will is invalid due to formal invalidity, the drafters improved the chances of formal validity being satisfied in Vietnam by taking inspiration from the provisions of the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Article 681(2) provides that the will is valid as to form

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[22] For further understanding of principles of territoriality, see G.B. DINWOODIE, Developing a Private International Intellectual Property Law: the Demise of Territoriality, *William and Mary Law Review* 2009.

[23] B.D. NGUYỄN (ed), *Giáo trình Tư pháp quốc tế* (Textbook on Private International Law), Hanoi National University Press2013, p. 184, 202, 204, 205; T.T. BÙI (ed), *Giáo trình Luật Tư pháp quốc tế* (Textbook on Private International Law), Vietnam Educational Press2012, p. 189, 190. V.Đ. ĐỖ / H.Q. MAI (note 4), p. 641- 657.

[24] American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, St. Paul 2008. European Max Planck Group on Conflict of Laws in Intellectual Property, *Principles on Conflict of Laws in Intellectual Property*, available at <http://www.cl-ip.eu/_www/en/pub/home.html>, last visited on 2 March 2017. International Law Association, Intellectual Property and Private International Law, *Washington Conference* 2014, available at <www.ila-hq.org/download.cfm/docid/33B8054F-F87D-4433-A1DC108BF6A08B68>, last visited on 2 March 2017.

[25]Article 680 of the CC 2015.

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if it complies with the law of the country in which the will is made, the law of the country in which the testator resides, the country where the testator holds nationality at moment of making the will or at the time of his or her death, or the law of the country in which the immovable estate is located.

d) Law Applicable to Guardianship

While *lex patriae* is key in determining the legal capacity and legal status of a natural person, guardianship is governed by the law of the country where the ward resides (*lex domicilii*). This provision is different from the provisions in certain bilateral treaties that Vietnam has signed[26] which use *lex patriae* (law of nationality of the guardian) as the applicable law. The drafters consider that the law of the State where the ward resides is more relevant because the guardianship will have impact on daily life of the ward in the place where he or she lives. That is why the applicable law shifts to *lex domicilii*.

e) Law Applicable to Contracts

The provisions of the CC 2015 on the law applicable to contracts are drafted with a strong view to expanding party autonomy. The principle of party autonomy is used as the primary connecting factor for designating the law applicable to contracts in Article 863. It provides that law applicable to contracts is designated by parties, except in three cases: (i) if the object of the contract is an immovable property, the law applicable to the transfer of its ownership rights and/or other property-related rights, lease of immovable property or use of the immovable property as the guarantee for performance of obligations shall be the law of the country where the immovable property is located; (ii) if the applicable law selected by contracting parties in a labor contract or a consumer contract adversely affects interests of employees or consumers as protected under Vietnamese law, Vietnamese law shall prevail and (iii) contracting parties in a contract may agree to change the applicable law provided that such changes do not adversely affect the lawful rights and interests of third parties existing before the change, unless otherwise agreed by the third party.[27] The second exception can be considered as a simple provision on mandatory rules in Vietnamese private international law.

If the parties fail to agree on the applicable law, the law of the country which has the closest relation to the contract shall be applied. In this case, Article 683(2) provides a list of assumptions for the law applicable to different kinds of

[26] At present, Vietnam is signatory to 17 bilateral agreements on mutual legal assistance (Ukraine, Cuba, Czechoslovakia – Czech Republic and Slovakia – Hungary, Poland, Bulgaria, Laos, Mongolia, France, North Korea, China, Taiwan, Belarus, Algeria, Russia, Cambodia, Kazakhstan. Eleven of them contain conflict of laws rules (Poland, Belarus, Hungary, Bulgaria, Cuba, Laos, Mongolia, Russia, Czechoslovakia, North Korea, and Ukraine) which include provisions on guardianship.

[27] Article 683(1) of CC 2015.

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contracts.[28] This provision has taken inspiration from the private international law of other countries and aims to assist the courts in designating the applicable law in absence of a choice of law. Moreover, subsection 3 of this Article establishes an exception clause which provides that if the law of a country other than the country prescribed in that list has a closer relation than the latter, the law of the former country shall prevail.

The law applicable to contracts also governs the form of the contract. In addition, much like the approach relating to the formality of a will, the CC 2015 enhances the chances that a contract will be valid as to form by providing that "[In] cases where the formalities of a contract do not comply with the formal requirements of the applicable law, but the contract nevertheless complies with the formal requirements of the law of the country where the contract is entered into or the law of Vietnam, such contract shall be recognized as formally valid in Vietnam" (Article 683(7)).

f) Law Applicable to Unilateral Acts, Unlawful Enrichment, Performance of Unauthorized Acts and Tort

Unilateral acts shall be governed by the law of place of residence if natural persons carries out these acts or the law of place of establishment if a legal person carries out these acts. Until now, material discussing this issue has been sparing. This provision has remained from the previous Civil Code and might have originally taken inspiration from Article 1217 Russian Civil Code on the Law Governing Obligations Emerging from Unilateral Transactions.[29]

Obligations arising from unlawful enrichment will be governed by the law of the country where the enrichment takes place. This is a new provision which was introduced for the first time into the CC in 2015 following studies into private international law rules in China, Thailand, Russia, Japan and European Union.

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[28] Article 683(2) provides that "The laws of any of the following countries shall be treated as the law of the country with which such contract closely associates:

a) The law of the country where the seller who is a natural person resides or the seller who is a legal person is established for sale contracts;

b) The law of the country where the provider who is a natural person resides or the provider who is a legal person is established for service contracts;

c) The law of the country where the transferee who is a natural person resides or the seller who is a legal person is established for contracts relating to the transfer of usage rights or intellectual property rights;

d) The law of the country where employees frequently perform jobs for labor contracts. If an employee frequently performs jobs in multiple countries or the country in which the employee frequently performs his/her job is unidentifiable, the law of the country with which his/her labor contract closely associates shall be the law of the country where the employer who is a natural person resides or the employer who is a legal person is established.

đ) The law of the country where a consumer resides for consumer contracts."

[29] English version available at <http://jafbase.fr/docEstEurope/RussianCivilCode-Chapter66.pdf>.

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Obligations arising from the performance of unauthorized acts and torts may be governed by the law chosen by the parties, except in cases where the parties to an action in tort have their residence or establishment in the same country, in which case the law of that country will be applied. If the parties fail to agree on the applicable law, the law of the country where the unauthorized act is performed or the law of the country where the consequences of the acts arise is the applicable law correspondingly.

B. Rules on Private International Law in the Civil Procedure Code 2015

Part 7 and Part 8 of the CPC 2015 provide rules on international jurisdiction, procedures for the resolution of civil cases involving foreign elements such as ascertaining the content of foreign law, special provisions relating to service and taking evidence abroad, recognition and enforcement of foreign judgments and foreign arbitral awards.

1. International Jurisdiction

a) Concurrent Jurisdiction

The CPC 2015 divides international jurisdiction into two types: concurrent jurisdiction and exclusive jurisdiction.

Article 469 sets forth the concurrent jurisdiction of Vietnamese courts to resolve civil cases involving foreign elements as following:

> "a) The defendant is an individual who resides, works or lives for a long period of time in Vietnam;
>
> b) The defendant is an agency or organization which is headquartered in Vietnam or the defendant is an agency or organization which has a branch or a representative office in Vietnam, and the dispute is related to the operation of the branch or representative office in Vietnam of such agency/organization;
>
> c) The defendant has assets in Vietnam;
>
> d) In divorce cases, where either party is a Vietnamese citizen or in the case of divorce between foreigners who reside, work or live for a long time in Viet Nam;
>
> e) In civil cases concerning relations which are established, changed or terminated in Vietnam, objects which are located in Vietnam or acts performed in Vietnam;
>
> f) In civil cases concerning relations which are established, changed or terminated abroad but involve the rights and obligations of Vietnamese agencies, organizations and individuals or agencies, organizations and individuals that are headquartered or resided in Vietnam."

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Unlike the designation of applicable law, the basic connecting factor for designating the jurisdiction of the Vietnamese court is the domicile of the defendant. This is a common principle when designating international jurisdiction which expedites the proceedings and facilitates subsequent enforcement. If the defendant is a legal person, the case is under the authority of the Vietnamese court when the defendant is headquartered or has a branch or representative office in Vietnam. If this principle is not satisfied but the defendant owns property in Vietnam, the case also falls under the jurisdiction of the Vietnamese courts.

Divorce cases are always in the interest of the government because of the negative impact they may cause to the society in general. Thus, the CPC 2015 provides a specific rule on divorce cases: if only the plaintiff or the defendant is a Vietnamese citizen (regardless of their residence or domicile), the divorce case is subject to the jurisdiction of the Vietnamese courts. In addition, if both parties are foreigners, the Vietnamese courts will hear the case if the foreign spouses have resided, worked or lived for a long period of time in Vietnam. The words "reside, work or live for a long period of time in Vietnam" refer to habitual residence or domicile in Vietnam. However, neither domicile nor habitual residence are universal concepts. The criteria used to determine whether a foreigner resides, works or lives for a long period of time in Vietnam will hopefully soon be clarified by the Supreme People's Court.

The designation of jurisdiction is also affected by the definition of foreign civil relations in the Civil Code. Article 469(1)(d) of the CPC 2015 provides that civil disputes arising out relations which are established, changed or terminated in Vietnam, objects which are located in Vietnam or acts performed in Vietnam are subject to the jurisdiction of Vietnamese courts.

The final limb of Article 469(1) is intended to cover all other cases having a significant connection with Vietnam which may arise. This last basis of jurisdiction intends to provide Vietnamese people with a last resort jurisdiction if foreign courts or authorities refuse to handle cases which directly affect their rights and obligations. Even foreign parties which reside or have headquarters in Vietnam can take advantage of this provision.

In short, almost all bases of jurisdiction[30] are covered in Article 469 so as to expand the international jurisdiction of the Vietnamese courts. However, it is important to note that there is no provision allowing the Vietnamese courts to rely on *forum non conveniens* and decline jurisdiction, although the Vietnamese courts do have the power to refuse a case according to Article 472 of the CPC 2015 when arbitration agreements and/or forum selection clauses have been concluded or otherwise where a dispute has already been settled by a foreign court, an arbitration tribunal or other foreign competent authority or when the involved parties are eligible for legal exemption. Problems may arise in the future when the Vietnamese courts are unable to deal with the case as efficiently as foreign courts but there is no ground for the Vietnamese courts to decline jurisdiction.

[30] See S.C. McCaffrey/ T.O. Main, *Transnational Litigation in Comparative Perspective. Theory and Application*, Oxford 2010, p. 75-81.

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b) Exclusive Jurisdiction

Exclusive jurisdiction of Vietnamese courts is stipulated in Article 470 of the CPC 2015.[31] "Exclusive" means only given to one particular person or group.[32] However, there is no legal text explaining in detail what the impacts or consequences of exclusive jurisdiction are.[33]As a result, it is not easy to ascertain whether the exclusivity of jurisdiction is absolute or not for the Vietnamese courts vis-à-vis foreign courts, the Vietnamese courts vis-à-vis all foreign adjudicators including arbitration tribunals, or the Vietnamese courts vis-à-vis Vietnamese arbitration tribunals. Failing this, if Vietnam is to base its claim of exclusive jurisdiction on the same grounds as that invoked in other jurisdictions,[34] then it shall consider those matters which are of particular importance to the Vietnamese community and have an overwhelmingly strong connection with this community. One thing is clear: once the Vietnamese jurisdiction is characterized as exclusive, the Vietnamese courts will be unable to recognize and enforce foreign judgments on these matters in Vietnam.

Exclusive jurisdiction in relation to immovables is familiar to the private international law of many countries, perhaps because "[T]he court of the place where the immoveable property is situated is the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices

[31] Article 470 provides that "[1.] The following civil lawsuits involving foreign elements shall fall under the exclusive jurisdiction of Vietnamese courts: a) Civil lawsuits involving rights to immovables in the Vietnamese territory; b) Divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live permanently in Vietnam; c) Other civil lawsuits where parties are allowed to choose Vietnamese Courts to settle according to Vietnamese law or international treaties to which the Socialist Republic of Vietnam is a signatory and parties agreed to choose Vietnamese Courts.2. The following civil cases involving foreign elements shall fall under the exclusive jurisdiction of Vietnamese courts; a) Claims without dispute arising from civil legal relations as specified in clause 1 of this Article; b) Claims for determination of a legal event occurring in Vietnam; c) Declaration of a Vietnamese citizen or a foreigner residing in Vietnam as missing or dead if such declaration is related to the establishment of their rights and obligations in Vietnam, except for cases where international treaties to which the Socialist Republic of Vietnam is a signatory otherwise apply; d) Declaration of a foreigner residing in Vietnam who has limited or no civil capacity if such declaration is related to the establishment of their rights and obligations in Vietnam; đ) Recognition of property in Vietnam as derelict, recognition of the right to ownership of the current manager over derelict immovables in Vietnam."

[32] <http://www.oxfordlearnersdictionaries.com >.

[33] Compare with 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. In this Regulation, the consequences of exclusive jurisdiction are stipulated in several articles (*e.g.* Articles 27 and 31) of this Regulation. See also "Exclusive jurisdiction", in Bryan A. GARNER (ed), Black's Law Dictionary, 10th edn., at p. 981: "A court's power to adjudicate an action or class of actions to the exclusion of all other courts".

[34] A. MILLS, Rethinking Jurisdiction in International Law, *British Yearbook of International Law* 2014, p. 208, available at <https://academic.oup.com/bybil/article/84/1/187/2262836/Rethinking-Jurisdiction-in-International-Law>.

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which are generally those of the State in which the property is situated".[35] Divorce cases when both spouses reside, work or live for a long period of time in Vietnam and one of them is a Vietnamese citizen, recognition of *res nullius* and the right of a person in possession of such property in the territory of Vietnam, and orders pertaining to the legal status and capacity of Vietnamese citizen or foreigners residing in Vietnam but only to the extent that those orders are sought to clarify their rights or obligations in Vietnam are other important issues. These issues remain within the exclusive jurisdiction of the Vietnamese courts as set out in the former Civil Procedure Code.

Interestingly, Article 470(1)(c) refers to the exclusive jurisdiction established by the choice of parties. Even though other laws such as the Law on Investment, the Law on Technology Transfer and the Maritime Code stipulate the right to choose jurisdiction, this is the first time that the CPC has allowed the parties to make a choice of court. Regretfully, there is no other provision on this matter. Thus, for now, the question of how it is limited or what conditions apply to such an agreement have not yet been determined. Normally, the exclusive jurisdiction established by a choice of court will be limited by the domestic rules on exclusive jurisdiction. Thus, the provision on choice of court should be separated from the provision of exclusive jurisdiction. On this issue, the Hague Conference on Private International Law[36] adopted the Convention on Choice of Court Agreements in 2005. It would have been a better approach to introduce similar provisions into the Vietnamese law. Additionally, the exclusive jurisdiction provision of the CPC 2015 also fail to mention standard cases that other countries usually characterize as falling within their exclusive jurisdiction: the recognition and enforcement of foreign judgments in Vietnam, bankruptcy of legal persons established or registered in Vietnam, intellectual property registered in Vietnam, *etc*. These loopholes may be fixed by gap-filling provisions in future laws but such measure will inevitably have the effect of making the rules of Vietnamese private international law more dispersed and less predictable.

c) Other Provisions on Jurisdiction

The CPC 2015 incorporates a provision which retains the jurisdiction of the court even where "during proceedings there is a change of nationality, residence or address of any of the involved parties or new details emerge which would cause such civil case to fall under the jurisdiction of another Vietnamese court or foreign court" (Article 471). This provision, to some extent, keeps the flow of proceedings in process and prevents the interruption caused by changing jurisdiction (except in forum shopping situations). However, should the connecting factor move abroad

[35] Press release No. 51/14, Judgment in case C-438/12, *Irmegard Weber v. Mechtilde Weber*. The exclusive jurisdiction in matters relating to immovable property attributed by the Brussels I Regulation to the courts of a Member State is not affected by the fact that the court of another Member State was first seized. Available at <http://europa.eu/rapid/press-release_CJE-14-51_en.htm>, last visited on March 2, 2017.

[36] Vietnam became a Member of The Hague Conference on Private International Law on 10 April 2013.

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so as to make the dispute fall under the jurisdiction of foreign courts, it would be better to let them deal with the case. However, the jurisdiction of the Vietnamese court will be maintained according to this provision, the new CPC 2015 failing to contemplate *forum non conveniens*.

A significant improvement has been brought to Article 472 which provides for cases where the Vietnamese courts may or have to decline jurisdiction[37]. Most of those cases relate to the comparative jurisdiction of the Vietnamese court and foreign court, including which court has exclusive jurisdiction and which court takes up the case and deals with it first.

Article 472(1)(đ) refers to the judicial exemption of the defendants. Unfortunately, there is no explanation of "judicial exemption". Vietnam is a party of both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations which provide for the judicial exemption of certain diplomatic and consular officials. Foreign States may also afford such defendants enjoyment of the exemption but Vietnam is not party to any treaty on this issue.

2. Procedure for Resolution of Civil Cases Involving Foreign Elements

The CPC 2015 introduces a supplementary part (Part 8) on the procedure relating to civil cases involving foreign elements in order to ensure that the Code is both adapted to specific issues arising from cross-border cases only and consistent with relevant international treaties.

One of the new provisions is Article 473 on requests for information and the determination of domicile of parties residing overseas in the petitions.[38] In

[37] Article 472 (1) provides that "[1.] Vietnamese Courts shall return lawsuit petitions or applications or terminate the settlement of civil cases involving a foreign element if such civil cases fall in concurrent jurisdiction of Vietnamese Courts but fall in any of the following cases: a) Involved parties were agreed to choose dispute settlement methods according to law provisions applicable to civil relationships involving foreign elements and such involved parties have chosen foreign arbitrators or Courts to settle such cases/matters. In case where the agreements to chose foreign arbitrators or Courts are replaced by agreements on choosing Vietnamese Courts, or the agreements to choose foreign arbitrators or Courts are annulled or cannot be executed, or where the foreign arbitrators or Courts refuse to accept the petitions, thus Vietnamese Courts shall have the jurisdiction to settle; b) The civil cases do not fall within the exclusive jurisdiction of Vietnamese Courts specified in Article 470 of this Code and fall in the exclusive jurisdiction of relevant foreign Courts; c) The civil cases do not fall within the exclusive jurisdiction of Vietnamese Courts specified in Article 470 of this Code and have been accepted for settlement by foreign arbitrators or Courts; d) The civil cases are settled by judgments/decisions of the foreign Courts or by foreign arbitrators' awards. If such judgments/decisions or awards are not recognized by Vietnamese Courts, Vietnamese Courts shall have jurisdiction to settle such cases; đ) The defendants are eligible for judicial exemption."

[38] Article 473(1) provides that "[T]he petitions or written requests must state clearly full names, addresses and nationalities of involved parties living overseas enclosed with papers and documents authenticating full names, addresses and nationalities of such involved parties."

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cases that addresses of these parties are not identifiable, the petitioners/requesters may request Vietnamese Courts to request competent authorities of foreign countries to determine the addresses. If the foreign authorities respond to the Vietnamese courts indicating that the address of the party in question residing overseas was not identifiable or there is no response after six months from the day of sending request to the competent foreign authority, the Vietnamese courts shall return such petitions or requests. This provision was added to overcome the difficulties raised by service of judicial documents abroad. In many cases where service of those documents was unsuccessful, the address of the defendant abroad proved to be inaccurate or wrongly written in Vietnamese transcription. A number of countries expressed concern in this regard. For example, Cambodia has sent to Vietnam a list of their cities and provinces in English transcription to facilitate service but there are still many countries which do not use the roman alphabet and for which judicial documents cannot reach defendants who live on their territory. In dealing with cases involving foreign elements, the cooperation of the foreign authorities is needed to determine the address of the parties. Mutual judicial assistance of foreign authorities is possible in so far as it is regulated by international agreements to which Vietnam is a member and the domestic legislation.[39] However, certain countries consider such information as part of the private sphere of the individual and refuse to provide such information to Viet Nam even where they have received a formal request from the Vietnamese courts. Nevertheless, Article 473 provides the petitioners with an additional opportunity to deal with this situation. The petitioners also have other options such as to request that the foreign authorities search for the persons who are absent from their claimed residence or to request that the Vietnamese courts or foreign authorities declare a party missing or dead according to Vietnamese law or the law of the foreign country in question or international treaties to which Vietnam is a signatory.

Since Vietnam is a member of the Hague Convention on Service Abroad of Judicial and Extrajudicial Document in Civil or Commercial Matters 1965, the new provisions of the CPC 2015 (Article 474) also provide for methods of serving documents abroad and handling cases in compliance with the Convention. Service by post is acceptable in Vietnam provided the documents be sent via registered mail with acknowledgment of receipt. The service of documents may also be conducted via electronic means should the parties request it.[40] Under the new CPC 2015, notifications of admission of jurisdiction and dates for opening meetings or Court sessions are incorporated into one document in order to save the time and money associated with serving documents to the parties abroad.

[39] Vietnam has a Law on Mutual Judicial Assistance from 2008, which regulates four areas: mutual judicial assistance in civil matters; mutual judicial assistance in criminal matters; extradition and transfer of sentenced persons.

[40] Further information in Resolution No. 04/2016/NQ-HDTP of the Judges' Council of the Supreme People's Court dated 30/12/2016 on Guidelines for Various Provisions of the Civil Procedure Code; Law on Administrative Proceedings on filing the petition, documents, evidence and issue, serving and notifying documents via electronic means.

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The time limit for appealing against court judgments or decisions is also longer now in relation to lawsuits involving foreign elements where one party failed to enter appearance.[41]

Provisions on the identification and proof of foreign law are also an important innovation. This is the first time that such issues are expressly addressed in the Civil Procedure Code. The idea is to clarify who has to establish the content of foreign law through which means. In general, the judge has such a responsibility. However, if a party to a dispute has validly chosen a foreign law, this party shall be responsible for providing accurate information as to the content of that law. The judges may rely on other means to determine the content of the foreign law by requesting the Ministry of Justice or Ministry of Foreign Affairs or consular offices of Vietnam in the respective foreign country, diplomatic missions of the respective foreign country in Vietnam, competent authorities of foreign countries or agencies, and organizations and individuals specialized in foreign law to provide them with the necessary information. If, during the period of 6 months following the date of request, there is no response from those authorities, bodies or individuals, the courts shall apply Vietnamese law to settle the case.

3. Recognition and Enforcement of Foreign Judgments and Arbitral Awards on Civil Matters in Vietnam

The CPC 2015 has a single part (Part 7) with 41 articles (from Article 423 to Article 463) laying down the rules and procedures for recognition and enforcement of judgments and foreign arbitral awards on civil matters in Vietnam.

The recognition and enforcement of both foreign judgments and foreign arbitral awards is based either on international treaties or on the principle of reciprocity. 17 bilateral agreements involving Vietnam dealing with mutual judicial assistance also contain provisions on the recognition and enforcement of foreign judgments and foreign arbitral awards in civil matters.[42] The New York Arbitration Convention 1958 is also in force in Vietnam. The Vietnamese Constitution and the CPC 2015 give priority to international agreements which regulate the conditions and procedures for the recognition and enforcement of foreign judgments and arbitral awards.[43]On the other hand, the application of principle of reciprocity is still ambiguous. The question of how to determine whether reciprocity exists or not has not been addressed in the CPC 2015.

The scope of the rules on recognition and enforcement of foreign judgments covers not only the judgments or decisions of foreign *courts* but also decisions on

[41] Article 479(3) provides that where the Court conducts the trial in the absence of an involved party who is overseas and no notice has been made regarding the delivery from the competent foreign authority, the time limit for filing an appeal is 12 months from the day on which the judgment is pronounced.

[42] See note 30.

[43] Article 2(2) of CPC 2015 provides that "[T]he Civil Procedure Code applies to the settlement of civil cases involving foreign element(s); where the international treaties to which the Socialist Republic of Vietnam is a signatory provide otherwise, the provisions of such international treaties shall apply."

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personal identity, marriage and family issues emanating from *administrative authorities*. The previous Civil Procedure Code did not have any provision relating to the recognition of such non-judicial decisions made by foreign administrative authorities. This expansion aims to decide cases that have been legally settled before the competent foreign authorities (but not before a court or arbitral tribunal) on the basis of foreign law rather than duplicating proceedings before Vietnamese courts.[44] The CPC 2015 also provides specific catalogues of foreign civil court judgments or decisions (Article 423) and foreign arbitral awards (Article 424) which can be subject to recognition and enforcement in Vietnam.

Creditors, persons with relevant legitimate rights and interests or their lawful representatives have the right to request recognition and enforcement. Furthermore, the CPC 2015 allows debtors or their lawful representatives to request before the Vietnamese courts that civil judgments/decisions not be recognized, except in cases relating to foreign arbitral awards. As the New York Arbitration Convention 1958 has no provision relating to the debtor's request for refusal of recognition and enforcement of the awards, the proposal to allow request for refusal of recognition of arbitral awards was abandoned during the drafting process of the CPC 2015.

The provincial Vietnamese courts only grant recognition and enforcement if the debtor in question is an individual who resides or works in Vietnam, if the debtor is an agency or organization that is headquartered in Vietnam, or if the property of the debtor which is subject to the enforcement of the foreign judgment/decision or foreign arbitral award is located in Vietnam at the time of filing of the petition.

There are certain types of civil judgment/decision by foreign courts or other competent foreign authorities that are automatically recognized in Vietnam, which means the recognition can be carried out without court proceedings. This does not exclude the examination by the Vietnamese administrative authorities to which these foreign decisions are submitted. Article 431 mentions two types of cases: (i) cases which are specified in international treaties to which Vietnam is a party and (ii) foreign decisions pertaining to marriage and family issues made by foreign courts or other competent foreign authorities that do not require enforcement in Vietnam and for which no application for non-recognition has been filed in Vietnam. This includes *e.g.* decisions relating solely to divorce (rather than to property, maintenance obligations or paternity). However, in order to recognize a marriage and add it to the Civil Registry, the competent authority of Vietnam also has to check that recognition would not be in violation of the Vietnamese Law on Marriage and Family, in which case it may not be registered in the Civil Registry.[45]

[44] Many Vietnamese women marry foreigners and live abroad. Most of them marry Chinese, Taiwanese or Korean men. In Taiwan, if both parties agree to divorce, the administrative authority will recognize their divorce by administrative decision. Under the new Civil Procedure Code, Vietnamese women can seize the court to recognize and enforce such decision.

[45] Article 37 Decree No. 123/2015/ND-CP dated 15/11/2015 on Guidelines for Various Provisions and Implementation Mechanisms of the Law on Civil Status.

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In general, the limitation period for a petition for recognition or non-recognition of the foreign judgment or decision with the requirement of enforcement in Vietnam is three years from the date on which the judgment/ decision or arbitral award takes legal effect. However, in the case of applications for refusal of a foreign judgment or decision without requirement of enforcement in Vietnam, the limitation period is only six months.

The CPC 2015 sets out the formalities for an application seeking recognition or non-recognition. The request shall be in the right form and be accompanied by a number of documents.[46] These documents should be authentic and accompanied by notarized or Vietnamese translations which should be certified by consular offices except where otherwise provided by the Vietnamese law or international treaties to which Vietnam is a signatory.

When considering an application for recognition and enforcement or non-recognition, courts shall not enter into the merits of the case but they are entitled to assess the civil judgment/decision of the foreign court or foreign arbitral award and accompanying papers and documents against the backdrop of the provisions of the CPC 2015, other relevant domestic legal provisions and international treaties to which Vietnam is a signatory, in order to form the basis for the issuance of the decision to recognize and enforce such judgment/decision or award.

The CPC 2015 also specifies the grounds for non-recognition of foreign judgments/decisions and arbitral awards.[47] Essentially, they are similar to those

[46] In the case of foreign judgments, the documents which need to be submitted are the following: "a) Originals or certified true copies of the judgment/decision issued by the foreign Court; b) Documents made by the foreign Court or other competent foreign agencies certifying that such judgment/decision has taken legal effect, has not expired and should be enforced in Vietnam, except where these details have already been clearly stated in the judgment/decision; c) Documents made by the foreign Court or other competent foreign agencies certifying the lawful delivery of such judgment/decision to the judgment debtors who have to execute such judgments/decisions; d) In cases the foreign Court issue the judgment in the absence of the judgment debtors or their lawful representatives, documents made by the foreign Court or other competent foreign agencies certifying that they have been duly summoned are required." (Article 434). In cases of foreign arbitral awards, only the originals or certified true copies of the foreign arbitrator's award, the originals or certified true copies of arbitration agreements between parties are needed (Article 453).

[47] Article 439 set out the specific cases in which civil judgments/decisions of foreign Court that shall not be recognized or enforced in Vietnam. Here is the text: Civil judgments/decisions of foreign Court that shall not be recognized or enforced in Vietnam: 1. Civil judgments/decisions of foreign Courts that do not satisfy one of conditions for being recognized provided for in International treaties to which the Socialist Republic of Vietnam is a signatory. 2. Civil judgments/decisions that have not taken legal effect as provided for in law of the home countries of the Courts issuing them. 3. Judgment debtors or their lawful representatives are absent from the Court sessions of the foreign Courts because they have not been duly summoned or documents of the foreign Courts have not been delivered to them in a reasonable time period as prescribed in law of home country of such foreign Court so that such persons can exercise the right to self-defense. 4. The foreign Courts that have issued the judgments/decisions do not have jurisdiction to settle civil cases as prescribed in Article 440 of this Code. 5. Such civil cases have been settled in legally effective civil judgments/decisions of Vietnamese Courts, or before the foreign agencies in charge accepted such cases, they have been accepted and are being proceeded by Vietnamese

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mentioned in Article V of the New York Arbitration Convention 1958. However, the CPC 2015 is silent as to who has the obligation to prove the existence of a ground for non-recognition of a foreign judgment.

The two-tier adjudication process (a first instance decision on recognition and a possibility for the losing party to seek an appellate decision) is also applied to disputes on the recognition and enforcement of foreign judgments/decisions or arbitral awards. This issue sparked an intensive debate among scholars and drafters of the CPC 2015. Some argued that a special procedure without appeal should be preferred in order to ensure enforcement without delay. Others feared that the decisions of lower courts may have errors and, as a result, a review mechanism should be available, especially in the light of treaties to which Vietnam is a party, most notably bilateral investment treaties. In the end, the latter view prevailed and the two-tier adjudication mechanism was introduced into the CPC 2015.

Foreign judgments/decisions or arbitral awards that are recognized and enforced in Vietnam shall have the same legal effect as those attaching to decisions by the Vietnamese courts and shall be enforced according to procedures for enforcement of a civil judgment. There is a single Law on Civil Enforcement[48] in Vietnam, which provides for specific principles and procedures for enforcement of judgments/decisions of competent authorities in Vietnam, including foreign judgments/decisions or arbitral awards.

III. Rules on Private International Law in Other Legal Instruments

There are several individual statutes which also contain provisions relating to certain aspects of private international law such as the international jurisdiction of Vietnamese courts, right of parties to choose the court or applicable law, and conflict of laws rules in specific areas. With the aim of providing a broader picture of Vietnamese private international law, this part will make a brief introduction into certain provisions found in these laws.

Courts, or such civil cases have been settled with civil judgments/decisions issued by Courts of third countries which have been recognized and allowed to be enforced by Vietnamese Courts. 6. Time limit for enforcement of judgments prescribed in law of the home countries of the Courts issuing such judgments/decisions or in Vietnam's law on civil judgment enforcement has been exceeded. 7. The enforcement of the judgments/decisions has been canceled or terminated at the home country of the Court issuing such judgments/decisions. 8. The recognition and enforcement of civil judgments/decisions of foreign Courts in Vietnam are contrary to basic principles of law of the Socialist Republic of Vietnam." and Article 459 provides cases of non-recognition of foreign arbitrator's awards.

[48] The latest updated version is the Law on the Amendment and Supplementing of Various Articles of the Law on Civil Enforcement adopted on 25 November 2014.

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A. Family Law

The Law on Marriage and Family 2014 has one provision defining marriage and family relations involving foreign elements (Article 3(25)). This article is based on the definition of the previous law which considered an overseas Vietnamese citizen as a special subject of legal relations. In the CC 2015, this special treatment no longer exists. The principle is now that if the overseas Vietnamese citizen has Vietnamese citizenship, they must be treated in the same way as any other Vietnamese person. This approach clarifies the status of overseas Vietnamese citizens and also prevents forum shopping or law shopping. However, since marriage and family relations are sensitive issues to society in general and taking into account that most couples go abroad to live together after their marriage, it would appear difficult to change the special status of overseas Vietnamese citizens or Vietnamese people who have habitual residence abroad at least in the family law area in the near future.

The main principles relating to applicable law provided in the Law on Marriage and Family 2014 are similar to the CC 2015. However, they clarify the fundamental principles "laid down in Article 2 of this Law" as an exception to the application of foreign law. They accept *renvoi I* but remain silent on *renvoi II*.[49] Where a treaty to which Vietnam is a contracting party refers to the application of a foreign law "such foreign law shall apply". However, whether applicable law in this case is substantive law or conflict of laws rules or both is still ambiguous.

The main rules on conflict of laws are *lex domicilii* and *lex patriae*. *Lex domicilii* deals with divorce (law of the place of co-residence), maintenance obligations (law of the place where the maintenance creditor resides), while *lex patriae* governs the conditions of marriage. However, if their marriage is celebrated before a Vietnamese authority, the foreigner shall also comply with the conditions for marriage laid down by Vietnamese law. However, the Law on Marriage and Family does not clearly provide applicable law to identify parents and children involving foreign elements, paternity and maternity, the relationship between members in the family, the matrimonial property regime, the legal consequences for co-habiting unmarried couples.

International jurisdiction is also provided in this statute with reference to the relevant laws: the Law on Civil Status and the Civil Procedure Code. The Law supplements special jurisdiction for district-level Vietnamese courts of localities where Vietnamese citizens reside. These courts are competent to annul illegal marriages, settle divorce cases, settle disputes over the rights and obligations of the husband and wife, parents and children, recognition of parents, children, child adoption and guardianship between Vietnamese citizens residing in border areas and citizens of neighboring countries living in border areas of Vietnam.

The recognition of foreign judgments and decisions of competent foreign authorities on marriage and family are divided into two catalogues. According to Article 125, enforcement and recognition of foreign judgments in Vietnam is governed by the Civil Procedure Code. Recognition of foreign judgments which are not requested for enforcement in Vietnam or for non-recognition in Vietnam

[49] For this terminology, see II.A.1.c) above.

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and decisions of competent foreign authorities on marriage and family matters concluded by registration in a civil registry (automatic recognition) is regulated by Government decree.[50]

B. Investment Law

Where at least one party is a foreign investor or a domestic business organization controlled by foreign investors as defined in Article 23(1) of the Investment Law 2014,[51] this statute allows parties to reach an agreement on the application of foreign law or international practice provided that such agreement does not contravene Vietnamese law. We can see here a departure from the provisions of the CC 2015. Article 80 of the CC 2015 states that "[E]ach legal person established in accordance with Vietnamese law shall be considered a Vietnamese legal person." However, legal entities that are controlled by foreign investors are considered as foreign entities in the field of investment. This broader scope of "non-domestic investors" affords investors a greater scope to choose the applicable law. The phrase "if such agreement does not contravene Vietnamese law" is a challenge for investors. They are likely to be compelled to find out whether the law allows parties to agree on application of foreign law and whether the content of that agreement is compatible with Vietnamese law while there is no specific provision other than provisions of this statute allowing the parties to choose in the law applicable to investment contracts.

Jurisdiction is provided in Article 14(3), which determines that Vietnamese courts or arbitration tribunals, foreign arbitration tribunals, international arbitration tribunals or ad hoc arbitration tribunals have jurisdiction over cases arising from investment disputes to which at least one party is a foreign investor or a business organization defined in Article 23(1) of this statute. Foreign courts are not mentioned because it is assumed that their jurisdiction will be provided in the law of their country as constituent part of their sovereignty. However, one question which may arise is that if the foreign courts settle such disputes will Vietnamese courts recognize such judgments or decisions of foreign courts? Any remaining

[50] The Decree No.126/2014/NĐ-CP dated December 31, 2016 detailing some articles and implementing measures of the Law on Marriage and Family 2014 (provisions relating to family relations with foreign elements were amended by Decree No. 123/2015/ND-CP dated 15/11/2015 on Rules of Interpretation and Implementation of the Law on Civil Status).

[51] Article 23(1) of the Law on Investment 2014 provides that "[W]hen establishing business organizations, contributing capital, buying shares or capital contributions of business organizations; making investments under business cooperation contracts in one of the following cases, the foreign investor must satisfy the conditions and follow investment procedures applied to foreign investors:

a) 51% of charter capital or more is held by foreign investors, or the majority of the general partners are foreigners if the business organization is a partnership;

b) 51% of charter capital or more is held by the business organizations mentioned in Point a of this Clause;

c) 51% of charter capital or more is held foreign investors and the business organizations mentioned in Point a of this Clause."

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disputes shall be settled by the Vietnamese courts or Vietnamese arbitration tribunals. Disputes between a foreign investor and a regulatory body may be settled by other dispute settlement bodies if the parties so agree or if international treaties to which Vietnam is a signatory so prescribe.[52]

C. Law on Technology Transfer and Law on Commerce

Article 4(3) of the Law on Technology Transfer 2006 specifies the law applicable to technology transfer activities involving foreign elements. The parties may agree on the application of foreign law and international practices provided that such foreign law and international practices do not contravene the basic principles of Vietnamese law. If there is no agreement and a dispute arises between parties, then that dispute shall be settled in accordance with Vietnamese law. The prerequisite in applying foreign law and international practices is different from that of the CC 2015. The requirement that the content of the foreign law and international practices do not contravene the basic principles of Vietnamese law is unrealistic because it is clear that different legal systems or mechanisms are based on different grounds, and thus that differences and contraventions appear frequently. Moreover, to ascertain whether the content of particular provisions of foreign law or rules of international practices and usages are inconsistent with the basic principles of Vietnamese law at the moment of conclusion of the contract when the dispute has not occurred is impossible. This shortcoming can be partly remedied by Article 663 of the CC 2015 which allows the provisions on general principles on choice of law to prevail over the Law on Technology Transfer in this situation.

Concerning jurisdiction, this statute not only provides for the jurisdiction of dispute settlement bodies, which states that domestic or overseas arbitration centers or courts can settle disputes relating to technology transfer activities, but also confirms the right for the parties to agree on a dispute settlement body (Article 56). For disputes arising from technology transfer activities where either party is a foreign organization or individual, the parties may agree to choose a dispute settlement body and the applicable law for dispute settlement as specified in Article 4 of this Law.

Similarly, Article 5(2) of the Law on Commerce 2005 also allows parties to commercial transactions involving foreign elements to choose foreign laws or international commercial practices as applicable law with the same condition as provided in the Law on Technology Transfer.

D. Law on Civil Aviation

The Law on Civil Aviation 2006 (amended in 2014) is one of a few legal instruments apart from the CC 2015 and the CPC 2015 which contains various provisions relating to private international law. It may result from the characteristics of

[52] The civil characteristic of disputes between investors and regulatory body is on debates and usually this kind of dispute is categorized as administrative cases.

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civil aviation in which cross-border transportation along international routes is widespread. Thus, applicable law and jurisdiction come into question more often.

The Law on Civil Aviation provides conflict of laws rules on specific issues. Under Article 4, the law of the State in which an aircraft's nationality is registered shall apply to social relations arising on board the aircraft in flight and determining rights to an aircraft. The law of the State in which an aircraft is salvaged or preserved is the law applicable to the payment of remuneration for the salvage or preservation. The law of the State in which an accident occurs as a result of aircraft collision or interference or in which an aircraft in flight causes damage to third parties on the ground shall apply to the compensation for damage. However, the formal requirements of contracts concerning the rights to an aircraft will be regulated only by the law of the State where the contract has been signed. This provision is more limited than the provision on the law applicable to contractual formalities provided in the CC 2015. Quite apart from this, it is surprising that there is no provision on the law applicable to the transportation contract itself.

As to jurisdiction, Article 185 provides that the claims of third parties seeking compensation shall be brought before the court of the State where the damage occurred, unless otherwise provided by the international conventions to which Vietnam is a contracting party. However, Article 172 only prescribes the jurisdiction of Vietnamese courts over international air transportation disputes. Even though Vietnam is not signatory of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the provisions found in Article 172 of the Law of Civil Aviation on jurisdiction are similar to those of Article 33 of the 1999 Montreal Convention. We may therefore speculate that Vietnam could become a Member in the future.

E. Maritime Code

Much like the Law on Civil Aviation, the Maritime Code 2015 has several articles relating to private international law in both aspects: conflict of laws rules and jurisdiction.

The law of the flag State governs most legal relations concerning ownership of property on board seagoing vessels, charter parties, crew employment contracts, contracts of carriage of passengers and luggage, the distribution of salvage remuneration between the owner and crew of the salvaged ship, the recovery of property sunk on the high seas or incidents occurring on board seagoing vessels on the high seas. Any legal relation concerning a common loss shall be subject to the laws effective in the location where a ship ends its journey immediately after such loss occurs. The law of the country where a maritime accident, collision or emergency occurred in its internal or territorial waters shall apply to legal relations concerning these events, but if these events take place on the high seas, the applicable law is the law of the State whose dispute settlement body is first to handle the proceedings or the law of common flag State if the involved seagoing vessels have the same nationality. In particular, Article 3(4) of the Code provides that "Any legal relation concerning a freight shipping contract shall be governed

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by the law of the State to which freight is shipped as agreed upon in this contract". Article 5 provides parties to contracts concerning marine operations with the right to enter into private negotiations unless otherwise restricted by the Code (subsection 1) and also, where at least one party is an overseas organization or individual, allows such parties to choose the applicable law and a dispute settlement body (subsection 2). It is unclear whether Article 3(4) is an exception to Article 5 or if it is only applied when parties have not made any choice. Article 5(3) of this Code once again stipulates the conditions for application of foreign law as the same as those provided in the Law on Technology Transfer which requires that the chosen foreign law does not contravene the fundamental principles of Vietnamese law.

Regarding jurisdiction, parties to a maritime contract where at least one party is a foreign organization or individual can choose an overseas dispute settlement body. The Code also clarifies the jurisdiction of Vietnamese courts where parties to maritime disputes are foreign individuals or organizations. The Vietnamese courts may hear such proceedings if the parties choose a Vietnamese court as the dispute settlement body in a written agreement, if the grounds for establishment, modification or termination of the relations among the parties to such disputes comply with Vietnamese law, or if the property connected with such relations is located in Vietnam.

F. Law on Commercial Arbitration

The Law on Arbitration 2010 sets out a number of flexible provisions on applicable law. It provides that for disputes involving foreign elements, the arbitration tribunal shall apply the law chosen by the parties. In cases where the parties have not made any agreement on the applicable law, the arbitration tribunal shall decide to apply the law which it considers the most appropriate. The arbitration tribunal may apply international customs to resolve the dispute at hand where the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, provided that such application, or the consequences of such application, are not contrary to the fundamental principles of the law of Vietnam (Article 14).

Concerning jurisdiction, the Law on Commercial Arbitration has one article designating which court has jurisdiction over arbitration activities (Article 7). This Article also affords the parties a wide range of rights to choose a court which has competence over arbitration activities. If the parties fail to agree, then the specific rules of court jurisdiction are applied.

IV. Conclusion

Following the adoption of the 2013 Constitution, there has been a vast overhaul of the Vietnamese legal system, including private international law. Crucial rules on private international law have been codified and stipulated in the Civil Code 2015 and Civil Procedure Code 2015. These new rules are the result of efforts to bring Vietnamese private international law closer to the international standards and

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satisfy the needs of practitioners. Moreover, certain rules found in international treaties to which Vietnam is not a signatory, such as the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air or the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, have been incorporated into Vietnamese laws which, to some extent, facilitate Vietnam's proactive international integration.

Nevertheless, the codification of private international law in Vietnam has not always proved to be adequate where the relevant private international law provisions are scattered across a variety of different pieces of legislation. The strength of private international law in Vietnam may then be reduced by gaps, overlaps and contradictions and, at the very least, the inclusion of private international law rules in various different legal instruments may downplay their importance. In addition, uncertainty relating to jurisdiction, the conditions for application of foreign law, or recognition and enforcement of foreign judgments still perplex legal practitioners, judges and legislators.

As we have seen in the above analysis, the conditions for application of foreign law to civil relations involving foreign elements still vary depending on the legal instrument in question. Although the Civil Code 2015 sets out some common principles, it may be unclear whether the principle of *lex specialis derogat legi generali* will puzzle competent authorities or otherwise cause them to forget to apply the prevailing principles of the Civil Code 2015. In addition, there is a gap in the Code between the rules relating to jurisdiction and rules in relation to the conflict of laws. Such gap does not facilitate comfort and efficiency when applying law and handling the cases. The recognition and enforcement of foreign judgments and jurisdiction are also compartmentalized as if they have little relevance to each other, though they are both drafted into the Civil Procedure Code 2015.

Following its accession to The Hague Conference on Private International Law in 2013, Vietnam recently planned to begin participating in the International Institute for the Unification of Private Law (UNIDROIT) in 2018.[53] Its participation in these international organizations promises a bright future for further development of private international law in Vietnam. On the basis of the Government's policy of promoting Vietnam's international integration[54] and improving the Vietnamese legal system, the next steps for development should lead to a single code on private international law in the near future.

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[53] Bộ Tư pháp làm việc với IDLO và UNIDROIT về Kế hoạch hợp tác 2017-2018 (Ministry of Justice worked with IDLO and UNIDROIT on Cooperation Plan in 2017-2018), available at <http://www.moj.gov.vn>, last visited on 2 March 2017.

[54] According to Government Resolution No. 31/NQ-CP dated 13/5/2014 on the Working Plan of the Government to Implement Resolution No. 22-NQ/TW dated 10/4/2013 of Politburo of the Communist Party; Decision of the Prime Minister No. 251/QD-TTg dated 13/2/2014 Issuing the Government's Plan to Implement the 2013 Constitution; Decision of the Prime Minister No. 1440/QD-TTg dated 16/8/2013 Issuing Plan to Exercise the Member's Rights and Obligations of Vietnam in The Hague Conference on Private International Law, the Ministry of Justice of Vietnam is assigned to research the possibility to develop a Law on Private International Law from 2015- 2016 and propose to add this law to the Legislative Program of the National Assembly in the period of 2016-2020.

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MATTERS OF SUCCESSION UNDER TURKISH PRIVATE INTERNATIONAL LAW

Ceyda SÜRAL*

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I. Introduction

In today's globalized world where people can freely pursue their lives in more than one country, establish family relationships, and make investments in different countries, it is not unlikely that, when a person dies, this person or his or her heirs are foreigners to the country of death or to the country where that person left property. This goes for Turkey too. Taking into consideration that many Turkish citizens emigrate to foreign countries, as well as the many transnational marriages in which one of the spouses has Turkish nationality, or the many foreigners who buy property in Turkey, it is not unlikely that the deceased or his or her heirs are foreigners or habitually resident in a foreign country. Furthermore, there may be

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 371-391
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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property within the estate that is located abroad or cases where the disposition of property upon death has been established abroad.[1]

In such cases, the rules of Turkish private international law come under analysis in determining the law applicable to succession, in establishing whether or not the Turkish courts are authorized to decide upon matters of succession as well as whether or not foreign judgments qualify for recognition and, as the case may be, enforcement in Turkey. The purpose of this study is to provide information on these matters and to seek answers to the relevant questions.

These issues are addressed by the Turkish Private International Law Act ("PILA"). The former version of the PILA entered into force in 1982, followed by a reform in 2007.[2]

II. Applicable Law in Matters of Succession

A. Law Applicable to Matters of Succession in General

According to Article 20(1) of the PILA, matters of succession shall be governed by the national law[3] of the deceased. However, Turkish law shall be applicable over immovables located in Turkey.[4]

Therefore, it is possible for Turkish courts to apply more than one law to matters of succession. If the deceased is a foreigner and has immovable property in Turkey, Turkish law will apply with regard to the Turkish immovables and the national law of the deceased will apply for the rest of his or her estate.[5]

The nationalities of the heirs are not taken into consideration. Even if all heirs are Turkish, foreign law applies if the deceased is a foreigner. Likewise, if

[1] E. NOMER, *Devletler Hususi Hukuku*, 21th edn., Beta 2015, p. 285; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE, *Milletlerarası Özel Hukuk,* 5th edn., Vedat Kitapçılık 2016, p. 210.

[2] OG 12 December 2007 No. 26728.

[3] *Renvoi* is excluded in matters of succession according to Art. 2(3) of the Turkish PILA. Therefore, any reference to any law shall be understood as reference to the substantive law.

[4] The 2nd Civil Chamber of the Court of Cassation, in its decision dated 29.11.2004, annulled the decision of the court of first instance that had refused to determine the heirs and their corresponding shares due to the fact that the deceased was a Bulgarian citizen. The 2nd Civil Chamber stated that the heirs and their respective shares were to be determined in accordance with the law designated by Art. 20 of the PILA. 2. HD., E.2004/12300, K.2004/14076, T. 29 November 2004. See N. EKŞI, *Yargıtay Kararları Işığında Milletlerarası Miras Hukuku,* Beta 2013, p. 35-36.

[5] A. ÇELIKEL/B. ERDEM, *Milletlerarası Özel Hukuk,* 14th edn., Beta 2016, p. 306; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 212.

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the deceased is Turkish[6] then Turkish law shall apply even if all the heirs are foreigners.[7]

The determination of the statutory heirs, their respective shares, property falling within the scope of the estate, whether an embryo or an absent person has succession rights, the causes and consequences of disinheritance, and reserved shares are subject to the law provided by Article 20(1).[8]

The position of the surviving spouse following the death of the other spouse, will not only be a matter of succession but will also be relevant with respect to the matrimonial property regime.[9] Under some legal systems, the living spouse has a succession right whereas, under other legal systems, he is only entitled to a part of the property as a result of termination of the matrimonial property regime. Therefore, in order to determine the position of the surviving spouse, the law applicable to the matrimonial property regime first needs to be determined.[10] After the surviving spouse gets his share from the matrimonial property, the estate will be distributed to the heirs according to the law applicable to succession. Some uncertainties may occur if the law applicable to succession and the law applicable to the matrimonial property regime are different laws. For example, under Turkish law, the participation in acquired property regime is valid if there is no agreement between the spouses to the contrary. The spouse additionally has a succession right. Some foreign laws, for example Swedish law, accept the integrity of property for the spouses, but the spouse has no succession right. Assuming that the spouses chose Swedish law to apply to their matrimonial property regime and the Turkish spouse died, the surviving Swedish spouse will get his share of the matrimonial property according to Swedish law, but he will also have a succession right according to Turkish law, the national law of the deceased. Therefore, he will be entitled to a larger proportion of the property compared with what he would have received had only one legal system been applied. Such result is obviously to the detriment of the rest of the heirs. If the spouses chose Turkish

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[6] Where the deceased has more than one nationality, one of which is Turkish, his Turkish nationality will prevail and Turkish law will apply even where the deceased had a closer connection with his foreign nationality, because for example he was resident abroad, his heirs do not possess Turkish nationality, most of his estate is located abroad etc. (Art. 4(1)(b) PILA).

[7] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 214.

[8] E. NOMER (note 1), at 287; A. ÇELIKEL/ B. ERDEM (note 5), at 307; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 215; R. AYBAY/ E. DARDAĞAN, *Uluslararası Düzeyde Yasaların Çatışması,* 2nd edn., İstanbul Bilgi Üniversitesi Yayınları 2008, p. 233; N. EKŞI (note 4), at 39; V. DOĞAN, *Milletlerarası Özel Hukuk*, 2nd edn., Seçkin 2013, p. 317.

[9] For further information on the law applicable to matrimonial property regimes under Turkish law, see G. ERSEN PERÇIN, *Milletlerarası Özel Hukuk Bakımından Mal Rejimleri,* XII Levha 2014.

[10] According to Art. 15(1) of the PILA, the spouses may designate one of their national laws or the law of the place where one of them is habitually resident. In the absence of such a choice of law, the law of common nationality of the spouses at the time of marriage or, failing this, the law of the place where they have their mutual habitual residence at the time of marriage or, failing this, Turkish law shall apply to their matrimonial property.

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law for their matrimonial property regime and the Swedish spouse died, the living Turkish spouse would be entitled to his share of the matrimonial property in accordance with the rules governing the participation in acquired property regime, but he will not be entitled to any succession right pursuant to Swedish law, the national law of the deceased. It has been suggested that in such cases, in order to prevent unfair outcomes, the Turkish judge should choose one law and apply it to both legal issues.[11] This approach may indeed lead to just and equitable solutions.

B. Law Applicable to the Opening of Succession, Transfer to the Heirs and Sharing-Out of the Estate

Article 20(2) of the PILA restricts the scope of application of the national law of the deceased. The law of the place where the estate is located shall govern the opening of succession, the transfer to the heirs, and the sharing-out of the estate. This provision exists for reasons of practicality; it is likely that these issues will be regulated very differently under different laws and, as regards property located in another country, it is impossible to ensure the application of Turkish law or the national law of the deceased.[12] For example, the foreign law may require the appointment of an administrator to the estate, whereas in Turkish law no such legal procedure is required. However, if the deceased is Turkish but has assets in a foreign country whose law requires the appointment of an administrator, it is not foreseeable that anything other than this law will be applied, *i.e.* an administrator will be validly appointed for the transfer of assets to the heirs.

Under Turkish law, death, absence or presumed death of a natural person[13] is required to trigger the opening of the succession.[14] This is true of most modern legal systems and therefore questions of conflict of laws will generally not arise.[15] Other causes such as lifelong imprisonment or religious death will not be applied by the Turkish courts as they will be deemed contrary to Turkish public policy.[16]

Under Turkish law, the heirs of the deceased shall be entitled to the whole of the estate *ipso jure* without making any declaration as to acceptance.[17] However, several legal systems require acceptance by the heirs. Under yet other systems, including English law, one is required to apply for a grant of representation and an

[11] V. DOĞAN (note 8), at 319-320.

[12] G. TEKINALP, *Milletlerarası Özel Hukuk Bağlama Kuralları,* 11th edn., Vedat Kitapçılık 2011, p. 293; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 217.

[13] The conditions of absence and presumed death shall be governed by the national law of the relevant person. However, if there is property located in Turkey or one of the heirs is a Turkish citizen, the person can be declared absent or presumed dead according to Turkish law (Art. 11 PILA).

[14] Z. İMRE/ H. ERMAN, *Miras Hukuku,* 12th edn., Der Yayınları 2016, p. 285.

[15] E. NOMER (note 1), at 286; A. ÇELIKEL/ B. ERDEM (note 5), at 310.

[16] G. TEKINALP (note 12), at 301; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 218; R. AYBAY/ E. DARDAĞAN (note 8), at 236; N. EKŞI (note 4), at 45.

[17] Z. İMRE/ H. ERMAN (note 14), at 283; R. SEROZAN/ B.İ. ENGIN, *Miras Hukuku,* 4th edn., Seçkin 2014, p. 411.

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appointed personal representative clears the estate of debts, duties and expenses and distributes the remaining part of the estate among those who are entitled to it.[18] The law of the place where the property is located shall determine the procedure applicable to the transfer of the relevant property to the heirs. In other words, the law of the place where the property is located shall decide whether the heirs will *ipso jure* be entitled to the estate or whether the appointment of a personal representative is necessary.[19]

It is clear that the requirement of a declaration of acceptance and its validity is within the scope of transfer and thus subject to the law of the place where the property is located.[20] The validity of a declaration concerning waiver of succession is also deemed to be within the scope of transfer by some scholars,[21] whereas others claim that it is within the scope of Article 20(1) since, under Turkish law, the waiver takes place after the transfer is concluded.[22] The former opinion, however, states that the transfer of succession depends on its acceptance and shall be deemed to be waived if not accepted within a certain period of time. In other words, the acceptance and waiver under such laws are unified for the purposes of the transfer. Thus, the waiver shall be deemed as part of the transfer and subject to the law of the place where the property is located and not to the national law of the deceased.[23]

Under Turkish law, before the sharing-out of the estate, a community of heirs is established, all of whom jointly and mutually own the estate and are responsible for its obligations.[24] The transfer of shares and the scope of liability of the heirs for the obligations of the estate are all part of the sharing-out stage and subject to the law of the place where the property is located.[25]

C. Estate with No Beneficiary

According to Article 20(3), an estate which has no beneficiary located in Turkey shall belong to the Turkish state.[26] It will be the national law of the deceased and/or

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[18] D. MC CLEAN/ V. RUIZ ABOU-NIGM, *The Conflict of Laws,* 8th edn., Thomson Reuters 2012, p. 457.

[19] E. NOMER (note 1), at 286.

[20] For the opposite view, see A. ÇELIKEL/ B. ERDEM (note 5), at 311.

[21] E. NOMER (note 1), at 286; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 221; R. AYBAY/ E. DARDAĞAN (note 8), at 236; V. DOĞAN (note 8), at 324.

[22] A. ÇELIKEL/ B. ERDEM (note 5), at 309; G.TEKINALP (note 12), at 295; N. EKŞI (note 4), at 43.

[23] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 221.

[24] Z. İMRE/ H. ERMAN (note 14), at 405; R. SEROZAN/ B.İ. ENGIN (note 17), at 471.

[25] E. NOMER (note 1), at 286; A. ÇELIKEL/ B. ERDEM (note 5), at 311; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 223; R. AYBAY/ E. DARDAĞAN (note 8), at 237; V. DOĞAN (note 8), at 325-326.

[26] It must be noted that there may be different rules in certain bilateral consular agreements. The Consular Agreement between Turkey and Turkmenistan prescribes that the consulate officers of the country of which the deceased was national may require the

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Turkish law (on immovable property located in Turkey) that decide whether the estate has no beneficiary.[27] However, once it has been decided under the applicable foreign law that the estate has no beneficiary, then any rule of the relevant foreign law pertaining to estates without beneficiary (typically providing that the estate is to be inherited by the foreign state) will not be applied and Article 20(3) will prevail.[28]

D. Law Applicable to Disposition of Property upon Death

The law applicable to disposition of property upon death is also covered within the scope of the national law of the deceased. Therefore, the substantive validity and consequences of disposition of property upon death, validity of a conditional disposition of property upon death, possibility to determine substitute beneficiaries, causes and consequences of actions for reduction of shares entitled as a result of dispositions of property upon death, shall all be governed by the national law of the deceased.[29] However, there are special rules provided for the legal formalities and the capacity to make dispositions of property upon death.

Article 20(4) makes a reference to the general rule, Article 7 of the PILA, on the law applicable to legal formalities. Accordingly, the formalities required of a legal transaction shall be governed by the law of the place where the transaction is conducted (*locus regit actum*) or the law otherwise applicable to the merit of the dispute (*lex causae*). Article 20(4) introduces another option: disposition of property upon death shall be valid as regards form if its form complies with the national law of the deceased.

Turkey is a party[30] to the 1961 Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions.[31] Forty-four states are party to

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delivery of any estate property that is deemed trivial because it is below a certain value. This provision was the subject of a decision by the 2nd Civil Chamber of the Court of Cassation. 2. HD., E.2009/16487, K.2010/20342, T. 6 December 2010. See N. EKŞI (note 4), at 87-88.

[27] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 224.

[28] A. ÇELIKEL/ B. ERDEM (note 5), at 312.

[29] A. ÇELIKEL/ B. ERDEM (note 5), at 316; G. TEKINALP (note 12), at 298; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 225; R. AYBAY/ E. DARDAĞAN (note 8), at 234; V. DOĞAN (note 8), at 322.

[30] Turkey is also party to the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, along with 11 other states. This Convention allows a testator to register his will with the competent authorities not only in the State of his residence, but also in other signatory States. The Convention provides that each Party shall establish or appoint one or more bodies responsible for the registration provided for by the Convention. These bodies will be in charge, after the death of the testator, of answering requests for information providing from the persons concerned. Each Party appoints a national body which shall facilitate the international co-operation. See <http://www.conventions.coe.int/Treaty/en/Summaries/Html/077.htm>.

[31] Turkey reserves (i) the right to determine in accordance with the *lex fori* the place where the testator had his domicile; (ii) the right not to recognize testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other

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this Convention.[32] However, the application of the rules on conflicts as laid down in the Convention shall be independent of any requirement of reciprocity (Article 6(1)). Therefore, Turkish courts are obliged to apply this Convention in order to determine the applicable law to the formal requirements of testamentary dispositions within the meaning of this Convention.[33] Consequently, Article 20(4) is only applicable in regards to the form of agreements on succession (*Erbverträge, pactes successoraux*).[34]

According to Article 20(5), the capacity of the person to make a disposition of property upon death shall be governed by the national law of the deceased at the time when he made the relevant disposition.

E. Public Policy

According to Article 5 of the PILA, the application of a provision of the law of any state specified by the PILA may be refused if such application is manifestly incompatible with the Turkish public policy and, if necessary, Turkish law shall be applied.

In the field of succession, any results such as disinheritance or disqualification due to political or religious reasons, or the implementation of different succession shares due to discriminatory grounds such as religion, gender or race may not be allowed.[35] Any treatment of siblings which differs because of gender or because one of them was born outside marriage will not be accepted due to public policy.[36] If the surviving wife is restricted from obtaining a share and left uncompensated as a result of her matrimonial property regime, such a result will be considered incompatible with Turkish public policy.[37]

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nationality; (iii) the right to exclude from the application of the Convention any testamentary clauses which, under its laws, do not relate to matters of succession. See <http://www.hcch.net/index_en.php?act=status.comment&csid=295&disp=resdn>.

[32] See <http://www.hcch.net/index_en.php?act=conventions.status&cid=40>.

[33] However, it is worth noting that the Convention has been ignored, or indeed not even mentioned, in several of the decisions made by the Court of Cassation. 2. HD., E.1990/4236, K.1990/11458, T. 23 November 1990; E.2008/13740, K.2008/14696, T. 6 November 2008; 3. HD., E.2013/17015, K.2014/1384, T. 3 February 2014. See C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 225. In a more recent decision, 3rd Civil Chamber refused to approve the decision of the first instance court as the court did not take into consideration the provisions of the Convention. 3. HD., E.2015/2397, K.2015/4054, T. 12 March 2015. See Kazanci Caselaw Database available at <www.kazanci.com>. Of course, it is still striking that since the entry into force of the Convention 33 years ago in 1983, the Convention has been vastly ignored by the Turkish courts.

[34] G. TEKINALP (note 12), at 308; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 227; R. AYBAY/ E. DARDAĞAN (note 8), at 239; N. EKŞI (note 4), at 55.

[35] G. TEKINALP (note 12), at 304; R. AYBAY/ E. DARDAĞAN (note 8), at 237; V. DOĞAN (note 8), at 326; N. EKŞI (note 4), at 68.

[36] G. TEKINALP (note 12), at 304; EKŞI (note 4), at 66.

[37] V. DOĞAN (note 8), at 326.

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F. Mandatory Rules

According to Article 6 of the PILA, mandatory rules of Turkish law prevail over any foreign law rules that are applicable according to Turkish conflict of laws rules.

Article 35 of the Code on the Registration of Immovable Property shall apply if any of the heirs is a national of a foreign state and immovable property located in Turkey is part of the estate. Article 35 sets forth certain restrictions to the possibility for foreigners to purchase real estate in Turkey. Additional explanations will be provided below under Section V of this paper. In summary, the Council of Ministers determines the countries whose nationals may acquire immovable property in Turkey. The area of the property may not exceed 10% of the total area of the district in which the property is located and it may not exceed 30 hectares per person in total throughout the whole country. Where this mandatory rule has been violated as a result of succession, the heir is obliged to dispose of any excessive land and is entitled to the relevant liquidated amount.

III. The International Jurisdiction of Turkish Courts in Matters of Succession

According to Article 40 of the PILA, the international jurisdiction of Turkish courts is determined by analogy to the domestic jurisdiction rules.

However, Article 43 of the PILA provides for a special jurisdiction rule applicable to succession cases. Therefore, Article 43 shall prevail over any domestic jurisdiction rule.[38] Accordingly, the Turkish courts of the place where the deceased had his last domicile shall have jurisdiction to rule on matters of succession. If the last domicile of the deceased was not in Turkey, then the courts where the property is located shall have jurisdiction.

The purpose of this provision is to ensure that there is a competent Turkish court where the last domicile of the deceased was not in Turkey but the deceased nevertheless left property located in Turkey.[39]

The courts that have jurisdiction for the issuance of certificates of succession,[40] however, are specially prescribed by Article 11(3) of the Turkish Civil Procedure Law. According to this provision, the courts where any of the heirs are resident shall have jurisdiction along with the courts where the last domicile of the deceased is located. However, Article 43 of the PILA is invoked as a special

[38] 14. HD., E.2015/2899, K.2015/9543, T. 28 October 2015. See Kazanci Caselaw Database available at <www.kazanci.com>.

[39] E. NOMER (note 1), at 460; A. ÇELIKEL/ B. ERDEM (note 5), at 573; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 386; V. DOĞAN (note 8), at 83.

[40] The function of a certificate of succession under Turkish law is similar to the function of probate under English law, i.e. it determines the persons who have a legal right of inheritance over the deceased's property.

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jurisdiction rule in determining the international jurisdiction of Turkish courts in matters of succession. Therefore, it will be applied in all cases where a foreign element is involved. As it does not make any exclusion to the effect, Article 43 will be applied also as regards issuance of certificates of succession.[41]

On the other hand, with the Act on Legislative Amendments in View of an Improvement of Judicial Efficiency,[42] notaries were also granted the authority to issue certificates of succession. Accordingly, Article 71 of the Notaries Act has been amended in order to expressly provide so (Article 71A).[43] It is possible to object to the certificate of succession issued by a notary before any civil court of peace (Article 71C). Notaries are not permitted to issue certificates of succession if their issuance would require judicial review, if the birth records are not sufficient, and in cases where the applicant is a foreigner (Article 71B). The Regulation on the Issuance of Certificates of Succession by Notaries[44] goes one step further and restricts the authority of notaries to issue certificates of succession in all cases where the succession involves a foreign element. This rule of the regulation is obviously contrary to law,[45] but currently it prevents the heirs from applying to notaries for issuance of certificates of succession in any cases with a foreign element, *i.e.* when the applicant is a Turkish national but the deceased is a foreigner or there are other heirs having a foreign nationality.

There are rules on applicable law and jurisdiction regarding succession in a number of bilateral consular agreements. The Consular Agreement between Turkey and Germany,[46] Turkey and Italy,[47] Turkey and Hungary[48] can be listed as examples. These agreements all set forth that the courts located in the country where the deceased has his nationality shall have jurisdiction for movable property and shall apply their own law and, if immovable property is concerned, the courts where that property is located shall have jurisdiction and apply their own law. However, a larger number of consular agreements that were concluded after the 1970s do not have such provisions and only give certain duties to the consular

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[41] C. ŞANLI, Yabancı Veraset İlamlarının Türk Mahkemelerinde "Tanınması" veya "Delil" Olarak Kullanılması, *İlhan Postacıoğlu'na Armağan*, Istanbul 1990, p. 300-302; N. EKŞI (note 4), at 28; U. TÜTÜNCÜBAŞI, *Yabancı Çekişmesiz Yargı Kararlarının Türk Hukukunda Tanınması,* Adalet 2014, p. 156. 14th Civil Chamber of the Court of Cassation confirms the prevalence of Art. 43 for the issuance of certificates of succession in a very recent decision. 14. HD., E.2015/1997, K.2015/6013, T. 1 June 2015. See Kazanci Caselaw Database at <www.kazanci.com>.

[42] OG 14 April 2011 No. 27905.

[43] For further discussions on the appropriateness of this authority given to the notaries, see E. GÖKÇE, Mirasçılık Belgesi Düzenleme Yetkisinin Noterlere Verilmesi Üzerine Görüşler, *İzmir Barosu Dergisi* 2011, p. 235 *et seq;* Z. KÜRŞAT, Noterlere Mirasçılık Belgesinin Düzenlenmesi Yetkisinin Tanınması Hakkında Değerlendirme, *Şener Akyol'a Armağan,* Seçkin 2011, p. 591 *et seq.*

[44] OG 4 October 2011 No. 28074.

[45] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 387.

[46] OG 8 June 1930 No. 1514.

[47] OG 7 April 1931 No. 1768.

[48] OG 27 December 1939 No. 4395.

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authorities such as notification of death, determination of estate, and collection of money in cases of death of one of their nationals.[49]

IV. Recognition and Enforcement of Foreign Court Judgments

A. Recognition and Enforcement of Foreign Court Judgments in Turkey

Recognition and enforcement of foreign court judgments in Turkey are governed by Articles 50-59 PILA.

Article 50 PILA requires that the decision be granted in a civil action; Turkish law determines whether an action is a civil action.[50] Court judgments regarding administrative and criminal matters are not subject to recognition and enforcement under the PILA.[51] According to Article 50 PILA, to seek recognition and enforcement, the existence of a foreign court decision is first required. Whether the foreign decision is a court decision shall be determined in accordance with the law of the country where it was rendered.[52] Decisions issued by administrative bodies such as the municipality,[53] governorship or notary cannot be enforced in Turkey. Article 50 PILA stipulates that only foreign court judgments which are final according to the law of the state of the court that issued the judgment shall be recognisable and/or enforceable before the courts of Turkey. The foreign judgment whose enforcement is sought, must be final and enforceable under the law of the state where the judgment was rendered.[54]

According to Article 51 PILA, the enforcement decision may be sought from the civil courts of first instance located in the Turkish domicile of the person against whom enforcement is sought.[55] If the person against whom enforcement is

[49] N. EKŞI (note 4), at 26-27.

[50] E. NOMER (note 1), at 484; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 495; P. GÜVEN, *Tanıma – Tenfiz,* Seçkin 2013, p. 39; C. SÜRAL/ Z.D. TARMAN, Recognition and Enforcement of Foreign Court Judgments in Turkey, *Yearbook of Private International Law* 2013/2014, p. 217.

[51] N. EKŞI, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi,* Beta 2013, p. 121; C. SÜRAL/ Z.D. TARMAN (note 50), at 217.

[52] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 491; N. EKŞI (note 51), at 109; P. GÜVEN (note 50), at 29; C. SÜRAL/ Z.D. TARMAN (note 50), at 217.

[53] 2nd Civil Chamber of the Court of Cassation, in its decision dated 13 April 1995, decided that a foreign divorce decision issued by the Copenhagen municipality could not be recognised in Turkey. 2. HD., E.3612, K.4567, T. 13 April 1995. See A. ÇELIKEL/ E. NOMER/ F.K. GIRAY/ E. ESEN, *Devletler Hususi Hukuku*, Beta 2010, p. 493.

[54] For further information, see B. ŞIT, Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kesinleşme Şartı, *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 2011, p. 61 *et seq*.

[55] According to Art. 4 of the Act on the Establishment, Jurisdiction and Procedure of the Family Courts, family courts have jurisdiction over the recognition and enforcement of foreign judgments concerning family law. This rule is respected by the 2nd Civil Chamber of

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sought does not have his or her domicile in Turkey, then the court where he or she is resident shall be the competent court. If the relevant person is neither domiciled nor resident in Turkey, then the enforcement decision may be required from the civil courts of first instance in Ankara, Istanbul or Izmir.

According to Article 52(1) PILA, anyone who has a legal interest in the enforcement of the foreign judgment may apply for its enforcement. The petition for enforcement shall be served on the party against whom enforcement is sought. The date of hearing shall also be notified (Article 55(1) PILA). If the person against whom enforcement is sought resides abroad, notification shall be made in accordance with the bilateral or multilateral agreements to which both Turkey and the state where the defendant resides are parties,[56] or Article 25 of the Notification Act[57, 58].

The party against whom enforcement is sought may submit that one of the grounds for non-enforcement exists, or that the foreign judgment has already been wholly or partly implemented, or that an impediment has arisen to prevent its implementation (Article 55(2) PILA). The Turkish judge may not review the merits of the foreign judgment. This is famously known as "prohibition of *révision au fond*".[59] There are only four grounds provided by Article 54 PILA that will prevent the recognition and/or enforcement of the foreign judgment. According to Article 54(a), a multilateral or bilateral agreement between Turkey and the state from whose courts the foreign judgment was given provides for the mutual enforcement of foreign judgments. If no such agreement is in place, a statutory provision must be in place in the relevant foreign state enabling the enforcement of Turkish court decisions in the relevant foreign state, or at least the Turkish court decisions shall *de facto* be enforced in that state. According to Article 54(b) PILA, foreign judgments given on issues that the Turkish courts have exclusive jurisdiction to resolve may not be enforced. According to Article 54(b) PILA, if the foreign court's jurisdiction is based on an exorbitant jurisdiction rule,[60] and the

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the Court of Cassation. 2. HD., E.2008/4922, K.2008/8982, T. 19 June 2008; 2. HD., E.2009/611, K.2009/9872, T. 25 May 2009. See N. EKŞI (note 51), at 67-68 and 70-71.

[56] Turkey is a party to the 1954 Hague Convention on Civil Procedure and the 1965 Hague Convention on the Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters (OG 17 June 1972 No. 14218).

[57] OG 19 February 1959 No. 10139.

[58] For further information, see B.B. ERDEM, *Türk Milletlerarası Usul Hukukunda Tebligat*, Beta 1992.

[59] E. NOMER (note 1), at 495; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 489; V. DOĞAN (note 8), at 125; P. GÜVEN (note 50), at 81.

[60] For example, Art. 14 of the French Civil Code grants jurisdiction to the French courts on the sole basis that the claimant is a French national. Art. 23 of the German Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or the subject-matter of the dispute is situated. Art. 127 of the Dutch Code of Civil Procedure provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Dutch court for the performance of obligations contracted towards a Dutch citizen either in the Netherlands or abroad. C. SÜRAL, *Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve*

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party against whom enforcement is sought objects to the enforcement, the foreign judgment may not be enforced in Turkey. Article 54(c) of the PILA allows for the refusal of recognition and enforcement of foreign judgment based on the grounds that it is manifestly contrary to Turkish public policy.[61] If the defendant has not been duly notified to appear before the court according to the law of the state of which the judgment rendered and given opportunity to be represented or if the judgment was rendered in the absence of defendant in a way that is contrary to the law, and if the defendant has objected to the enforcement before the Turkish court, then it is assumed that the defendant was not duly granted the right or possibility of defending himself (Article 54(c) PILA).[62]

As mentioned above, in the field of succession, any results such as disinheritance or disqualification due to political or religious reasons, or the implementation of different succession shares due to discriminatory grounds such as religion, gender or race are not permitted. [63] Therefore, any foreign decision that leads to such outcomes will not be recognized or enforced in Turkey. For example, if siblings with different genders were not treated equally so that the brother inherited a larger part of the estate, this decision will thus be deemed contrary to public policy.

According to Article 43 PILA, the Turkish court located at the last domicile of the deceased shall have jurisdiction in disputes arising out of succession. If the deceased's last domicile was not in Turkey, then the court where the estate of the deceased is located shall have jurisdiction. If this provision is deemed to grant exclusive jurisdiction to Turkish courts, as is believed to be the case by some scholars,[64] then any foreign judgment concerning immovable and movable property located in Turkey may not be enforced. This would mean, however, that foreign decisions would hardly ever be recognised in Turkey, for recognition is generally sought when the estate or part of it is situated in the State addressed. According to another opinion, which seems preferable, a two-tier jurisdictional rule may not be regarded as an exclusive jurisdiction rule and it does not prevent enforcement.[65]

Tenfizi, Güncel Hukuk Yayınları 2007, p. 127. For further information on exorbitant jurisdiction rules see N. EKŞI, Devletler Özel Hukukunda Aşırı Yetki Kuralları, *Selahattin Sulhi Tekinay'ın Hatırasına Armağan*, İstanbul 1999; N. EKŞI, *Türk Mahkemelerinin Milletlerarası Yetkisi*, 2nd edn., Istanbul 2000, p. 50 *et seq*.; N. EKŞI (note 51), p. 235 *et seq*.

[61] For further information, see C. DEMIR GÖKYAYLA, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni,* Seçkin 2001.

[62] This provision was applied in the following decisions of the Court of Cassation: 2. HD., E.2009/532, K.2009/6718, T. 8 April 2009; 11. HD., E.2011/2822, K.2012/9027, T. 28 May 2012; 11. HD., E.2012/3175, K.2012/5547, T. 6 April 2012. See Kazanci Caselaw Database available at <www.kazanci.com>.

[63] G. TEKINALP (note 12), at 304; R. AYBAY/ E. DARDAĞAN (note 8), at 237; V. DOĞAN (note 8), at 326; N. EKŞI (note 4), at 68.

[64] A. ÇELIKEL, Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1982, p. 9-10; C. ŞANLI, Yabancı Veraset İlamlarının Türk Mahkemelerinde "Tanınması" veya "Delil" Olarak Kullanılması, *İlhan Postacıoğlu'na Armağan*, Istanbul 1990, p. 301.

[65] E. NOMER (note 1), at 502.

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Another similar view is that Article 43 aims to provide a competent court in all cases, therefore, it is of a complementary nature and cannot be interpreted as an exclusive jurisdiction rule.[66] There are also scholars who believe that the judgments of a foreign court pertaining to the immovable property of the deceased may not be enforced in Turkey because Turkish courts have exclusive jurisdiction over immovables located in Turkey (Article 12 of the Civil Procedure Law),[67] and the acquisition of immovable property by foreigners is subject to certain restrictions and only Turkish courts can make a decision which is mindful of such restrictions.[68]

B. Recognition of Certificates of Succession Issued in Foreign Countries

1. Recognition of Certificates of Succession Issued by Foreign Courts

The function of a certificate of succession under Turkish law is similar to the function of probate[69] under English law, *i.e.* it determines the persons who have a legal right of succession over the deceased's property. Therefore, issuance of a certificate of succession is the first and vital step to obtaining rights of succession under Turkish law as no legal action can be taken by the heirs without a certificate of succession. For example, if the heirs inherited immovable property, then they need a certificate of succession to complete the registration of the immovable under their names, or if they inherited a certain amount of money which is held in a bank account, they need a certificate of succession in order to withdraw that money from the bank. Therefore, even if there is no controversy as regards the heirs or the distribution of the estate, a certificate of succession is necessary.

However, certificates of succession obtained from a foreign court will not be recognized or enforced in Turkey, for two reasons.

First, the certificates of succession are not final and binding. In other words, a certificate of succession may be issued for the benefit of a person who can show that he has a legal bond with the deceased, *i.e.* he is the spouse or child. However, the certificate of succession may at any time be contested if there are other legal heirs. If this is the case also under the foreign law, the relevant court decision will not be recognized because Article 50 of the PILA requires that the court decision whose recognition is sought be final and binding according to the law of the country of origin of the decision.[70] Even if the certificates of succession issued by a foreign court have a final and binding effect under the relevant foreign law, such a certificate will merely be considered as a foreign declaratory instrument because foreign court judgments may not have further effects than those of a Turkish court

[66] A. ÇELIKEL/ B. ERDEM (note 5), at 557; C. DEMIR GÖKYAYLA, Yabancı Mahkemelerden Alınan Mirasçılık Belgelerinin Türkiye'de Hüküm ve Sonuç Doğurması, *Prof. Dr. Fikret Eren'e Armağan,* Yetkin 2006, p. 572.

[67] A. ÇELIKEL/ B. ERDEM (note 5), at 557; U. TÜTÜNCÜBAŞI (note 41), at 158.

[68] N. EKŞI (note 51), at 193-194; P. GÜVEN (note 50), at 95.

[69] See <service.gov.uk>.

[70] A. ÇELIKEL/ B. ERDEM (note 5), at 656; C. ŞANLI (note 41), at 298.

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judgment had the judgment been given in Turkey. A certificate of succession issued by a foreign authority may be referred to as evidence in any Turkish court proceeding concerning the issuance of a certificate of succession.[71] However, there are also different, less rigid views in this regard. According to those views, it is the law of the foreign state where the judgment was rendered which will determine whether the judgment has a final and binding effect. Based on Article 50 of the PILA, the judgment shall be final and binding under the foreign law, that is the law of the country where the certificate of succession was issued. Therefore, the fact that the certificates of succession have no final and binding effect under Turkish law may not be a valid ground to reject the recognition of a foreign certificate of succession issued by a foreign court that has a final and binding effect in the state where it was rendered.[72] Additionally, although the certificates of succession are not final and binding under Turkish law, it is possible to transfer title of property on the basis of them. If the certificate of succession is for some reason revoked or amended, any transfers already carried out will be annulled. Therefore, the same possibility shall be granted to foreign certificates of succession instead of completely rejecting their recognition.[73] However, in practice the Court of Cassation does not permit recognition of certificates of succession rendered by foreign courts as they do not have a final and binding effect. The 2nd Civil Chamber, in its decision dated 10.7.2001, stated that certificates of succession issued by foreign authorities may not have a different effect or power than those issued by Turkish authorities. The final and binding effect of the certificate in question was not recognized.[74] Similarly, the 2nd Civil Chamber of the Court of Cassation, in its decision dated 21.12.2004, rejected recognition and enforcement of a certificate of succession as it is not final and binding according to the relevant foreign law.[75] In a more recent decision dated 07.4.2014, the 11th Civil Chamber again held that a certificate of succession issued by a foreign court may not have any effect in Turkey as a foreign certificate of succession may not have any further effect than that of a Turkish certificate of succession, which does not have any final and binding force under Turkish law.[76]

Secondly, if the recognition of a certificate of succession is being sought because the deceased has immovable property in Turkey, the exclusive jurisdiction of Turkish courts will come into play. Under Article 12 of the Turkish Civil Procedure Law, the Turkish courts have exclusive jurisdiction to decide on the property rights over immovables located in Turkey. Therefore, any foreign certificate of succession or a similar court decision obtained abroad and granting a right of property to a person over an immovable in Turkey will not be recognized. The

[71] E. NOMER (note 1), at 291.

[72] N. EKŞI (note 51), at 573.

[73] C. DEMIR GÖKYAYLA (note 66), at 568.

[74] 2. HD., E.2001/3841, K.2001/10889, T. 10 July 2001. See N. EKŞI (note 51), at 574-575.

[75] 2. HD., E.2004/13533, K.2004/15443, T. 21 December 2004. See C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 475.

[76] 11. HD., E.2014/4823, K.2014/6777, T. 7 April 2014. See Kazanci Caselaw Database available at <www.kazanci.com>.

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2nd Civil Chamber of the Court of Cassation, in its decision dated 10.2.1986, rejected the recognition of a certificate of succession as Turkish courts have exclusive jurisdiction over immovables located in Turkey.[77] The Court of Cassation confirmed this position in its more recent decisions.[78]

2. Recognition of Certificates of Succession Issued by Foreign Authorities Other than Courts

According to Article 50 PILA, to seek recognition and enforcement, the existence of a foreign court decision is first required. Whether the foreign decision is a court decision shall be determined in accordance with the law of the country where it was rendered.[79] Decisions issued by administrative bodies such as the municipality,[80] governorship or notary cannot be enforced in Turkey pursuant to the PILA. Therefore, a certificate of succession issued by a foreign authority other than a court will not be subject to recognition or enforcement within the meaning of Articles 50-59 PILA. The Court of Cassation, in its decision dated 12.7.2002, rejected the recognition of a certificate of succession issued by a notary in France on the ground that the certificate did not constitute a final and binding court judgment.[81]

However, if the foreign authority is acting like a court in the issuance of certificates of succession according to the relevant foreign law, then recognition or

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[77] 2. HD, E.1986/808, K.1987/1284, T. 10 February 1986. See C. DEMIR GÖKYAYLA (note 66), at 570.

[78] 2. HD., E.1990/12861, K.1990/5906, T. 11 June 1990; E.1990/6373, K.1990/6410, T. 22 June 1990; E.1999/6974, K.1999/8850, T. 13 September 1999; E.2002/8254, K.2002/9339, T. 12 July 2002. See C. DEMIR GÖKYAYLA (note 66), at 570-571. 8. HD., E.2013/23629, K.2014/18556, T. 17 October 2014. See Kazanci Caselaw Database available at <www.kazanci.com>.

[79] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 1), at 491; N. EKŞI (note 51), at 109; P. GÜVEN (note 50), at 29; C. SÜRAL/ Z.D. TARMAN (note 50), at 217.

[80] 2nd Civil Chamber of the Court of Cassation, in its decision dated 13 April 1995, held that a foreign divorce decision issued by the Copenhagen municipality did not qualify for recognition in Turkey. 2. HD, E.3612, K.4567, T. 13 April 1995. See A. ÇELIKEL/ E. NOMER/ F.K. GIRAY/ E. ESEN (note 53), at 493. The recognition of foreign divorce decisions issued by foreign authorities other than courts has been introduced to Turkish law by a Statutory Decree dated 29.4.2017. See OG 29 April 2017 No. 30052. By this new regulation, a provision is inserted into Population Services Act which prescribes that spouses who got divorced before foreign courts or administrative authorities may apply to the birth registry in Turkey or the Turkish consulates in foreign countries to amend their status from married to single. This amendment should be made if certain conditions are met. The spouses should make a request together personally or through their lawyers. The foreign court or the administrative authority should have jurisdiction to decide on divorce according to its own law. The divorce decision should be final and binding according to the relevant foreign law. The decision on divorce should not be incompatible with Turkish public policy.

[81] 2. HD, E.2002/8254, K.2002/9339, T. 12 July 2002. See N. EKŞI (note 51), at 560.

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enforcement may be granted within the meaning of Articles 50-59 PILA.[82] Furthermore, if the certificate of succession issued by a foreign administrative authority or a foreign notary is subject to the approval of the foreign court, the approved certificate may be subject to recognition or enforcement in Turkey.[83]

On the other hand, according to Article 37 of the Code on the Registration of Immovable Property, any transfers made for the benefit of foreigners shall be effected based on certificates of succession issued by Turkish courts or certificates of succession issued by the *foreign competent authorities* and whose compliance with the Turkish law on succession is approved by a Turkish court. Therefore, it is possible to conclude that Turkish law does not strictly require that certificates of succession be issued by a foreign court. In other words, it will not be correct to conclude that the certificates of succession issued by a foreign authority other than a court will have no effect under Turkish law. It must be noted, however, that the scope of this provision only covers cases where immovable property is concerned.[84] To be more precise, the transfer of immovable property for the benefit of a foreigner may take place upon a foreign certificate of succession issued by a foreign authority other than court.

The certificate of succession issued by a foreign authority other than a court will be subject to the scrutiny of a Turkish court. But will this scrutiny be the same as the scrutiny pertaining to recognition and enforcement under Articles 50-59? What will be the scope of the review by the Turkish court? According to one opinion, this review shall be conducted in accordance with Article 54 PILA. In other words, approval of the Turkish court under Article 37 of the Code on the Registration of Immovable Property means recognition and enforcement of the certificate of succession.[85] According to a similar view, the Turkish court shall review whether the conditions in the PILA regarding recognition and enforcement are met and also whether the certificate of succession complies with Turkish law on succession.[86] Furthermore, some authors understand the provision in such a way that the foreign authority shall fully comply with Turkish law, *i.e.* determine the applicable law in line with Turkish private international law rules and decide as if it were a Turkish court. These authors, however, confirm that this is not possible in practice because no foreign court would act as if it were a Turkish court, so they opine that Article 37 has no practical application.[87]

In this author's view, however, the reasoning behind Article 37 must be to facilitate the formalities governing the registration of immovable property. It will not be appropriate to expect persons who rely on certificates of succession issued in a foreign country to go through an additional recognition and enforcement procedure which is a characteristic procedure for foreign "judgments". If Article 54 of the PILA applies, recognition is to be rejected by the court due to the

[82] N. EKŞI (note 51), at 560.

[83] C. ŞANLI (note 41), at 295; N. EKŞI (note 51), at 560.

[84] C. DEMIR GÖKYAYLA (note 66), at 560.

[85] E. NOMER (note 1), at 291-292.

[86] N. EKŞI (note 51), at 558.

[87] C. ŞANLI (note 41), at 304; C. DEMIR GÖKYAYLA (note 66), at 560.

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exclusive jurisdiction of the Turkish courts over immovables located in Turkey. It has been demonstrated above that the Court of Cassation has rejected recognition of certificates of succession issued by foreign courts due to exclusive jurisdiction of Turkish courts. Thus, it may not be realistic to expect Turkish courts to allow recognition when the certificate of succession is issued by a foreign authority other than a court if the Turkish court applies Article 54 PILA within the context of Article 37 of the Code on the Registration of Immovable Property. On the other hand, there are certain restrictions on the acquisition of immovable property by foreign persons under Turkish law. These are mandatory rules and any acquisition contrary to these rules will not be permitted. Therefore, for a review on the basis of Article 37 of the Code on the Registration of Immovable Property, the Turkish judge shall take into consideration these restrictions as part of Turkish law and shall not approve any certificate of succession which is in breach of these restrictions.[88] On the other hand, the court's review of compliance of the foreign certificate of succession with these mandatory rules of Turkish law must be limited and the judge should not necessarily try to argue that the foreign court or authority acted in the same way as a Turkish notary or judge, nor should they try to apply Articles 50-59 PILA. Such an interpretation would in fact make the existence of Article 37 meaningless.[89] Furthermore, it is not necessarily a foreigner who wants to rely on a foreign certificate of succession. It might well be a Turkish citizen who wishes to rely on that certificate.[90] In such cases, there is no valid reason to restrict the application of Article 37 or to make its application identical with the application of Articles 50-59 PILA since no transfer of immovable property to a foreigner is at stake.

Another question is whether Article 37 conflicts with the Apostille procedure? According to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, to which Turkey is party, the contracting states undertake to grant the same effect to public documents issued in other contracting states that have an Apostille. If a certificate of succession has been issued by a foreign notary and bears an Apostille, will that notarial document have the same effect as a certificate of succession issued by a Turkish notary? In light of Article 71B of the Notaries Act and the relevant regulation[91] mentioned above, which prohibits the issuance of certificates of succession by notaries when a foreign element is involved, and Article 37 which requires a Turkish court's approval of foreign certificates, it is fair to conclude that Turkish law does not permit the direct effect of certificates of succession when a foreign element is

[88] N. EKŞI (note 51), at 558; N. EKŞI (note 4), at 111.

[89] N. EKŞI (note 4), at 110.

[90] C. DEMIR GÖKYAYLA (note 66), at 576.

[91] As explained under Part III above, Turkish notaries cannot issue certificates of succession if the issuance of them requires judicial review, if the birth records are not sufficient, and in cases where the applicant is a foreigner (Art. 71B). The relevant regulation on the issuance of certificates of succession by the notaries goes one step further and restricts the authority of notaries to issue certificates of succession in all cases where the succession involves a foreign element.

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involved.[92] Bearing in mind that the succession rights of foreigners are subject to certain conditions, it is understandable that the intervention of a Turkish court is required in all cases involving the transfer of immovable property.

What if there is no immovable property within the estate? Would a certificate of succession issued by a foreign authority other than a court bearing an Apostille have legal effect in Turkey? This point is controversial. On the one hand, there is no express restriction to this. Especially since 2011, the idea of issuance of certificates of succession by authorities other than courts, *i.e.* notaries, have been accepted in Turkish law. However, it must be noted that Article 71B of the Notaries Act and the relevant regulation do not permit Turkish notaries to issue a certificate of succession when a foreign element is involved. Furthermore, the Court of Cassation does not accept the recognition or enforcement of certificates of succession issued by a foreign court. Therefore, if we accept that a foreign notarial act bearing an Apostille will have a direct effect as a certificate of succession, this will mean that a Turkish notary cannot issue a certificate of succession when a foreign element is involved but a certificate of succession bearing an Apostille will suffice to make any transaction concerning movable property in Turkey. Additionally, this will mean that a certificate of succession issued by a foreign court will not have any effect because Turkish courts will refuse its recognition, but a notarial act may have direct effect. Both outcomes are hardly acceptable. Thus, in our opinion, an Apostille should not be sufficient to give direct legal effect to foreign certificates of succession in Turkey.

V. Restrictions on the Acquisition of Immovable Property by Foreign Persons

There are no special restrictions on the succession rights of foreigners under Turkish law.[93] However, there are certain restrictions on the acquisition of immovable property by foreign persons. The transfer of an immovable by succession will only be possible if it complies with these restrictions.[94]

Article 35(1) of the Code on the Registration of Immovable Property prescribes certain conditions for the acquisition of immovable property by foreign real persons in Turkey. These conditions are as follows:

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[92] N. EKŞI (note 51), at 567; N. EKŞI (note 4), at 121.

[93] In the *Fokas v. Turkey* (Application No. 31206/02) case, the applicants, Ioannis Fokas and Evangelos Fokas, were Greek nationals who were born in 1945 and 1948 respectively and lived in Katerini (Greece). The case concerned the applicants' inability as Greek citizens to inherit their sister's immovable property in Turkey on account of their nationality and of the principle of reciprocity between Greece and Turkey. They relied in particular on Art. 1 of Protocol No. 1 (protection of property) and the Court decided that Turkey had violated Art. 1 of Protocol No. 1. See <http://hudoc.echr.coe.int>.

[94] A. ÇELIKEL/ G. ÖZTEKIN GELGEL, *Yabancılar Hukuku,* 20th edn., Beta 2014, p. 274; N. EKŞI, *Yabancılar ve Uluslararası Koruma Hukuku*, Beta 2016, p. 314; V. DOĞAN, *Türk Yabancılar Hukuku,* Savaş Yayınevi 2016, p. 208.

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1. There should not be any other specific statutory restriction. For example, under the Forbidden Military Areas and Security Zones Act, foreign real or legal persons can not acquire immovable in certain territories.
2. The Council of Ministers will, according to bilateral relations and the benefits brought to the Turkish state, determine that nationals of certain states may acquire immovables in Turkey.
3. The total area of the acquired land shall not exceed 10% of the area of the town where the acquired property is located.
4. The total area of the acquired land by a person may not exceed thirty hectares. The Council of Ministers may double this amount if it deems necessary.

According to Article 35(2), companies established in foreign countries pursuant to their own laws may only acquire immovable property in Turkey in compliance with special laws. Therefore, any legal entities other than companies cannot acquire immovable property in Turkey. This leads us to the result that it is not possible for foreign associations and foundations to be entitled to a succession right over immovables located in Turkey, although they are determined as the beneficiaries of a disposition of property upon death.[95]

According to Article 35(6), any acquisitions that were realized contrary to these restrictions have to be liquidated within a one year period granted by the Ministry of Finance, otherwise they will be liquidated by the Ministry and revenue will be paid to the relevant heir.

VI. Conclusion

The applicable law to succession matters is determined under Article 20 PILA. There is a dual system in Turkey where the applicable law is the national law of the deceased except for immovables located in Turkey. If immovable property located in Turkey is part of the estate, Turkish law shall be applicable to that property. Furthermore, the law of the place where the estate is located shall govern the causes of the opening of the succession, the transfer to the heirs, and the sharing-out of the estate. The reason for this provision is one of practical necessity. According to Article 5 of the PILA, the application of a provision of the law of any state specified by the PILA may be refused if such application is manifestly incompatible with Turkish public policy and, if necessary, Turkish law shall be applied. According to Article 6 of the PILA, mandatory rules of Turkish law prevail over any foreign law rules that are applicable according to Turkish conflict of laws rules.

According to Article 43 of the PILA, the Turkish courts of the place where the deceased had his last domicile shall have jurisdiction to rule on matters of

[95] A. ÇELIKEL/ G. ÖZTEKIN GELGEL (note 94), at 284.

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succession. If the last domicile of the deceased was not in Turkey, then the courts where the estate property is located shall have jurisdiction. The purpose of this provision is to ensure that there is a competent Turkish court where the last domicile of the deceased was not in Turkey but he nevertheless has some property located in Turkey.

A foreign court judgment is subject to recognition or enforcement by a Turkish court to have legal effect in Turkey. Recognition and enforcement of foreign court judgments are stipulated in Articles 50-59 PILA. In the field of succession, foreign judgments which are against Turkish public policy may not be enforced. Additionally, foreign court judgments which pertain to the immovable property of the deceased may not be enforced because Turkish courts are deemed to have exclusive jurisdiction over immovables located in Turkey. Furthermore, certificates of succession obtained from a foreign court will not be recognized or enforced in Turkey for two reasons: First, the certificates of succession are not final and binding. In other words, a certificate of succession may be issued for the benefit of a person who can show that he has a legal link with the deceased; *i.e.* he is the spouse or child. However, the certificate of succession may at any time be contested if there are other legal heirs. Secondly, if the recognition of a certificate of succession is being sought because the deceased has immovable property in Turkey, then the exclusive jurisdiction of Turkish courts will come into play. There are a number of Turkish Court of Cassation decisions where the recognition of a certificate of succession issued by a foreign court was rejected because the Turkish courts have exclusive jurisdiction.

On the other hand, according to Article 37 of the Code on the Registration of Immovable Property, transfers for the benefit of foreigners shall be realized based on certificates of succession issued by Turkish courts or certificates of succession issued by the foreign competent authorities and whose compliance with Turkish law's provisions on succession is approved by a Turkish court. This provision may lead to two conclusions: First, that Turkish law does not strictly require that the certificates of succession be issued by a foreign court. It must be noted, however, that this provision applies only to cases where immovable property is concerned. Second, recognition or enforcement of foreign court decisions stipulated in Articles 50-59 PILA are not the only way to give effect to a certificate of succession issued either by a foreign court or another foreign authority. However, there are certain restrictions on the acquisition of immovable property by foreign persons under Turkish law. These are mandatory rules and any acquisition in conflict with these rules will not be permitted. Therefore, for a review on the basis of Article 37 of the Code on the Registration of Immovable Property, the Turkish judge shall take into consideration these restrictions as part of Turkish law and shall not approve any certificate of succession which contradicts these restrictions.[96] On the other hand, the court's review of compliance of the foreign certificate of succession with these mandatory rules of Turkish law must be limited and the judge should not necessarily try to argue that the foreign court or authority acted in the same way as a Turkish notary or judge, or he should not try to apply Articles 50-59 of the PILA.

[96] N. EKŞI (note 51), at 558; N. EKŞI (note 4), at 111.

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As Article 37 of the Code on the Registration of Immovable Property is only applicable in respect of a transfer of immovable property, one might ask whether a certificate of succession issued by foreign authorities other than courts has legal effect in Turkey if it bears an Apostille. The answer to this must be negative; Article 71B of the Notaries Act and the relevant regulations do not permit Turkish notaries to issue certificates of succession when a foreign element is involved. Furthermore, the Court of Cassation does not accept recognition or enforcement of certificates of succession issued by a foreign court. Therefore, if we accept that a foreign document bearing an Apostille has direct effect as a certificate of succession, this would mean that a Turkish notary cannot issue a certificate of succession when a foreign element is involved but a certificate of succession bearing an Apostille would suffice to make any transaction concerning movable property in Turkey. Additionally, this would mean that a certificate of succession issued by a foreign court has no effect because Turkish courts will refuse its recognition, but a notarial act or another document issued by a foreign authority other than a foreign court may have a direct effect. Both solutions are hardly acceptable.

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INTERNATIONAL *LIS PENDENS* AS A CONTEMPORARY PROBLEM OF TURKISH INTERNATIONAL CIVIL PROCEDURE

Gülüm BAYRAKTAROĞLU ÖZÇELIK*

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 393-422
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. Introduction

Lis pendens (or *lis alibi pendens*) can be regarded as one of the most important aspects of international parallel litigation, where the courts of more than one country having jurisdiction are seised to try the same dispute simultaneously.[1] This may also be viewed as a natural consequence of today's world where legal relationships including foreign elements are more easily established by the increase in free movement of persons and technical developments on the one hand and the lack of universally accepted rules of international jurisdiction on the other.

Outside the scope of international conventions and European Union (EU) regulations providing for common rules, international jurisdiction is still largely subject to national law. It follows that one of the obvious reasons of the *lis pendens* phenomenon is the possibility of establishing international jurisdiction of the courts of different countries on the same dispute on the basis of different criteria provided in national legislation. However, even where uniform rules apply, it may also be possible to take the same action before the courts of different countries at the same time. This may arise, either as a result of the fact that general and specific rules of jurisdiction do not preclude the application of each other,[2] or the fact that the basis of jurisdictional rules are provided in an alternative way.[3]

Where the same dispute is litigated simultaneously before the courts of different countries, either by the same party or the parties against each other, there is a risk of irreconcilable judgments and waste of financial resources, time and effort incurred both by the courts in question and the parties to the dispute. Such undesirable consequences identify *lis pendens* as one of the problems of international civil procedure, although Anglo-American and Continental European legal systems approach the problem differently.[4]

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[1] Another aspect of international parallel litigation can be considered in the context of "related actions" where the courts of different countries are simultaneously seised not for the same action but for closely connected actions. For a comprehensive analysis of parallel proceedings in international civil litigation, see G. BAYRAKTAROĞLU ÖZÇELIK, *Milletlerarası Usûl Hukukunda Paralel Davalar*, Ankara 2016, p. 27 *et seq*.

[2] See *e.g.* the relationship between Article 4(1) as the general rule of jurisdiction (proving for the jurisdiction of the courts of the member State where the domicile of the defendant is situated) and Articles 7-9 as the special rules of jurisdiction (according to the subject matter of the dispute) of 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), OJ L 351/1, 20.12.2012 (the Brussels I Recast Regulation).

[3] See *e.g.* Article 3(1) of 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/I, 23.12.2003 (the Brussels IIa Regulation) providing for the jurisdictional rule in matters relating to divorce, legal separation or marriage annulment.

[4] Regarding different approaches and tools adopted for international *lis pendens* in different legal systems as well as in international instruments see C. MC LACHLAN, *Lis Pendens in International Litigation*, Leiden/ Boston 2009, p. 91 *et seq*.; G. BAYRAKTAROĞLU ÖZÇELIK (note 1), at p. 69 *et seq*.

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In Turkish law – with the exception of bilateral and multilateral conventions to which Turkey is a party[5] – international *lis pendens* has not been subject to express rules in legislation. The first comprehensive act on Turkish private international law was the Code on Private International Law and International Civil Procedure of 1982 ("CPIL-1982")[6] which provided rules on international jurisdiction of Turkish courts, conflict of laws as well as on recognition and enforcement of court decisions and arbitral awards, leaving the issue of international *lis pendens* outside its scope.

CPIL-1982 was amended and replaced by the Code on Private International Law and International Civil Procedure in 2007 ("CPIL-2007")[7], considering *inter alia* the EU instruments on private international law with a view to the possible accession of Turkey into the EU.[8] In addition to amending certain provisions of CPIL-1982, CPIL-2007 also includes new rules relating to both conflict of laws and international civil procedure.[9] However, international *lis pendens* is one of the topics that is not subject to specific rules in CPIL 2007.[10]

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[5] See *infra* note 14.

[6] Official Gazette (OG), dated 22.05.1982, numbered 17701.

[7] OG, dated 12.12.2007, numbered 26728. For an unofficial English translation of CPIL-2007 see N. A. ODMAN BOZTOSUN, The 2007 Turkish Code on Private International Law and International Civil Procedure, this *Yearbook* 2007, Vol. 9, pp. 583-604.

[8] For the rationale of the CPIL-2007 see B. TIRYAKIOĞLU/ M. AYGÜN/ E. KÜÇÜK, *Türk Uluslararası Özel Hukuk Mevzuatı*, Ankara 2016, p. 75 *et seq*.

[9] Regarding the rules of CPIL-2007 see G. GÜNGÖR, The New Turkish Act on Private International Law and International Civil Procedure, *Specificitate şi complementaritate în dreptul privat european, Conflictele de legi şi de jurisdictii şi integrarea juridicã europeanã* 2012, pp. 528-558.

[10] An adverse trend can be identified in the national laws of other Continental European countries to accept international *lis pendens* as a problem and make it subject to specific rules starting at least from the second half of the twentieth century. In this regard, the Swiss Federal Act on Private International Law of 1987 (Article 9); the Italian Law on the Reform of the Italian System of Private International Law of 1995 (Article 7(1)); the Belgian Code of Private International Law of 2004 (Article 14); the Croatian Private International Law Act of 1991 (Article 80); the Polish Code on Civil Procedure as amended in 2015 (Article 1098) constitute examples of national legislation providing express rules on international *lis pendens*. In some other countries such as Germany, France or Austria, although international *lis pendens* is not subject to specific rules, there is a similar tendency to accept international *lis pendens* by analogy to national rules of civil procedure regarding *lis pendens*: See R. GEIMER/ R.A. SCHÜTZE, *Europäisches Zivilverfahrensrecht – Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVTVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, München 2010, p. 1710, No. 36; D. BUREAU/ H. MUIR WATT, *Droit international privé*, T. I, Paris 2010, p. 218, No. 209; T. PETZ, Austria, in T. KONO (ed), *Intellectual Property and Private International Law: Comparative Perspectives*, Oxford/ Portland 2012, p. 336 respectively. In regard to such a trend as of 2007 in the EU member States with respect to parallel proceedings in the courts of third countries also see A. NUYTS, *General Report - Study on Residual Jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of Their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)*, para. 99 *et seq*.: Available at <http://ec.europa.eu/civiljustice/news/

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In fact, in Turkish domestic law the objection of *lis pendens* has been subject to express rules since the enactment of Code of Civil Procedure of 1927 ("CCP-1927").[11] CCP-1927 provided the objection based on *lis pendens* as one of the preliminary objections to be raised by the defendant (Article 187/I(4)). The Code of Civil Procedure of 2011 (CCP-2011),[12] which replaced CCP-1927, also provides that "*an identical action must not be previously filed and still pending*", however this is designated as one of the procedural requirements and not as a preliminary objection (Article 114/I(1)). As a result, under the CCP-2011, pendency of the same action can today be examined by the court on its own motion or on the objection of one of the parties during all stages of the action (Article 115/I). Based on a typical mechanical first-in-time rule, if the court second seised determines that the same action is already pending before another court, it shall dismiss the action on procedural grounds in favour of the first court (Article 115/II).

A lack of provisions on international *lis pendens* in Turkish legislation has led to controversy which has been discussed in the literature and seen in court practice over the years. As will be elaborated below, the traditional view (which constituted the majority opinion) has advocated rejection of international *lis pendens* with two exceptions: first under Article 41 CPIL-2007 that provides rules on international jurisdiction of Turkish courts in actions arising from the personal status of Turkish nationals and second under Article 47/I CPIL-2007 on the foreign choice of court agreements. According to this line of thought, international *lis pendens* is implicitly and exceptionally accepted in the application of the said provisions and the objection based on international *lis pendens* could therefore only be accepted by the Turkish courts in these two situations.

In this regard, this paper aims to cover two distinct but related discussions in Turkish Law: *(i)* whether it is possible to generally accept the objection of international *lis pendens* before the Turkish courts notwithstanding that it is not subject to express rules (*infra* II) *(ii)* whether it should be possible to raise an objection of international *lis pendens* in the application of Articles 41 and 47 CPIL-2007 (*infra* III).[13]

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docs/study_residual_jurisdiction_en.pdf>. See also Article 33 of the Brussels I Recast Regulation providing clear rules on international *lis pendens* where the same action is pending before the courts of member States and third countries.

[11] OG, dated 2, 3 and 4.7.1927, numbered 622, 623 and 624.

[12] OG, dated 4.2.2011, numbered 27836. For an unofficial English translation of the CCP-2011 see M. GÖKSU, *Civil Litigation and Dispute Resolution in Turkey*, Ankara 2016, p. 287 *et seq*.

[13] For a more comprehensive analysis of the discussions relating to international *lis pendens* in Turkish law see G. BAYRAKTAROĞLU ÖZÇELIK (note 1), at p. 273 *et seq*.

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II. Divergent Views and Practices as Regards International *Lis Pendens*

Where the jurisdiction of a Turkish court is established according to an international convention to which Turkey is a party, there is unanimous agreement in both literature and in practice that the problem of parallel proceedings shall be subject to the provisions of that convention.[14] This is a natural consequence of Article 90/V of the Turkish Constitution of 1982[15] which states that "*[i]nternational agreements duly put into effect have the force of law*".

However, outside the scope of international conventions controversy exists as to whether international *lis pendens* could be accepted if the same action is already pending before the courts of a foreign country. As in most Continental European countries, the doctrine of *forum non conveniens* is considered not to be a part of Turkish law[16] mainly because of the constitutional requirement that "*[n]o court shall refuse to hear a case within its jurisdiction*" (Article 36/II).[17] Thus, the Turkish courts do not enjoy any discretion not to hear a dispute if their jurisdiction is established according to a rule of international jurisdiction.[18] Similarly, anti-suit injunction is not accepted as a tool in international parallel proceedings.[19]

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[14] Turkey is a party to number of international conventions which provide clear rules on *lis pendens* including the Convention on the Recognition of Decisions Relating to the Matrimonial Bond of 1967 (Article 10(1)); Convention on the Contract for the International Carriage of Goods by Road (CMR) (Article 31(2)); Convention concerning International Carriage by Rail as amended by the Vilnius Protocol (Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) Article 57/II; Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) Article 46/II). See also the Agreement between Republic of Turkey and Ukraine on Legal Assistance and Cooperation in Civil Matters providing for an express rule on *lis pendens* under Article 17/III. For an analysis of the mentioned provisions see G. BAYRAKTAROĞLU ÖZÇELIK (note 1), at pp. 276- 290.

[15] Constitution of the Republic of Turkey, dated 7.11.1982, numbered 2709: An official English translation is available at <https://global.tbmm.gov.tr/docs/constitution_en.pdf>.

[16] E. NOMER, *Milletlerarası Usul Hukuku*, İstanbul 2009, p. 119; N. EKŞI, *Türk Mahkemelerinin Milletlerarası Yetkisi*, İstanbul 2000, p. 73; Z. AKINCI, *Milletlerarası Usul Hukukunda Yetki Sözleşmesine Dayanan Yabancı Derdestlik*, Ankara 2002, p. 29; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE, *Milletlerarası Özel Hukuk*, İstanbul 2015, p. 355.

[17] N. EKŞI (note 16), at p. 73; Z. AKINCI (note 16), at p. 29.

[18] Rules of international jurisdiction of Turkish courts are found in Articles 40-46 of CPIL-2007. Article 40 which is the general rule of international jurisdiction provides that "*international jurisdiction of Turkish courts shall be determined according to domestic rules of jurisdiction as to venue*". Between Articles 41 and 46 specific rules of jurisdiction are provided for actions regarding the personal status of Turkish citizens (Article 41), particular actions concerning the personal status of foreigners (Article 42), succession (Article 43), employment contracts and relationships (Article 44), consumer contracts (Article 45) and insurance contracts (Article 46). If the dispute falls within the scope of Articles 41-46, international jurisdiction of Turkish courts should be determined according to those provisions since they are specific rules, which are provided by taking into

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Therefore, the discussion outside the scope of international conventions is mainly centered on the question of whether a procedural objection on international *lis pendens* can be raised before the Turkish courts. As will be stated below, answers to this question vary depending primarily on one's interpretation of the present state of a lack of an express provision on the objection of international *lis pendens,* as well as of the scope of Article 114/I(1) CCP-2011 which provides for *lis pendens* as one of the negative procedural requirements without differentiating between Turkish and foreign courts.

A. Traditional View: Rejection of International *Lis Pendens*

The traditional view in Turkish legal doctrine has been the rejection of international *lis pendens*, since there is no clear provision to the contrary.[20] Arguments in support of the traditional view include that the acceptance of international *lis pendens* would be against the sovereignty of the Turkish State;[21] that there is no

consideration the characteristics of the disputes involving foreign elements. If the dispute does not fall under the scope of specific jurisdictional rules, domestic rules of jurisdiction (to be found mainly in CCP-2011 but also in different legislation including the Turkish Civil Code, numbered 4721, or the Turkish Labour Code, numbered 4857) should be applied by virtue of the general rule provided under Article 40 CPIL-2007: G. BAYRAKTAROĞLU ÖZÇELIK, Yabancı Unsurlu Tüketici Sözleşmelerinden Doğan Uyuşmazlıklarda Türk Mahkemelerinin Milletlerarası Yetkisinin Tayini, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 2014, Vol. 63, p. 838 *et seq*. See also B. TIRYAKIOĞLU, Türklerin Kişi Hallerine İlişkin Davâlarda Türk Mahkemelerinin Milletlerarası Yetkisi, *Prof. Dr. Tuğrul Arat'a Armağan*, Ankara 2012, pp. 1156-1157; C. ŞANLI/ E. ESEN/ İ. ATAMAN- FIGANMEŞE (note 16), at p. 369.

[19] See the decision of Küçükçekmece Civil Court of First Instance rejecting the claim of the plaintiff to issue an anti-suit injunction to restrain the defendant to continue the pending proceedings before the foreign courts on the ground that the Turkish courts do not have jurisdiction to issue such injunctions: Küçükçekmece Civil Court of First Instance [*Küçükçekmece Asliye Hukuk Mahkemesi*] (First Chamber), registration No. 2002/1987, decision No. 2003/90, dated 17.10.2003. The Supreme Court (*Yargıtay*) upheld the decision of the court of first instance having found that the plaintiff did not have legal interest: see *Yargıtay* (Supreme Court), Eleventh Chamber, registration No. 2004/1141, decision No. 2004/10544, dated 1.11.2004. Regarding both decisions see Z. AKINCI, *Milletlerarası Tahkim*, İstanbul 2016, pp. 140-141; H. TÜFEKÇI, Milletlerarası Usûl Hukukunda Dava Etmeme Emrine (Anti-Suit Injunction) İngiliz Hukuku, Brüksel Konvansiyonu Rejimi ve Türk Hukuku Çerçevesinde Genel Bir Bakış, *Prof. Dr. Ata SAKMAR'a Armağan,* Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2011, Vol. 1, pp. 743-744.

[20] M. R. SEVIĞ, *Türkiye Cumhuriyeti Kanunlar İhtilâfı Kaidelerinin Sentezi*, İstanbul 1941, p. 72; V. R. SEVIĞ, Ticarî Sahadaki Kanunlar İhtilâfı, İstanbul 1957, pp. 50-51; Y. ALTUĞ, *Devletler Hususi Hukukunda Yargı Yetkisi*, İstanbul 1979, p. 208; E. NOMER, *Devletler Hususî Hukuku*, İstanbul 2015, p. 451 *et seq*.; A. ÇELIKEL/ B. B. ERDEM, *Milletlerarası Özel Hukuk*, İstanbul 2016, p. 608; Z. AKINCI (note 16), at p. 45; H. DEMIRARSLAN, Türk Devletler Hususi Hukukunda Kazai Salâhiyet, *Adalet Dergisi* 1952, Y. 43, I. 1, p. 49.

[21] M. R. SEVIĞ (note 20), at p. 72; Y. ALTUĞ (note 20), at p. 208; H. DEMIRARSLAN (note 20), at p. 49.

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reason to deprive the plaintiff of his action before the Turkish courts because of the fact that the other party has already filed an action before a foreign court[22] or that grounds for *lis pendens* objection in domestic cases such as procedural economy, prevention of contradicting actions of the plaintiff and irreconcilable judgments on the same dispute are not equally applicable for international parallel proceedings.[23] In this regard it was stated that the Turkish courts are by no means under any obligation to assess whether the foreign court would bear any burden because of the pendency of the same action;[24] that the decisions of the foreign courts (regarding actions for performance) are in any case subject to *exequatur* procedure in Turkey, thus accepting international *lis pendens* would not be more advantageous regarding the costs;[25] and that even where the same action is taken before courts of different countries by the same party, it is not always safe to say that the plaintiff has acted fraudulently.[26] It is also argued that since it is not possible to recognize a decision of a foreign court if it contradicts with a previous decision of Turkish courts, rejection of international *lis pendens* would not cause any conflicting judgments.[27]

In a similar vein, it is also argued that dismissal of an action by the Turkish courts would be a serious obstacle against the right of access to Turkish courts of the plaintiff.[28] Acceptance of international *lis pendens* where there is no clear provision would mean forcing the party against whom an action was taken before the foreign court to defend himself before that court although that action was taken beyond his control or where he/she may not have the necessary financial means[29]. In this regard, it is also argued that Article 114/I(1) of the CCP-2011 on *lis pendens* is only applicable in domestic cases and does not include any clear indication to cover international *lis pendens.*[30]

In a rather recent decision in 2014, the Turkish Supreme Court ruled according to the traditional view.[31] The case was a divorce lawsuit where the first action was taken before the Russian courts. The Turkish court of first instance accepted the objection of international *lis pendens* of the defendant and dismissed the action, taking into consideration the fact that the action involving the same

[22] V. R. SEVIĞ (note 20), at p. 51; V. R. SEVIĞ, Bir Yabancılık Unsuru Taşıyan Ticarî Davalar Hakkında Yetkili Mahkeme, *İstanbul Barosu Dergisi* 1959, Vol. 33, I. 7-8, p. 244.

[23] E. NOMER, Milletlerarası Yetki Alanında Derdestlik İtirazı, *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 1968, p. 355.

[24] E. NOMER (note 23), at p. 355.

[25] E. NOMER (note 23), at p. 356.

[26] E. NOMER (note 23), at p. 357.

[27] E. NOMER (note 23), at p. 374.

[28] A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 608.

[29] *Ibidem*.

[30] M. TAN DEHMEN, Türk Vatandaşlarının Kişi Hallerine İlişkin Davalar Bakımından 5718 sayılı MÖHUK'ta Kabul Edilen Yetki Kuralı, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 2013, Vol. 33, I. 1, p. 182.

[31] See *Yargıtay* (Supreme Court), Second Chamber, registration No. 2014/12316, decision No. 2014/23427, dated 20.11.2014 (Not published).

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subject-matter and cause of action between the same parties was already pending before the Russian courts.[32] However, in the appeal procedure the Supreme Court ruled that international *lis pendens* can only be accepted by the Turkish courts in two exceptional situations, namely where there is an international convention to which Turkey is a party, or by virtue of Article 47/I of CPIL-2007.[33] According to the Court, acceptance of international *lis pendens* in all other situations would mean the acceptance of the jurisdiction of foreign courts within national borders; thus would be incompatible with the sovereign rights of the Turkish State.

B. Acceptance of International *Lis Pendens* under Different Conditions

The second view that has been defended by Turkish scholars is in direct contrast to the above view. This view is based on the idea that the lack of an express provision on international *lis pendens* in Turkish legislation does not mean its rejection if the Turkish court is seised second for the same action.[34] However, different views and practices can be determined on the approach to be adopted in the acceptance of international *lis pendens,* as well as on its possible consequences on the action pending before the Turkish courts.

1. Direct Application of the Provision on the Objection Based on Lis Pendens *to International Parallel Proceedings*

One of the early views declared in doctrine, even before the enactment of CPIL-1982, was that the rules on *lis pendens,* as provided in the (then) CCP-1927, should equally apply where the same action is pending before foreign and Turkish courts at the same time.[35] Accordingly, it was sufficient to determine whether two actions

[32] *İstanbul Anadolu Aile Mahkemesi* (İstanbul Anatolia Family Court), Fifteenth Chamber, registration No. 2013/321, decision No. 2013/1014, dated 21.11.2013 (Not published).

[33] Regarding the discussions on international *lis pendens* under Article 47/I see *infra* at III.B.1.

[34] M. R. BELGESAY, *Teorik ve Pratik Adliye Hukuku IV.-Devletler Hususi Hukukunda Adliye (2. Kısım: Kanunlar İhtilâfı-Türk Mahkemelerinin Ecnebiler Hakkında Salâhiyeti-İstinabe-Ecnebi Mahkemesi Kararları-İflâs)*, İstanbul 1938, p. 92; V. R. SEVİĞ/ E. NOMER/ G. TEKINALP/ A. SAKMAR, *Devletler Hususî Hukuku Pratik Çalışmaları*, İstanbul 1976, pp. 180-181; F. TIRYAKI, Derdestliğin Şartları, *Ankara Barosu Dergisi* 1979, I. 2, p. 37; E. ŞEKERCI, Medeni Usûl Hukukunda ve İdari Yargılama Usûlünde Derdestlik, *Yargıtay Dergisi* 1986, I. 3, p. 216; B. KURU, *Hukuk Muhakemeleri Usulü*, Vol. 4, İstanbul 2001, p. 4223; S. TANRIVER, *Medenî Usul Hukukunda Derdestlik İtirazı*, Ankara 2007, p. 46; S. ÜSTÜNDAĞ, *Medeni Yargılama Hukuku*, Vol. I-II, İstanbul 2000, p. 500; N. EKŞI (note 16) at p. 204; F. SARGIN, *İnternet Aracılığıyla Gerçekleşen Marka İhlâlleri Hakkında Milletlerarası Yetkiyi Haiz Mahkemeler ve Uygulanacak Hukuk*, Ankara 2005, p. 252; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 415; E. ERDOĞAN, *Medenî Usûl Hukuku Kurallarının Yer Bakımından Uygulanması*, Ankara 2016, p. 179.

[35] M. R. BELGESAY (note 34), at p. 92.

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could be qualified as the same action and whether the foreign court was the first in time to be seised. In a 1998 decision, the view was also adopted by the Supreme Court, accepting the objection of international *lis pendens* of the defendant and declining jurisdiction in a divorce lawsuit based on the fact that the foreign court was seised first for the same action.[36]

2. Recognition or Enforcement Prognosis

Particularly since the enactment of CPIL-1982 it is also possible to identify a significant number of authors arguing that international *lis pendens* can be accepted through recognition or enforcement prognosis.[37] However, as will be demonstrated below, different views have been expressed with regard to whether a positive recognition or enforcement prognosis should suffice or whether some other conditions should also be required. The recognition or enforcement prognosis in the acceptance of international *lis pendens* has also been stated in the decisions of Supreme Court although no clear indication has been made by the Court regarding how such an assessment will be made.

a) Recognition or Enforcement Prognosis Suffices

According to one line of thought, in cases where the foreign court is seised first, the Turkish court second seised for the same action should decline jurisdiction once it makes an assessment that the decision of the foreign court could possibly be recognized or enforced in Turkey.[38] The ground for this view was stated as that where the decision of the foreign court could be enforced in Turkey, the plaintiff has no legal interest in filing the same action before a Turkish court[39] or that considering the frequency and development of international private law relationships, international *lis pendens* should be accepted if it is not expressly prohibited by legislation.[40] In this regard, it was advocated that as pendency is a matter of procedure, the objection of international *lis pendens* must also be subject

[36] See *Yargıtay* (Supreme Court), Second Chamber, registration No. 1998/10337, decision No. 1998/12221, dated 13.11.1998: B. KURU (note 34), at p. 4223.

[37] B. KURU (note 34), at p. 4222; S. TANRIVER (note 34), at p. 46; S. ÜSTÜNDAĞ (note 34), at p. 500; V. DOĞAN, Türk Hukukunda Yabancı Derdestliğin Nazara Alınması, *Prof. Dr. Ergin NOMER'e Armağan, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 2002, Vol. 22, p. 145; N. EKŞI (note 16) at p. 204. For a similar view on applying the rule on the objection of *lis pendens* (Article 187/I(4) CCP-1927) to international *lis pendens* by analogy see F. SARGIN (note 34), at p. 252.

[38] F. TIRYAKI (note 34), at p. 37. See also V. DOĞAN, *Milletlerarası Özel Hukuk*, Ankara 2016, p. 54; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 415; C. ŞANLI, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, İstanbul 2013, p. 152.

[39] F. TIRYAKI (note 34), at p. 37; V. DOĞAN (note 38), at p. 54.

[40] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 415; C. ŞANLI (note 38), at p. 152.

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to Article 114 CCP-2011 regarding its conditions and consequences.[41] This would mean that pendency of the same action before the foreign court can be objected by one of the parties, or can be taken into consideration by the Turkish court on its own motion during all stages of action and, should the Turkish court determine that the decision of the foreign court that was seised first for the same action could be recognized or enforced in Turkey, it shall dismiss the action in favour of that court.

According to another view, Article 114 CCP-2011 on *lis pendens* cannot be applied directly or by analogy to international situations, however the Turkish judge can close the loophole in law according to Article 1/II of the Turkish Civil Code of 2001[42] which requires that "*where there is no provision to be applied in legislation the judge shall decide according to customary law and if there is no such rule then according to a rule that he/she would have created if he/she was the legislator*". Accordingly, a solution similar to that of Article 9 of the Swiss Federal Act on Private International Law is proposed.[43] In this regard, if the Turkish court that is seised second for the same action considers that the decision of the foreign court can be recognized or enforced in Turkey, it can accept the objection of international *lis pendens.*[44] However, unlike the effect of *lis pendens* in domestic cases, since it is not certain whether the future judgment of the foreign court will be recognized or enforced in Turkey, the effect of accepting the objection of international *lis pendens* should be the stay of Turkish proceedings.[45] Once the judgment of the foreign court is recognized or enforced in Turkey, the Turkish court should decline jurisdiction.[46]

The recognition or enforcement prognosis has been stated in some decisions of the Turkish Supreme Court even before the adoption of CPIL-1982. For instance, in 1973 the Court rejected the objection of international *lis pendens* based on the fact that the (future) decision of the German court could not be enforced in Turkey.[47] In a similar vein, in 1985 the Court approved the decision of a court of first instance[48] rejecting the objection of international *lis pendens,* since in absence of any bilateral agreement between Turkey and Syria, the reciprocity required in the enforcement of foreign court decisions in the then CCP-1927 (Article 540)

[41] *Ibidem*.

[42] OG, dated 8.12.2001, numbered 24607.

[43] E. ERDOĞAN (note 34), at p. 179 *et seq*.

[44] E. ERDOĞAN (note 34), at p. 183 *et seq*.

[45] E. ERDOĞAN (note 34), at p. 184.

[46] *Ibidem*.

[47] *Yargıtay* (Supreme Court), Second Chamber, registration No. 1973/4413, decision No. 1973/4363, dated 2.7.1973: B. KURU (note 34), at p. 4223.

[48] *Kırıkhan Asliye Hukuk Mahkemesi* (Kırıkhan Civil Court of First Instance), registration No. 1981/325, decision No. 1984/215, dated 20.6.1984: Published in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1986, I. 1, pp. 80-85.

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could not be fulfilled and therefore the decision of the Syrian court could not possibly be enforced in Turkey.[49]

In more recent decisions of the Supreme Court, recognition or enforcement prognosis has found a place for itself although the Court does not indicate how it is to be implemented. For example in a divorce lawsuit, the plaintiff took an action first before the Canadian courts and subsequently before the Turkish courts. The court of first instance accepted the international *lis pendens* objection determining that the Canadian court was seised first for the same action and declined jurisdiction in favour of that court. On the appeal of the decision in 2010, the Supreme Court ruled that for the acceptance of the objection of international *lis pendens*, the same action (where the parties, the subject-matter and the cause of two actions are identical) must be taken before different courts at the same time and "*the decision of the foreign court must be capable of enforcement in Turkey and there must be a convention between that foreign country and Turkey or a clear provision in Turkish private international law*".[50] Thus, the Court seems to treat recognition prognosis not as a separate condition to accept the international *lis pendens* objection, but rather as a condition to be satisfied along with the existence of an international convention between the foreign country in question and Turkey. In the specific case the Supreme Court set the decision of the court of first instance aside on the grounds that the causes of the two actions were not the same and there existed no bilateral agreement between Turkey and Canada and Canada was also not a party to the Convention on the Recognition of Decisions Relating to the Matrimonial Bond of 1967.

In another decision of 2011 of the Supreme Court, a divorce lawsuit was filed before German courts by the wife and was subsequently taken before the Turkish courts by the husband.[51] The defendant objected before the Turkish court of first instance due to the pendency of the same action in the German courts. The court of first instance upheld the objection stating that pendency of the same action before foreign courts could also be taken into consideration.[52] In the appeal of the decision, the Supreme Court ruled that acceptance of the objection of international *lis pendens* requires "*identity of causes of two actions, the capability of enforcement of the decision of the foreign court in Turkey, existence of an international convention between Turkey and the state before which the action is pending as well as a clear provision on international* lis pendens *in Turkish Law*", thus looking for the fulfilment of the requirements cumulatively. In the specific case, the Court set the decision of the court of first instance aside on the grounds

[49] *Yargıtay* (Supreme Court), Eleventh Chamber, registration No. 1985/123, decision No. 985/1209, dated 6.3.1985: Published in N. EKŞI, *Milletlerarası Özel Hukuk I Pratik Çalışma Kitabı*, İstanbul 2014, p. 231 *et seq*.

[50] *Yargıtay* (Supreme Court), Second Chamber, registration No. 2009/13541, decision No. 2010/11899, dated 15.6.2010: Published at <http://www.kazanci.com>.

[51] *Yargıtay* (Supreme Court), Second Chamber, registration No. 2010/6713, decision No. 2011/8635, dated 17.5.2011: Published at <http://www.kazanci.com>.

[52] *Karacabey Asliye Hukuk Mahkemesi*, (Karacabey Civil Court of First Instance), registration No. 2009/134, decision No. 2009/1019, dated 3.12.2009 (Not published).

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that the causes of two actions were not the same and the parties to the dispute did not act in the same capacity in both of the actions.

b) Recognition or Enforcement Prognosis and Extra Requirements

Other views in Turkish legal doctrine follow the line of accepting international *lis pendens* according to recognition or enforcement prognosis, but they also require the fulfilment of additional conditions.

According to one view, Turkish courts should accept the objection of international *lis pendens* once they determine that it could be possible to enforce the decision of the foreign court in Turkey and that the basis of jurisdiction of the foreign court must sufficiently satisfy the objective link between the dispute and the foreign court.[53] According to the scholar, writing on the subject when CPIL-1982 was in force, while determining whether the foreign decision could be enforced in Turkey the Turkish court should make an assessment regarding two of the conditions of enforcement of foreign court decisions, namely "reciprocity" and "exclusive jurisdiction of Turkish courts".[54]

According to another view, other than recognition or enforcement prognosis, the Turkish court should also determine whether reciprocity regarding acceptance of international *lis pendens* exists and whether the foreign court shall render its decision in a reasonable time.[55] Thus, the Turkish court should decline jurisdiction in favour of the foreign court if it can reasonably be expected that the decision of that court which will be rendered in a reasonable time could be recognized or enforced in Turkey and if the courts of that foreign country also consider the pending actions before the Turkish courts.[56] Since it is not possible to be certain whether all the conditions of recognition or enforcement of foreign decisions will be fulfilled, in assessing whether the decision of the foreign court could be recognized or enforced in Turkey, it is sufficient to determine that certain requirements of recognition or enforcement of judicial decisions are fulfilled including the existence of a "civil law dispute", "reciprocity" and "jurisdiction".[57] Furthermore, since *lex fori* applies in the area of civil procedure; Article 114 CCP-2011 does not make a distinction between internal law and private international law and Article 40 of CPIL-2007 makes a reference to the domestic rules of jurisdiction as to venue,[58] international *lis pendens* can be accepted as a procedural requirement according to Article 114 of CCP-2011, and can therefore be raised as an objection by one of the parties or can be taken into account by the court on its own motion during all stages of the action.[59]

[53] N. EKŞI (note 16), at p. 204.

[54] *Ibidem*.

[55] V. DOĞAN (note 38), at p. 57; V. DOĞAN (note 37), at p. 146.

[56] V. DOĞAN (note 37), at p. 146.

[57] V. DOĞAN (note 38), at p. 54-55. See also V. DOĞAN (note 37), at pp. 145-146.

[58] Regarding Article 40 of the CPIL-2007 see *supra* note 18.

[59] V. DOĞAN (note 38), at p. 56.

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C. Evaluation of Different Views

It is very clear that the absence of a provision on international *lis pendens* in Turkish Law has led to divergent views in doctrine as well as various court practices which hamper legal certainty and consistency. Therefore, the first point to be noted is the urgent need for express rules in legislation accepting international *lis pendens*.[60]

However, notwithstanding that the objection of international *lis pendens* is not currently subject to specific rules in legislation, I am of the opinion that it can still be accepted. In other words, the absence of a provision on international *lis pendens* does not necessarily mean its rejection by the Turkish legislator. There is no provision in Turkish law, either expressly or implicitly preventing the Turkish courts from considering any pending actions before the foreign courts. Thus it cannot be inferred with certainty from any provision that silence of the Turkish legislator has to be interpreted as the rejection of international *lis pendens*. On the contrary, taking into consideration the frequency of private international law relations of the day, the undesirable consequences of international parallel proceedings, as well as the idea of international cooperation between the courts of different countries, the international *lis pendens* objection should be accepted by the Turkish courts.

Nevertheless, although it is true that Article 114/I(1) CCP-2011 on the *lis pendens* objection prohibits the pendency of the same action without differentiating between Turkish courts and courts of foreign countries, both the principle of priority required in domestic cases and the effect of acceptance of the objection of *lis pendens* on the second action may bring inappropriate and in certain cases unjust results once it is accepted that such provisions can be directly applied in international parallel proceedings. Sole acceptance of the principle of priority

[60] According to my opinion, such clear rules should also cover related actions, since express rules limited to international *lis pendens* would solve the problem of international parallel proceedings only partially. Where only international *lis pendens* is provided, that provision would apply as long as the actions pending before the Turkish and foreign courts can be characterised as the same action. Thus, a similar discussion regarding related actions will continue to arise. Regarding divergent views in Turkish literature, court decisions as well as the proposal of the present author on a provision regarding related actions in Turkish international civil procedure see G. BAYRAKTAROĞLU ÖZÇELIK (note 1), at p. 336 *et seq*. It is true that related actions are mostly not subject to clear rules even in national legislation providing express rules on international *lis pendens*: See *e.g.* Swiss Federal Act on Private International Law (Article 9); Belgian Code of Private International Law (Article 14); Croatian Private International Law Act (Article 80). In this respect, the Italian Law on the Reform of the Italian System of Private International Law is exceptional where Article 7 provides express rules not only regarding international *lis pendens* (Article 7(1)) but also on related actions (Article 7(3)). In regard to discretion of French courts to take a related action before the foreign courts into consideration by applying Article 101 of the Code on Civil Procedure on *connexité* by analogy see D. BUREAU/ H. MUIR WATT (note 10), at p. 222, No. 213; A.T. VON MEHREN/ E. GOTTSCHALK, *Adjudicatory Authority in Private International Law: A Comparative Study*, Leiden/ Boston 2007, p. 295. See also Article 34 of the Brussels I Recast Regulation providing rules on related actions pending before the courts of member States and of the third countries.

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where the same action is pending before different Turkish courts may be justified as a result of the fact that the said courts will apply the same rules on the dispute regarding both substance and procedure. The same line of approach may also be followed in international parallel litigation where there is reciprocal acceptance of countries through bilateral or multilateral conventions or, as in the EU, where it is based on a system of mutual trust, which the member States accord to each other's legal systems and courts[61] with the assumption of parity between such courts.[62] However, where such reciprocity is absent, the same kind of relationship cannot be said to exist between Turkish courts and the courts of foreign countries.[63]

However, taking the needs and requirements of international litigation into consideration, it should be possible to apply Article 114 CCP-2011 by analogy to international parallel proceedings.[64] This will require identity of actions before the foreign and Turkish courts, the first in time of the foreign proceedings and a positive recognition or enforcement prognosis, as will be discussed under the following headings.

1. Requirements of Accepting the Objection Based on International Lis Pendens

a) Identity of Actions

The first requirement for the acceptance of the objection of *lis pendens* in Turkish civil procedure, which should also be applied regarding international *lis pendens*, is that the action pending before the Turkish and foreign courts is the same action.

Although there is no clarity in CCP-2011 on what is required for the identity of actions, it is established both in doctrine and in practice that actions are deemed to be same where proceedings involve the same subject-matter and cause of action, and are between the same parties.[65] The parties are accepted to be the same even if they act in different capacities before different courts.[66]

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[61] C-116/02 *Erich Gasser GmbH v. MISAT Srl,* 9.12.2003, ECLI:EU:C:2003:657, para. 72.

[62] U. MAGNUS/ P. MANKOWSKI/ R. FENTIMAN, *Brussels I Regulation*, Munich 2012, Articles 27-30, No. 27 *et seq*. However, even in the EU *lis pendens* provisions based on the principle of priority are not free of criticism, encouraging race to court and abusive litigation strategies: J. J. FAWCETT, General Report, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law*, Oxford 1995, at p. 35; U. MAGNUS/ P. MANKOWSKI/ R. FENTIMAN (note 62), No. 17 *et seq*.; N. EKŞI (note 16), at p. 196; BAYRAKTAROĞLU ÖZÇELIK (note 1), at p. 174.

[63] See also N. EKŞI (note 16), at p. 204.

[64] See also F. SARGIN (note 34), at p. 252.

[65] R. ARSLAN/ E. YILMAZ/ S. TAŞPINAR AYVAZ, *Medenî Usul Hukuku*, Ankara 2016, at p. 327; S. TANRIVER, *Medenî Usûl Hukuku*, Vol. I, Ankara 2016, at p. 646.

[66] B. KURU, *Hukuk Muhakemeleri Usulü*, Ankara 1974, at p. 653; *Yargıtay Hukuk Genel Kurulu* (General Assembly of Civil Chambers of the Supreme Court), registration No. 1985/13-114, decision No. 1986/591, dated 28.5.1986: E. YILMAZ, *Hukuk Muhakemeleri Kanunu Şerhi*, Ankara 2012, at p. 768.

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Thus, the parties should be deemed to be the same even if they act in different capacities before the foreign and Turkish courts. In this regard, both where the same party takes concurrent actions against the other party before a foreign and a Turkish court and where the defendant of the first action before the foreign court subsequently takes another action before the Turkish court, the actions should be deemed to be between the same parties. Although it is possible to determine number of decisions of the Supreme Court in which the Court required that the parties should act in the same capacity before the foreign as well as the Turkish courts,[67] in my opinion it is not necessary to make any exception for international *lis pendens* from the approach adopted for domestic cases.[68] Furthermore, requiring the parties to act in the same capacity before the courts of different countries would also be contrary to the fact that parallel proceedings usually arise from reactive litigation, *i.e.* where the parties take different actions against each other before the courts of different countries.

The same cause of action exists where the facts of the actions are the same.[69] Identity of claims is required for the identity of the subject-matter of the actions.[70] Where the first action taken before the foreign court is a declaratory action which is followed by an action for performance before the Turkish court, the actions are not deemed to arise from the same subject-matter,[71] since the claim in the first action is limited to the existence or non-existence of a legal relationship whereas the second one also includes a claim on the performance of an act by the defendant.[72] On the contrary, where the action before the foreign court is an action for performance which is followed by a declaratory action before the Turkish court, the objection of international *lis pendens* should be admissible before the latter based on the fact that the plaintiff does not have a legal interest since the decision in the action for performance would also include determination of the (non)-existence of the legal relationship in question.[73]

b) Time of Seising

When Article 114 CCP-2011 is applied by analogy on international *lis pendens*, the second requirement should be as regards the chronology of the seizure of

[67] See *e.g. supra* notes 51 and 31 respectively regarding the decisions of 17.5.2011 and 20.11.2014 of the Supreme Court (Second Chamber) where the Court required *inter alia* that the parties should have acted in the same capacity before Turkish and foreign courts.

[68] For a comprehensive analysis of the requirement of "identity of the parties" with regard to *lis pendens* objection in domestic cases see S. TANRIVER (note 34), at p. 66 *et seq*.

[69] S. TANRIVER (note 65), at p. 653. See also *Yargıtay Hukuk Genel Kurulu* (General Assembly of Civil Chambers of the Supreme Court), registration No. 1985/13-114, decision No. 1986/591, dated 28.5.1986: E. YILMAZ (note 66), at p. 768.

[70] B. KURU (note 66), at p. 654.

[71] S. TANRIVER (note 34), at p. 82; E. ŞEKERCI (note 34), at pp. 220-221; F. TIRYAKI (note 34), at p. 40.

[72] F. SARGIN (note 34), at p. 254.

[73] S. TANRIVER (note 34), at p. 88.

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courts. As noted earlier, under Turkish civil procedure the objection of *lis pendens* is made to the second court seised which is obliged to dismiss the action as soon as it determines that the same action is already pending before another Turkish court. The same approach is also to be adopted in the objection of international *lis pendens* in terms of seizure of courts; thus, the objection should be admissible if the Turkish court is the one that is later seised.[74] The time of seizure of the courts is to be determined by the *lex fori* of the respective courts. In Turkish civil procedure, the court is deemed to be seised when the document instituting the proceedings is registered by the court (Article 118/I CCP-2011). As one of the procedural consequences of filing an action, pendency also starts from the same date. On the other hand, the Turkish court shall apply the law of the foreign court to determine the time of seizure of that court.

c) Recognition or Enforcement Prognosis

In accepting the objection of international *lis pendens*, the third requirement should be that the Turkish court which is seised second for the same action should make a positive assessment that the decision to be given by the foreign court could be recognized or enforced in Turkey.

Other than the fact that the plaintiff would have no legal interest in taking the same action before the Turkish courts if the foreign judgment is recognized or enforced in Turkey, recognition or enforcement prognosis is based on the idea that the risk of irreconcilable judgments exists only if the *res judicata* effect of the foreign judgment is recognized in Turkey. Thus, acceptance of the objection of international *lis pendens* according to recognition or enforcement prognosis would preclude the possibility of dismissal of the pending action before the Turkish court because of *res judicata* if the decision of the foreign court which is seised first is already recognized or enforced in Turkey.

At this point it should be underlined that, although recognition of a foreign judgment in Turkey suffices to accept its *res judicata* effect (Article 58/I CPIL-2007),[75] the distinction provided in CPIL-2007 regarding the conditions of

[74] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 414; V. DOĞAN (note 38), at p. 55; N. EKŞI (note 16), at p. 204. See also *Yargıtay* (Supreme Court), Second Chamber, registration No. 2005/8685, decision No. 2005/11319, dated 14.7.2005: Published at <http://www.kazanci.com>.

[75] Even if the decision of the foreign court is one requiring enforcement, as long as the party asking for recognition in Turkey has a legal interest, it is sufficient to decide on its recognition to accept its *res judicata* effect: F. SARGIN/ R. ERTEN, MÖHUK Hükümleri Dairesinde Tanımanın Hukukî Niteliği, Usûlü ve Karşılaşılan Bazı Sorunlar: "Yeni Bir Düzenleme Yapma Gereği", *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* 2014, Vol. 3, I. 2, pp. 51-52; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at pp. 478-479; P. GÜVEN, *Tanıma-Tenfiz (Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi)*, Ankara 2013, p. 53; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 653; N. EKŞI, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi*, İstanbul 2013, p. 7. See also *Yargıtay Hukuk Genel Kurulu* (General Assembly of Civil Chambers of the Supreme Court), registration No. 2009/19-161, decision No. 2009/207, dated 27.5.2009: Published in N. EKŞI, *5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'a İlişkin Yargıtay Kararları*,

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recognition and enforcement of judicial decisions should also be followed in the acceptance of international *lis pendens*. Thus, the prognosis should be made depending on the type of action in question and considering whether the decision of the foreign court could be subject to recognition or enforcement in Turkey.

In Turkish law, conditions of enforcement of foreign judgments are provided under Articles 50/I and 54 of the CPIL-2007.[76] According to Article 50/I, that provides for the pre-requisites of enforcement, a foreign judgment can be enforced in Turkey if it is given in a "*civil law action*" by a foreign "*court*" and is "*final*" according to the law of that country.

Under Article 54, the Turkish court shall decide on the enforcement of a foreign judgment if;

(i) Reciprocity exists either by an agreement between Turkey and the country by the court of which the judgment is given or where a statutory provision or practice exists in that foreign country which enables enforcement of decisions of Turkish courts (Article 54/I(a));

(ii) The judgment is not as to a dispute which falls under the exclusive jurisdiction of Turkish courts or is not given by a court granting itself jurisdiction without having a genuine link with the subject of the dispute or the parties, on the condition that the defendant raises an objection to that effect (Article 54/I(b));

(iii) The judgment is not manifestly contrary to public policy (Article 54/I(c));

(iv) Contrary to the law of that country the party against whom enforcement is sought has not been duly summoned to that court or properly represented before that court or where the judgment was given in default of appearance and that party has not raised an objection to enforcement on these grounds before the Turkish court (Article 54/I(ç)).

It is also established that the same conditions apply for recognition of foreign judgments, with the exception of reciprocity (Article 58/I CPIL-2007). The conditions of recognition and enforcement are assessed by the Turkish court in which recognition or enforcement is sought on its own motion, except for the ones regarding exorbitant jurisdiction (Article 54/I(b)) and the rights of defence (Article 54/I(ç)), which have to be raised by the party against whom recognition or enforcement is sought.

Nevertheless, it is obvious that where the action is still pending before the foreign court, the Turkish judge cannot determine with certainty whether all the conditions of recognition or enforcement are fulfilled,[77] either because of the nature

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İstanbul 2010, pp. 144-147. See *Yargıtay* (Supreme Court), Thirteenth Chamber, registration No. 1989/1221, decision No. 1989/4636, dated 30.6.1989: Published at <www.kazanci.com>.

[76] Regarding the conditions of recognition and enforcement of judicial decisions in Turkey see C. SÜRAL/ Z. D. TARMAN, Recognition and Enforcement of Foreign Court Decisions in Turkey, in this *Yearbook* 2013/2014, Vol. 15, pp. 485- 508; F. SARGIN, A Critical Analysis of the Requirements of Recognition and Enforcement of Foreign Judgments under Turkish Law, *IPRax* 2008, H. 4, p. 354 *et seq*.

[77] This argument has also been made in Turkish doctrine against the acceptance of recognition or enforcement prognosis: A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 608; E. NOMER (note 23), at p. 368. It was also stated that existence of mere probability of not

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of some conditions[78] or because some require the objection of the party against whom enforcement is sought.[79] Thus, some probability of recognition or enforcement of foreign judgment should suffice to uphold the objection of international *lis pendens* if the Turkish judge can make a positive prognosis on the conditions which can be assessed with certainty on its own motion at this stage.

In this regard, as far as the pre-requisites of recognition and enforcement are concerned, the Turkish court could assess whether the decision of the foreign "*court*" will be as to a "*civil law action*". When determining whether the judgment is given by a "*court*", it should suffice if the institution that will give the judgment is accepted as a court having the authority to give judicial decisions under the law of that country.[80] However, the mere existence of an alternative court should not be sufficient to reach the conclusion that this condition is satisfied. The alternative court in question should also guarantee the right to a fair trial as provided under Article 6/I of the European Convention on Human Rights (ECHR),[81] to which Turkey is a party,[82] and Article 36/I of the Turkish Constitution.[83] Therefore, the foreign court must be an independent and impartial tribunal guaranteeing a fair and public hearing within a reasonable time. Although it may not always be possible to determine with certainty that the proceedings before the foreign court shall be concluded satisfying the requirements of a fair trial, if the Turkish judge has legitimate doubts that proceedings before the foreign court shall not be concluded as guaranteeing the right to a fair trial, the objection of international *lis pendens* should not be upheld.

On the other hand the Turkish court can also determine with certainty whether reciprocity (Article 54/I(a) CPIL-2007) exists as regards enforcement of

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recognizing or enforcing a foreign judgment on public policy grounds is a reason not to adopt recognition or enforcement prognosis: E. NOMER (note 23), at p. 369.

[78] In this regard, the Turkish court cannot determine whether the foreign proceedings shall be concluded with a final judgment (Article 50/I CPIL-2007), whether the judgment is manifestly contrary to public policy (Article 54/I(c) CPIL-2007) or whether the party against whom recognition or enforcement is sought is given judgment in default of appearance (Article 54/I(ç) CPIL-2007) since the proceedings before the foreign court are still pending.

[79] See Article 54/I(b) CPIL-2007 on exorbitant jurisdiction and Article 54/I(ç) CPIL-2007 on the rights of defence.

[80] N. EKŞI (note 75), at p. 109 *et seq*.; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 483; V. DOĞAN (note 38), at p. 108. For the view also requiring that the foreign "court" should be accepted as a court according to the law of the country where recognition or enforcement is sought: C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 483; P. GÜVEN (note 75), at p. 29.

[81] J. J. FAWCETT, The Impact of Article 6(1) of the ECHR on Private International Law, *International and Comparative Law Quarterly* 2007, Vol. 56, p. 9. See also L.R. KIESTRA, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague 2014, p. 111.

[82] OG, numbered 8662, dated 19.3.1954.

[83] Article 36/I of the Turkish Constitution (note 15) reads that "*[e]veryone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures*."

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judicial decisions and whether the dispute falls under the exclusive jurisdiction of Turkish courts (Article 54/I(b)).[84]

Furthermore, it should also be noted that, in the recognition or enforcement of foreign court decisions, although objection of the party against whom the enforcement is sought is required for the protection of the rights of defence under Article 54/I (ç) CPIL-2007, it is still possible not to recognize or enforce a foreign judgment on public policy grounds (Article 54/I(c) CPIL-2007) if the Turkish court determines on its own motion that infringement of the rights of defence amounts to an infringement of the effective right of access of that party to the foreign court.[85] The same conclusion should also be adopted for international *lis pendens*. Therefore, if the Turkish judge has legitimate doubts that the effective right of access has not been guaranteed before the foreign court, which would result in non-recognition or non-enforcement of that judgment in Turkey, the objection of international *lis pendens* should be rejected.

2. Effect of Accepting the Objection Based on International Lis Pendens *on the Pending Action Before the Turkish Courts*

Once it is agreed that the objection of international *lis pendens* can be accepted according to the recognition or enforcement prognosis, its effect on the action pending before the Turkish court should also be further deliberated. As previously mentioned, in Turkish civil procedure once the conditions of objection of *lis pendens* are satisfied, the second court dismisses the action before it in favour of the first court (Article 115/II CCP-2011).

However, where international *lis pendens* is accepted according to recognition or enforcement prognosis, an immediate dismissal of the action pending before the Turkish court may lead to undesirable consequences since this approach mainly rests on an assumption that the foreign proceedings will be concluded with a final judgment, which could be recognized or enforced in Turkey. Thus, the action before the foreign court may itself be dismissed on procedural grounds, or may be concluded with a judgment the recognition or the enforcement of which is rejected in Turkey. In such cases dismissal of the action before the Turkish courts may amount to an infringement of the right to a court of the party that has brought the action before the Turkish courts as guaranteed by Article 6/I ECHR and Article 36/I of the Turkish Constitution. It will also lead to

[84] In Turkish law, exclusive jurisdiction of Turkish courts is not clearly provided by legislation, but certain jurisdictional rules are interpreted as rules of exclusive jurisdiction. In this regard, unanimous opinion exists that the jurisdiction of Turkish courts as regards disputes arising from property rights on immovable property which is situated in Turkey (Article 12 CCP-2011) is exclusive in character. Different views are declared on whether the rules of jurisdiction regarding disputes arising from employment contracts and relationships, consumer contracts and insurance contracts under Articles 44-46 CPIL-2007 establish exclusive jurisdiction of Turkish courts. Regarding the latter discussion See also *infra* at III.B.2.

[85] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 526; P. GÜVEN (note 75), at p. 146; N. EKŞI (note 75), at p. 696.

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waste of resources made in the proceedings before the Turkish courts until the date of dismissal, as well as requiring the plaintiff to take a new action before the Turkish courts and therefore bring questions of procedural economy.[86]

In this regard, the primary consequence of the acceptance of international *lis pendens* according to recognition or enforcement prognosis by Turkish courts should be the stay of the proceedings rather than dismissal.[87] However, it must also be underlined that a stay of proceedings for an excessive period of time may itself amount to an infringement of the right to a fair trial.[88] In view of this, as noted earlier, depending on the circumstances of each case, the Turkish court should stay the proceedings if it can make a positive assessment that the foreign court can render a judgment within a reasonable time, which can then be recognized or enforced in Turkey. The Turkish court should dismiss the action once the foreign decision is recognised or enforced in Turkey.

III. International *Lis Pendens* and Articles 41 and 47 CPIL-2007

As noted earlier, a second discussion relating to international *lis pendens* in Turkish law has been as regards Articles 41 and 47/I of Turkish CPIL-2007 (previously Articles 28 and 31 CPIL-1982), which provide rules on the international jurisdiction of Turkish courts relating to personal status of Turkish nationals and the foreign choice of court agreements, respectively. Although there is no express provision to this end, since the enactment of Turkish CPIL-1982, the majority view in Turkish doctrine has provided that in the application of two mentioned provisions, international *lis pendens*, is implicitly accepted.

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[86] See also E. ERDOĞAN (note 34), at p. 181. *Cf.* E. NOMER (note 23), at p. 369.

[87] Stay of proceedings is also adopted as the primary consequence of accepting international *lis pendens* through recognition or enforcement prognosis in different national legislation (*e.g.* Swiss Act on Private International Law, Article 9(1); Reform of the Italian System of Private International Law, Article 7(1); Belgian Code of Private International Law, Article 14) as well as in the Brussels I Recast Regulation regarding parallel proceedings between the courts of the member States and the third countries (Article 33(1)). Regarding recognition prognosis adopted in the Brussels I Recast Regulation see F. MARONGIU BUONAIUTI, *Lis Alibi Pendens* and Related Actions in the Relationship with the Courts of Third Countries in the Recast of the Brussels I Regulation, in this *Yearbook* 2013/2014, Vol. 15, p. 95 *et seq*.; G. BAYRAKTAROĞLU ÖZÇELIK (note 1), at p. 237 *et seq*.

[88] For similar concerns raised regarding delay in trial because of the stay of English proceedings on *forum non conveniens* grounds see J. J. FAWCETT (note 81), at p. 9; AG Opinion (*Léger*) of 14 December 2004, C-281/02 *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others,* para. 270. See also ECHR, *Kutic v. Croatia,* (Application No. 48778/99), 1 March 2002, para 33, where the European Court of Human Rights ruled that a stay of proceedings of over six years for the enactment of new legislation concerning the applicants' situation amounts to a violation of Article 6(1) of the ECHR.

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A. If an Action Relating to Personal Status of Turkish Nationals is Already Pending Before the Foreign Courts

Article 41 of Turkish CPIL-2007 provides for a specific rule on international jurisdiction of Turkish courts regarding actions relating to personal status of Turkish nationals[89] with the aim of maintaining a Turkish court having jurisdiction regarding such disputes. The provision reads that "*[a]ctions relating to personal status of Turkish nationals can be taken before the court which has jurisdiction according to domestic rules of jurisdiction as to venue, if there is no such court where the person concerned is resident in Turkey, 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, İstanbul or İzmir, provided that the action is not or cannot be instituted in any foreign court*".

Thus, two conditions must be satisfied for an action to be taken before the competent Turkish courts: first, the action must relate to personal status of Turkish nationals, a condition which is subject to a wide interpretation including matters relating to law of persons and family law,[90] where the plaintiff and/or the defendant is a Turkish citizen;[91] and second the action is not or cannot be instituted in any foreign court. As regards the second condition, either the parties may have not preferred to take the action before a foreign court,[92] or the action instituted before the foreign court may have been rejected on procedural grounds.[93]

The discussion on international *lis pendens* is mainly related with the application of the second condition. The said condition was also found in Article 28 of CPIL-1982 (which was applicable to actions relating to the personal status of Turkish nationals who are not domiciled in Turkey) but in a different way, requiring that "*the action is not or cannot be instituted in the courts of the foreign country where the Turkish nationals have domicile*". The aim of this condition was to underline the fact that Turkish courts did not have exclusive jurisdiction regarding the actions of personal status of Turkish nationals who had their domicile in foreign countries[94] since Article 18 of CCP-1927,[95] its predecessor, had been

[89] For a comprehensive analysis of Article 41 CPIL-2007 see B. TIRYAKIOĞLU (note 18), at p. 1141 *et seq*.; Z.D. TARMAN, The International Jurisdiction of the Turkish Courts on Personal Status of Turkish Nationals, in this *Yearbook* 2012/2013, Vol. XIV, p. 477 *et seq*.

[90] However actions regarding matrimonial property, maintenance obligations and damages are not considered within the scope of Article 41 CPIL-2007: C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 377; E. NOMER (note 16), at p. 96; B. TIRYAKIOĞLU (note 18), at p. 1145, Z. D. TARMAN (note 89), at p. 480.

[91] E. NOMER (note 16), at p. 97; A. ÇELIKEL/ B.B. ERDEM (note 20), at p. 569; B. TIRYAKIOĞLU (note 18), at p. 1153.

[92] V. DOĞAN (note 38), at p. 66.

[93] Z. AKINCI (note 16), at p. 50; *Yargıtay* (Supreme Court), Second Chamber, registration No. 1985/11103, decision No. 1986/97, dated 14.1.1986: Published in *Yargıtay Kararları Dergisi* 1986, Vol. 12, I. 12, pp. 1764-1765.

[94] E. NOMER, *Devletler Hususî Hukuku*, İstanbul 2002, p. 367.

[95] Article 18 of CCP-1927 read that actions relating to the personal status of Turkish nations who are not domiciled in Turkey shall be taken before the court of their last

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mostly interpreted and implemented as a rule of exclusive jurisdiction.[96] Thus, when Article 18 of CCP-1927 was in force, actions relating to personal status of Turkish nationals who were not domiciled or resident in Turkey had to be instituted before the Turkish courts and the enforcement of decisions of foreign courts regarding such actions had also been rejected because of the then enforcement condition that the foreign judgment was not to be related with a dispute of personal status or family law (Article 540/IV CCP-1927).[97] Therefore, the effect of the said condition in Article 28 of CPIL-1982 was to reject the idea of exclusive jurisdiction of Turkish courts in matters regarding the personal status of Turkish nationals[98] and to provide the plaintiff with the choice to take an action either before the Turkish courts or the courts of a foreign country.[99]

Nevertheless, neither Article 28 CPIL-1982 nor Article 41 CPIL-2007 has expressly provided for any tool for dismissing the action before the Turkish court if the same action is already pending before the court of a foreign country. However, in doctrine, it has been stated that if the action is already taken before a foreign court (under Article 28 CPIL-1982, before the court of the country where the Turkish national has his/her domicile), the defendant may raise the objection of international *lis pendens* in the second action before the Turkish court.[100] Therefore, although international *lis pendens* has not been subject to an express provision, it was accepted that Article 28 CPIL-1982 (now Article 41 CPIL-2007) is one of two situations where an objection can be made before the Turkish courts on the pendency of the same action.[101] In this regard, the majority view seems to provide for the sole application of principle of priority, while some other scholars have provided for the recognition or enforcement prognosis.[102]

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domicile in Turkey and if there is no such court before Ankara court provided that they are not resident in Turkey.

[96] A. ÇELIKEL, *Milletlerarası Özel Hukuk*, İstanbul 1995, p. 305.

[97] A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 564; N. EKŞI (note 16), at p. 153.

[98] See the rationale of Article 28 CPIL-1982: Published in *Milli Güvenlik Konseyi Tutanak Dergisi*, Vol. 7, No. 408, p. 1 *et seq*.

[99] Milletlerarası Özel Hukuk ve Usûl Hukuku Hakkındaki Kanunun Milletlerarası Yetkiye İlişkin Olarak Adalet Bakanlığı Hukuk İşleri Genel Müdürlüğünün yazısı ve bu yazıya Devletler Hususi Hukuku Anabilim Dalı Öğretim Üyelerinin Verdiği Cevap-Notverbal, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1983, Vol. 3, No. 2, p. 51.

[100] A. ÇELIKEL (note 96), at p. 307; N. EKŞI (note 16), at p. 155; Z. AKINCI (note 16), at p. 47-48; A. UYANIK ÇAVUŞOĞLU, *Türk Milletlerarası Özel Hukukunda Boşanma*, İstanbul 2006, p. 14 *et seq*.

[101] E. NOMER (note 16), at p. 98; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 568; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 379; R. AYBAY/ E. DARDAĞAN, *Uluslararası Düzeyde Yasaların Çatışması (Kanunlar İhtilafı)*, İstanbul 2008, p. 58; Z. AKINCI/ C. DEMIR GÖKYAYLA, *Milletlerarası Aile Hukuku*, İstanbul 2010, pp. 38-39.

[102] V. DOĞAN (note 38), at p. 54. See also M. TULUAY, "Milletlerarası Özel Hukuk ve Usûl Hukuku Hakkında Kanun" Üzerine Düşünceler, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 1982, Vol. 1, p. 25; V. DOĞAN (note 37), at p. 142 vd.; M. ATALI, Beachtung ausländischer Rechtshängigkeit im türkischen Recht, *ZZPInt* 2005, Vol. 10, p. 429.

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However, in my opinion, if an action regarding the personal status of Turkish nationals has already been instituted before a foreign court and that court has established its jurisdiction, the second action before the Turkish court should be dismissed not because of pendency of the same action but rather as a result of the fact that the Turkish court does not have international jurisdiction to try the dispute.[103] It is unanimously agreed that "*the action is not or cannot be instituted in a foreign court*" is one of the conditions of Article 41 CPIL-2007. Thus, as in a case where the action is not related to the personal status of Turkish nationals, if the second condition is not satisfied, (*i.e.* if the action is already pending before a foreign court) the jurisdiction of Turkish courts cannot be established under the said provision.[104]

On the contrary, one can refer to international *lis pendens* if the same action is taken before the courts of different countries, both of which have international jurisdiction to hear the dispute.[105] Therefore if an action regarding the personal status of Turkish nationals is instituted before a foreign court and that court has established its jurisdiction, in the second action before the Turkish court the defendant should raise the objection to international jurisdiction of the Turkish court.[106] However, if the foreign court does not establish its jurisdiction and rejects the action on procedural grounds, the action shall be deemed not to be instituted before that court and it should therefore be tried by the Turkish court having jurisdiction under Article 41 CPIL-2007.[107]

B. If an Action is Already Pending before Foreign Courts Pursuant to a Choice of Court Agreement

Article 47 of CPIL-2007 provides two paragraphs for rules on foreign choice of court agreements. While Article 47/I provides for the conditions and effect of foreign choice of court agreements in general, the second paragraph regulates such agreements in disputes arising from insurance, consumer and employment contracts.

Article 47/I has replaced Article 31 of the CPIL-1982, without providing major changes. Both of the provisions have been subject to much comment in literature and have been accepted by the majority view as a second instance (the first instance being Article 41 CPIL-2007) where the objection of international *lis pendens* can be raised before Turkish courts. On the other hand, Article 47/II

[103] On the same opinion see F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at p. 1153; G. GÜNGÖR (note 9), at p. 550.

[104] B. TIRYAKIOĞLU (note 18), at p. 1153.

[105] F. SARGIN (note 34), at p. 252, fn. 553.

[106] F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at p. 1154; G. GÜNGÖR (note 9), at p. 550. Even if the objection is not raised by the defendant the Turkish court should take it into consideration on its own motion: B. TIRYAKIOĞLU (note 18), at p. 1155; F. SARGIN (note 34), at p. 252, fn. 553. See N. EKŞI (note 75), at p. 205.

[107] B. TIRYAKIOĞLU (note 18), at p. 1159.

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CPIL-2007 is a new provision not found in CPIL-1982 and has also been commented on extensively in literature.

Both paragraphs of Article 47 CPIL-2007 will be elaborated under the following headings in terms of the issues of international *lis pendens*.

1. If a Valid Choice of Court Agreement Exists under Article 47/I CPIL-2007

Article 47/I provides for the conditions of a valid foreign choice of court agreement as well as its effect on the international jurisdiction of Turkish courts. According to the first sentence of the provision, where Turkish courts do not have exclusive jurisdiction under the rules of jurisdiction as to venue, the parties may designate a court of a foreign country regarding a dispute involving a foreign element and arising from a debt relationship.[108] Although not expressly provided, it is also accepted that such an agreement can be concluded regarding a particular relationship between the parties, conferring jurisdiction on particular court(s) of a foreign country.[109] Such an agreement does not have to be in writing, however it has to be proven in writing according to the said provision.

Where there exists a valid agreement under Article 47/I, the action can be tried by the Turkish courts only if the designated court denies its jurisdiction, or if no objection to international jurisdiction of the Turkish courts is raised (Article 47/I).

Today, it is the unanimous opinion that where there is a choice of court agreement between the parties satisfying the conditions of Article 47/I, the agreement being exclusive in nature sets aside the international jurisdiction of Turkish courts, therefore the action must be taken before the designated foreign court.[110] Thus, if one of the parties primarily takes an action before the Turkish court disregarding the foreign choice of court agreement, an objection should be raised to the jurisdiction of Turkish courts. An objection as to jurisdiction of Turkish courts is one of the preliminary objections to be raised by the defendant (Article 116/I(a) CCP-2011) in his/her answer pleading (Article 117 CCP-2011), within two weeks from the date of service of the complaint (Article 127 CCP-2011).

However, where the designated foreign court is first seised and a subsequent action is taken before the Turkish courts involving the same subject-matter and cause of action between the same parties, the objection to be raised before the latter is not expressly provided and is thus subject to much comment. As stated earlier, it has been accepted by most scholars that in such a situation, an

[108] Regarding validity of foreign choice of court agreements under Article 47/I CPIL-2007 see G. GÜNGÖR (note 9), at p. 552.

[109] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 393; V. DOĞAN (note 38), at pp. 75-76.

[110] E. NOMER (note 20), at p. 480; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 404; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 594; B. TIRYAKIOĞLU (note 18), at p. 1152, fn. 27; G. GÜNGÖR (note 9), at p. 552; V. DOĞAN (note 38), at p. 78.

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objection of international *lis pendens* can be raised before the Turkish court,[111] qualifying this situation as the second exceptional situation of raising such an objection in Turkish international civil procedure.[112] The General Assembly of Civil Chambers of the Supreme Court ruled accordingly in a decision of 1998 where it stated that if there exists an effective choice of court agreement between the parties concluded according to Article 31 CPIL-1982 but one of the parties takes an action before the competent Turkish court disregarding the agreement, the other party enjoys a right to raise an objection against the jurisdiction of the Turkish court and, where applicable, an objection of international *lis pendens*.[113] The same line of thought has also been followed in practice regarding Article 47/I CPIL-2007.[114]

However, in my point of view, if the plaintiff has already instituted proceedings before the designated foreign court and that court has established its jurisdiction according to the agreement between the parties, in the second action taken before the Turkish court involving the same cause of action and same subject-matter between the same parties, the defendant could only raise an objection to the jurisdiction of Turkish courts and not an objection of international *lis pendens*.[115] Thus, in such a case, the Turkish court does not have international jurisdiction to hear the case before it, which had been set aside by the choice of court agreement itself. The said situation cannot be considered as international *lis pendens*, since international *lis pendens* requires simultaneous seizure of courts of different countries having jurisdiction in relation to the same dispute. On the contrary, where the dispute is already pending before a foreign court that has established its jurisdiction pursuant to an exclusive choice of court agreement, the Turkish courts lack jurisdiction to hear the same dispute. Therefore, in such a case,

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[111] E. NOMER (note 16), at p. 117; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 407; A. ÇELIKEL/ B.B. ERDEM (note 20), at p. 596; Z. AKINCI (note 16), at p. 45; N. EKŞI (note 16), at p. 183. On a different view regarding acceptance of international *lis pendens* in such situations according to recognition or enforcement prognosis see M. ATALI (note 102), at p. 429 *et seq*.

[112] E. NOMER (note 20), at p. 452; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 407; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 596. See also the decision of 20.11.2014 by the *Yargıtay* (Supreme Court), Second Chamber (note 31) where the Court ruled that international *lis pendens* can only be accepted either according to an international convention to which Turkey is a party or by virtue of Article 47/I CPIL-2007.

[113] *Yargıtay Hukuk Genel Kurulu* (General Assembly of Civil Chambers of the Supreme Court), registration No. 1998/12-287, decision No. 1998/325, dated 6.5.1998: Published at <www.kazanci.com>.

[114] *Yargıtay* (Supreme Court), Ninth Chamber, registration No. 2010/7381, decision No. 2010/16168, dated 3.6.2010: Published in *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* 2012, Vol. 1, No. 2, p. 289 *et seq*.

[115] See also F. SARGIN, *Milletlerarası Usûl Hukukunda Yetki Anlaşmaları*, Ankara 1996, p. 189; F. SARGIN (note 34), at p. 252, fn. 553; B. TIRYAKIOĞLU (note 18), at 1152, fn. 27; V. DOĞAN (note 38), at p. 52; V. DOĞAN (note 37), at p. 142; C. SÜRAL, Hukuk Muhakemeleri Kanunu'nun Türk Mahkemelerinin Milletlerarası Yetkisine Etkisi, *Türkiye Barolar Birliği Dergisi* 2012, No. 100, p. 196; Z. D. TARMAN, Montreal Sözleşmesi'nin Yetki ve Tahkime İlişkin Hükümleri, *Türkiye Barolar Birliği Dergisi* 2013, No. 107, p. 112.

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the ground of the objection to be raised before the Turkish court should be to give effect to the choice of court agreement and not the pendency of the same action before a foreign court.

Nevertheless, if the defendant does not raise an objection as to the jurisdiction of Turkish courts within the time limit provided in CCP-2011, or if such an objection is rejected by the court, then it should be possible to raise an objection of international *lis pendens*.[116] Thus, in such a case, the situation would be different and the same action would be pending before two competent courts; the foreign court which is seised first having jurisdiction according to the agreement between the parties and the Turkish court that is seised second, the jurisdiction of which is revived either because of the rejection of the objection as to its jurisdiction or that such an objection is not raised within the time limit.[117]

In a similar vein, if the choice of court agreement concluded between the parties is non-exclusive (*i.e.* if the parties have expressly designated the courts of a foreign country without removing the international jurisdiction of Turkish courts)[118] and the same action is already pending before the designated court, an objection of international *lis pendens* could be raised before the Turkish courts.[119] In such situations, the objection of international *lis pendens* should be accepted by the Turkish court according to the recognition or enforcement prognosis, as explained above.[120]

2. If a Valid Choice of Court Agreement Exists under Article 47/II CPIL-2007

Article 47/II of the CPIL-2007 is a new provision not found in CPIL-1982. It provides that the jurisdiction of courts determined in Articles 44,[121] 45[122] and 46[123]

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[116] See also G. GÜNGÖR (note 9), at p. 552.

[117] *Ibidem*.

[118] In regard to the view that a non-exclusive foreign choice of court agreement should also be upheld if the parties have expressly designated the courts of a foreign country without removing the international jurisdiction of Turkish courts See also C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 404; F. SARGIN, (note 115), at p. 195.

[119] V. DOĞAN (note 38), at p. 52; F. SARGIN (note 115), at p. 190.

[120] For a similar view on the possibility of accepting international *lis pendens* according to recognition or enforcement prognosis where the agreement between the parties is non-exclusive see V. DOĞAN (note 38), at p. 54.

[121] According to Article 44 CPIL-2007 "*[t]he court of the workplace in Turkey where the employee habitually carries out her/his work shall have jurisdiction in actions arising from individual employment contracts or employment relationships. In actions filed by the employee, the Turkish courts where the domicile of the employer or where the domicile or the habitual residence of the employee is situated shall also have jurisdiction*".

[122] According to Article 45 CPIL-2007 "*[i]n actions arising from contracts defined in Article 26, Turkish courts where the domicile or the habitual residence of the consumer, or where the place of business, domicile or habitual residence of the opposing party is situated, shall have jurisdiction, subject to the choice of the consumer*" (para. 1). "*The court*

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of CPIL-2007 (regarding employment contracts and relationships, consumer contracts and insurance contracts, respectively) cannot be set aside by the agreement of parties.[124] It aims to protect the employee, the consumer, the insured and the beneficiary as the weaker party in such relationships and not to deprive them of the jurisdiction of Turkish courts indicated in those provisions.[125]

Conflicting views are present in literature as regards the meaning of Article 47/II and the nature of Articles 44, 45 and 46 CPIL-2007.

According to the view held by the majority, Articles 44, 45 and 46 should be characterized as provisions of exclusive jurisdiction, but limited with the aim of protection of the weaker party.[126] In this regard, Article 47/II does not prohibit choice of court agreements and the parties are able to confer jurisdiction upon the courts of a foreign country, along with the Turkish courts provided between Articles 44 and 46.[127] Nevertheless, the party which is protected by the said provisions should benefit from that agreement, in other words, the choice of court agreement should be considered valid only if the protected party initiates proceedings before the designated court.[128] On the other hand, based on the characterization of those provisions as exclusive jurisdiction provisions limited with the aim of protection of the weaker party, decision of the designated foreign court can be recognised or enforced in Turkey on the conditions that it is in favour of the weaker party and its recognition or enforcement is sought by the weaker party.[129] On the contrary, if the action before the foreign court is instituted against the weaker party and that court has rendered a decision against that party, recognition or enforcement of that decision should be rejected by the Turkish court on the ground that it has exclusive jurisdiction.[130]

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of habitual residence of the consumer in Turkey shall have jurisdiction regarding actions filed against the consumer pertaining to consumer contracts concluded under the first paragraph" (para. 2).

[123] According to Article 46 CPIL-2007 "*[t]he court of the principal place of business of the insurer or of the place where the branch concluding the insurance contract or its agency is situated in Turkey shall have jurisdiction in actions arising from insurance contracts. However, in actions filed against the policy owner, the insured and the beneficiary, the court having jurisdiction shall be the court of their domicile or habitual residence in Turkey*".

[124] For a comprehensive analysis of Articles 45 and 47/II CPIL-2007 see G. BAYRAKTAROĞLU ÖZÇELIK (note 18), at p. 833 *et seq*.

[125] See rationale of Article 47/II CPIL-2007: B. TIRYAKIOĞLU/ M. AYGÜN/ E. KÜÇÜK (note 8), at p. 104.

[126] E. NOMER (note 16), at p. 163; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 398; A. ÇELIKEL/ B. B. ERDEM (note 20), at p. 597; P. GÜVEN (note 75) at p. 105.

[127] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 397.

[128] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 398; C. ŞANLI (note 38), at p. 94.

[129] E. NOMER (note 16), at p. 163-164; E. NOMER (note 20), at p. 514; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 16), at p. 505; A. ÇELIKEL/ B.B. ERDEM (note 20), at p. 597; P. GÜVEN (note 75), at p. 105.

[130] E. NOMER (note 16), at p. 163; P. GÜVEN (note 75), at p. 105.

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According to another view, it is possible to consider choice of court agreements that do not rule out the jurisdiction of Turkish courts provided between Articles 44 and 46 and are in favour of the weaker party as valid.[131] However, the said provisions cannot be interpreted as provisions establishing exclusive jurisdiction of Turkish courts.[132] On the other hand, the Turkish court from which recognition or enforcement is sought cannot examine whether the decision of the foreign court is in favour of the weaker party since this would be against the prohibition of *révision au fond*.[133] However, without such an examination, recognition or enforcement should be granted if it is sought by the protected party.[134]

According to another view, due to its clear wording, Article 47/II rules out the possibility of concluding choice of court agreements even if the agreement favours the interests of the weaker party.[135]

In my view, by virtue of Article 47/II, Articles 44-46 cannot be characterized as provisions establishing exclusive jurisdiction of Turkish courts.[136] The mentioned provisions can only be accepted as rules of protective jurisdiction which aim to provide courts in Turkey in favour of the weaker party by considering the positions of the parties in the contract.[137] They cannot be interpreted as provisions conferring exclusive jurisdiction upon Turkish courts in all circumstances, since it is not possible to initiate proceedings in Turkey if any basis of jurisdiction provided in the said provisions does not point to Turkey.[138] Furthermore, the language used in two paragraphs of Article 47 is not identical: while under the first paragraph the parties are prevented from concluding a choice of court agreement if the dispute falls under the "*exclusive jurisdiction*" of Turkish courts, in the second paragraph it is stated that the jurisdiction of courts determined in Articles 44, 45 and 46 cannot be "*set aside by the agreement of parties*".[139] Thus, Article 47/II should be interpreted as giving the parties the possibility of concluding a choice of court agreement without removing the international jurisdiction of Turkish courts under Articles 44-46.

In this respect, the conclusion regarding international *lis pendens* to be reached here will be different than the one regarding Article 47/I. In cases where there is a choice of court agreement in regard to the disputes arising from the contracts where the weaker party is protected and the first action is taken before the designated foreign court, one of the parties to the dispute before the Turkish court can raise an objection of international *lis pendens*, rather than an objection to international jurisdiction of Turkish courts. Thus, in this situation, both courts have

[131] V. DOĞAN (note 38), at p. 75.

[132] *Ibidem*.

[133] V. DOĞAN (note 38), at p. 118.

[134] *Ibidem*.

[135] R. AYBAY/ E. DARDAĞAN (note 101), at p. 76.

[136] G. BAYRAKTAROĞLU ÖZÇELIK (note 18), at p. 866. See also N. EKŞI (note 75), at p. 207.

[137] G. BAYRAKTAROĞLU ÖZÇELIK, (note 18), at p. 866.

[138] N. EKŞI (note 75), at p. 210, p. 214.

[139] N. EKŞI (note 75), at p. 207.

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jurisdiction to hear the dispute. In such a case, international *lis pendens* should be accepted by the Turkish court if it concludes that the decision of the foreign court could be recognized or enforced in Turkey.[140]

IV. Conclusion

International *lis pendens* is one of the important topics that is not expressly provided for in Turkish CPIL-2007 and therefore has been subject to extensive comment in literature and to conflicting decisions when considered by Turkish courts. Absence of an express provision on the topic has divided the doctrine on the question of whether international *lis pendens* is rejected by the Turkish legislator. However, although not clearly provided in law, taking the undesirable consequences of international parallel proceedings, the frequency of international private law relationships as well as the necessary cooperation between the courts of different countries, the objection of international *lis pendens* should be accepted by the Turkish courts by analogy to Article 114 CCP-2011, providing for the objection of *lis pendens* in domestic cases. As such, the objection of international *lis pendens* should be subject to three conditions: identity of the actions, prior seizure of the foreign court and a positive prognosis to be made by the Turkish court that the foreign judgment could be recognized or enforced in Turkey. The primary effect of accepting such an objection should be a stay of the Turkish proceedings, rather than dismissal.

On the other hand, I am of the opinion that in two situations where the same action involving the same subject-matter and cause of action between the same parties is already pending before the courts of a foreign country, the defendant of the subsequent action before the Turkish courts should raise an objection as to the international jurisdiction of Turkish courts, rather than an objection of international *lis pendens*.

The first situation is as regards the application of Article 41 CPIL-2007 providing on the international jurisdiction of Turkish courts in disputes related to the personal status of Turkish nationals. The said provision clearly indicates as a condition that "*the action is not or cannot be instituted in the foreign courts*". Therefore if such an action is already pending before a foreign court which has established its jurisdiction, the said condition is not fulfilled and the Turkish courts lack jurisdiction to hear the dispute. In such a situation, the objection to be made

[140] An urgent need is also obvious for an amendment of Article 47/II CPIL-2007 taking the divergence of views in doctrine. In this regard certain situations where a choice of court agreement is possible related with contracts where the weaker party is protected should expressly be provided in legislation, including for instance the possibility of concluding such agreements after the dispute has arisen or which allows only the protected party to institute proceedings in courts of foreign countries. For a proposal of the present author on the amendment of Article 47/II CPIL-2007 in the context of consumer contracts see G. BAYRAKTAROĞLU ÖZÇELIK (note 18), at p. 867 *et seq*.

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before the Turkish courts should be as to the international jurisdiction of Turkish courts.

Secondly, if there is a valid choice of court agreement between the parties under Article 47/I CPIL-2007 and the first action is taken before the designated foreign court which has established its jurisdiction pursuant to that agreement, the defendant in the second action should raise an objection to international jurisdiction of Turkish courts. In such a case, the choice of court agreement being exclusive in character removes the international jurisdiction of Turkish courts, therefore international pendency cannot be said to exist technically since it requires seisure of courts of different countries having jurisdiction in relation to the same dispute. Nevertheless, if the defendant does not raise an objection to international jurisdiction of Turkish courts within the time limit, or the objection is not accepted by the court, or if the parties have expressly concluded a non-exclusive choice of court agreement, it should be possible to raise an objection of international *lis pendens*.

Moreover, although from my point of view Article 47/II CPIL-2007 providing for a special rule on the choice of court agreements regarding employment, consumer and insurance contracts requires further amendment, as it stands today it cannot be interpreted as preventing the parties of such contracts from concluding choice of court agreements. The mentioned provision stating that the jurisdiction of the courts determined in Articles 44, 45 and 46 CPIL-2007 cannot be set aside by the agreement of parties can be interpreted to mean that the parties to such contracts can conclude foreign choice of court agreements without removing the international jurisdiction of Turkish courts in such disputes. Thus, if such an action is first taken before the foreign court, the defendant before the Turkish court should be able to raise an objection of international *lis pendens.*

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THE MAURITIAN SUPREME COURT RELIANCE ON FRENCH AND BRITISH LAWS TO RESOLVE PRIVATE INTERNATIONAL LAW DISPUTES

Jamil Ddamulira MUJUZI*

I. Introduction
II. Private International Law: French Law, British Law or Mauritian Law?
III. Conclusion

I. Introduction

For over one hundred years the Supreme Court of Mauritius (hereinafter, the Court) has dealt with the question of whether to apply French or British law when dealing with a case that involves private international law issues – for example, a contract signed abroad which is sought to be enforced in Mauritius or a marriage celebrated abroad but the divorce is sought in Mauritius.

The Court has adopted three approaches when dealing with cases which raise conflict of laws issues: the first approach has been to follow French legal principles; the second approach has been to follow both French and British legal principles; and the third approach has been to follow British legal principles. In the majority of the cases, the Court has followed French legal principles but there is evidence that it is willing to follow English legal principles if it is in the interests of justice to do so.

The author argues that the Court should take a stand on which principles are applicable otherwise its jurisprudence will end up being unpredictable.

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 423-430
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II. Private International Law: French Law, British Law or Mauritian Law?

One of the issues that the Supreme Court has had to grapple with for over one hundred years is that of the applicable principles of private international law when dealing with the issue of conflict of laws. This has been the case where, for example, a contract was entered into in one country and has to be enforced in Mauritius or a marriage was celebrated in one country but a divorce is sought in Mauritius. Because of the fact that Mauritius was at different times colonised by the French and the British, the Court has had to decide whether to invoke French or British law or Mauritian law. The cases in which the Court has dealt with this question are discussed here. In *Bell the husband v Bell the wife*,[1] the parties had contracted their marriage in England but were later domiciled in Mauritius. The question was whether the court had jurisdiction to dissolve the marriage. Most importantly, the court had to determine whether Mauritian law was applicable to the marriage. The Court held that because the parties had been domiciled in Mauritius, Mauritian law was applicable to the dissolution of the marriage. The same approach was followed in subsequent cases.[2] In *Cessio bonorum John Billing Messrs. Davy & Robinson, opposing creditors,*[3] the Court had to determine whether the Mauritian law on the prescription of a debt was applicable to a contract that was entered into in a foreign country (Natal – South Africa). The Court held that:

> "In Mauritius, the term of prescription is 5 years. The celebrated judgment of Lord Chancellor Brougham, in the […] case of Lippman [Lippmann v Don, 26 May 1837] proceeds on a most elaporated [*sic*] review of the principles of international law, of the opinions of commentators, and the decisions of Courts of Justice, and has, ever since, been acknowledged to have fixed the principle that the prescription of the country where the suit is raised, not of the place where the contract was entered into, must regulate the case."[4]

The Court suggests that when it comes to the issue of prescription, the law was settled as early as 1837 that it is the law of the country in which the suit is brought which is applicable. In *Goolam Hossen Mahomed v Mahomed Assenjee,*[5] the defendant had contracted a debt in India and relocated to Mauritius. He argued that according to Indian law, the debt had prescribed and therefore could not be

[1] *Bell the Husband v Bell the Wife* 1865 MR 26. See also *Bell the Husband v Bell the Wife* 1864 MR 147.

[2] *Besson v Besson* 1960 MR 141. See also *Chettiar V. Chetty & Ors.*1955 MR 56 (on the issue of domicile in inheritance cases); *Liong Fat (h) Petitioner v Liong Fat (w)* 1952 MR 308 (marriage contracted in France).

[3] *Cessio bonorum. John Billing. Messrs. Davy & Robinson, opposing creditors*. 1861 MR 62.

[4] *Ibid.*, p.3.

[5] *Goolam Hossen Mahomed v Mahomed Assenjee* 1872 MR 67.

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enforced in Mauritius. The Court had to determine whether it was Indian or Mauritian law which was applicable to the debt in question. In deciding that it was Mauritian law which was applicable, the Court observed that:

> "The question of what prescription is to apply when a contract or obligation is sought to be enforced out, of the country where it was made, is a very important, and interesting one. It has been much discussed by writers of highest eminence and of different countries, and been frequently the subject of decisions by the Courts of law in Europe, and America. It is impossible to affirm that the question can now be held as finally settled. All the civilized world over, but the whole weight of authority British and American is so completely in favor of the rule that the *lex fori* should prevail, that we consider ourselves quite precluded from examining the question at length. It was urged by the defendant, that we are here to be guided rather by the opinions of French writers, and by the decisions of the Courts of that Country, than by the English Authorities; but we find ourselves in a question like this, not, be it observed, of Municipal, or French or Colonial, but of international law, bound by what has been decided by the judges of the Privy Council to whom we are subordinate. That Supreme Tribunal has declared, «that it has become almost an axiom in jurisprudence, that a law of prescription or law of limitation which is meant by that denomination, is a law relating to procedure, having reference only to the *lex fori*» Her highness Ruckmabaye v. Sulloobhoy Motichund, December 1851 and November 1852. Moore's P.C. Case VIII 35. Whether this doctrine may not be held to be too broadly, and strongly stated when the French and German authorities are looked at, may well be doubted…but we are bound to follow the ruling of our own Highest Court of appeal which we believe is entirely in accordance with the now accepted doctrine of England and America, – we are therefore of opinion that the Prescription of our own law *i.e.* of the Civil Code, must *prima facie* prevail in this case. We say *prima facie* for if the defendant should be in a position to shew that the law of the place where the contract was entered into (Bombay) absolutely annuls the contract and not merely cuts off the remedy and that by the lapse of a shorter period than the term of prescription adopted by the Civil Code, an argument might be open to him as was noticed in the course of the discussion at the bar […]"[6]

In this case, the Court makes it very clear that on issues of prescription when a contract was entered into abroad, it is Mauritian law which is applicable but that the contract is governed by the law of the country in which it was entered into. In arriving at this decision, the Court was guided by an earlier decision of the Privy Council and English and American writers. The Court states that the position taken by French and German writers may be applicable if it was dealing with the

[6] *Ibid.*, p. 1 - 2.

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exception to the general rule. This means that the facts of the case determine whether Mauritian or foreign law would be applicable. This decision was followed in *Baylis v Goolam Mahomed Ajum & Co* 1905[7] in which the court had to deal with the enforcement of a Bill of Landing signed abroad which contained a clause to the effect that in case of a dispute between the parties, English law was applicable. The Court, in concluding that English law was applicable in this case, held that:

> "Two points are perfectly clear: 1– That the law which governs the contract between parties is the English law, 2 – it is settled case law in England, based upon principles of public international policy, that all questions connected with the remedy such as limitation of action by lapse of time and procedure are governed by the law of the country in whose Courts the remedy is sued for, *i.e*. by the *lex fori*. The host of decisions and opinions of text writers on the subject […] clearly establish the principle […]"[8]

In *The Chartered Mercantile Bank v Scott & Co.,*[9] the Court held that

> "The contract now sought to be enforced is one, which by their acceptance, the defendants entered into, binding themselves to pay the plaintiffs, as endorsers of the Bill, the amount therein specified. The acceptance having taken place in Mauritius and no specific place of payment being mentioned, there can be no doubt that the contract must be regarded as one entered into and to be performed in Mauritius, and that, in accordance both with the English and with the French authorities, the law of this Colony must regulate the payment."[10]

Where English and French law on the matter was the same, the court did not have to choose between the two. In *De Chazal v De Chazal and Ors,*[11] the plaintiff was domiciled in Mauritius. His underage son went to the USA for studies and entered into a marriage with a US citizen. The plaintiff applied to the Mauritian court to have the marriage annulled. The Court observed that it was dealing with a question of private international law which was governed by French law.[12] On the basis of French law, the Court held that it had the jurisdiction to annul the marriage and it annulled it.[13] In *Austin v Bailey,*[14] the plaintiff argued that a testatrix's will should

[7] *Baylis v Goolam Mahomed Ajum & Co* 1905 MR 43. See also *Cantin & Ors. v Bouchet & Ors*.1866 MR 33 in which the Court held, though briefly, that the law of England governed the terms of the deed and the law of Mauritius governed the circumstances of its execution.

[8] *Ibid.*, p. 2.

[9] *The Chartered Mercantile Bank v Scott & Co.* 1879 MR 93.

[10] *The Chartered Mercantile Bank v Scott & Co.* 1879 MR 93.

[11] *De Chazal v De Chazal and Ors*. 1961 MR 5.

[12] *Ibid.*, para 4.

[13] *Ibid.*, paras 4 - 6.

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be nullified on the ground that it was repugnant to Mauritian laws. The will had been made in England in accordance with English law. The court referred to text books on international law and held that:

> "The death of the testatrix in England where she was residing at the time she made her will and the legacies she instituted by virtue of a trust, in accordance with a system which is foreign to our law, raise questions involving a conflict of laws, and it becomes necessary to ascertain what is the applicable law in relation to the various questions which this Court has to decide. Since the rules of private international law in any country must necessarily have their foundation on the internal law of that country, those which are applicable must be based substantially on the provisions of… laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that, subject to any exceptions which may arise through certain different statutory enactments and treaty obligations, we must be guided by the French rules of private international law."[15]

The Court added that in certain situations French law allows a testatrix to expressly state in her will that Mauritian law shall not be applicable in its execution. However, that wish is also valid if it is not against public policy.[16] In this case the court holds that if there is a conflict of laws, Mauritian courts have to be guided by French rules of private international law.

Ever since that judgement, the Supreme Court has held that French law is the applicable law where there is conflict of laws.[17] In *Pillay v Pillay,*[18] the Court held that although there is evidence to the effect that prior to 1962 it had referred to English case law when dealing with some issues of private international law, "it does not follow that when confronted with a conflict of laws this Court should and will necessarily turn to its English counterpart for guidance. The standpoint of this Court was thus defined in *Austin v. Bailey* [1962 MR 113]."[19] Likewise, in *Ex Parte Moonshiram and Anor,*[20] the Court held that French law was applicable to the case when parties wanted to change the regime of their foreign marriage. In *F. Renggli v Davie Shaw & Anor,*[21] the Court held that "in matters of conflict of laws we are mainly governed by the French principles of private international law. With regard to the period of prescription of judgments for the purpose of their execution,

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[14] *Austin v Bailey* 1962 MR 113.

[15] *Ibid.*, p. 2.

[16] *Ibid.*, p. 8.

[17] See *Immobilien Development Indien I GMBH v Kalra A. & Ors* 2011 SCJ 249, pp.8 - 9.

[18] *Pillay v Pillay* 1973 MR 179; 1973 SCJ 65.

[19] *Ibid.*, p. 3. See also *Temooljee and Co. Ltd. v Pardiwalla* 1975 MR 58; 1975 SCJ 73.

[20] *Ex Parte Moonshiram and Anor* 1983 MR 196.

[21] *F. Renggli v Davie Shaw & Anor* 1998 MR 143; 1998 SCJ 467.

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it is the *lex fori* which is applicable."[22] In this case the court used the word "mainly". This implies that it is not only French law which governs conflict of laws. In *Michael R. Jordan v Marie M. Jordan,*[23] the Court held that "we follow French rules insofar as private international law is concerned."[24] In *De Chazal Du Mee & Cie v Bancoult O. & Anor,*[25] the Court held that "[i]t is settled law that in matters of conflict of laws, the courts in Mauritius will be guided by the French rules of private international law…"[26] It is thus clear that since 1962, there were two positions on the issue of which private international law was applicable to Mauritius. In some decisions the Court said that it was French law and in others it held that "mainly" French law was applicable thus leaving open the possibility of relying on English law. However, the dominant view was that French law was the only law to be relied on.

However, this position seems to be changing. For example, in *Peeroo A.K. v Peeroo M.J,*[27] the petitioner, a Mauritian national, initiated divorce proceedings in Mauritius against the respondent, a French national. The marriage had been entered into in France and was therefore governed by French law. The petitioner started the divorce proceedings two months after the respondent had initiated similar proceedings in France. The respondent argued that according to French law, the Mauritian proceedings had to be put on hold until the finalisation of the French proceedings. However, the petitioner's lawyer argued that "we should not blindly follow the principles of French law in the present matter mainly because the petitioner, who is a citizen of Mauritius and who is resident in Mauritius, is entitled to enter a divorce petition by virtue of" the relevant Mauritian legislation.[28] He added that "a stay of proceedings would defeat the ends of justice by placing an undue burden on the petitioner in terms of additional costs and inconvenience if he has to submit to the French Jurisdiction."[29] He referred to case law from the United Kingdom and argued that:

> "[T]he principles applicable under English law should be preferred because it lays more emphasis on the need to meet the ends of justice and consequently the interest of justice would be better served by choosing the most appropriate forum which, in the circumstances, would be Mauritius."[30]

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[22] *Ibid.*, p. 7.

[23] *Michael R. Jordan v Marie M. Jordan* 2000 SCJ 338; 2000 MR 165.

[24] *Ibid.*, p. 15. This was a custody matter involving the execution of a foreign judgement of a court in the United States of America (California). See also *Mootoo M F v Mootoo R* 2009 SCJ 237 (where the court dissolved a marriage that had been entered into in the United Kingdom and a decree nisi had been granted by a court in the United Kingdom).

[25] *De Chazal Du Mee & Cie v Bancoult O. & Anor* 2002 SCJ 208.

[26] *Ibid.*, p. 2.

[27] *Peeroo A.K. v Peeroo M.J* 2003 SCJ 132; 2003 MR 75.

[28] *Ibid.*, p. 1.

[29] *Ibid.*, pp. 1-2.

[30] *Ibid.*, p. 2.

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The court referred to the relevant English case law and its jurisprudence since the 1962 judgement of *Austin v Bailey*[31] and observed that:

> "[S]ince the laws of Mauritius regarding civil rights and obligations are fundamentally of French origin and inspiration, the cursus has always been that this Court would follow the French rules of private international law in order to ascertain the applicable law in relation to the issue which the Court has to decide."[32]

The Court held that:

> "Although we need to have recourse to the French rules of private international law which would generally apply to determine whether a stay should be granted where there are concurrent divorce proceedings pending before a foreign jurisdiction, the English principles … may prove to be useful in certain instances and cannot be totally overruled. They may be of particular assistance in providing additional safeguards and in preventing any risk of injustice and cannot therefore be wholly excluded if one were to adopt a pragmatic approach in dealing with the increasingly complex issues with which one is likely to be confronted as a result of the conflict of laws."[33]

However, the court concluded that in this case the petitioner's act amounted to "*forum shopping*" and stayed the proceedings to wait for the outcome of the proceedings before the French court.[34] This case is important in that it is likely to change the approach that Mauritian courts have taken since 1962 on the issue of private international law. The court is open to invoking principles from the United Kingdom in a case where relying on French principles would put one of the parties to a disadvantage.

However, subsequent case law continues to confirm the 1962 position that in case of conflict of laws, Mauritian courts are governed by French law. For example, in *Dallah Albaraka (Ireland) Ltd. v Pentasoft Technologies Limited,*[35] the Court held that "French principles of private international law" is "the law which governs us in matters of conflict of laws"[36] and states that '"with regard to the period of prescription of judgments for the purpose of their execution, it is the *lex fori* which is applicable".'[37] In *Usher G V & Anor,*[38] the Court held that "[f]or the

[31] *Ibid.*, pp. 2-3.

[32] *Ibid.*, p.3.

[33] *Ibid.*, p. 3.

[34] See also *Toorabally N v Ashraf M M N* 2009 SCJ 51, which dealt with the issue of "forum shopping" in divorce proceedings.

[35] *Dallah Albaraka (Ireland) Ltd v Pentasoft Technologies Limited* 2012 SCJ 463.

[36] *Ibid.*, p. 4.

[37] *Ibid.*, p. 4.

[38] *Usher G V & Anor* 2013 SCJ 219.

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recognition of foreign judgments and in matters of conflict of laws we are mainly governed by the French principles of private international law."[39]

Where a contract of employment is governed by foreign law, both Mauritius and the foreign country have jurisdiction over the dispute arising from the termination of the contract. Parties to the contract have to choose which country to resort to in case of a dispute.[40] The above discussion shows that the position is still less than clear when it comes to the issue of which law Mauritian courts should rely on when dealing with cases involving conflict of laws – is it British law or French law. It appears that the dominant view is that French law should be considered. However, there also appears to be a convincing view that if French law would lead to an injustice, British law should be followed.

III. Conclusion

In this article, the author has discussed the jurisprudence from the Supreme Court of Mauritius on the issue of conflict laws. The author has demonstrated that on the issue of private international law, the Court has leaned more towards French as opposed to British law. However, this position could also change towards a more flexible approach and the Court has held in one case that where the interests of justice require relying on British law, the Court will rely on that law.

[39] *Usher G V & Anor* 2013 SCJ 219, p.3.

[40] *Compagnie Mauricienne D'Hypermarch és Lt ée v El Maliki* 2001 SCJ 168.

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COURT DECISIONS

THE EU *FORUM NON CONVENIENS* RULE IN CHILD CARE PROCEEDINGS CASES INVOLVING PUBLIC BODIES

Gilles CUNIBERTI* / Céline CAMARA**

I. Introduction
II. The Scope of Article 15
III. The Operation of Article 15: A Three-Staged Assessment
A. The Particular Connection between the Child and the Receiving Member State
B. A Court Better Placed to Hear the Case
C. The Best Interests of the Child
D. The Interaction of the Three Prongs of the Test

I. Introduction

Cross-border parental responsibility disputes are particularly sensitive given the involvement of children. They also give rise to complex proceedings involving not only private parties but also a wide range of public stakeholders, such as health and social services and child protection agencies.[1] In this context, Regulation 2201/2003[2] ("Brussels II*bis*") provides an intricate body of jurisdiction rules to ensure – above all else – that the best interests of the child prevail. As a general rule, it is the courts of the child's habitual residence that have jurisdiction.

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[1] See generally P. BRAZIL, Recent developments concerning transfer of child care proceedings under Brussels II Revised, *Irish Jurist* 2014, p. 187.

[2] 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 [2003] *OJ* L 338/1. All articles without reference to their source are those of the Brussels II*bis* Regulation.

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 431-440
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However, Brussels II*bis* also provides some exceptional grounds and relating provisions including a codified *forum non conveniens* rule.[3]

This transfer mechanism is regarded as one of the most innovative provisions of the Regulation.[4] According to Article 15, the competent court having jurisdiction over parental responsibility matters[5] may decline jurisdiction in favour of another court that is better placed to hear the case if it is in the best interests of the child.[6] This codified *forum non conveniens* rule has been regarded as a compromise between the common law and continental law approaches to jurisdiction.[7] For this reason, Article 15 has attracted significant scholarly attention,[8] especially in the aftermath of the seminal *Owusu* case.[9] Yet, the practical application of this transfer mechanism has raised methodological issues.[10] Indeed, such exotic mechanism based on a discretionary assessment is very foreign to the rigid mandatory approach to jurisdiction prevailing in continental law systems.[11]

In its decision of 27 October 2016, the Court of Justice of the European Union (CJEU) takes up these issues by clarifying the scope of Article 15 and interpreting the conditions for transfer of proceedings. The Court had to deal with the following facts: Ms D – who is a British national – physically abused her child and was diagnosed with a personality disorder. As a result, her child was placed in institutional care. In 2014, while Ms D was pregnant with her second child, the child protection authorities conducted a pre-birth assessment. Pursuant to this examination, the authorities considered that her child to be, R., should be placed in a foster family. One month later, Ms D left the United Kingdom and moved to Ireland where her son was born and where they have resided since. The Irish Child and Family Agency requested the placement in care of R. The request was granted by the Irish Court of Appeal. Subsequently, the Irish agency applied to the Irish High Court and requested the transfer of the case to the British High Court in accordance with Article 15 of Regulation 2201/2003. In March 2015, the High Court gave the Irish agency the authorization to apply to the British High Court. Pursuant to this decision, Ms D brought an appeal to the Irish Supreme Court.

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[3] Brussels II*bis*, Recital 13.

[4] U. MAGNUS/ P. MANKOWSKI, *Brussels IIbis Regulation*, Munich 2012, p. 165.

[5] Brussels II*bis*, Article 15.

[6] *Id*.

[7] See generally A. FIORINI, The Codification of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?, *Journal of Comparative Law* 2007, p. 12.

[8] U. MAGNUS/ P. MANKOWSKI (note 4).

[9] ECJ, 1 March 2005, C-281/02, *Owusu v Jackson*, *ECR* [2005] I-1383. The CJEU ruled that the *forum non conveniens* doctrine was incompatible with Brussels I regime and notably with the principle of legal certainty.

[10] U. MAGNUS/ P. MANKOWSKI (note 4).

[11] P.L. HARTLEY, The European Union and the systematic dismantling of the common law of conflict of laws, *International & Comparative Law Quarterly* 2005, p. 824.

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In this context, the Irish Supreme Court referred six questions to the CJEU for a preliminary ruling. The first question was concerned with the scope of application of Article 15. The five others related to the operation of Article 15.

II. The Scope of Article 15

The first question addressed by the Irish Supreme Court relates to the scope of application of Article 15. More specifically, it raises the complex issue of the involvement of public bodies as parties to the dispute. It is particularly worth mentioning since it is one of the main points of contention between the Advocate General's opinion[12] and the CJEU judgment.

Once the competent court has conducted the relevant examination as to the appropriateness of the transfer,[13] Brussels II*bis* provides for two alternatives to trigger the transfer mechanism: (1) either one of the parties introduces a request before the better placed court or (2) the court of origin directly requests the other court to assume jurisdiction.[14]

The Irish Supreme Court asked in substance whether Article 15 was applicable to public law care proceedings in which national procedural law requirements alter the identity of the parties. Indeed, British procedural law would require that, following the transfer of the case before British courts, British child protection authorities bring new proceedings that are separate from those initially brought in Ireland by its Irish counterpart.[15]

The Advocate General considered that Article 15 does not apply because such a procedural requirement exceeds the scope of Article 15. AG WATHELET points out the exceptional nature of Article 15. Indeed, it is an exception to the general ground of jurisdiction set in Article 8 and therefore it must be interpreted narrowly.[16] It can be inferred from the wording of Article 15 that the transfer mechanism implies that the parties to the litigation remain identical after the transfer. Therefore, subjecting the jurisdiction of the better placed court to the petition of an authority that is not a party to the pending proceedings would contradict the letter of Article 15.[17]

The CJEU saw things differently. The Court first agreed with the AG opinion as to the fact that the transfer can only be subject to the alternative

[12] ECJ, 16 June 2016, C-428/15, *Child and Family Agency v J.D*, ECLI:EU:C:2016:458, Opinion of AG WATHELET, para. 29.

[13] This assessment will be dealt with in detail in the following section (III).

[14] As respectively set in Article 15(1)(a) and 15(1)(b) of Brussels II*bis*.

[15] ECJ, 27 October 2016, C-428/15, *Child and Family Agency v J.D*, ECLI:EU:C:2016:819, para. 28.

[16] ECJ, 23 December 2009, C-403/09 PPU, *Detiček*, ECLI:EU:C:2009:810, para. 38.

[17] *Child and Family Agency v J.D*, Opinion of AG WATHELET (note 12), paras. 55-58.

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conditions strictly set in Article 15(1).[18] However, the CJEU considered that since the commencement of new proceedings is an *a posteriori* requirement, the latter does not impede the strict application of Article 15(1).

This issue illustrates the complex nature of cases involving public bodies in transnational family disputes. There is a clash between the autonomous interpretation of "civil matters"[19] and the strict interpretation of Article 15.[20] On the one hand, the procedural requirement to have a new request introduced by an equivalent public body is intrinsically linked to the public law nature of such hybrid cases.[21] On the other hand, Article 15 letter strictly establishes a judicial cooperation between three stakeholders: the original parties to the pending proceedings, the court of origin and the better placed court.

Beyond the strict interpretation of Article 15, the national procedural requirement at hand raises substantial practical issues: Does Brussels II*bis* provide for the relevant cooperation between the equivalent national public bodies[22] to ensure that the new request is filed before the better placed court?

The cooperation between central authorities – as set in Brussels II*bis* – could be seen as relevant. Article 55 of Brussels II*bis* serves as a basis to facilitate communication between courts. Nevertheless, this provision has a limited practical reach and cannot serve as a legal basis to ensure the commencement of new proceedings by the local public authority.[23] Transnational cooperation between child protection authorities has therefore proven to be difficult and remains an important challenge.[24] Indeed, the relocation from the UK to Ireland before the birth of a child – in order to avoid child care proceedings launched by public authorities – has become a common phenomenon and a structural problem in the past years.[25] In this context, applying Article 15 has been a matter of policy in order to deter parents.[26] Clarification as to the inclusion of the aforementioned

[18] *Child and Family Agency v J.D* (note 15), para. 35.

[19] ECJ, 27 November 2007, C-435/06, *C*, *ECR* [2007] I-10141. Both the AG and the Court refers to the established body of case law according to which the public law nature of certain national procedures is irrelevant as to the scope of Brussels II*bis*.

[20] *Detiček* (note 16).

[21] *Re T (A Child) (Care Proceedings: Request to Assume Jurisdiction)* [2013] EWHC 521 (Fam), para. 1271; *HSE v M.W & G.L* [2013] IEHC 280, para. 1271.

[22] A double cooperation at the judicial level and at the public body level would be required.

[23] Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 30 June 2016, SWD(2016) 207 final, p. 71.

[24] B. BALZANI/ J-L. DESHAYES *et al.* (eds), *Protéger l'enfant par-delà les frontière*s, Nancy 2015, p. 82. There is a willingness to take an interdisciplinary approach to the problem in order to develop cooperation between the legal, psychological and sociological spheres.

[25] P. BRAZIL (note 1), at 185.

[26] *Id*.

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hybrid proceedings has been awaited for some time[27] and is certainly welcome by Irish and UK courts.[28] In the case at hand, the Irish agency seems to have been in contact with its British counterpart.[29] However, the framework and the extent of this dialogue are not clear.[30] In addition, the temporal aspect is also of importance: It clearly appears that the transfer mechanism is aimed at ensuring a quick procedure in the best interests of the child.[31] As a result, ensuring that the new request is filed by the relevant public body in cases involving Member States that are not intricately familiar with each other's legal systems might raise even more difficulties, delays and undermine the effectiveness of Article 15.

III. The Operation of Article 15: A Three-Staged Assessment

The interpretation of the conditions for transfer set in Article 15 has proven difficult and guidance from the CJEU had been long awaited. Article 15 provides that the child should have a particular connection with the Member State of the receiving court, that the court should be better placed to hear the case, and that the transfer should be in the best interests of the child. The language of the provision seemed to pretty clearly lay down a three prong test which, as such, raised two traditional issues: that of the definition of each prong and that of their interaction. As the Advocate General noted, the interpretation of the first prong seemed rather straightforward, as Article 15(3) gives a limitative list of factors which are to be considered as a particular connection between the Member State and the child. But guidance on the content of the concepts used by the two other prongs – better placed court, best interests of the child – would be most welcome. Furthermore, guidance on how to weigh the different prongs would also be most welcome.

Advocate General WATHELET added a third issue for consideration by arguing that the test should be rewritten so that the second prong be merged into the third.[32] The Court rejected this proposition and confirmed that the test should be understood as having three autonomous prongs, which will be discussed in turn.

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[27] *Id*, at 187.

[28] *HSE v M.W & G.L* (note 21).

[29] *Child and Family Agency v J.D* (note 15), para. 13.

[30] For instance, the fact that the first request of the Irish agency as to transfer the case was deemed inadmissible because it was based on hearsay of the British child agency illustrates the absence of an adequate cooperation and exchange of relevant documents such as social reports.

[31] European Commission, Practical Guide for the application of the new Brussels II Regulation, June 2005, p. 42.

[32] *Child and Family Agency v J.D*, Opinion of AG WATHELET (note 12), para. 65.

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A. The Particular Connection between the Child and the Receiving Member State

Article 15 only allows transfer to a court with one of the particular connections listed in Article 15(3). As the Advocate General underscored, it seemed, therefore, that the existence of one of these connections should be understood as a straightforward precondition to the transfer, allowing a debate on the other prongs of the test.[33] Surprisingly, the CJEU offers a different interpretation, by calling the courts of the Member State to weigh the importance and the intensity of the particular connection against that of the general connection granting jurisdiction to the court contemplating to transfer the case.[34] The foreign court should be more closely connected to the child than the forum. Although the Court does not elaborate, it seems that it would, in effect, introduce a mechanism comparable to the exception clause found in choice of law legislation.[35] The general connection granting jurisdiction to the forum is the habitual residence of the child at the time of the initiation of the proceedings.[36] The particular connections possibly pointing to a foreign Member State are former or new habitual residence of the child, nationality of the child, location of his assets and habitual residence of one of the persons having parental responsibility.[37] In this case, it seemed that only one particular connection pointed to the foreign jurisdiction – England –: the nationality of the child, and it is unclear whether it should be considered to be stronger than the general connection. In contrast, one could predict that the prong would typically be satisfied where two factors would point to the foreign court: the former or new habitual residence of the child, and any additional one.

B. A Court Better Placed to Hear the Case

The second prong of the test of Article 15 is that the contemplated court should be better placed to hear the case. Unfortunately, the CJEU does not offer much guidance on the interpretation of the concept. It first insists that national courts should conduct a comparative assessment as to whether transferring the case would provide a "genuine and specific added value" to the decision-making.[38] It then goes on to explain that, among the many elements that could be considered, the forum should consider the procedural rules of the foreign court, and more particularly its rules relating to the taking of evidence.[39] In contrast, the CJEU makes clear that the consideration of substantive rules should be excluded.[40]

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[33] *Child and Family Agency v J.D*, Opinion of AG WATHELET (note 12), para. 62.

[34] *Child and Family Agency v J.D* (note 15), para. 54.

[35] See *e.g.* Rome I Regulation, Article 4(4).

[36] Brussels II*bis*, Article 8(1).

[37] Brussels II*bis*, Article 15(3); *Child and Family Agency v J.D* (note 15), para. 53.

[38] *Child and Family Agency v J.D* (note 15), para. 57.

[39] *Id.*

[40] *Id*.

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This part of the judgment is the most disappointing. Once again, the CJEU fails to make the necessary efforts to learn from the legal tradition which has developed the concept which obviously inspired the European lawmaker here, the doctrine of *forum non conveniens*. The first lesson that the CJEU could have learned from the English experience is that it is equally inappropriate to compare the forum and the foreign court from the perspective of the substantive rules as from the perspective of the procedural rules that they would apply. English courts have long held that a court should not be considered as better placed because it would offer different procedural rules which would benefit one party over the other (such as discovery, or rules on costs).[41] English courts never wanted the doctrine of *forum non conveniens* to become a tool of assessment of the quality of foreign judicial processes, and this could only be avoided by refraining from taking into account most of the differences in civil procedure between England and foreign jurisdictions. In the context of European civil procedure, the idea of assessing the appropriateness of the courts of other Member States on such criteria is even less appealing: it violates the principle of mutual trust in the judicial systems of other Member States. Even if a foreign court had better procedural rules, including on the taking of evidence, it is unacceptable to rely on them to decide on a jurisdictional issue.

The second lesson that the CJEU should have learned from the English experience is that it is possible to identify neutral factors for assessing whether a given court is better placed than another. The most important example is the cost of the litigation, for the parties and possibly for the states involved. If witnesses will be heard, for instance, it is useful to wonder where their residence is, in order to assess whether they would have to travel to one court, but not to the other. Likewise, if one court would have to apply foreign law while the other would apply the law of the forum, it would obviously be less expensive to avoid the costs of ascertaining foreign law.

In contrast, certain factors typically taken into account by common law courts should be neglected in the context of Article 15. The first is the assessment of the connections existing between the dispute and the two courts: this assessment is obviously to be conducted as part of the first prong of the test in Article 15. The second is the compared enforceability of the resulting judgments. In a judicial area where grounds for denying recognition of foreign judgments have been dramatically limited, and sometimes suppressed, recognition and enforceability should be presumed.

C. The Best Interests of the Child

The third prong of the test is that the transfer of the case must be in the best interests of the child. The relevance of the concept, however, is far from being limited to Article 15. As the preamble of Brussels II*bis* makes clear, it is also the guiding principle of the entire instrument and, as such, shapes the rules of

[41] *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460 (H.L.).

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jurisdiction[42] and ensures respect for the child's fundamental rights as stated in the EU Charter.[43] Indeed, the importance of the best interests of the child is also recognized by the UN Charter on the Rights of the Child[44] and a number of other instruments.

In this context, it was legitimate to wonder whether the best interests of the child should be considered as a genuinely autonomous and stand-alone criterion in the context of Article 15. The Advocate General took a different view and considered that the concept was a "general assessment factor".[45] In his view, there was no need for a specific analysis of the best interests because it overlapped with the better placed criterion.[46] According to him, assessing whether the court is better placed should be conducted from the perspective of the best interests of the child.[47] The Advocate General concluded that assessing the second and third prongs together or separately would thus be irrelevant.[48] The argument was rejected by the Court, which ruled that the best interests of the child should be assessed autonomously under Article 15.

Unfortunately, the Court gives limited guidance on the content of the concept in that context. After recalling that its goal is to assess *in concreto* whether the transfer would be detrimental to the situation of the child, it rules that it is necessary to examine the "*negative effects [of] the envisaged transfer on the familial, social and emotional attachments of the child concerned in the case or on that child's material situation*".[49] Although the Court is merely silent on the issue, it is reasonable to conclude that it does not allow the court to take into account whether the substantive outcome of the case might favour the child.

In the case at hand, the child was born in Ireland, lived there in a foster family while having contacts with his mother. His other sibling and potentially social reports relating to his mother, as well as potential experts were in the UK[50] but the child did not have any other known tie in the UK.[51] Surprisingly, the child's guardian *ad litem* was in favour of such transfer.[52] This position might have been motivated by the substantive best interests of the child. Indeed, it is worth noting that UK law is regarded as liberal with regard to child adoption in the current

[42] Preamble of Brussels II*bis*, Recital 12.

[43] *Id*, Recital 33.

[44] United Nations Convention on the Rights of the Child, Article 3.

[45] *Child and Family Agency v J.D*, Opinion of AG WATHELET (note 12), para. 67.

[46] *Id*, para. 70.

[47] *HSE v M.W & G.L* (note 21). In this decision, the Irish high Court pointed out that there can be cases in which the two conditions do not coincide.

[48] *Child and Family Agency v J.D*, Opinion of AG WATHELET (note 12), para. 74.

[49] *Child and Family Agency v J.D* (note 15) para. 58.

[50] *Child and Family Agency v J.D* (note 15), paras. 15 and 18.

[51] Article 55 Brussels II*bis* could even be relevant to assist Irish courts in order to have access to social reports or other relevant documents relating to the mother for instance instead of transferring the case.

[52] *Child and Family Agency v J.D* (note 15) para. 15.

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system of public childcare.[53] There has been an important increase of non-consensual adoptions in this framework. An autonomous assessment of the third prong could shed specific light on the fact that although the English courts might be better placed, the child only has links with Ireland and has never been to the UK.

Interestingly enough, UK courts tended to amalgamate the "better placed" and the "best interests" criteria until recently. As a result, they would limit their assessment to the two first prongs. This resulted in a "pro-transfer approach"[54] pursuant to which the fulfilment of the better placed criterion would imply that the best interests of the child are met.[55] In *Re J*, the UK Supreme Court rejected this approach and underscored the necessity to distinguish between the "better placed court" and the "best interests" criteria.[56] The UK Supreme Court particularly insisted that the transfer-focused examination of the best interests is necessary as to consider the short or long term impact of the transfer itself on the child.[57] Although there might be an overlap between the factors taken into account at both stages,[58] it is possible that the transfer to the better placed court has detrimental effects on the child's ties.[59] In *Re J*, the court put the emphasis on the distinction between the effects of the transfer and the substantive outcome reached by the better placed court and ruled that the focus should be on whether the transfer would be in the child's best interests. In contrast, a court contemplating a transfer under Article 15 should not take into account a potential difference in the outcome of the case.[60] There is indeed no doubt that the purpose of Brussels II*a* is to set substance-neutral rules, and that taking into account the substantive outcome of the case would not comport with the principle of mutual trust.

D. The Interaction of the Three Prongs of the Test

Finally, the test established by Article 15 raises the issue of the interaction of the three prongs. The Court relies on the language of the provision to underscore that the rule should be considered as an exception to the general rule on jurisdiction, and thus interpreted strictly. It then draws the important conclusion that the court contemplating a transfer under Article 15 should consider that there is a strong presumption in favour of maintaining its jurisdiction, and that it should only allow a transfer if satisfied that the operation of the test has resulted in a rebuttal of the

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[53] Adoption and Children Act 2002, Section 52(1)(b).

[54] K. TRIMMINGS, Transfer of jurisdiction and the best interests of the child, *Cambridge LJ* 2016, p. 473.

[55] *Id*.

[56] *Re J (Children) (Brussels II Revised: Article 15)*, [2016] UKSC 15.

[57] *Id*.

[58] *HSE v M.W & G.L* (note 21). In this judgment the Irish High court favours the same approach.

[59] *Id*, para. 27.

[60] *Re J* (note 56), para. 44.

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presumption.[61] Although it has been formulated differently, the same rule applies in the traditional doctrine of *forum non conveniens*: the foreign court should not only appear as more appropriate than the forum, but clearly so.[62]

The strength of the presumption leads to the logical conclusion that all three prongs of the test must point to the foreign court, and the Court indeed insists that each of them must be met.[63] One cannot, therefore, make up for the other. It is arguable, however, that the mere fact that each prong favours the foreign court will be enough for rebutting the presumption, and that it is not necessary that the foreign court be clearly more appropriate on each of the three accounts.

[61] *Child and Family Agency v J.D* (note 15), para. 49.

[62] In England, see *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460, 476; see also the U.S. Supreme Court decision in *Gulf Oil v Gilbert,* 330 U.S. 501, 508.

[63] *Child and Family Agency v J.D* (note 15), para. 55.

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SURROGACY ABROAD, RECOGNITION (OR NON-RECOGNITION?) IN SWITZERLAND

A PAINFUL DILEMMA

Elodie SPAHNI*

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 441-466
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. Introduction

Surrogacy is a method of assisted reproduction through which the surrogate mother agrees to carry a child conceived by medically-assisted reproduction and to give the child to the third party or parties who "ordered" him or her, *i.e.* the "intended" or "intentional" parent(s).[1] Generally, the intended parents are directly registered as the legal parents of the child on the birth certificate delivered by the authorities of the country of birth. The intended parents will live with and raise the child.[2]

In Switzerland, this method of assisted reproduction is prohibited. Switzerland is indeed one of the few countries in the world where the ban on surrogacy is inscribed into the Constitution itself.[3] While there are no official statistics, it is estimated that several hundred Swiss intended parents have resorted to surrogacy in "permissive" States, such as California, Ukraine, Russia, Georgia... Typically, the intended parents ask for recognition of the foreign birth certificate after the arrival of the child in Switzerland. In most cases, the Swiss authorities do not realise that the child was conceived by surrogacy, and recognize the foreign certificates without any discussion.[4]

In 2015, the Swiss Federal Tribunal, which is the highest court in the Swiss judiciary (hereinafter, Federal Tribunal), was confronted for the first time with two cases regarding surrogacy carried out abroad. The Federal Tribunal had to address the question of whether or not the birth certificates, and the resulting legal parentage between the child and the intended parents, qualify for recognition in this country.

In the first case,[5] two men of Swiss nationality bound by a registered partnership entered into a surrogacy agreement with a couple in California in 2010 whereby it was stipulated that the U.S. woman would be the surrogate mother of the child which would be conceived with the egg of an anonymous donor and the sperm of one of the two partners. In February 2011, a paternity judgment was issued by a court of California, stating that the Swiss intended parents were to be recognized as parents of the child upon birth and that neither the surrogate mother nor her husband would have any rights over the child (and want none). The child was born on the 11th April 2011 in California, and a birth certificate designating the Swiss partners as his only parents was issued. The child has U.S. nationality, and has apparently been living with his intended parents in Switzerland ever since.

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[1] SWISS FEDERAL COUNCIL, *Rapport sur la maternité de substitution*, § *Aperçu* and 1.3.2, available at <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-11-29/ber-br-f.pdf>.

[2] B. CHRISTENSEN, Schwangerschaft als Dienstleistung – Kind als Ware? Eine rechtliche Annäherung an das komplexe Phänomen der sogenannten Leihmutterschaft, *Zeitschrift für Recht und Gesundheit* 2013, Nr. 86.

[3] Art. 119 (2) (d) Swiss Federal Constitution (Cst.; RS 101), available at <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>; also inscribed into Art. 4 Federal Act on Medically Assisted Reproduction (RMA; RS 810.11), available at <https://www.admin.ch/opc/en/classified-compilation/20001938/index.html>.

[4] SWISS FEDERAL COUNCIL (note 1), § 1.3.2 and 2.2.1.

[5] ATF 141 III 312.

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He has a genetic link with one of the intended fathers but not with the other. The intended parents make a request to register the U.S. birth certificate with the Swiss registry. After several procedures, the recognition is partially granted on the 21st May 2015 by the Swiss Federal Tribunal: the legal relationship with the biological father is upheld, but not with the other intentional yet non-genetic father.

In the second case,[6] two spouses of Swiss and German nationality respectively, with domicile in Switzerland, concluded a surrogacy agreement with a woman in California in 2011. On the 17th May 2012, the surrogate mother gave birth to twins. At this time, the intended mother was already over 50 years old. The children were conceived with the sperm and eggs of anonymous donors; they have no genetic links with either their intended parents or with the surrogate mother. On the birth certificate issued by the State of California, the intended parents are recognized as the legal parents of the children; the surrogate mother is not mentioned. The Federal Tribunal denied transcription of the birth certificates on the 14th September 2015, because there is no genetic link between the intended parents and the children.

In 2016, the Federal Tribunal confirmed its case law in a new case in which the circumstances were exactly the same as the first case of 2015.[7] Only the intentional genetic father has been recognized as the child's legal father.

The Federal Tribunal was confronted with the following questions: Under what circumstances are the Swiss authorities under an obligation to recognize foreign birth certificates which designate the intended parents as legal parents? When are they allowed, or bound, to deny recognition?

Part II of this contribution will examine the question of recognition and its conditions as discussed by the Federal Tribunal. In Part III, the practical implications of these rulings will be discussed, with a focus on the legal status of the intended parents and the child (or the absence of status) and the consequences for the child.

II. Recognition of Foreign Decisions

A. General Principles

The recognition of a foreign decision means, roughly stated, that this decision generates the same effects in the requested State as in the State in which the decision was made, *i.e.* "State of origin".[8]

Each State must decide in its internal law the conditions under which it accepts, or does not accept, to recognize foreign decisions.[9] Switzerland sets forth

[6] ATF 141 III 328.

[7] TF, 5A_317/2016.

[8] A. BUCHER, PILA 25-32, in A. BUCHER (ed), *Commentaire romand, Loi fédérale sur le droit international privé (LDIP)/ Convention de Lugano (CL)*, Bâle/ Genève/ Munich 2011, No. 1.

[9] A. BUCHER/ A. BONOMI, *Droit international privé*, Bâle 2013, No. 240.

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such conditions in the Swiss Federal Act on Private International Law (hereinafter, PILA).[10]

Nonetheless, international treaties and their specific provisions take precedence over the PILA.[11] The Lugano Convention is in force in Denmark, Iceland, Norway, Switzerland and the European Union. However, since this Convention does not cover the establishment or dissolution of family relationships, such as marriage, divorce and filiation, it will never be applicable in cases of surrogacy and recognition of foreign birth certificates.[12]

Switzerland has also concluded several bilateral treaties on the recognition of foreign decisions, but none with countries which authorize surrogacy.[13]

Therefore, as neither the Lugano Convention nor any other bilateral treaty is applicable, the conditions of recognition are to be determined exclusively by the PILA and more specifically by Articles 25 to 32 PILA.

B. Swiss Law

The general principle on recognition of foreign birth certificates is laid down in Article 32 PILA: the foreign birth certificate must be recorded in the Swiss register of civil status. This is only permissible to the extent that all the requirements under Articles 25 to 27 PILA are satisfied, which are the general conditions on which a foreign decision may be recognized.

Under Article 25 PILA, the decision must have been rendered by a foreign authority, meaning an authority of a foreign State[14] exercising State functions, that is having powers recognized by this foreign State.[15] A simple contract, for example, is not an exercise of State functions.[16] The judicial, administrative or religious character of this authority plays no role.[17] The decision must also be final or no longer subject to any ordinary appeal, which is determined according to the law of the State of origin of the decision.[18] Both the decision on the legal relationship between the child and all the possible parents as well as the birth certificate itself are foreign decisions under Article 25 PILA.

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[10] Art. 1 (1) (c) Swiss Federal Act on Private International Law (PILA; RS 291), available at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>. For an English translation as amended until 1st July 2014 see <http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf>.

[11] Art. 1 (2) PILA.

[12] A. BUCHER/ A. BONOMI (note 9), No. 68.

[13] Recueil systématique (RS), available at <https://www.admin.ch/gov/fr/accueil/droit-federal/recueil-systematique.html>.

[14] R. K. DÄPPEN/ R. MABILLARD, PILA 25, in S. BERTI/ H. HONSELL/ A. SCHNYDER (eds), *Basler Kommentar, Internationales Privatrecht*, Basel/ Genf/ München 2013, No. 3.

[15] A. BUCHER (note 8), PILA 25, No. 4; A. BUCHER/ A. BONOMI (note 9), No. 245.

[16] A. BUCHER (note 8), PILA 25, No. 9.

[17] A. BUCHER (note 8), PILA 25, No. 4; R. K. DÄPPEN/ R. MABILLARD (note 14), PILA 25, No. 6.

[18] R. K. DÄPPEN/ R. MABILLARD (note 14), PILA 25, No. 32.

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Under Article 26 PILA, the decision must have been rendered by an authority which was competent to do so; it is competent if the jurisdiction derives from a provision of the PILA. The Swiss authorities must verify the indirect competence of this authority, which means that the Swiss law must designate this foreign authority as having jurisdiction in the eyes of Switzerland.[19] By contrast, it is not possible to verify direct competence, which is the competence of the authority according to the law of the foreign State.[20]

Article 70 PILA concerns indirect competence for all decisions pertaining to the parent-child relationship.[21] Under this Article, a foreign decision relating to a parent-child relationship shall be recognized in four alternative cases, *i.e.* if it was rendered *either* in the State of the child's habitual residence *or* in the child's national State *or* in the State of domicile *or* nationality of one of the parents, an effective bond with the State of nationality being not required.[22] When it comes to surrogacy, the intended parents do not generally have their domicile in the State of origin nor do they possess nationality of it: they merely travel to this country in order to take advantage of the legislation permitting surrogacy – and that was true for both couples in the cases brought before the Federal Tribunal. As a result, jurisdiction must be founded on the child's nationality or habitual residence. There is no problem if jurisdiction is founded on the nationality of the child, even if the decision is rendered before the child's birth, to the extent that the rules of the relevant country grant nationality to the child upon birth.[23] If the child does not acquire the nationality of this State, another possibility to establish indirect competence is the habitual residence of the child. If the relevant foreign decision is issued before the birth of the child, however, relying on the habitual residence of the child is not uncontroversial, because the unborn child does not have habitual residence.[24] If the decision is issued after the child is born, on the other hand, it is possible to use habitual residence. When the child is very young, his or her habitual residence is generally that of the mother.[25] The problem in the case of surrogacy is: which mother to choose? The surrogate mother, or the intended mother – who is not the mother in the eyes of the Swiss authorities? This point is unclear, and promises to complicate things even further.

Finally, and perhaps more importantly, under Article 27 PILA, the foreign decision must not be manifestly incompatible with Swiss *ordre public*. That was indeed the focus of the analysis and reasoning of the Federal Tribunal in the three

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[19] R. K. DÄPPEN/ R. MABILLARD (note 14), PILA 26, No. 1; A. BUCHER (note 8), PILA 26, No. 1.

[20] A. BUCHER/ A. BONOMI (note 9), No. 33.

[21] I. SCHWANDER, PILA 70, in S. BERTI/ H. HONSELL/ A. SCHNYDER (eds), *Basler Kommentar, Internationales Privatrecht*, Basel/ Genf/ München 2013, No. 1.

[22] ATF 130 III 327, § 3.3.3; Art. 23 (3) PILA.

[23] N. BERTSCHI, *Leihmutterschaft – Theorie, Praxis und rechtliche Perspektiven in der Schweiz, den USA und Indien*, Bern 2014, p. 74; ATF 141 III 312, § 3.3; ATF 141 III 328, § 4.3. See also ATF 116 II 202 for such an interpretation in the framework of the law of the name.

[24] TF, 5A_346/2012, § 4.4.

[25] ATF 129 III 288, § 4.1.

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cases. As the Federal Tribunal recalls, there is a violation of *ordre public* when the effects of recognition of a foreign decision in Switzerland are deemed to clash with Swiss conceptions of justice and contravene the fundamental principles of the Swiss legal system, hereby making the foreign decision manifestly incompatible with that system.[26] Use of *ordre public* in order to resist recognition must be restrictive though, and constitute an exception.[27] It is only if the connection with Switzerland is strong and very loose with the other State that a conflict with the Swiss public policy may be invoked.[28] Moreover, the *ordre public* defence is less likely to be successful if a significant amount of time has elapsed between the moment when the decision was rendered abroad and the moment when recognition in Switzerland is sought.[29] The purpose of such restrictive use is to avoid "limping relationships".[30]

Surrogacy is expressly prohibited – so the Federal Tribunal reminds us – in the Swiss Federal Constitution and the Federal Law on Medically Assisted Reproduction. This ban is designed to protect both the child (who should not be a simple good that can be "ordered") and the woman (against the marketing of her body).[31] This prohibition and the intended purpose are – the Federal Tribunal holds – part of the fundamental principles of the Swiss legal system.[32] As the intended parents travel to another state with the express purpose of "evading" Swiss law, they should be regarded as attempting to "circumvent" the law.[33] Recognition of the foreign birth certificate would mean for the Swiss authorities to uphold legal parentage established through a kind of *fraude à la loi*, which would in fact be contrary to the purposes underlying the ban on surrogacy and the protection pursued by the legislator.[34]

In the light of this analysis, the Federal Tribunal reaches the conclusion that the recognition of foreign birth certificates such as those in the cases submitted to it should be denied because they are manifestly contrary to Swiss *ordre public*. But before ruling definitively in this manner, the Federal Tribunal reviews the principles flowing from international law.

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[26] ATF 126 III 327, § 2b and ATF 126 III 101, § 4b.

[27] ATF 126 III 101, § 3b; A. BUCHER (note 8), PILA 27, No. 3.

[28] Principle of the *Binnenbeziehung*; O. GUILLOD/N. HELLE, Les voyages forment la jeunesse ou tourisme et procréation médicalement assistée, in F. BOHNET/ P. WESSNER, *Mélange en l'honneur de François Knoepfler*, Bâle/ Genève/ Munich 2005, p. 443.

[29] ATF 141 III 312, § 4.1.

[30] Because the legal relationship which has been established abroad is a final decision. ATF 126 III 327, § 2b and ATF 126 III 101, § 4b.

[31] ATF 141 III 328, § 5.2.

[32] ATF 141 III 328, § 6.2.

[33] ATF 141 III 328, § 6.4.

[34] ATF 141 III 328, § 6.6.

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C. Principles of International Law

Switzerland pays heed to the primacy of international law, which means that international treaties and the relevant case law must be honoured, even if they deviate from, or are in conflict with, Swiss domestic law.[35] International law may potentially require Switzerland to recognize foreign decisions even if they are normally not recognizable since they are contrary to Swiss law or principles. International treaties ratified by Switzerland and relevant in the field of surrogacy are, on the one hand, the European Convention on Human Rights (hereinafter, ECHR) as construed and implemented by the European Court of Human Rights (hereinafter, ECtHR) and, on the other hand, the Convention on the Rights of the Child (hereinafter, CRC).[36]

Article 8 ECHR protects the right to respect for private and family life against any unjustified interference of the State. More specifically, the right to respect for *private* life protects physical and social identity, which includes the right to have legal parentage.[37] The right to respect for *family* life presupposes the existence of a family; a *de facto* family is sufficient, there is no need that this family is legally recognized as such.[38] The existence of a family depends on the personal ties between child and adults, the role played by the adults *vis-à-vis* the child, and the time they spend together.[39] The minimal duration of time sharing life together has not been defined; depending on the circumstances, two months may be enough.[40] According to the ECtHR, the State interferes in the private and family life of the intended parents and the children when it refuses to recognize legal parentage established abroad.[41] This interference is justified only if three cumulative conditions are fulfilled: it is provided for by law, it pursues a legitimate goal, and it is necessary in a democratic society.[42] Even if the recognition of legal parentage is not expressly excluded under the Swiss law, the parents are still aware that surrogacy is *de facto* prohibited and no court order can give recognition to the legal parentage.[43] This prohibition also pursues three legitimate goals: the protection of health, the protection of the rights and freedoms of others, and the prevention of disorder.[44] Finally, regarding the necessity of the measure in a

[35] A. AUER/ G. MALINVERNI/ M. HOTTELIER, *Droit constitutionnel suisse – Volume 1: L'Etat*, Berne 2013, No. 1344-1345.

[36] RS 0.101 and RS 0.107.

[37] European Court of Human Rights (ECtHR), *Mikulić* v. *Croatia*, § 53-55; ECtHR, *Jäggi* v. *Switzerland*, § 37; ECtHR*, Mennesson* v. *France* § 46.

[38] ECtHR*, Wagner* v. *Luxembourg*, § 117; ECtHR*, Labassée* v. *France*, § 37; ECtHR*, Marckx* v. *Belgium*, § 31; ECtHR*, X, Y, Z* v. *United Kingdom*, § 36.

[39] ECtHR (Grand Chamber), *Paradiso and Campanelli* v. *Italy*, § 149.

[40] ECtHR (Grand Chamber), *Paradiso and Campanelli* v. *Italy*, § 153-154.

[41] ECtHR, *Mennesson* v. *France*, § 48-49.

[42] To be necessary in a democratic society, there must be an imperious social need and the proportionality must be respected; *Wagner* v. *Luxembourg*, § 124.

[43] ECtHR, *Mennesson* v. *France*, § 58.

[44] ECtHR, *Mennesson* v. *France*, § 62; ECtHR, *Labassée* v. *France* § 54; ECtHR (Grand Chamber), *Paradiso and Campanelli* v. *Italy*, § 177.

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democratic society, the situation is different for the intended parents and children respectively.[45] As the intended parents are not faced with insurmountable difficulties and do not have to fear separation of their family, the State which denies recognition does not exceed its margin of appreciation.[46] Regarding the children, on the other hand, as the interest of the child is paramount in any decision about him, and as the right to recognition of the biological identity of the child is critically important, the State exceeds its margin of appreciation in refusing to recognize the child's right of legal parentage with the genetically-linked intended parent.[47] In the absence of a genetic link with either parent, the refusal of recognition is not unsustainable (but the ECtHR never examined in-depth this question and its consequences on the child).[48]

The CRC is particularly important if legal parentage is not recognized or only partially. Three provisions of the CRC are relevant: Article 2, Article 3 and Article 7. According to the case law of the Federal Tribunal, there is no discrimination within the meaning of Article 2, even if the rejection of the birth certificate's recognition is based on the fact that the child is born by way of surrogacy.[49] Article 3 protects the best interests of the child and its wellbeing. In case of at least partial recognition of legal parentage, this provision is respected; in case of non-recognition, the question of the protection of the child's best interests will be examined in the adoption procedure.[50] Finally, Article 7 protects the right of the child to have a name and to acquire a nationality, to be registered and, as far as possible, to know and be cared for by his or her parents. Even if they must prevent a child from being stateless, States still do not have an unconditional obligation to award nationality to the child.[51] If the child acquires nationality from the country of birth, then there is no breach of this right because the other conditions are also

[45] ECtHR, *Labassée* v. *France*, § 65

[46] ECtHR, *Mennesson* v. *France*, § 92, 94-95.

[47] ECtHR, *Labassée* v. *France*, § 99-100; ECtHR, *Mennesson* v. *France*, § 46. For similar decisions, see ECtHR, *Foulon and Bouvet* v. *France* and ECtHR, *Laborie* v. *France.*

[48] In the case *Paradiso and Campanelli* v. *Italy*, the Chamber of the ECtHR stated that "the national courts did not act unreasonably in applying the national law strictly to determine paternity and in ignoring the legal status established abroad" (§ 77). The case was referred to the Grand Chamber of the ECtHR. The child was not an applicant in this complaint, which did not concern the registration of a foreign birth certificate and recognition of the legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement (§ 133). Neither the Chamber nor the Grand Chamber of the ECtHR examined the question of the consequences for the child who can have no legal parent because of the absence of genetic links. If the child has at least one intended parent who is also a genetic parent, there is no problem in case of non-recognition of the second parent as legal parent because of the absence of a genetic link with the child (ECtHR, *Mennesson* v. *France*). The solution may be different if none of the intended parents are genetically-linked with the child, because the consequences may be contrary to the child's best interests.

[49] ATF 141 III 328, § 7.4

[50] ATF 141 III 312, § 6.4.3; ATF 141 III 328, § 7.4.

[51] S. SCHMAHL, *Kinderrechtskonvention mit Zusatzprotokollen – Handkommentar, CRC Art. 7-8*, Baden-Baden 2013.

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automatically fulfilled. If the child is born in a country which does not follow the principle of *jus soli*, non-recognition may indeed lead to statelessness, i.e. to a situation which may be at odds with Article 7 CRC.

D. Conclusion

The Swiss lower authorities refused to recognize the legal parentage on behalf of Swiss *ordre public*, surrogacy being forbidden under Swiss law. Following the ECtHR case law, the Federal Tribunal recognized the legal parentage existing between a child and its genetically-linked intended parent, even if the child was conceived through surrogacy, but declined to recognize the legal parentage with a non-biological parent (mother or father). In the current state of legislation and case law, the Swiss authorities are not obliged to recognize legal parentage in the absence of any genetic link.

III. Practical Implications of this Case Law

This case law has many practical implications, both for the intended parents and, to an even greater extent, for the child.

In the first part below, the different options available to establish legal parentage between the intended parents and the child, including through presumptions and adoption, will be examined, in addition to the question of which status the intended parents may have if legal parentage cannot be established immediately or at all (A). In the second part, the focus will be shifted on the implications for the child if legal parentage cannot be recognized, or only partially, with one of the intended parents (such as citizenship, maintenance and visitation rights of the intended parents) (B).

A. Legal Status of the Intended Parents

1. Maternity

In Switzerland, the legal mother of a child is the birth mother. Motherhood is established automatically upon birth. This holds true even if the birth mother is not the genetic mother. No recognition or registration of maternity is required, nor possible. The only possibility to change the identity of the legal mother is by adoption.[52]

The way in which legal maternity is perceived in Switzerland may have to undergo a change in the near future. Both the ECtHR and the Swiss courts have declared that genetic parent must be legally recognized if its existence has been

[52] P. MEIER/ M. STETTLER, *Droit de la filiation*, Bâle/ Genève/ Zurich 2014, No. 39-42.

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established *de facto* and both the genetic parent and the child require such recognition, without making any distinction between a genetic father and a genetic mother. Thus, if the intended mother is the genetic mother, she should also be recognized as the legal mother of the child even if she is not the birth mother.

2. Paternity

a) General Principles

It is important to note that legal maternity is required to form legal fatherhood.[53] Problems will arise where the intended father is the genetic father but no legal maternity can be established. This may happen either because the intended mother is neither the birth mother nor the genetic mother, or because there is no intended mother and the surrogate mother may not be recognized as the legal mother because she was not registered in the foreign birth certificate. According to the Swiss case law, if there is a genetic link between the intended parent and the child, then legal parenthood must be recognized – but normally only if there exists a legal maternity. The Swiss courts have not yet been confronted with this issue[54].

In any case, legal fatherhood may well be recognized even if there is no legal maternity, for two reasons. First, the surrogate-born child has, under Article 8 ECHR as construed by the ECtHR, an absolute right to legal parentage with the genetic parent, the State being prevented from refusing to recognize such relationship. Second, a parallel may be drawn between surrogacy and adoption by a single person under Article 264b Swiss Civil Code. If it is possible for a single man to adopt a child – even if this child has no legal mother – with the result that the child will only have a legal father and no legal mother –, there should be no reason why it would not be possible to reach the same outcome in cases of surrogacy.

b) Presumption of Paternity of the Husband

If the child is born into a marriage, the paternity of the husband is automatically presumed even if he has no biological links with this child.[55] In the case of surrogacy, this means that if the wife is recognized as the legal mother of the intended child, her husband will automatically be recognized as the legal father. Nobody except the child and the husband can rebut this presumption. The Swiss authorities are not permitted to refuse recognition to this legal relationship, even if they know that the husband is not the biological father.[56]

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[53] P. MEIER/ M. STETTLER (note 52), No. 39.

[54] In the two cases in which the legal relationship with the father had to be recognized by the Swiss authorities, the surrogate mother was also registered in the foreign birth certificate.

[55] O. GUILLOD, SCC 255, in B. FOËX/ P. PICHONNAZ (eds), *Commentaire romand, Code civil I – Art. 1-359 CC*, Bâle/ Genève/ Munich 2010, No. 4.

[56] Art. 256 (1) SCC.

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Where the conception of the child by surrogacy was instigated by both spouses together, and the child and intended father live together and form a family, no one should be interested to challenge this presumption.

c) Voluntary Acknowledgment

If the mother is not married when her child is born, there is no presumption of paternity. Under article 260 SCC, to form the legal relationship with the father, the father must declare that he acknowledges the child as his own. This declaration may be made at any time, before or after the birth of the child, so long as the child in question has already been conceived. This declaration must be made before a civil registry officer.[57]

Voluntary acknowledgment is not permissible, however, if there is any court order in existence stating that the man who wants to recognize the child is not the real father.[58] Thus, if the intended parents first try to have the foreign birth certificate recognized, but obtain only partial recognition (for example recognition of maternity because of a genetic link with the intended mother only), any subsequent acknowledgment of paternity by the intended father will not be allowed by virtue of this Swiss judgment awarding only partial recognition.

If the authorities know that the man is not the father of the surrogate child, but there is no judgment to this effect, then it is uncertain whether the courts have the power to refuse this recognition or not.[59]

Even if recognition has been obtained, it may still be challenged by any "interested party"[60] under Article 260a (1) SCC. This language is interpreted very broadly. The fact that this challenge may be against the interests of the child to maintain of its existing parent-child social ties is disregarded.[61]

3. Joint Adoption

a) By Spouses

If the married intended parents have no genetic links with the child, then they have no legal relationship with the child in the eyes of Switzerland. A Swiss procedure of joint adoption under Articles 264 and 264a SCC is the only available avenue for

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[57] Art. 260 CC; O. GUILLOD (note 53), SCC 260, No. 1-7.

[58] ATF 122 III 99.

[59] I. SCHWENZER/ M. COTTIER, SCC 260, in T. GEISER/ H. HONSELL/ N. P. VOGT (eds), *Basler Kommentar, Zivilgesetzbuch I – Art. 1-456*, Basel/ Genf/ München 2014, No. 7; O. GUILLOD (note 53), SCC 260, No. 11; P. MEIER/ M. STETTLER (note 52), No. 108 and 111.

[60] Art. 260a SCC.

[61] Art. 260a (1) SCC; P. MEIER/ M. STETTLER (NOTE 52), No. 123; I. SCHWENZER/ M. COTTIER (note 58), SCC 260a, No. 7.

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spouses to give rise to this relationship. Several conditions must be satisfied for the adoption to be permitted.

First, when the petition for adoption is filed, the prospective adoptive parents must have been married for at least five years or have reached the age of thirty-five. Secondly, the prospective adoptive parents and the child must have formed a life together for at least one year before the adoption petition is filed. The simple fact of going on holiday together is not sufficient, even if the total duration of these holidays is equivalent to one year. The purpose is to verify that the parents and the child get along daily and form a real family which works.[62]

These two requirements do not require the spouses to produce any in-depth evidence. The authorities will have to verify the age of the spouses and the duration of their marriage. On the other hand, concerning the duration of their life together, this condition will generally be met because of the length of the previous judicial procedures (the child living with the intended parents during this time).

The third condition concerns the consent required for the adoption to be pronounced. The degree of consent required from each party will not be the same in all situations.

If the child is capable of judgment, the latter will be required to consent to an adoption.[63] In cases of surrogacy, the child will most often not be old enough to fall under the requirement of consent to adoption. At any rate, even if the child were required to consent to being adopted, in all likelihood such consent would be given in the circumstances.

As the child has no legal parents in the view of Swiss authorities, a legal guardian must be nominated and the consent of the guardianship supervisory authority required, even if the child is capable of judgment.[64] Here again, it is rather safe to assume that it is in the interest of the child, who has no legal parents, to finally establish parentage with the intended parents with whom he or she has lived since birth.

The consent of the biological parents is also required, even if the child is capable of judgment.[65] Here, three potential approaches are thinkable. The first approach which may be taken by Swiss authorities is to consider that the declaration of the surrogate mother stating that the intended parents are the legal parents of the child is equivalent to the required declaration of consent for adoption under Article 265a SCC. After all, the method by which legal parentage is established between the intended parents and the child does not matter (be it directly by way of birth certificate registration, or indirectly by way of adoption); the surrogate mother fundamentally does not want to have any legal relationship with the child and wishes, on the contrary, for a legal relationship to be established between the child and the intended parents. Secondly, Swiss authorities may instead decide to dispense with the requirement of consent from the biological parents because the latter are unable to be identified under Article 265c (1) SCC. Swiss authorities admit that the child has no link with the surrogate mother or with

[62] P. MEIER/ M. STETTLER (NOTE 52), No. 311-312.

[63] Art. 265 (2) SCC.

[64] Art. 327a SCC and Art. 265 (3) SCC.

[65] Art. 265a (1) SCC.

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egg or sperm donors, but refuse to recognize any legal parentage with the intended parents or any other person. For Switzerland, this child does not have any parents. It is not possible to request the consent of inexistent or "unidentified" parents. Thirdly, under Article 265c (2) SCC, it is possible to dispense with the consent from a biological mother, in this case the surrogate mother, who has never taken care of the child and does not want to parent him or her, by considering that she never cared for the child to any meaningful degree.

The fourth and last condition is arguably the most important one: the adoption must be in the child's best interests. The authority responsible for pronouncing the adoption must assess, from all points of views, the positive and negative consequences of the adoption on the child: personal and financial situation of the prospective adoptive parents, personal circumstances of the child, cultural differences, etc.[66]

Among the criteria for assessing if this adoption is in the child's best interests is the age difference between the child and the adoptive parents. The law requires a minimum age difference of sixteen years; this requirement is a strict condition and cannot be adjusted, even in very particular circumstances.[67] The maximum age difference is fixed at forty-five years. The purpose of this limit is to reflect the biological reality to the greatest possible extent, and to ensure that the adoptive parents will be able to take care of the child at least until the latter reaches adulthood.[68] This maximum age difference limit is not a strict condition, but if it is exceeded then the adoption will be presumed contrary to the child's best interests. If both prospective adoptive parents exceed the maximum age difference limit, then the authority responsible for pronouncing the adoption should normally refuse the adoption because the condition of the child's best interest is not satisfied.[69]

Exceptional circumstances allow deviation from this maximum age difference.[70] This will be the case, for example, if the prospective adoptive parents have formed strong bonds with the child in taking care of him or her. In this case, depending on all the circumstances, the adoption may be more favorable for the child than the denial of the adoption.[71]

These exceptional circumstances may indeed be granted for the intended parents of the second case with which the Federal Tribunal had to grapple and mentioned above in the "Introduction", in which the intended mother was more

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[66] M.-B. SCHOENENBERGER, SCC 264, in B. FOËX/ P. PICHONNAZ (eds), *Commentaire romand, Code civil I – Art. 1-359 CC*, Bâle/ Genève/ Munich 2010, No. 38-40.

[67] Art. 265 (1) SCC; P. BREITSCHMID, SCC 265, in T. GEISER/ H. HONSELL/ N.P. VOGT (eds), *Basler Kommentar, Zivilgesetzbuch I – Art. 1-456*, Basel/ Genf/ München 2014, No. 2.

[68] Art. 5 (4) Adoption Regulation (AdoptO; RS 211.221.36), available at <https://www.admin.ch/opc/en/classified-compilation/20091244/index.html>; SWISS FEDERAL COUNCIL, *Message concernant la modification du Code civil (Droit de l'adoption)*, FF 2015 835, § 2.2.4, available at <https://www.admin.ch/opc/fr/federal-gazette/2015/835.pdf>.

[69] SWISS FEDERAL COUNCIL (note 67), § 2.2.4.

[70] Art. 5 (4) AdoptO.

[71] SWISS FEDERAL COUNCIL (note 67), § 2.2.4.

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than 50 years old at the time of the birth. The twin children were born in 2011 and they had lived in Switzerland with their intended parents ever since then. Recognition was refused in 2015. The children had already been living for three years with their intended parents, and will continue to do so during the adoption procedure. In this case, it would seem more in the children's interests to authorise adoption than to refuse it.

We ought nevertheless to recognize that in refusing, on the one hand, to give effect to legal parentage established by a foreign birth certificate, but in pronouncing the adoption on the other – which has in fact the same result –, the Swiss authorities *de facto* recognize the legal parentage established by surrogacy, yet in a more expensive and time-consuming manner.

b) By Registered Partners

Currently, joint adoption by registered partners is prohibited, regardless of the circumstances. Swiss legislation on adoption is undergoing a revision, but joint adoption will remain unavailable for registered partners.[72]

4. Adoption of a Stepchild

a) Adoption of a Spouse's Child

The conditions here are almost the same as for the joint adoption. First, the prospective adoptive parent must have been married to the other spouse for at least five years. Second, the prospective parent must have taken care of the child for at least one year. Third, the step-parent adoption must be in the child's best interests. Finally, the consent of each of the legal parents and of the child (if the child is capable of judgment) is required.[73]

b) Adoption of a Registered Partner's Child

Currently, a registered partner cannot, under Swiss law, adopt the child of his or her partner, regardless of the circumstances.[74]

5. New Swiss Legislation on Adoption

Swiss legislation on adoption underwent a significant revision in recent years and the legislator introduced a reform in mid-2016 in order to somewhat modernize the

[72] SWISS FEDERAL COUNCIL (note 67), § 2.7.1.

[73] Arts. 264, 264a (3), 265 II and 265a I SCC.

[74] SWISS FEDERAL COUNCIL (note 67), § 2.3.3.4.

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conditions for adoption.[75] This new regime is expected to enter into force at some point in 2018.

First, joint adoption will be open to spouses and to non-married heterosexual couples; adoptive parents must both have reached the age of twenty-eight and have lived in a common household for at least three years. The adoption of the other partner's child will be open to spouses, registered partners and to non-married heterosexual couples, if they have lived for at least three years in a common household. Second, it will be expressly provided that the prospective adoptive parents must be able to take care of the child until the latter reaches the age of majority, and that the maximum age difference between the adoptive parents and the child is forty-five years (with exceptions being possible in very particular cases). All the other conditions – the required consents, the respect of the child's best interests and the required duration of cohabitation with the child – remain unchanged.

6. Appointment as Legal Guardians

If a child does not have any parent with legal authority, a guardian must be appointed.[76] This is a protective measure, which is compulsory and must be adopted *ex officio*,[77] but only if the child has no legal parent.[78]

This measure of protection automatically terminates if the child obtains a legal parent, for example through adoption.[79] This measure will also terminate if, for any reason, the foreign decision which establishes the legal parentage is ultimately recognized in Switzerland. The situation of the intended parents is thus similar to that of adoptive parents in the sense that, for example, as soon as legal parentage has been established a few months or years after the birth of the child, the parents then automatically acquire legal authority over the child.

A child under guardianship has the same legal status as a child under parental authority when it comes to his or her legal capacity, capacity to act and representation. The only difference concerns the domicile: the child's domicile is at the seat of the child protection authority and not where the child lives.[80] The legal guardian has the same rights and obligations toward the child as those of a legal parent.[81]

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[75] New Swiss Civil Code, available at <https://www.admin.ch/opc/fr/federal-gazette/2016/4757.pdf> (French version) or <https://www.admin.ch/opc/de/federal-gazette/2016/4925.pdf> (German version).

[76] Art. 327a SCC; P. MEIER/ M. STETTLER (note 52), No. 455.

[77] B. LIENHARD/ K. AFFOLTER, SCC 327a, in T. GEISER/ H. HONSELL/ N. P. VOGT (eds), *Basler Kommentar, Zivilgesetzbuch I – Art. 1-456*, Basel/ Genf/ München 2014, No. 2; P. MEIER/ M. STETTLER (note 52), No. 593.

[78] P. MEIER/ M. STETTLER (note 52), No. 593.

[79] B. LIENHARD/ K. AFFOLTER (note 76), SCC 327a, No. 37.

[80] B. LIENHARD/ K. AFFOLTER (note 76), SCC 327b, No. 1.

[81] Because Art. 327c (1) CC refers back to the provisions on legal parents, Arts. 267 ss and 310 ss SCC.

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Regarding the appointment of the legal guardian, Article 327c (2) of the Swiss Civil Code refers to the provisions on adult protection. The legal guardian must be a natural person, whether professional or non-professional, with the personal aptitude and knowledge to carry out his or her duties. It is possible to appoint several guardians who will be required to discharge their duties jointly. Therefore, if the goal is to extend parental authority, then both parents will generally be appointed as guardians.[82] In the case of surrogate maternity, the goal is not to extend this authority (since there is none to begin with), but to create it. Since the intended parents will have already taken care of the child for some time, and in some cases for a significant amount of time, during which they will have developed a relationship of trust with the child, and their intention and desire was to be awarded parental authority, it should be possible for them to be vested with legal guardianship.

If the child has no legal parents, it should be possible for both intended parents to be designated as jointly responsible for the child as guardians. On the other hand, if legal parentage with one of the intended parents has been recognized, then the other parent will not be able to serve as guardian, since parental authority held by a parent and guardianship are mutually exclusive. The only remaining possibility in this case would be to appoint the second intended parent – who has no link with the child – as "guardian" (*curateur* in French) under Article 308 SCC.

We must nevertheless bear in mind that the position of legal guardians is not equivalent to that of adoptive parents. The protection offered to the child is not the same.[83] This is also true for foster parents.

7. Appointment as Foster Parents

The only reference which the law makes to the position of foster parents is at Article 300a *sexies* (1) SCC: foster parents represent the legal parents in the exercise of parental responsibility. According to the text of this provision, the child must have legal parents holding parental authority. *A contrario,* it is not possible to appoint foster parents if the child has no legal parents.

As regards the placement of a child during the adoption procedure, this is governed by the general rules on foster parents.[84] The prospective adoptive parents do not serve as legal representatives of the child. A third person must be appointed as guardian of the child for the whole duration of the procedure and it is this person who represents the child.

If the intended parents have not been able to obtain recognition of the foreign birth certificate but they are nevertheless able to adopt "their" child, then they will serve as the foster parents of the child during the adoptive procedure, and become legal parents once the adoption has been pronounced. However, their

[82] B. LIENHARD/ K. AFFOLTER (note 76), SCC 327a, No. 33; P. MEIER, *Droit de la protection de l'adulte – Art. 360-456 CC,* Bâle/ Genève/ Zurich, No. 969.

[83] ATF 119 II 1, § 4a).

[84] P. MEIER/ M. STETTLER (NOTE 52), No. 314.

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designation as foster parents settles only part of the problem: they will still have no power to represent the child for decisions other than day-to-day decisions or in case of emergency, and the child will still not be a legal heir during the procedure.

If no adoption procedure is available to the intended parents, then the child's legal situation is very unsettled. Normally, a child may have foster parents only if he or she has a legal parent holding parental authority or throughout the adoptive procedure. However, in case of surrogacy, the child who is biologically unrelated to either intended parent has no legal parents whatsoever in the eyes of the Swiss authorities and, as regards the adoptive procedure, this child will not be adoptable either by the intended parents or by any third party because this would breach the family rights as protected by Article 8 ECHR. As a result, in the current state of the law, it seems very complicated for the intended parents to be appointed as foster parents outside of an adoption procedure.

B. Practical Implications for the Child

1. Return to the Country of Birth

This question may once again arise if the child and the intended parents have no genetic links. Should the consequence of non-recognition of fatherhood or motherhood arising from surrogacy be the same as the consequence flowing from non-recognition of an adoption ordered abroad,[85] then the child may have to return to the country of birth.[86] In the context of surrogacy, this appears to be a rather troublesome, and unpalatable, outcome for three reasons.

First, the surrogate mother (and her husband) waived their rights and obligations towards the child. They do not recognize the child as theirs. It is not possible to impose a child on them because they are not the parents for the State of birth, which is generally the State where they also live. Moreover, it is not certain that this State would accept the return of the child. For this State, a child-parent relationship between the child and the intended parents arose and there is no reason for the child to come back.

Second, if the child were sent back to his or her country of birth, then the latter would have to be supported by a new foster family in order to be adopted in this country. This appears to be a complicated outcome and hardly in the child's interest. The Swiss procedures will take many years and, throughout this time, the child is likely to have become firmly rooted in Switzerland within the family of the intended parents.

The third powerful reason is that sending back the child would normally be inconsistent with Article 8 ECHR. The intended parents and the child form a *de facto* family which is protected under Article 8 ECHR.[87] They have the right to live together.[88] Even a few months together may be enough to form a protected family.[89]

[85] ATF 141 III 328, § 6.6.

[86] P. MEIER/ M. STETTLER (note 52), No. 372.

[87] ECtHR, *Wagner* v. *Luxembourg*, § 117.

[88] ECtHR, *Pontes* v. *Portugal*, § 74.

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The separation of the child from his or her family must be an *ultima ratio* and can be authorized only if the child must be protected from an immediate danger (physical or psychological violence).[90]

These three reasons – that the biological mother has no desire to keep the child as her own, the best interests of the child, and the fact that the intended parents and the child form a family protected under Article 8 ECHR – should in most if not virtually all cases prevent the non-recognizing State from ordering the return of the child to his or her country of birth.

2. Citizenship

The conditions required for Swiss citizenship are set out in the Swiss Citizenship Act. There are four ways to acquire Swiss citizenship: by descent if one of the legal parents is Swiss, by law if the child is found in Switzerland but it is impossible to know who the child's parents are, by adoption if the adoptive parents are Swiss, or by naturalization.[91]

If Switzerland does not recognize legal parentage with the intended parents, then the child cannot acquire Swiss nationality by descent. The case of a child being found in Switzerland and born from unknown parents is unlikely to apply: legal parentage exists, but is not recognized by Switzerland. To acquire citizenship by way of adoption, the adoption must first be completed; it is uncertain whether it will always be possible for the intended parents to adopt "their" child. The only available alternative would then be naturalization. However, the child is required to reside in Switzerland for eleven years before being entitled to apply for Swiss nationality.

This raises the issue of potential statelessness. If the child was born in a country that follows the principle of *jus soli* for nationality, e.g. the United States, then there is no problem. Even if the child cannot immediately acquire Swiss nationality, the latter will not be stateless. On the other hand, if the child was born in a country that follows the *ius sanguini* principle, then the latter will not acquire the nationality of this country; if Switzerland then does not recognize legal parentage with the intended parents, the child will not acquire Swiss nationality by descent and will be stateless. The latter will have to have lived for five years in Switzerland before applying for naturalization, and will therefore be stateless for at least five years.[92]

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[89] ECtHR, *Moretti and Benedetti* v. *Italy*, § 48; ECtHR, *Kopf and Liberda* v. *Austria*, § 37; ECtHR, *D. and Others* v. *Belgium*, § 49. For a different view, based on the peculiar circumstances of the case, see ECtHR (Grand Chamber), *Paradiso and Campanelli* v. *Italy.*

[90] ECtHR, *Neulinger and Shuruk* v. *Switzerland*, § 136; ECtHR, *Zhou* v. *Italy*, § 56; ECtHR, *Kutzner* v. *Germany*, § 69.

[91] Arts. 1, 6, 7 and 12 with 15 Swiss Federal Act on the Acquisition and Loss of Swiss Citizenship (SCA; RS 141.0), available at <https://www.admin.ch/opc/en/classified-compilation/19520208/index.html>.

[92] Art. 30 SCA.

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3. Entry and Residence in Switzerland

The inability to immediately acquire Swiss nationality raises the question of the child's right of entry and right of residence in Switzerland. The solutions are a little different depending on the country of birth.

If the child is born in a country which follows the *ius soli* principle, it should not be too complicated. The authorities of the native country will deliver a passport to the child. Among the countries most chosen by Swiss residents for surrogacies, the United States is the only one which follows the principle of *ius soli*.[93] As Switzerland does not require a visa for U.S. citizens to enter the country, the intended parents should not experience any trouble returning to Switzerland with the child.[94] The right of entry is thus easily provided. Regarding the right of residence in Switzerland, this should not be too difficult either since the family – including the *de facto* family – is entitled to protection, the child may be separated from his or her parents only as a last resort measure, and it will not be possible to send back the child to his or her native country. The right of residence will also generally be awarded to the child.

The situation is more complex if the child is born in a country which follows the *ius sanguini* principle, such as Georgia, India, Russia or Ukraine. The native country will normally refuse to deliver any passport or travel documents to the child. As the Swiss authorities will not recognize the foreign birth certificate, they will also decline to do so.[95] Without travel documents, the child will not be able to leave the native country. There are three ways in which it may be possible to obtain them: the intended parents may either start adoption proceedings in Switzerland or request the placement of the child in their family as foster parents or family reunification under Article 8 ECHR. Those procedures are likely to prove time-consuming and their outcome, as the law stands today, will be uncertain.

4. Representation of the Child

This question will arise, for example, when the child goes to school or to a doctor's appointment. The situation is not exactly the same if legal parentage has been partially recognized by Switzerland or if it has not been recognized at all but the intended parents have been nominated as foster parents or guardians.

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[93] For a list of the countries most chosen by Swiss residents for surrogacy, see SWISS FEDERAL COUNCIL (note 1), § 2.2.2; P. HAY, *Law of the United States – An Overview*, Munich 2016, No. 77.

[94] To view the conditions applicable to entry and residence in Switzerland according to nationality see https://www.sem.admin.ch/sem/fr/home/publiservice/weisungen-kreisschreiben/visa/liste1_staatsangehoerigkeit/e.html.

[95] SWISS FEDERAL COUNCIL (note 1), § 1.3.2; see also SWISS FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, *Merkblatt Leihmutterschaft für den schweizerischen Rechtsbereich*, available at <https://www.eda.admin.ch/content/dam/countries/countries-content/georgia/de/merkblatt-leihmutterschaft_DE.pdf>.

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a) In Case of Partial Legal Recognition of Parentage by Switzerland

It is first important to make reference to the spouse or registered partner who has no legal link with the child (and is so considered the child's step-parent) and therefore has no legal authority over the child. Swiss law does not offer the possibility of granting legal authority to the step-parents or intended parents of the child. Legal authority may only be granted if a legal relationship is established.[96]

The question of the child's representation by step-parents is provided for under Articles 299 SCC and 27 (1) SSPA. Swiss law grants them a power of representation "as circumstances require".

Thus, this power of representation may be exercised only in very specific circumstances: an urgent or immediate decision must be taken for the child and, for a reason or another, the person holding parental authority cannot decide in time, for example, because the latter is absent or ill.[97] Such decision may be required, for example, when the child needs urgent medical treatment or his or her school requires the parent's signature for a report card or for a letter of absence – especially if the person holding parental authority is absent for several days.[98]

In practice, the parents – both legal and intended – organize the representation of the child through a power of representation. This delegation of power can be implied or explicit.[99]

Should parents separate, the intended parent – who does not hold legal authority over the child – automatically loses the power of representation. Parental authority *de facto* cannot be discussed in the divorce or separation proceedings, even if *de lege ferenda* the interest of the child must be considered, which could prompt a power of representation to be awarded in the interest of the child.[100]

The best way to guarantee the rights of the two parents – and to protect the interests of the child – is for the intended parents to enter a representation agreement mentioning that the child has been conceived by a common desire, and providing both of them with the same power of representation on behalf of the child, as if both of them were holders of parental authority. Ideally, the parents should provide that this agreement will continue to apply in the event of separation or divorce. It is not mandatory for this agreement to be written, but it is much easier to prove its existence if it is written in case of conflict between the parents.

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[96] P. MEIER/ M. STETTLER (note 52), No. 450; P. VEZ, SCC 296, in B. FOËX/ P. PICHONNAZ (eds), *Commentaire romand, Code civil I – Art. 1-359 CC*, Bâle/ Genève/ Munich 2010, No. 6.

[97] V. BOILLET/ E. DE LUZE, Mère porteuse, parents d'intention, homoparentalité… Et l'enfant? Analyse de l'arrêt du Tribunal fédéral 5A_748/2014 du 21 mai 2015, *Jusletter* 5 octobre 2015, No. 41, available at <http://jusletter.weblaw.ch/fr/juslissues/2015/818/mere-porteuse,-paren_5854feb9dd.html__ONCE>.

[98] I. SCHWENZER/ M. COTTIER (note 58), SCC 299, No. 4,

[99] I. SCHWENZER/ M. COTTIER (note 58), SCC 299, No. 3.

[100] I. SCHWENZER/ M. COTTIER (note 58), SCC 299, No. 7.

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b) In Case of no Legal Recognition of Parentage by Switzerland

The legal position of the intended parents appointed as legal guardians of the child is provided under Articles 327b and 327c (1) SCC, which refer back to the provisions of Articles 267 ff. and 301 ff. SCC on the holders of parental authority. If they are the legal parents of the child, the intended parents have the same power of representation as any other holder of parental authority and will thus be entitled to take almost any decision regarding the child.[101]

On the contrary, if the intended parents are foster parents but not guardians of the child, their power of representation is laid down by the provisions on the foster placement.[102] In this case, the intended parents only have very limited powers. They have the power to represent the child only for very usual or urgent decisions. In all other cases, only the legal representative will have that power.[103]

5. Contact between the Child and the Intended Parents

This question will arise if legal parentage is recognized with only one of the intended parents, and the intended parents separate. The answer is provided for in Article 274a SCC in the case of married parents and in Article 27 (2) SSPA in the case of parents bound by a registered partnership. The legal situation is the same in both cases.

Three conditions must be met for a right of contact with the child to arise. First, this provision is only applicable in cases where the parents separate. Second, this right of contact may even then only be granted in extraordinary circumstances. Finally, it must serve the child's best interests.[104] Circumstances are extraordinary when there is a social relationship akin to that of a parent-child relationship between the claimant and the child without any legal relationship between them, and where a family change occurs which endangers the relationship of the child with this *de facto* parent.[105]

The continuity of contact must be in the child's best interests or, in other words, the rupture of the relationship between the child and the *de facto* parent must prove detrimental to the child.[106] Where that relation is stable and continuous, the interests of the child shall prevail to maintain it in order to avoid the negative

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[101] For the exceptions regarding certain types of decisions, see the provisions on adult protection (Arts. 388 ff. SCC) which apply *mutadis mutandis* under Art. 327c (2) SCC.

[102] Under Art. 300 (1) SCC, the foster parents "exercise parental responsibility over the child *in loco parentis*".

[103] P. MEIER/ M. STETTLER (NOTE 52), No. 1359-1360.

[104] P. MEIER/ M. STETTLER (NOTE 52), No. 761.

[105] I. SCHWENZER, SCC 274a, in T. GEISER/ H. HONSELL/ N. P. VOGT (eds), *Basler Kommentar, Zivilgesetzbuch I – Art. 1-456*, Basel/ Genf/ München 2014, No. 5; A. BOOS-HERBERGER/ A. BÜCHLER, SSPA 27, in A. BÜCHLER (ed), *FamKommentar, Eingetragene Partnerschaft*, Bern 2006, No. 29.

[106] I. SCHWENZER (note 101), SCC 274a, No. 4.

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consequences that the end of this relationship could have on the development of the child.[107] This will be the case, for example, if the child considers the legal parent's partner as a *de facto* parent with whom the child wants to maintain a relationship, without this relationship having any adverse effects on the child.[108]

The spouses or registered partners may contractually determine the effects of separation, including the effects regarding the maintenance of the child and the contact between the child and the two parents. However, this agreement does not bind the judge; the judge will certainly give consideration to such agreement, but will also have the option of deviating from it altogether.[109]

Finally, in the event that the legal parent of the child dies, the other parent may request to be appointed legal guardian of the child, but is not automatically entitled to such status. The decision always falls upon the child protection authorities, even if the legal parent designated in an agreement or testament that this is the person who should take care of the child in case of death.[110]

In the event of a surrogacy where the child has always been taken care of by the two intended parents, there is no doubt that breaking up the relationship between the child and the *de facto* parent would be harmful to the child. The child regards this person as a second parent. The judge should grant this right of contact, even in the absence of such agreement between the intended parents. However, it is uncertain as to whether this right of contact can be equated with that of a joint custody proper, as it could have been set up if the two intended parents were the legal parents of the child.

In the event of death of the legal parent of the child, since the other parent always took care of the child and the child regards this person as a second parent, the child protection authorities should appoint this parent as legal guardian. This solution would be the best solution in the interests of the child because it would allow the child, insofar as possible, to maintain a stable situation.

6. Maintenance

As there are no specific provisions regarding the duty of the intended parents in surrogacy, we must rely on the existing general principles and attempt analogies with their legal situation.

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[107] A. Boos-Herberger/ A. Büchler (note 104), SSPA 27, No. 28.

[108] A. Leuba, SCC 274a, in B. Foëx/ P. Pichonnaz (eds), *Commentaire romand, Code civil I – Art. 1-359 CC*, Bâle/ Genève/ Munich 2010, No. 6.

[109] A. Boos-Herberger/ A. Büchler (note 104), SSPA 27, No. 32.

[110] Art. 327a SCC; Art. 401 by Art. 327 (2) SCC; V. Boillet/ E. De Luze (note 96), No. 48.

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a) Where Recognition of Legal Parentage is Impossible

If the relationship between the intended parents and the child is not recognized, the intended parents may only be foster parents (during the adoption procedure) or guardians of the child.

As the child has no legal parents, it is not possible to base the responsibility for maintenance on Article 276 SCC, which concerns only the legal parents' duty of maintenance.

If the intended parents are the foster parents of the child during the adoption procedure, the law is clear: they are responsible for the maintenance of the child, including financial maintenance.[111] If the intended parents have been appointed as guardians of the child and they all live together, it is possible to draw a parallel with the situation under Article 294 SCC regarding the foster parents during the adoption procedure. If the foster parents take care of the child with a view to subsequent adoption, *i.e.* to establishing a legal relationship with the child, they are usually required to provide maintenance to the child. In the event of a surrogacy, the objective of the intended parents when they choose this method of conception is precisely to establish a legal relationship with the child whom they take care of. Therefore, they should be under obligation to provide maintenance.

b) Where Legal Parentage is Only Partially Recognized

The applicable provisions are Article 278 (2) SCC if the intended parents are married, and Article 27 (1) SSPA if they are registered partners.[112] Even if the text of Article 278 (2) SCC seems to exclude children born into marriage, it should be applicable in response to surrogacy. The aim of this provision is to exclude illegitimate children who were not wanted by the other spouse, but in the case of a surrogacy, it is a project of both parents, even if only one of them may ultimately be recognized as the legal parent.[113]

The holder of the maintenance right is the legal parent of the child, and not the child. Because there is no legal bond between the child and the intended parent who is not the legal parent, the child cannot assert any claim in maintenance against him or her, notwithstanding the *de facto* bond that may arise between them.[114]

This right of maintenance of the legal parent of the child is subsidiary in nature: it is only if the legal parent is financially unable to cater for the needs of the child on his or her own that he or she entitled to require assistance from the other spouse or registered partner. In turn, the spouse or registered partner is under an

[111] Art. 294 SCC.

[112] The content of these legal provisions is the same. A. BOOS-HERBERGER/ A. BÜCHLER (note 104), SSPA 27, No. 3.

[113] D. PIOTET, SCC 278, in B. FOËX/ P. PICHONNAZ (eds), *Commentaire romand, Code civil I – Art. 1-359 CC*, Bâle/ Genève/ Munich 2010, No. 2 and 10.

[114] D. PIOTET (note 112), SCC 278, No. 4; A. BOOS-HERBERGER/ A. BÜCHLER (note 104), SSPA 27, No. 10.

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obligation to provide assistance only to the extent that his or her own subsistence is ensured.[115]

This right terminates upon divorce or dissolution of the registered partnership. The intended parent has no legal obligation to provide maintenance in the absence of a legal relationship, and the legal parent will not be able to demand maintenance for the child from an ex-spouse or ex-registered partner, even though they "conceived" the child together.[116]

These legal provisions provide a rather thin protection for the child, who was born of a common desire of the couple. Ideally, the intended parents should conclude an agreement fixing the distribution of the maintenance of the child, and specifically provide that this agreement will also be enforceable in case of separation.[117] However, this is an option and not an obligation. It is not certain that the intended parents will think to make such an arrangement. Furthermore, even with this arrangement, only the legal parent of the child will be able to assert claims against the other intended parent. The child still has no possibility to do so.

There is evidently a gap between law and reality. Even if, legally, the child has one parent only, in reality he or she has two. The child should be able to assert such rights against both parents directly, even when the intended parents have separated. Yet, according to the law as stands today, the child is not entitled to maintenance against the intended parent who is not the legal parent. Likewise, in the event of separation, neither the child nor the legal parent will be able to assert claims against the second intended parent. The child is ultimately deprived of a number of rights that he or she would otherwise benefit from were his or her legal status as child fully recognized.

7. Inheritance

If the child has no legal link with the intended parent, then there exists no right of inheritance *ex lege* in the event of the intended parent's death, even if the child has lived together and formed a family with both intended parents.[118] The denial of a right to inherit can impact heavily upon a child, especially if the legal parent died before the intended parent and they were married: in this case, the intended parent and the child will each receive half of the deceased person's estate.[119] Afterwards, when the intended parent also dies, if the intended parent did not make any will, the child will be entitled to nothing, he or she will not receive half of the estate of the legal parent which was transmitted to the other intended parent, contrary to other children who have two legal parents.

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[115] D. PIOTET (note 112), SCC 278, No. 6; V. BOILLET/ E. DE LUZE (note 96), No. 43.

[116] P. VEZ (note 92), SCC 299, No. 3; V. BOILLET/ E. DE LUZE (note 96), No. 44.

[117] The maintenance of the child is part of the maintenance of the family under Art. 163 SCC and Art. 13 SSPA.

[118] P.-H. STEINAUER, *Le droit des successions*, Berne 2015, No. 54.

[119] Art. 462 (1) SCC.

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The intended parent can make a will providing that part of the latter's estate is bequeathed to the child. However, nothing forces to the intended parent to do so, and it is not always certain that the intended parent will think about making a will. Moreover, a will is freely revocable.[120]

The best solution to ensure that the child will inherit is to conclude a "contract of succession" (*pacte successoral* in French, *Erbvertrag* in German). The contract of succession is an arrangement between two parties in which one party, denoted "disposing party" (here the intended parent), undertakes toward the other party (here the child) to organize his or her succession in a certain way which is generally beneficial to the other party. The disposing party is thereafter prevented from making a will which would be in breach of or inconsistent with his or her undertaking under the contract of succession nor is that contract revocable. The child may be then in the same situation as a statutory heir.[121]

If the child is under age and lacks capacity of judgment, the legal parent's consent – or that of the legal guardian if there is no legal parent – is required. There is no need to nominate a legal guardian to sign the contract because there is no conflict of interest between the child and the representative – quite on the contrary, the aim of this contract of succession is to guarantee a right to inherit that the child will not have otherwise. If the child is capable of judgment, then this contract can be signed without the consent of the parents.[122]

This solution guarantees the child a right of inheritance in the event of death of the intended parents, but it does not suppress all inequalities. Despite the *de facto* parent-child relationship, the inheritance will be taxed as if the child is a third party because of the lack of legal relationship with the deceased person and the tax, which would normally be set at a maximum of 3% of the inheritance, will rise to 50%.[123]

IV. Conclusion

The legal position of the intended parents and the child born through surrogacy is very unsettled. The approach of the European Court of Human Rights is now clear with respect to the intended parents who have a genetic link with the child: the Contracting States of the ECHR, and their authorities, are under an obligation to recognize the legal parentage.[124] The question is still unresolved regarding a child

[120] P.-H. STEINAUER (note 114), No. 722-723.

[121] P.-H. STEINAUER (note 114), No. 609, 624 and 629.

[122] Art. 19 SCC; P.-H. STEINAUER (note 114), No. 319-321; ATF 118 II 101, § 4 and 4.c).

[123] CRÉDIT SUISSE, *Aperçu des impôts cantonaux sur les successions et les donations, Etat le 1er janvier 2015*, available at <https://www.credit-suisse.com/ch/fr/privatkunden/persoenliche-beratung/beratung-fuer-vermoegende.html>; X. OBERSON, *Droit fiscal suisse*, Bâle 2012, § 18, No. 24.

[124] ECtHR, *Labassée* v. *France*; ECtHR, *Mennesson* v. *France*; ECtHR, *Foulon and Bouvet* v. *France*; ECtHR, *Laborie* v. *France*.

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who has no genetic link with either of the intended parents. The ECHR seems to be unwilling to deny the States the freedom not to recognize that parentage but had little chance so far to address the consequences flowing from non-recognition and to consider the possibility of legally protecting the *de facto* relationship between the child and the intentional parents despite formal non-recognition of parentage.

Once the child is born, the situation of, and level of protection required for, the surrogate mother are not the same as before birth. The surrogate mother no longer requires protection. Admittedly, she is in the same situation as a woman who has given her child up for adoption. On the contrary, the child is at this stage longer prospective or merely desired, he or she is a flesh-and-blood human being which, like all children, requires protection. Clearly, the level of protection enjoyed by the child is not the same if he or she has one or two parents. It was ultimately based on such realization that the German *Bundesgerichtshof* held it was in the child's best interests that legal parentage established abroad in the context of surrogacy be fully recognized, *i.e.* even with respect to the intended parent who is genetically unrelated the child.[125]

To be sure, domestic courts are required to comply with both their national law, including prohibition of surrogacy as part of the public policy of their country, and the demands of international law, which point to the child's best interests. Nevertheless, alone they cannot change the law. A potential solution may then come from the Hague Conference on Private International Law, which is currently preparing a legislative proposal on the issues surrounding the status of children arising from international surrogacy arrangements.[126]

[125] German Bundesgerichtshof, Decision of the 10th December 2014, XII ZB 463/13.

[126] See <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

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FORUM

THE LAW APPLICABLE TO INTERMEDIATED SECURITIES; BEYOND PRIMA AND THE HAGUE SECURITIES CONVENTION

Alkaios Panagiotis SIVITANIDIS*

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 467-509
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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2. The Need to Select a Connecting Factor that Leads to one Sole Applicable Law
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I. Introduction

More than a decade has already passed since the Hague Conference on Private International Law adopted the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (hereafter: "*Hague Securities Convention*" or "*HSC*" or "*Convention*"), yet the conflict of laws rules applicable to securities held through intermediaries remain vague and contentious. A long delay followed the conclusion of its drafting procedures; however the Convention finally entered into force on 1 April 2017,[1] notwithstanding the very limited participation of just three States. This outcome did not live up to the initial expectations that were evident in the preparation of the final text through a fast-track procedure, in an effort to address as quickly as possible and on a global level the urgent practical need for legal certainty and predictability on the law applicable to securities held, transferred and pledged through modern indirect holding structures.[2] From the perspective of the European Union, the initial positive reactions[3] were followed by scepticism[4] and finally by the rejection of the Hague Securities Convention.[5] This issue is now expected to be addressed

[1] The Convention was signed by the USA and Switzerland on 5 July 2006 and this joint signing gave the Convention its date. However, the final text of the Convention had been adopted in The Hague, on 13 December 2002, during the 2nd part of the Nineteenth Diplomatic Session. Switzerland and Mauritius had ratified the Convention since 2009. The third contracting State that was necessary, according to its provisions (Article 19), to trigger its entry into force, is the USA, which deposited its Instrument of Ratification on 15 December 2016.

[2] See R. GOODE/ H. KANDA/ K. KREUZER with the assistance of Ch. BERNASCONI (Permanent Bureau), *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary: Hague Securities Convention,* Hague 2005 (hereafter: "*HSC Explanatory Report*"), paras. Int-1 *et seq*.

[3] See Proposal for a Council Decision Concerning the signing of the Hague Convention on the Law applicable to certain rights in respect of securities held with an intermediary (presented by the Commission), COM (2003) 783 final, OJ C 096, 21.4.2004, at 33.

[4] See Opinion of the European Central Bank of 17 March 2005 at the request of the Council of the European Union on a proposal for a Council decision concerning the signing of the Hague Convention on the Law applicable to certain rights in respect of securities held with an intermediary (COM (2003) 783 final) (CON/2005/7), OJ C 81, 2.4.2005, at 10–17.

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through the prospective EU Securities Law Legislation;[6] however, the exact rules to be adopted in this context have not yet been finalised and are still under discussion. Besides, it is not clear when this latter project will be completed, if ever.

The goal of the Hague Securities Convention was the formation and the uniform adoption of effective conflict of laws rule(s) on the law applicable to indirectly held securities at a global level. It is clear from the fierce academic debate and the reluctance of most States to ratify the Convention or – more generally – to legislate on this field, that the issue still remains controversial. After the almost universal rejection of the application of the traditional conflicts rules in this context,[7] this controversy often appears to relate to the question of whether the applicable law shall be left to the autonomy of the parties involved or shall be determined according to objective factors related to the maintenance of the securities accounts. Others argue that different solutions of the problem favour different commercial interests and thus, the underlying reason for not reaching an agreement on a global level is not the diverging legal views but business antagonism.[8] However, it is hereby suggested and will be explained in detail that the main reason that triggers the controversies and prevents the formation of a well-accepted approach for the solution of the issue is a serious misconception of the scope and the subject-matter of the conflicts rule in question. This misconception blurs the borderline between traditional and modern conflicts rules and hinders the formation of a clearly defined subject-matter, as well as the selection of an appropriate connecting factor for the conflict of laws rule in question.

II. The Factual and Legal Context of the Problem

The difficulties related to the determination of the applicable law for intermediated securities are mainly linked to two particularities of the problem. The first is the structural characteristics of modern securities holding systems, which differ substantially from traditional holding structures. The second is the different responses

[5] See European Parliament resolution on the implications of signing the Hague Securities Convention of 14.12.2006, P6_TA(2006)0608, OJ C 317E, 23.12.2006, at 904–905, as well as Withdrawal of obsolete Commission proposals, OJ C71, 25.3.2009, at 17–18.

[6] Further information on this project is available at the European Commission webpage <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/securities-ownership_en >.

[7] See HSC Explanatory Report, paras. Int-38 *et seq*., R. POTOK, Rapporteur's Summary, The Oxford Colloquium on Collateral and Conflict of Laws, *Butterworths journal of international banking and financial law,* Special Supplement, Sept. 1998, at 6. The application of the traditional conflicts rules to intermediated securities is often referred to as the "look-through approach".

[8] See European Banking Federation, Letter to the Council Committee on Civil Law and the Commission dated 29 June 2004 (FBE ref. No 447).

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of various jurisdictions to contemporary securities holding practices and the resulting disparity in the relevant provisions of the different national laws. These elements, as well as their impact on cross-border transactions, are analysed in this part of the paper, as their examination is critical to satisfactorily determining the conflict of laws question.

A. The Transition from the Direct to the Indirect Holding of Securities[9]

Historically, the holding of securities has been based on the physical possession of paper certificates. Often, these certificates are deemed by legal fiction as embodying the legal relationship between the issuer and the investor. Thus, ownership of a paper certificate equates to the entitlement to the securities and to the rights and benefits that derive from the investment relationship that is embodied in the certificate. These certificates are usually referred to as bearer securities. The holder of such securities is typically able to exercise the rights deriving from the embodied investment relationship (collection of dividends, interest, voting rights, *etc*.) directly against the issuer of the securities, merely on the basis of the possession of the certificate. Apart from the exercise of rights deriving from the securities, the physical possession of the paper certificate is also critical in relation to transactions concerning the securities. In order to transfer the title of the bearer securities, for example, it is necessary to deliver the paper certificate of the securities to the new owner. Equally, the delivery of the certificate to the security taker is necessary for pledging securities. These features, which aim to increase the speed and safety of these transactions, are reflected in the general rule which provides that, in case of bearer paper securities, the rights deriving *from* the certificate (*i.e.* the rights deriving from the investment relationship) follow the rights *on* the certificate (*i.e.* the proprietary rights to the paper that embodies the securities).

Bearer securities are the type of securities most commonly used in the continental law countries, albeit with many variations and divergences among the different jurisdictions. On the other hand, common law countries typically base their traditional securities holding systems on registered securities.[10] The latter are not considered as fully embodying the investment legal relationship, as is the case with bearer securities, and simply transferring the paper certificate by itself is not sufficient to complete and perfect the transfer of registered securities. Instead, transactions in registered securities additionally require, in order to be invoked against the Issuer and/or third parties, the filing of the agreement between the

[9] For a detailed introduction to the modern securities holding structures, the legal issues involved and the conflict of laws problems, see Hague Conference on Private International Law, Preliminary Document No 1 of November 2000 for the attention of the Working Group of January 2001; The law applicable to dispositions of securities held through indirect holding systems, Report prepared by Christophe Bernasconi for the Working Group of January 2001 (hereafter: "*Prel. Doc. 1*"), *passim*.

[10] For an explanation of how this divergence is the outcome of the differences in the historical development of the securities law see E. MICHELER, Doctrinal Path Dependence and Functional Convergence: The Case of Investment Securities, 2006, available at SSRN<https://ssrn.com/abstract=880110>, *passim*.

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transaction parties through an entry at the relevant registry of the issuer. This agreement is usually evidenced by the documentation of the transaction[11] and/or the endorsement and delivery of the paper certificate which, even though it does not embody the investment relationship as in the case of bearer securities, its possession is typically necessary for the registration and the completion of the transfer.

Despite the above differences, the important common characteristic for both types of securities is the reliance on the physical possession and delivery of the paper certificate (and often of the transfer documents as well), as they play a primary role and are an indispensable part of any securities transaction or safe-keeping. Besides, another common and defining feature of these paper securities is the aforementioned entitlement and the ability of the possessor to invoke and exercise the rights deriving from the securities directly against the issuer of the securities, without the involvement of any other persons or intermediaries. Traditional securities holding systems are based on this direct entitlement and direct exercise of securities rights through the physical possession of the paper certificates by the investor. For this reason, this type of securities holding, which relies on the physical possession of paper certificates by the investor, is referred to as the *direct securities holding structure*, in order to distinguish it from the indirect securities holding system that does not depend on this physical possession and that will be described in detail below.

This paper-based securities holding system worked efficiently for a long period of time. However, from the 1960s the volume of securities transactions began to increase rapidly, and the requirement to physically transfer certificates became a serious obstacle to the smooth operation of financial markets and caused the settlement of transactions to become time-consuming, labour-intensive and expensive.[12] The serious and escalating delays and the malfunctioning of the traditional holding system revealed that this structure of holding of securities, which relied on the possession of the paper certificate by the investor, had become unsustainable. The growing securities markets' needs led to the development of new holding techniques, such as the immobilisation and the dematerialisation of the securities, as a means to eliminate the need for the physical transfer of certificates. These techniques, combined and developed further, resulted in the contemporary indirect securities holding structures.

The modern indirect securities holding system is based on two main principles. The first is the replacement of the physical transfer of securities' paper certificates with book-entries in fungible (*omnibus*) securities accounts; the second is the multi-tiered structure. These indirect holding patterns are structured as at the

[11] Under English law, for example, these documents are commonly referred to as stock transfer forms; the necessity of a written transfer form derives from the provisions of the Stock Transfer Act 1963 - see J. BENJAMIN, *Interests in Securities; A Proprietary Law Analysis of the International Securities Markets,* Oxford 2000, para. 3.36.

[12] The "paperwork crisis" that the New York stock exchange experienced in the 1960's was the triggering event for the development of more efficient securities holding systems (see Prel. Doc. 1, at 2, 12).

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following typical – yet simplified – example[13]: the total number of a certain type of securities is acquired by a Central Securities Depository (CSD), that takes possession of the securities certificates and becomes the sole securities holder *vis-à-vis* the issuer of the securities.[14] The CSD is the first-tier intermediary of the holding structure. Then, the CSD maintains securities accounts in the name of its participants, who are a limited number of professionals (brokers, banks, investment services providers, *etc*.). The securities are credited to these accounts and the relevant book-entries confer to the participants their rights in relation to the securities. The participants may acquire these rights in order to invest their funds to these securities, however they most commonly make the acquisition in the interest of their clients, acting as second-tier intermediaries. The securities accounts that are maintained by the CSD are fungible (*omnibus*) in the sense that all securities of an intermediary are credited to a single account, without distinction or separation between the securities of the intermediary and each of his clients.[15] Accordingly, the participants also maintain securities accounts for their clients; these accounts are maintained exclusively through their own books,[16] where the rights of their clients in relation to the securities credited at the participant's fungible account are evidenced in the form of credits to these accounts. In the same way, a client of the participant may be itself an intermediary (a third-tier Intermediary), by maintaining securities accounts in the same way and through his own books for his own clients and by effecting book-entries to these accounts that evidence the rights of his clients. This pattern may be repeated many times, forming a multi-tiered system that is shaped as a pyramid structure.

The holding of securities through this multi-tiered system is characterised as *indirect*, for the reason that between the issuer of the securities and the ultimate investor, one or more persons, the intermediaries, are interposed in a way that the investor is not able to directly invoke and exercise his rights against the issuer of the securities. Instead, in order for these rights to be exercised, the recourse to these intermediaries and their substantive involvement and assistance is indispensable and absolutely necessary. This restriction of the investor's ability to exercise his rights directly may be caused either by the fact that an intermediary – and not the investor – is the owner of the securities *vis-à-vis* the issuer or – in cases where the investor retains the ownership of the securities despite the intermedia-

[13] For a more detailed presentation of the indirect holding model see Prel. Doc. 1 (note 9), at 12 *et seq*.

[14] In case of bearer securities, the acquisition of the ownership of the paper securities usually suffices to become the securities holder as against the issuer. In relation to registered securities, it is additionally required for an entry to be effected at the securities registry.

[15] In fact, some jurisdictions impose on intermediaries the obligation to maintain a segregated account for the securities that they acquire for their clients, in order to separate them from those held as their own investment; but even after such a regulatory requirement is met, all the securities acquired for the clients still remain commingled.

[16] These accounts are completely separate from and different to the corresponding fungible securities accounts that the CSD maintains in the name of each participant. The identity of the clients of each participant and the entries to the clients' securities accounts are not disclosed or otherwise communicated to the CSD.

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tion – by the inescapable and utterly necessary involvement of an intermediary in order to practically be able to prove and exercise the rights deriving from the securities, mainly because the holding of these securities involves book-entries in *omnibus* accounts and because investors' rights are evidenced solely through the accounts maintained by the intermediaries.

B. The Diversity of the Substantive Law Provisions Concerning Modern Securities Holding Structures

A critical question arising under modern indirect securities holding structures concerns the exact nature and the characteristics of the rights that are vested to investors as a result of the book entries to the securities accounts maintained in their names by the intermediaries. Functionally, the characteristics and the practical aspects of the indirect holding are uniform, or at least very similar, world-wide. In contrast, the rules governing the rights of the account holders differ significantly from jurisdiction to jurisdiction.[17] Thus, as any answer to the above question on the nature and features of the rights of investors depends on the specific substantive law provisions under which these rights are analysed, this lack of uniformity of legislation at a national level and the disparity of the relevant provisions from State to State mean that the answer varies and can be provided only in reference to a specific jurisdiction.

According to some legal systems, in the context of modern securities holding structures, the investor acquires nothing more than mere personal rights against his intermediary in relation to the securities credited to his account.[18] The problem that emerges under this structure is that the investor is fully exposed to the intermediary risk, *i.e.* the risk of the insolvency of his intermediary.[19] Under a personal rights analysis, if the intermediary becomes insolvent, the investor will typically have only a personal claim against him to receive the securities credited to his account, or even just their market value (*i.e.* a claim for money and not for securities). This claim will have no preference in relation to the claims of other creditors. Thus, after the satisfaction of the preferential creditors, the investor will receive his claim in full only in the unlikely event that there is enough property left to cover all the claims of all the intermediary's creditors (of course if this were the case, it is unlikely that insolvency would have been declared in the first place). In

[17] For references to the relevant substantive law provisions and information on many different jurisdictions see R. POTOK (ed), *Cross-border collateral: Legal Risk and the Conflict of Laws*, London 2002; see also M. HAENTJENS, *Harmonisation of Securities Law: Custody and Transfer of Securities in European Private Law*, The Netherlands 2007; C. CHUN, *Cross-Border transactions of intermediated securities: A comparative analysis in substantive law and private international law*, Berlin/ Heidelberg 2012.

[18] This is the outcome of the traditional personal law analysis that typically becomes applicable in the context of intermediated securities in jurisdictions that have not adopted special provisions for modern securities holding systems.

[19] See St. L. SCHWARCZ/ J. BENJAMIN, Intermediary risk in the indirect holding system for securities, *Duke Journal of Comparative & International Law* 2002 (12), 309, *passim*.

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the more likely event that the insolvency estate is insufficient, the investor (as well as other unsecured creditors) will receive only a pro-rata portion of his claim, according to the *pari passu* principle that is applicable to this type of distributions. This risk – that practically may result in anything up to the total loss of the invested capital – is a strong counter-incentive for investors, who would reasonably seek to avoid the indirect holding systems, notwithstanding that the traditional direct holding system is more expensive and slow-moving.

In order to reduce the risk and bolster trust in the indirect holding system, most jurisdictions adopt provisions that equip the investor with considerably stronger rights than a mere personal right against his intermediary. These rights, while often different in nature, seek to protect investors from the above intermediary risk, typically by ring-fencing and protecting the securities rights acquired by the intermediary for his clients from the claims of third parties and by enabling the investors, in case of insolvency, to exclusively assert these assets and to separate them from the intermediary's insolvency estate. Under English law, for example, this is achieved by regarding the securities – or the interests in securities[20] – acquired and held by the intermediary for his clients, as the subject-matter of a trust: the intermediary is the trustee, so he acquires merely the legal title to these securities, while the investor is the beneficiary and thus, he acquires the equitable (or beneficial) ownership.[21] This arrangement protects the investor in the event of insolvency of the intermediary, as the trust structure separates the relevant (interests in) securities from the other assets of the intermediary in favour of the investors. Similarly, under US law[22] the investor acquires *securities entitlements*, a hybrid bundle of personal rights against the intermediary and real rights in relation to the (interests in) securities held by the intermediary.[23] Comparable protection of

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[20] The term *"interests in securities"* refers to the rights that an investor acquires through the book-entries at the securities account maintained in his name by an intermediary that holds securities (or interests in securities) collectively for his clients, on an unallocated basis; the term *"(interests in) securities"* is used to refer to both securities and interests in securities indistinctively. These very accurate terms were introduced and used by Joanna BENJAMIN (note 11) at paras. 1.04 *et seq*.

[21] See J. BENJAMIN (note 11) at paras. 2.01 *et seq*.; R. GOODE, *Commercial Law in the Next Millennium*, London 1998, at 75 *et seq*.; E. MICHELER, *Property in Securities: A Comparative Study*, Cambridge 2007, at 19 *et seq*.

[22] More precisely, the reference to the "US law" is a reference to the revised Article 8 of the Uniform Commercial Code (hereafter "*UCC*"). The UCC, in whole or in part, has been enacted, with some local variation, in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands - see Duke University School of Law, J. Michael Goodson Law Library, Research Guides, Uniform Commercial Code, available at <http:// law.duke.edu/ lib/researchguides/pdf/ucc.pdf>. The relevant Article 8 "Investment Securities", which governs the intermediated securities, has been modernised through a major review in 1994. For the UCC Article 8 regime, see J. St. ROGERS, Policy Perspectives on Revised U.C.C. Article 8, *UCLA Law Review* 1996 (43), 1431, *passim*; Ch. W. J. MOONEY, Beyond Negotiability: A new model for transfer and pledge of interests in securities controlled by intermediaries, *Cardozo Law Review* 1990 (12), 305, *passim*; C. BJERRE/ A. ROCKS, *The ABCs of the UCC, Article 8: Investment Securities*, Chicago 2004, at 33 *et seq*.

[23] The same concept of securities entitlements is followed by the "Canadian Uniform Securities Trading Act", which was adopted by the "Uniform Law Conference of Canada"

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the investor is also achieved under the laws of Belgium[24] and Luxemburg,[25] where the investor is deemed to acquire co-ownership rights on a notional pool of securities, consisting of the variable pool of (interests in) securities that the intermediary has acquired for his clients.[26] There, the involvement of the concept of ownership, as an absolute right that can be invoked against third parties, ensures that this pool of securities will not be part of the insolvency estate in the event that the intermediary becomes insolvent. At the same time, the subject-matter of the ownership rights is not the actual securities, but the fictional pool of the rights of the intermediary in relation to securities. This feature facilitates the indirect and multi-tiered structure of the holding, as the securities are held in commingled pools and on an unallocated basis and no reference to specific securities is made, despite the application of a traditional ownership analysis.

Under all of the above indirect holding patterns, from the perspective of the issuer, the owner of the securities and the person entitled to the securities is clearly the first-tier intermediary, *i.e.* the intermediary who stands at the top of the holding chain (typically the CSD or its nominee) and not the investor. This intermediary is, *vis-à-vis* the issuer, the person qualified to directly exercise the rights deriving from the securities (as, for example, to vote or to receive interest payments under the terms of a bond) and to whom the issuer must make the relevant payments, give the appropriate information or recognise the voting rights, *etc*. This characteristic is quite typical in a broad category of securities holding structures, especially in common law jurisdictions, and the systems that follow this analysis may be referred to as *"fully-indirect" securities holding systems*.[27]

This category shall be distinguished from another broad category of indirect holding systems, that we may name *"semi-indirect" securities holding systems*. The latter follow a different approach, under which the intermediation of the securities holdings uses a scheme that enables investors that hold their securities through intermediaries, to nevertheless be deemed and legally treated, even from the standpoint of the issuer, as the owners of the securities and as the persons entitled to exercise the rights deriving from the securities *vis-à-vis* the issuer, *i.e.* as having the same ownership rights as the investors that hold the securities directly. As will be analysed below, this feature significantly alters the legal analysis of the

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in August 2004; full text available at the website: < http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/761-securities-transfer-act/2049-securities-transfer-act >. After a recent revision, similar provisions can be found at the Swiss law; the relevant statute is the *Bundesgesetz über Bucheffekten* (*Bucheffektengesetz*, BEG) vom 3. Oktober 2008 (Stand am 1. Januar 2010).

[24] See Belgium Royal Decree No 62 of 10 November 1967, as coordinated by Royal Decree of 27 January 2004.

[25] See Luxembourg Grand-Ducal Decree of 17 February 1971, as amended.

[26] See Prel. Doc. 1 (note 9), at 22 *et seq*. (with further references).

[27] This expression is influenced by the distinction of jurisdictions to "Semi-modern jurisdictions" and "Fully-modern jurisdictions", according to their legislation in the field of indirectly held securities, a distinction that has been used by R. GYUNN/ N. MARCHAND, Transfer or pledge of securities held through depositories, in H. van HOUTTE (ed), *The Law of Cross-border Securities Transactions*, London 1999, at 58, paras. 3.12, 3.13.

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structure, despite the fact that the architecture and the functional characteristics of modern intermediated holdings (involving tiers of intermediaries, *omnibus* accounts, *etc*.) resemble, or are even identical, to those of fully-indirect securities holding systems.

Semi-indirect holding systems are established and operate by virtue of special statutes, commonly enacted to apply to securities deposited at local CSDs. A semi-indirect securities holding system is envisaged, for example, by German law.[28] Under German law, each class of bearer securities deposited at the local CSD is collectively owned by the relevant investors. The intermediaries do not acquire any property rights in the securities but merely a constructive possession for their clients.[29] The investors acquire co-ownership rights in the securities deposited at the CSD, usually in conformity with the traditional principles governing the transfer of movable property,[30] despite the fact that their rights are only evidenced in the securities accounts maintained by their intermediary, thus making indispensable and absolutely necessary the involvement and assistance of these intermediaries in order to exercise the rights deriving from the securities. Similar structures and analysis, usually in respect of the securities at the local CSDs, can be found in Dutch, Spanish and French law.[31] The common characteristic of these approaches is that, despite the interposition of the intermediaries between the

[28] For the German law regime see C. CHUN (note 17) at 157 *et seq*. with further references; E. MICHELER (note 21) at 145 *et seq*.; RÖGNER H., Inconsistencies between the Hague Convention and German law, *Journal of International Banking Law and Regulation* 2006, 367; D. EINSELE, Modernising German Law: Can the UNIDROIT Project on Intermediated Securities Provide Guidance?, *Uniform Law Review* 2005, 251; D. EINSELE, The Book-Entry in a Securities Account: Linchpin of a Harmonised Legal Framework of Securities Held with an Intermediary, *Uniform Law Review* 2004, 41; B. GEIER, Comparison of the electronic securities settlement systems for the secondary securities markets in Germany and England, *Journal of International Banking Law and Regulation* 2008, 97.

[29] The possession is regarded as constructive because, despite the fact that intermediaries have actual control over the securities, the physical possessor of the paper certificates is the CSD where the securities are deposited.

[30] However, in order to bolster confidence in the modern holding, if the investor does not acquire co-ownership rights under the traditional property law analysis, these rights are nevertheless acquired by the virtue of Article 24 of the *Depotgesetz* of 1937, as amended (i.e. the German statute for the custody of the securities with the full title "*Gesetz über die Verwahrung und Anschaffung von Wertpapieren*" vom 4. Februar 1937).

[31] For the Netherlands see R. VERHAGEN, Book-entry securities and private international law; The transfer and pledge of securities held in international multi-tiered securities holding systems, *European Business Law Review* 2000, 112, *passim*; W. RANK/ A.-J. van der LELY in R. POTOK (ed), *Cross-border collateral: Legal Risk and the Conflict of Laws*, London 2002, at 402 *et seq*., for Spain see F.J. GARCIMARTÍN ALFÉREZ, Direct and indirect holding: the challenge of the functional approach, UNIDROIT Seminar on intermediated securities - Bern, Switzerland, 15-17 September 2005, Appendix 2, at 6 *et seq*., for France see Ch. BERNASCONI/ R. POTOK/ G. MORTON, in R. POTOK (ed), *Cross-border collateral: Legal Risk and the Conflict of Laws*, London 2002, at 25, para. 2.56; Legal Certainty Group, Comparative Survey, MARKT/G2/MNCT D (2005), at 55, para. 2.8.2, (text available at the website: <http://ec.europa.eu/internal_market/financial-markets/docs/certainty/background/comparative_survey_en.pdf>.

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issuer and the investors in a way critical for exercising the securities' rights (as a result of maintaining *omnibus* accounts in the name of the intermediaries), it is the investor, and not the intermediary, that is regarded as the owner of the securities *vis-à-vis* the issuer. Thus, the architecture and the functional characteristics of this category of securities holdings are comparable to fully-indirect securities holdings, as a result of the involvement of intermediaries, the fungible accounts and the multi-tiered structure. However, from a legal perspective, these semi-indirect structures are closer to traditional holdings, since they confer on investors direct property rights to the securities, despite the commingling and the intermediation. These semi-indirect holding systems can therefore be said to have a hybrid character, combining characteristics of the direct with those of the fully-indirect systems.

C. The Conflict of Laws Aspect and the Need for Legal Certainty and Predictability

This disparity in the treatment and analysis of modern securities holding systems in different jurisdictions underlines the significance of the question of the law applicable to cross-border indirect holdings of securities. The absence of a uniformly accepted and sound conflicts rule that ensures legal certainty and predictability in relation to the choice of law question has been repeatedly cited as a source of legal risk that seriously impedes the efficiency and the seamless operation of financial markets and causes a series of barriers and problems to cross-border transactions.[32] Since investors and collateral-takers may be unable to determine the applicable law governing the securities rights they acquire, they cannot adequately assess their exact legal position and the relevant risks and, as a result, they may become reluctant to invest in securities that are held indirectly. This lack of confidence may result in an increased cost of capital for issuers and a reduction in the value of securities as assets or collateral. In addition, this uncertainty is susceptible to contributing to systemic risk in times of financial distress. Hence, it becomes obvious in the contemporary context of highly complicated and sophisticated financial markets, which operate almost irrespective of national

[32] See R. GYUNN, Modernizing Securities Ownership, Transfer and Pledging Laws, A Discussion Paper on the Need for International Harmonization, with Responding Comments by Professor James Steven Rogers (USA), Professor Kazuaki Sono (Japan) and Dr Jürgen Than (Germany); Capital Markets Forum, Section on Business Law, IBA 1996, *passim*; Group of Thirty, Clearance and Settlement Systems in the World's Securities Markets, New York & London 1989, *passim*; Bank for International Settlements, Cross-border Securities Settlement, Basel 1995, *passim*; Group of Thirty, Global Clearing and Settlements: A Plan of Action, Washington, D.C. 2003, *passim*; Committee of Wise Men, Initial report of the Committee of Wise Men on the Regulation of the European Securities Markets, Brussels 2000; and Committee of Wise Men, Final report of the Committee of Wise Men on the Regulation of the European Securities Markets, Brussels 2001 (Lamfalussy reports); Giovannini Group, Cross-Border Clearing and Settlement Arrangements in the European Union, Brussels, 2001; Giovannini Group, Second Report on EU Clearing and Settlement, Brussels, 2003; UNDROIT Study LXXVIII, Doc. 8, UNIDROIT Study Group on Harmonised Substantive Rules Regarding Indirectly Held Securities, Position Paper, August 2003.

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borders and without serious restrictions in the movement of funds and securities, the goal of certainty and predictability in the applicable law is of paramount importance. For this reason, a conflicts rule in this field is necessarily required in order to promote primarily and above all the predictability of the applicable law, even at the expense of other objectives, as for example the *in concreto* application of the most appropriate applicable law or the achievement of a better outcome from a case-to-case perspective.[33] These concerns have spurred numerous discussions and debates on a global level, both in relation to the substantive law provisions and to the conflict of laws regime of the intermediated securities.

In the U.S., a major revision of Article 8 of the U.C.C., concerning investment securities, took place in 1994.[34] Following a proposal in 2000, the Hague Conference on Private International Law finalised in 2002 the well-known Hague Securities Convention. In 2009, the text of the UNIDROIT Convention on substantive rules for intermediated securities was finalised in Geneva.[35] The European Commission launched public consultations, in 2009 and 2010, in an effort to eliminate obstacles towards a single post-trading market in the EU, a project that may result in the aforementioned EU Securities Law Legislation that will harmonise both the substantive and the private international law provisions at the EU level. However, none of the initiations and proposals were able to be adopted uniformly on a global basis and thus, none of these developments were sufficient to mitigate the risks and the ambiguity in cross-border intermediated securities transactions.

As aptly observed during the HSC drafting,[36] this paramount objective of achieving legal certainty and predictability could be accomplished by drafting and implementing globally a harmonised conflicts rule in relation to indirectly held securities. Such a rule must designate the applicable law neutrally, on the basis of general and pre-determined criteria. If such a rule were adopted uniformly by all jurisdictions, the same law would be indicated as applicable, irrespective of the forum where a question arises. However, in the attempt to formulate this conflicts rule, two interesting but difficult problems need to be addressed. The first one concerns the precise subject-matter of the new rule and how its scope can be defined with the necessary accuracy. The other major issue is the selection of the most appropriate connecting factor, in order to ensure that the conflicts rule indicates the substantive law in the most sufficient, workable and reasonable way. Despite the fact that these two issues are separate and distinct, there is a strong link between them; because the proper formation and shaping of the scope of the rule is a factor strongly influencing and determining the choice of the appropriate

[33] In other fields of private international law, as – for example – in relation to family law issues, it seems clearly more important to achieve *in concreto* better results, by leaving discretion to the judge to apply the most suitable law to the specific case from the different laws that are connected to it, rather than pursuing the predictability and the *ex ante* knowledge of the applicable law.

[34] See J. St. ROGERS (note 22) *passim*.

[35] For full text, preparatory work materials and selected bibliography visit <http://www.unidroit.org/instruments/capital-markets/geneva-convention>.

[36] See HSC Explanatory Report, para. Int-1 *et seq*.

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connecting factor(s) of the rule,[37] in the sense that the selection of the appropriate connecting factor may be completely different in reference to different possible formations or definitions of the subject matter of a conflicts rule.

III. The Formation of the Appropriate Conflicts Rule

By examining the modern securities holding systems structure and the varying responses of each jurisdiction to intermediated securities, a clear disparity emerges, that spurs difficult problems in the context of cross-border transactions. As a result, this part of the paper focuses on the question of the appropriate conflicts rule. The endeavour to shape this rule departs from the definition of its subject-matter, a task that inevitably involves the question of whether it is possible to include every kind of indirect holding system in the scope of one single conflicts rule. Analysis of the subject-matter is followed by a determination of the appropriate connecting factor, which is probably the most debated conflict of laws of intermediated securities.

A. The Definition of the Subject-Matter of the Conflicts Rule for Intermediated Securities

It is hereby suggested that the subject-matter of the conflicts rule for intermediated securities shall be a new type of rights, which are referred to in this paper as *indirect securities rights*. This new class of rights, as well as the legal relationship under which these rights arise, form, from a private international law perspective, a new category of legal relationships. The shaping of this category, as well as the characterisation of the issues falling within this new class of legal relationships, shall be conducted in accordance with the needs of the private international law analysis and thus, it shall be separate and autonomous from the various substantive law characterisations of the categories of rights related to intermediated securities. Acknowledgement of the existence of these indirect securities rights and an understanding of their core characteristics is critical for the formation of a workable and effective conflicts rule. However, in order to precisely define these indirect securities rights and the legal relationship under which they arise, it is helpful to first distinguish this new category from two entirely separate and distinct categories, namely the personal law relationship between the investor and the intermediary, as well as the direct securities rights relationship.

[37] On the interrelationship between the subject matter of the conflicts rule and the chosen connecting factor see S. VRELLIS, Conflit ou coordination de valeurs en droit international privé – A la recherche de la justice, *Recueil des Cours* 328, Leiden/ Boston 2007, at 438-439, para. 384-386.

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1. The Personal Law Relationship between the Investor and the Intermediary

The contractual relationship between an investor and his intermediary is subject to the general conflict of laws regime that applies to any contractual relationships.[38] Thus, this relationship is governed by the *lex contractus*, which is often the law chosen by the contracting parties. Similarly, the non-contractual but nonetheless purely personal aspects of this relationship are also governed by the general conflicts rules that are usually applicable to these kinds of personal law relationships (torts, unjust enrichment, *etc*.).[39] A divergence from application of the general conflicts rules in the context of intermediated securities would be justified only in the event of a personal law relationship between the investor and his intermediary, whether contractual or not, raising unique and extraordinary considerations that would necessitate a special and exceptional conflict of laws treatment. But here there is generally nothing profoundly new nor substantially different in the personal law aspect of this particular relationship, that would require a special conflicts rule. Thus, the application of the existent rules shall remain intact in this field.

2. The Direct Proprietary Rights on Securities

As with purely personal rights, the direct proprietary rights on securities are well governed by long-established conflicts rules. Thus, it is not necessary to radically[40] amend the conflict of laws regime that applies to these rights especially in relation to indirect securities holdings. Under those traditional rules – that will be examined in more detail below – the applicable law is usually the *lex societatis* (especially for shares), the law chosen by the issuer of the securities (especially for bonds), the *lex cartae sitae* (especially for bearer securities) or the law of the place of the registry (especially for registered securities).

It is suggested that the conflict of laws treatment of the direct proprietary rights on securities is a clearly separate issue, totally different from the indirect securities rights that are the subject-matter of the special conflicts rule in question for intermediated securities. But as the same terms sometimes have different meanings in different jurisdictions, in order to draw this distinction between direct and indirect security rights sharply and with certainty, it is particularly necessary to clarify that the term *"direct proprietary rights on securities"* or *"direct securities*

[38] These rules typically respect the autonomy of the parties and their choice on the applicable law *(professio juris)*. In the absence of such a choice, the applicable law is usually that with the closest connection to the contractual relationship; for these conflicts rules within the EU see Regulation (EC) No 593/2008 - Rome I Regulation - Articles 3, 4.

[39] The law applicable to these relationships is also determined by the closest connection criterion, adapted to the nature of these personal relationships (for these conflicts rules within the EU see Regulation (EC) No 864/2007 - Rome II Regulation).

[40] However, for the necessary improvements and adjustments in relation to direct securities rights acquired through semi-indirect holding systems, see below.

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rights" is defined and used –at least in this paper– as referring to the direct relationship between the investor and the securities, to the extent – and provided – that this relationship can be invoked against the issuer of the securities. This way of defining direct securities rights has significant practical effects, especially in the context of legal systems where the question of who has direct proprietary rights on securities cannot be answered in one way in every occasion, but it rather differs according to the standpoint from which it is answered. An example is found in legal systems that allow ownership of the securities to be split into beneficial and legal ownership, under which the legal owner is entitled to the securities from the perspective of the issuer, but he is not entitled to them from the perspective of the beneficiary or his creditors.[41]

As a result of the disparity in the different substantive laws, direct securities rights are defined – for the needs of this paper – by implementing as sole criterion the standpoint of the issuer: whoever is entitled to the securities from the issuer's perspective is, by definition, the person regarded as having direct securities rights, irrespective of whether these rights can also be invoked against everybody (as the case may be in continental law jurisdictions) or not (as the case may be if the person entitled *vis-à-vis* the issuer has merely legal title and thus, cannot invoke his entitlement to the securities against the beneficiary). Therefore, reference here to a direct proprietary right to securities means the entitlement of a person *vis-a-vis* the issuer to directly enjoy the benefits and exercise the rights of the securities (collection of dividends/interest, voting rights, *etc*.). This person is the direct owner (or possessor) of the securities, even if – or irrespective of whether – the same person is not regarded as the owner of the securities as against persons other than the issuer, such as his clients or his creditors, *etc*.

3. The New Category of Rights: Indirect Securities Rights

It is suggested that the quintessence, the novel aspect and the defining characteristic of modern indirect securities holding systems is a special type of rights hereby

[41] The ability to split the ownership and to have, for example, one person (legal owner) entitled to the securities as against the issuer and another person (beneficiary) entitled to the very same securities as against other parties, is not a concept followed by all legal systems. In common law jurisdictions this relativity of ownership, or title, is usually quite familiar. However, in other (mostly continental law) jurisdictions, the ownership cannot be split; a person either owns a security *vis-à-vis* everybody or not at all. In the context of the latter legal systems, both the ownership of the securities and the entitlement to exercise the rights flowing from the securities against the issuer are indivisibly bonded together, in the sense that the person entitled to exercise these rights in his own name against the issuer is by definition the owner of the securities and vice-versa; thus, it is conceptually impossible to answer these two questions in a different way. Of course, even among continental law jurisdictions, this structure is not always followed. For example, even in the context of legal systems that do not recognise the split of the ownership, a person may be generally regarded as entitled to the securities (because – for example – he acquired the paper certificates), however he may not exercise and invoke the relevant rights against the issuer before he meets some further requirements (for example, filing of his acquisition at the shareholders' registry).

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referred to as *"indirect proprietary rights on securities"* or *"indirect securities rights"*. This is a category of rights that is clearly distinct from both of the above traditional categories, namely the personal law aspect of the relationship between the investor and the intermediary and direct proprietary rights on securities. The concept of *indirect securities rights* includes, without distinction, any rights of any nature and characteristics that an investor acquires and which relate to the (interests in) securities that an intermediary holds on behalf of his clients. The unique feature of these rights and their *raison d'être* in modern legislation is that they enable their holder to invoke his interest in the pool of (interests in) securities that the intermediary holds on behalf of his clients against third parties, an interest that in the absence of indirect securities rights would be merely a personal claim against the intermediary. As mentioned above, at a substantive law level, indirect securities rights may take the form of beneficial ownership under a trust, of securities entitlements, of co-ownership at notional pools of securities, *etc*. However, the term "indirect securities rights", includes any form of this kind of rights of the investor and is used to define the scope of the new conflicts rule for intermediated securities for the purposes of conflict of laws analysis in an autonomous way and irrespective of the heterogeneous forms and characterisations of these rights under different legal systems.

These indirect securities rights have as *res* the pool of (interests in) securities that the intermediary has acquired as a whole. Thus, indirect securities rights are rights to another person's rights, the latter being a variable class of assets (composed by the intermediary's direct securities rights and/or indirect securities rights) that may change from time to time, according to the dealings of the intermediary, rather than to a specifically defined and invariable class of particular assets. These indirect securities rights are clearly different from direct securities rights, which are indispensably related to the question of who is the securities' owner as against the issuer. Furthermore, the indirect securities rights of the investor presuppose and are based on the direct securities rights of the intermediary (either of the immediate or of a lower tier intermediary). Thus, though direct and indirect securities rights are totally distinct from each other, are also interdependent, because indirect securities rights derive their value and significance from the relevant pool of (interest in) securities to which these refer and depend on whether – and to what extent – this pool actually consists of sound direct securities rights, held either by the immediate intermediary, or a lower tier one.

It is suggested that these rights, as well as the legal relationship under which indirect securities rights are created, should be the subject-matter of the conflicts rule for intermediated securities. It follows from the nature and the purpose of indirect securities rights that the relationship under which they are created shall be defined as the relationship between the investor and the (interests in) securities that the intermediary holds for his clients. By this definition, it becomes apparent that the subject-matter of the conflicts rule in question is a relationship between a person, *i.e.* the investor, and a *res*, *i.e.* the varying pool of the intermediary's (interests in) securities (proprietary relationship). Since this is not a relationship between persons (personal relationship), the contractual or otherwise personal relationships between the investor and the intermediary fall clearly

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outside its scope; this is consistent with the remark that these contractual or otherwise personal relationships are governed by their own *lex causae* and do not need to be subject to the new conflicts rule for intermediated securities. Equally, direct rights to securities, *i.e.* the ones that entitle their owner to exercise the rights flowing from the securities against the issuer, are also clearly excluded. This is critically important since these rights are already well governed by the applicable law indicated through the traditional conflicts rules: this regime shall be preserved in order to avoid serious problems, as will be explained below.

The main advantage of the above definition of indirect securities rights is that it introduces a reliable, certain, substantive-law neutral and straightforward method to introduce an accurately defined subject-matter and scope of the conflicts rule for intermediated securities.[42] The *lex causae* that will be indicated under this conflicts rule will govern – first and foremost – the question of whether the investor acquires any indirect securities rights at all, *i.e.* whether the investor is equipped with anything more than merely personal rights against his intermediary. The same *lex causae* will govern the nature of these rights (for example, beneficial ownership under a trust, securities entitlements, co-ownership in a notional pool of securities, *etc*.), the requirements for their acquisition, holding, transfer, collateralisation and perfection, as well as the priorities among competing indirect securities rights. At the same time, there can be no grey zones or ambiguous characterisation questions between this category of rights and the personal rights of the investor against the intermediary, nor direct securities rights on the securities that are exercisable against the issuer, as these latter both fall clearly outside its scope.[43] Besides, this precise delimitation of the scope clarifies the field, contributes to the selection of the appropriate connecting factor and facilitates the formation of a conflicts rule that promotes legal certainty and predictability. On the other hand, there seems to be no other reliable alternative to define the subject-matter and describe the new characteristics of the intermediation with the necessary clarity, efficiency and in a conceptually even way. Thus, the above definition of the subject-matter of the conflicts rule in question is possibly the only workable and consistent way to form a sound and widely accepted substantive-law-neutral private international law regime for modern intermediated securities holdings.

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[42] Cf. the title of the Hague Securities Convention, which vaguely refers to *"certain rights"* (in French *"à certains droits"*) in respect of securities held with an Intermediary, a term neither illuminative nor successful, that substituted the equally problematic term "*proprietary"* rights (see HCCH Permanent Bureau, Preliminary Document No 6 of November 2001, at 1). The vagueness of these terms corresponds to the lack of precision of the definition of the subject-matter of the HSC.

[43] Cf. the contradiction between Article 2(2) and Article 2(3) of the Hague Securities Convention: the first stipulates that *"This Convention determines the law applicable to the issues specified in paragraph (1) [...] even if the rights resulting from the credit of those securities to a securities account are [...] contractual in nature"*, while the latter that *"this Convention does not determine the law applicable to – a) the rights and duties arising from the credit of securities to a securities account to the extent that such rights or duties are purely contractual or otherwise purely personal"*.

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B. The Interconnection between the Subject-Matter and the Connecting Factor of the Proposed Rule

1. The Exclusion of Semi-Indirect Securities Holding Systems from the Scope of the Proposed Conflicts Rule

Despite the aforementioned significant advantages, the suggested definition of the subject-matter of the conflicts rule may be seen as having a considerable disadvantage: while all kinds of fully-indirect securities holding systems fall within its scope, semi-indirect securities holding systems are clearly excluded. As mentioned previously, under semi-indirect holding patterns, despite the involvement of the intermediary and the credit of the securities to *omnibus* securities accounts, the person regarded as the owner of the securities *vis-à-vis* the issuer is the investor, and not the intermediary. Semi-indirect systems are usually provided by continental law statutes that specifically govern the local CSDs and transactions concerning the securities deposited there.[44] These statutes typically envisage up to two tiers of intermediaries (the CSD and its participants) and typically regard the investors who acquire rights through the participants as the owners of the securities. Thus, despite the intermediation, the investor acquires direct proprietary rights in the securities, which can be invoked against the issuer. It follows that the intermediary acquires no property rights to (interests in) securities for his clients as, under these arrangements, the intermediary acts merely as the *agent* of the investor.[45]

Under semi-indirect systems, there is almost no area for indirect securities rights to emerge. Bearing in mind that, under the suggested approach, the new conflicts rule for intermediated securities applies precisely to indirect securities rights, it becomes obvious that this conflict of laws regime is not relevant to any – or most – of the rights that an investor acquires through a semi-indirect holding system, because the latter are direct securities rights.[46] The conclusion that semi-indirect securities holding systems practically fall outside the scope of the new conflicts rule may *prima facie* be seen as a disadvantage of the suggested definition of its subject-matter. Most importantly, it directly contravenes the view

[44] The reluctance to shift from the direct to the indirect holdings of securities is said to be explained in reference to the historic development of the securities holdings at these jurisdictions and in particular due to the fear of the legislators that the investors will lose their confidence to deposit their certificates to the CSDs if they lose their proprietary rights on them – see E. MICHELER (note 10), *passim*.

[45] Cf. the acquisition by the intermediary of a "constructional possession" of the securities "in favour of others" ("*mittelbarer Eigenbesitzer*") under the German law analysis; see C. CHUN (note 17) at 180.

[46] Of course, this exclusion concerns solely the direct securities rights that the investor acquires through these systems. Instead, other rights (typically less important) that might – according to the peculiarities of every national law – be acquired by the investor through an intermediary in the context of a semi-indirect holding system, such as the acquisition by the intermediary of the possession (not the ownership) of a bulk number of securities on behalf of his clients, may nevertheless fall within the subject-matter of the indirect securities rights conflicts rule.

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that prevailed during the drafting of the Hague Securities Convention, *i.e.* that the new conflicts rule must indicate the applicable law in relation to any form of indirect securities holding, a feature that was regarded as critical for the success of the Convention.[47] The approach followed by the HSC is apparent from the way that the subject-matter of the Convention's conflict rule is shaped, namely that the criterion to activate the new conflicts rule is merely the credit of securities to a securities account.[48]

It is suggested, however, that this failure to differentiate and distinguish between these two categories of fully and semi-indirect holding systems had a severe negative impact on the overall evaluation of the Convention's regime and ultimately hindered the broad adoption and general acceptance of the Convention. This distinction is considered so crucially important and inevitable, because it is imposed by the very nature, the functional features and the significant differences between direct and indirect securities rights instead of merely being a matter of policy or preference whether it should be followed or not. Thus, any attempt to treat both categories of indirect holdings under the same conflicts rule will inevitably create more problems than it will solve, as explained in detail below.

The reasons that prohibit the uniform conflict of laws treatment of both forms of indirect securities systems relate to the interdependence between the subject-matter of the conflicts rule on the one hand, and the connecting factor that shall be implemented to designate the applicable law on the other hand. As will be analysed below, the law applicable to fully-indirect systems must be indicated by an *"intermediary-oriented"* connecting factor, while for semi-indirect systems the involvement of an *"issuer-oriented"* connecting factor is necessary. If both systems are squeezed in the scope of the same conflicts rule, then one of these categories will be governed by a law indicated by an inappropriate connecting factor; such irregularity may cause severe complications and seems very likely to lead to quite unsatisfactory and unacceptable results.

2. Traditional "Issuer-Oriented" Conflicts Rules for Direct Securities Rights

The conflicts rules applicable to direct securities holdings, *i.e.* to holdings that do not involve intermediaries, and the resulting direct securities rights, defined above as the rights that make a person entitled to securities against the issuer, are not always completely clear, nor globally uniform. However, these rules have the common characteristic of providing the applicable law primarily by reference to factors that either relate, or can be traced back to the issuer of securities. For this reason these connecting factors, as well as the relevant conflicts rules, will be hereby referred to as *"issuer-oriented"*. These issuer-oriented conflicts rules shall be distinguished from *"intermediary-oriented"* conflicts rules, which pertain to indirect securities rights and which are based on connecting factors primarily related to the intermediary of the securities in question.

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[47] See HSC Explanatory Report, Int-20, Int-22 *et seq*., 1-36, Article 2 *passim*.

[48] *Ibid*.

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Under a traditional conflict of laws analysis, the most commonly accepted rule to ascertain the law applicable to direct proprietary rights on securities is the *lex rei sitae* rule. This equates to the *lex cartae sitae* rule, in respect of bearer securities and their paper certificates, and to the law of the place of the registry, in respect of registered securities.[49] However, the great acceptance of the application of the *lex rei sitae* rule in relation to direct propriety rights on securities stems from the fact that it derives from an issuer-oriented conflicts rule, namely the *lex creationis* of the securities, which is the law primarily governing direct securities rights. This law is closely related to the issuer and it is either the personal law of the issuer, or a law chosen by the latter. The *lex creationis* has a significant bearing upon the determination of the applicable law to these direct proprietary rights, even if as a result of the subsequent steps of the analysis the *lex rei sitae* ends up being the governing law of these rights.

More specifically, in relation to shares, the beginning of the analysis of the law applicable to them shall be the *lex societatis*, *i.e.* the personal law of the issuer, under which these shares have been created.[50] This law will govern the nature and the exact details of the rights deriving from each share and will also determine the issue of the negotiability of the shares,[51] *i.e.* whether they can be issued as bearer or registered securities. In the case of bearer securities, the *lex societatis* enables (or "authorises") the *lex cartae sitae* to have a bearing upon the question of who is the shareholder *vis-à-vis* the issuer, by providing, for example, that whoever acquires ownership or possession of the paper certificate will be deemed as the shareholder. In relation to registered shares, if the registry operates outside the jurisdiction of the personal law of the company, the law of its place will be applied to transactions enacted through this registry provided, and to the extent that, the *lex societatis* permits and recognises the operation of a registry abroad and subsequently the transactions conducted under this law. Otherwise, the transactions concluded through this registry according to its local law, and the rights acquired under its operation, will not be able to be invoked against the issuer. The same principles apply *mutatis mutandis* to bonds, albeit with the difference that, as a result of their contractual character, the *lex creationis* of the securities that governs all of the above critical issues is usually the law chosen initially by the issuer and not the *lex societatis*.

This paramount importance and pivotal role of the *lex creationis* is justified and explained by the significance and the importance of this primarily applicable

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[49] See Prel. Doc. 1 (note 9), at 3.

[50] See A. JOHNSON, The law applicable to shares, in H. van HOUTTE (ed), *The Law of Cross-border Securities Transactions*, London 1999, at 14, 23; Johnson also refers to the "Paramount Power" (*ibid* at 18) or the "pivotal role" of the *lex societatis* (at 23) in the sense that methods of disposition of shares which involve actions abroad, pursuant to the local law may effect a valid transfer if the personal law of the company gives effect to and authorise them (at 19, 23).

[51] Cf. another view, under which the issue of negotiability is governed by the law where the certificate is located; see A. JOHNSON (note 50) at 14, fn. 54 who further observes that this rule may cause absurd results in case the personal law of the company and the law of the place of the certificate have contradicting views on the negotiability of the same share (*ibid* at 25-26).

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law to the integrity of the securities system from the perspective of the issuer. This approach enables the issuer to know in advance the law under which he undertakes the obligations related to the securities, as well as the law, or the starting point that will indicate the law, under which the persons entitled to the securities will be determined. This is critical for the exercise of the securities-embodied rights to receive money (dividend, interest) and to participate in the decision-making processes (general meetings of shareholders, *etc*.). In case the *lex creationis* authorises foreign laws to govern the acquisition of the securities and in case the results of these laws are in conflict,[52] the *lex creationis* will provide the rules under which this conflict will be resolved.[53] Thus, the most important role of the *lex creationis* and the necessity to adopt issuer-oriented rules in this field is to ensure that the question of who is the person entitled to specific securities as against the issuer can ultimately be answered by reference to one single and predictable substantive law, despite the possible involvement of different laws in the holding of the securities.

3. The Need for "Intermediary-Oriented" Conflicts Rules for Indirect Securities Rights

While optimum for direct securities rights, the application of traditional "issuer-oriented" conflicts rules to indirect securities rights is, on the other hand, rather problematic and unsuitable. Their application, which has been referred to as the *"look-through approach"*,[54] has been heavily criticised and almost unanimously rejected.[55] The name of this approach reflects the fact that in order to determine the applicable law, one has to *look-through* the tiers of the intermediaries up to the level of the issuer, registry or the paper certificates, in order to locate the *lex societatis* or the *situs* of the certificates or the place of the registry, *etc*., that are used as connecting factors under the conflicts rules regarding direct securities rights. The indirect securities rights have as *res* and attach to the variable pool of (interests in) securities that the intermediary holds for his clients as a whole. Thus, these rights have completely different *res* in comparison to direct securities rights, which attach directly to the actual securities. Equally, direct securities rights can be exercised directly against the issuer and derive from the relationship between their holder and the securities, while indirect securities rights cannot be exercised against the issuer and have no immediate relevance to the securities or the issuer.

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[52] For example different foreign laws may govern different registries held abroad; under the different rules of these foreign laws, two persons may claim full title to the same securities, each of them validly under each foreign law.

[53] Under the example of the previous note, the *lex creationis* will govern the issue of how these claims rank and which (if any) will prevail, at least to the extent that the issuer is concerned.

[54] This term was introduced by Richard Potok; see Ch. BERNASCONI/ R. POTOK/ G. MORTON (note 31), at 28 (para. 2.66). The same writer had previously used the equivalent phrase "place-of the underlying-securities approach"; see R. POTOK (note 7) at 6. For a brief analysis of the look-through approach see also Prel. Doc. 1 (note 9), at 28.

[55] See references above, at note 7.

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From the sharp distinction between direct and the indirect securities rights and the differences in their nature and characteristics, it becomes apparent that any attempt to extend the application of the traditional conflicts rules in order to apply also to the indirect securities rights would be inappropriate. The reason is that the connecting factors that pertain to direct securities rights, *i.e.* factors relating to the securities or the issuer (*e.g.* registry of securities, place of the certificates, *lex societatis*, *etc.*), are different and quite irrelevant to the connecting factors that are appropriate to indicate the applicable law to indirect securities rights, *i.e.* factors relating to the relationship between the investor and the intermediary as well as to the (interests in) securities that an intermediary holds for his clients. Besides, the look-through approach is justifiably criticised as unworkable when securities are held by intermediaries in *omnibus* accounts, since the investor's rights are evidenced and recorded solely on the books of the immediate intermediary and not on any other tier of the holding system or at the issuer's registry.[56] Thus, the application of issuer-oriented conflicts rules in relation to indirect securities rights must be avoided.

As issuer-oriented connecting factors are not suitable for determining the applicable law to indirect securities rights in a way consistent with the nature and the *res* of these rights, this law shall be indicated by reference to factors that relate solely to the relationship between the immediate intermediary and the investor and to the (interests in) securities that an intermediary holds for his clients. These connecting factors are herein referred to as intermediary-oriented connecting factors, while the conflicts rules that implement and are based exclusively on these connecting factors are referred to as intermediary-oriented conflicts rules. The most prominent example of intermediary-oriented conflicts rules are the rules that stem from the well-known *"Place of the Relevant Intermediary Approach"* principle (*PRIMA*),[57] namely the "Factual" PRIMA rule, when the place of the intermediary is determined by the location of the relevant securities account, and "Consensual" PRIMA rule, when this place is determined by agreement between the intermediary and the investor.[58]

4. The Conflict of Laws Treatment of Semi-Indirect Holding Structures

It is suggested that the above distinction between issuer-oriented and intermediary-oriented connecting factors, and conflicts rules in general, shall correspond and

[56] See Prel. Doc. 1 (note 9), at 28.

[57] According to Benjamin, this term is attributed to Richard Potok; see J. BENJAMIN, Cross-Border Electronic Transfers in the Securities Markets, *The International Lawyer* 2001 (35), 31, at 42, fn. 35. For the PRIMA in general, see Ch. BERNASCONI/ R. POTOK/ G. MORTON (note 31), at 30 *et seq*., para. 2.75 *et seq*., HSC Explanatory Report, Int-41 *et seq*.

[58] This reference to Factual and Consensual PRIMA is aptly introduced by Philipp PAECH, Market Needs as Paradigm: Breaking Up the Thinking on EU Securities Law (September 14, 2012), LSE Legal Studies Working Paper No. 11/2012, available at SSRN: < http://ssrn.com/abstract=2150156>.

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follow the distinction between direct and indirect securities rights and not the distinction between direct and indirect (including, without distinction, both fully and semi-indirect) holding systems. As the centre of gravity of each category of securities rights differs, it is vital for the accuracy of the analysis and the coherence of the whole structure, to preserve direct securities rights as always subject to issuer-oriented conflicts rules, even if acquired through intermediaries in the context of semi-indirect securities holding structures. Equally, it is important to ensure that indirect securities rights will be respectively subject to intermediary-oriented ones. However, this approach is not widely accepted or followed; the most prominent example of the opposite view is the analysis adopted under the Hague Securities Convention.

Under the view that prevailed and was finally adopted by the Hague Securities Convention, semi-indirect securities holdings are subject to the same conflicts rule that governs the fully-indirect holdings. This conflicts rule, or – more precisely – both the primary[59] and the fall-back[60] conflicts rules of the Convention are intermediary-oriented rules.[61] The uniform treatment of these two categories of indirect holding systems is achieved by defining the subject-matter of the new conflicts rules for intermediated securities, not by reference to direct and indirect securities rights, but instead by reference solely to the securities account. Under the HSC regime, the criterion for the application of the intermediary-oriented conflicts rules of the Convention is the mere existence of a book-entry to a securities account, irrespective of the classification of the rights resulting of this credit or debit according to the different legal systems.[62] As soon as a credit of securities to a securities account has been conducted, the securities are considered as having entered the intermediated system and all the resulting rights of the investor in relation to the credited securities are determined by the law that is indicated as applicable by one of the HSC's conflicts rules.[63] In the case of semi-indirect holding systems, this credit to a securities account maintained by an intermediary confers direct securities rights on the investor. Thus, as the HSC examines merely whether the rights of the investor have been acquired through a credit to a securities account and disregards the nature of these rights as irrelevant to the applicability of the Convention's conflicts rules, it follows that the HSC conflicts rules provide the applicable law for both indirect and direct proprietary rights on securities.

However, while the intermediary-oriented conflicts rules are optimal for fully-indirect securities holdings, it is suggested that their application to semi-indirect securities holdings raises serious concerns. These concerns emanate from the fact that, as described previously, in the case of semi-indirect structures, the investor acquires direct (rather than indirect) securities rights, despite the

[59] See HSC Article 4.

[60] See HSC Article 5.

[61] Cf. HSC Article 6 – "Factors to be disregarded": this provision explicitly excludes the consideration of issuer-oriented connecting factors under the Conventions regime.

[62] See HSC Articles 1, 2; HSC Explanatory Report, Int-24, 1-16.

[63] HSC Explanatory Report, Int-22, Int-24.

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intermediation. Direct securities rights are traditionally subject to issuer-oriented conflict rules and need to be so, in order for the issuer to be in a position to determine to whom he must perform and meet his obligations under the securities and in order for investors to be confident about the rights they acquire. To indistinctively include these rights in the scope of an intermediary-oriented conflicts rule, as is the case under the HSC, while initially appealing and having the advantage of alleged simplicity and of forming an all-inclusive solution, is in fact rather inappropriate, unworkable and prone to lead to unacceptable results.

The necessity of subjecting direct securities rights, even if acquired through semi-indirect holding systems, to issuer-oriented conflicts rules, is related to the need for legal certainty and predictability as to who owns these rights *vis-à-vis* the issuer, a factor that is critically important for the issuer of the securities, for the confidence of investors in the trustworthiness of the system, and for the smooth operation of financial markets in general. As mentioned previously, the implementation of issuer-oriented conflicts rules for direct securities rights enables the issuer to know in advance the law under which he undertakes obligations concerning the securities, as well as the law, or the starting point that will indicate the law, under which the persons entitled to the securities will be determined. By unconditionally applying an intermediary-oriented conflicts rule in this field, this predictability is seriously compromised, as it is impossible to know in advance who may in the future be the critical intermediary through whose accounts the direct securities rights will be acquired by some investor.

Under traditional arrangements, in the event that there are securities registries operating abroad, through which an investor may acquire direct securities rights, the issuer has wittingly opted and arranged for a particular registry to operate under the laws of the particular foreign State. Typically, the issuer has made this choice after carefully examining the law of the place of the future registry to ensure that its provisions will not cause any unnecessary complications or problems. But what if the issuer had no say in the establishment of securities registries that operate abroad? It is obvious that a very arbitrary element would be introduced, while any peculiarities, obsolete or unusual rules of the applicable local law would have to be taken into account by the issuer in order to ascertain who is entitled to the securities acquired through this registry. However, in relation to semi-indirect securities holdings, this is exactly the case if the intermediary-oriented conflicts rules apply unconditionally to direct securities rights. Then, the issuer, in the process of ascertaining who owns the securities, may be obliged to scrutinise and apply a substantive law that he is not familiar with and that he otherwise might have arranged to avoid, merely because is the law connected to an intermediary, through whom the investor claims to have acquired direct securities rights.

Besides, an even more serious problem for legal certainty is the danger of having more than one substantive law that is concurrently applicable to questions that need to be subject to a single law. This may happen if, for the question of who is the shareholder or the bondholder against the issuer, the relevant conflict rule simultaneously indicates two different substantive laws as simultaneously applicable, yet these laws have different substantive rules and provide different answers for the same question. Then, a paradox may occur in that for the same

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securities more than one person may appear to have full ownership and direct securities rights (each founded on different substantive rules of the different applicable laws), and each person's direct securities rights may appear to be exercisable against the issuer on the very same securities. This absurdity is likely to emerge, in particular because the question of who has direct securities rights on some particular securities often arises in the context of a controversy between two parties, each one claiming the same securities. The different substantive laws usually provide the rules that solve these conflicts, however different substantive laws may resolve the same conflict through different criteria (*e.g.* good-faith acquisition, temporal priority, pro ratio allocation, *etc*.). But if the direct securities rights are subject to an intermediary-oriented conflicts rule, the question arises how such a controversy will be resolved in the event that each of the contenders has acquired his alleged rights through different intermediaries, all connected to different jurisdictions? In such a case, it is conceivable and possible that each of the adversary parties has acquired fully effective direct securities rights according to the substantive law indicated in relation to his own intermediary. Thus, the issuer and the parties will be faced with conflicting yet valid rights on the same securities, without having as last resort a hierarchically prevailing law, as the *lex creationis* would be under the issuer-oriented rules, to resolve this conflict.

The same problem may also arise as a result of the fact that the same class of securities may be held partially directly and partially through semi-indirect holding structures. Or because some securities may change holding system at any time, by entering or exiting the indirect holding system. In these situations, difficult questions may arise if one person claims direct securities rights acquired through the direct holding and another claims direct securities rights on the same securities but acquired through a credit to a securities account held by his intermediary. If different conflict rules apply, the direct securities rights of these persons may be subject to different substantive laws and, as mentioned above, these substantive laws may implement different criteria to solve these kinds of disputes and priorities questions, based on different policies. Thus, in the unfortunate event that the provisions of the different laws diverge in an incompatible way, it will be impossible to answer the question of who is entitled to the disputed securities *vis-à-vis* the issuer with certainty and predictability and according to one single law.

The inevitably tailor-made, or – even worse – potentially arbitrary outcome of these controversies, no matter how fair or otherwise might be *in concreto*, may seriously compromise the high standards of *ex ante* legal certainty that are required for the smooth operation of the financial markets. Also, while the most important feature of direct securities rights is the ability to be invoked directly against the issuer, an *in concreto* solution would compromise the issuer's ability to be able to determine in advance who is (at least from his standpoint) the person entitled to the securities and to allow him to exercise the relevant rights, as – for example – to whom the issuer must pay any monetary obligations deriving from the securities to obtain a good discharge or whose presence or votes have to be taken into account in relation to the exercise of participation rights, *etc*. Equally, any person intending to acquire direct securities rights becomes unable to determine confidently and *a priori* under which law the acquisition of these rights shall be effected in order to be invulnerable and immune to adverse claims. Thus, the exclusion of semi-

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indirect securities holding systems from the scope of the conflicts rule for indirect securities rights is considered important in order to preserve the efficiency and soundness of direct securities rights, particularly given the function of these rights as a cornerstone for confidence in and the smooth operation of the securities markets.

5. Converting Intermediary-Oriented Conflicts Rules to Issuer-Oriented

It has been argued that the unconditional application of intermediary-oriented conflicts rules to direct securities rights must be avoided in any case, even if these rights are acquired through semi-indirect holding systems. This is achieved by shaping the subject-matter of the new conflicts rule in question for intermediated securities by using the suggested definition of indirect securities rights, which excludes semi-indirect holding structures from its scope. But this exclusion shall not be construed as a total rejection of the intermediary-oriented connecting factors from the process of determining the applicable law to rights acquired through semi-indirect securities holdings. What is in fact rejected here, is only the *unconditional* application of an intermediary-oriented conflicts rule to this category. This rejection is inevitable and necessary in order to maintain the supervening role of the *lex creationis* at the determination of the applicable law to direct securities rights. On the other hand, provided that under the relevant conflicts rule the aforementioned function of the *lex creationis* is preserved, thus rendering the particular conflicts rule an issuer-oriented one, there is no reason to reject a subsequent and *conditional* recourse to an intermediary-oriented connecting factor, in order to ultimately determine the applicable law in semi-indirect securities holding structures.

As mentioned previously, the semi-indirect systems are hybrid, standing between and resembling both the direct and the fully-indirect securities holding systems. The allocation of direct securities rights to the investor despite the intermediation is one important characteristic of this category, but not the only one. At the same time, in contrast to direct holding structures, an intermediary is nonetheless interposed between the issuer and the investor in a way that the latter is not able to exercise his rights against the issuer of the securities without recourse to the intermediary and without the substantive involvement and assistance of the latter. The indispensable involvement of the intermediary in order to exercise the rights deriving from the securities is caused primarily by the usage of omnibus securities accounts held by the intermediary and a multi-tier structure that is almost identical to the fully-direct structures.

Despite the allocation of direct rights to the investors under the relevant substantive law provisions, the credit of the securities to *omnibus* accounts is liable to create the same complex practical and legal problems as those emerging under the fully-indirect holdings, as for example, the problem of the allocation of a shortfall of securities held by the intermediary. Besides, the only record of the investor's securities rights, even if these rights are direct and not indirect, is in the books of his immediate intermediary and not in the books and databases of other tiers of intermediaries, neither those of the CSD or the issuer. Therefore, this aspect of semi-indirect securities holdings is very closely connected with the intermediary

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and for this reason it justifies, or even demands, the involvement of an intermediary-oriented connecting factor when determining the law applicable to this type of holdings, always as part of an issuer-oriented conflicts rule and depending on the *lex creationis*.

It is further proposed that this intermediary-oriented connecting factor should be identical for both semi and fully-indirect systems, as it will be shaped to address almost the same type of relationships and problems that arise from the *omnibus* securities accounts and the involvement of the intermediaries in the multi-tiered structures. Thus, both the fully-indirect and the semi-indirect securities holding systems will be governed by a law identified by the same intermediary-oriented connecting factor; the sole, but nonetheless very important, difference is that in case of semi-indirect securities holding systems, this applicable law will apply if just one additional criterion is satisfied, namely if, and to the extent that, the *lex creationis* of the securities *accepts* and *authorises* the application of the foreign law indicated by that intermediary-oriented connecting factor, to the direct securities rights. This requirement suffices to render the relevant conflicts rule an issuer-oriented one, despite the subsequent involvement of an intermediary-oriented connecting factor, since the *lex creationis* – a law very closely connected with the issuer, being his personal law or the law he had chosen to govern the securities – retains its supremacy and remains at the starting point of the analysis. On the contrary, such a requirement does not concern the fully-indirect securities holding systems and thus, the conflicts rule applicable to the latter is clearly an intermediary-oriented one.

This dependency of the conflicts rule for semi-indirect systems from the *lex creationis* may, however, impose the burden on the prudent buyer or collateral taker to investigate separately each class of securities of a portfolio, to enquire and acknowledge the *lex creationis* of each one and to assess whether this law accepts as applicable the law indicated by the one single connecting factor. This examination of the transaction from the prism of the *lex creationis* is reminiscent of the look-through approach that has been unanimously rejected in the context of modern securities holding structures. It must be observed, however, that the rejection of the look-through approach is fully justified and well-founded only in relation to indirect securities rights. On the contrary, in relation to direct securities rights, some kind of a look-through process is imposed by the very nature of these rights and it is suggested that there is no effective way around this; instead, the only workable way to dispose of this burden is to switch to fully-indirect holding systems. Otherwise, if an investor purports to acquire direct securities rights but fails to consider the *lex creationis*, even if this acquisition is fully effective according to all other substantive laws that may relate to the transaction except the *lex creationis*, at the bottom line his rights will be worthless and futile as he will be unable to invoke them against the issuer.

It is important to also note that in practice, the above process of investigating the *lex creationis* will usually be neither an insurmountable nor a new burden. First, because semi-indirect holding systems are typically a two-tier structure, involving merely the local CSD, one intermediary and the investor, and thus access to the information regarding the *lex creationis* of the securities and the examination of the investor's position will be much more easy and convenient,

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compared to a possible look-through approach in relation to more complicated multi-tiered structures. Besides, from a broader point of view, to some extent a look-through examination is inevitable for the prudent investor or collateral taker of every holding system. Because, even in the context of fully indirect structures, the duly acquired indirect securities rights, which are completely sound and enforceable under their applicable law, become futile and valueless, in case the relevant intermediary holds no sufficient (interests in) securities to cover these indirect rights. Thus, a prudent investor would investigate whether the intermediary holds enough (interests in) securities on behalf of his clients, a task that requires examination of other tiers of the structure and thus, a kind of a look-through process.[64]

The aforementioned issuer-oriented rule that, in order to provide the law applicable to direct property rights on securities in the context of semi-indirect securities holding systems, adopts – in a way that is strictly dependent on the *lex creationis* – an intermediary-oriented connecting factor, is neither a new concept, nor unfamiliar. It is hereby suggested that the relevant conflict rules of the current EU legislation actually follow this approach and the most appropriate interpretational view for these rules is to see them through this prism. By reviewing the conflicts rules adopted in Article 9(2) of the Settlement Finality Directive,[65] Article 24 of Directive 2001/24/EC[66] and Article 9 of the Financial Collateral Directive[67], it may be noticed that all these rules implement an intermediary-oriented connecting factor, *i.e.* the place in which the relevant account is located (factual PRIMA). However, it is important to observe that the application of the law of the place of the account is *conditional*: this place will have a significance in determining the applicable law if, and only if, the rights to the securities are "*legally*" recorded there,[68] or their record is "*presupposed*" to their transfer[69] or the title is

[64] Both the issues of whether the intermediary holds sufficient (interests in) securities (in case of fully-indirect holding systems), or whether the intermediary acts according to the *lex creationis* and -more generally- in a way effective to confer to the investors direct securities rights (in relation to semi-indirect systems), are issues critical to the protection of the investors and to the efficiency of the modern holding structures and thus the intermediaries are usually supervised in relation to them by the relevant regulatory authorities.

[65] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems. Official Journal L 166, 11.6.1998, at 45 – 50.

[66] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, Official Journal L 125, 5.5.2001, at 15–23.

[67] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, Official Journal L 168, 27.6.2002 at 43 - 50.

[68] See Article 9(2) of Directive 98/26/EC.

[69] See Article 24 of Directive 2001/24/EC. Cf. Article 14 of the former Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160, 30.6.2000 at 1–18), as well as Article 17 of the new Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, at 19–72) that implement similar wording.

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"*evidenced*" by entries in a register or an account maintained there.[70] These requirements, *i.e.* the question of whether the particular securities are legally recorded at a particular securities account, *etc.*, constitute an important qualification, a question on which the application of the conflicts rule is dependent and that must be answered in advance and affirmatively in order to validly indicate the applicable law. According to the analysis followed in this paper, it is suggested that the only reasonable way of answering this question is by reference and in accordance with the *lex creationis* of the (interests in) securities in question.[71] Thus, under this analysis, the above EU conflicts rules are not implementing the factual PRIMA unconditionally, *i.e.* in the form of an autonomous intermediary-oriented conflicts rule, but only as a part and in the context of an issuer-oriented rule, *i.e.* subject to the provisions of the *lex creationis*. Therefore, in relation to semi-indirect securities holding systems, the paramount position of the *lex creationis* of the securities in question is preserved, while the law indicated under the factual PRIMA connecting factor governs the relevant direct securities rights only if, and to the extent that, this law is relevant and its effects are recognised according to the law by virtue of which the particular securities have been created.

Conclusively, in the process of shaping the scope of the conflicts rule in question, it is very important to distinguish between semi and fully-indirect holding systems and to use as criterion whether the investor claims that he acquired direct proprietary rights in the securities, even through intermediaries, which can be invoked against the issuer or not. If he claims that he did so, then the traditional conflicts rules for these direct rights are applicable; these rules may be developed and elaborated by using intermediate-oriented connecting factors, but these sub-rules will be totally dependent to, and will apply only to the extent permitted by, the *lex creationis* of the securities involved. If the claim does not concern direct proprietary rights on the securities, the traditional conflicts rules are inapplicable. Then, the law governing the indirect securities rights that the investor claims that he has acquired shall be determined by the new, intermediary-oriented conflicts rule. This will be a fully autonomous rule, in the sense that no recourse to the *lex creationis* of the underlying securities or any other traditional conflicts rule (*e.g.* the *lex rei sitae*) will be needed to justify its application.

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[70] See Article 9 and 2(1)(g) of Directive 2002/47/EC. Cf. Article 2(9)(ii) of the new Insolvency Regulation (Regulation (EU) 2015/848), that implements similar wording.

[71] The application of the *lex creationis* is favoured in order to ensure that these requirements will always be viewed in the same way and that the answer to these questions will always coincide with the relevant analysis from the standpoint of the issuer of the securities. Towards the same objective, it is further suggested that the application of the *lex creationis* to these requirements shall include the relevant conflicts rules as well (*renvoi*) and not only its substantive law provisions. In contrary, any attempt to consider these requirements according to the substantive law of the *forum* would be arbitrary, as the *forum* may be irrelevant to the securities holding structure in question. Equally, it would be inconsistent and erroneous to examine these requirements according to the substantive law that these conflict rules indicate (*lex causae*), as their application will be justified only after these requirements have been met; before that point, their application would be problematic, as involving the type of circular reasoning characteristically referred to as "begging the question" or "*petitio principii*".

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C. The Appropriate Connecting Factor

1. The Currently Prevailing Views on the Appropriate Connecting Factor

Besides the definition of the subject-matter, the other critical issue related to the formation of the proper conflicts rule for intermediated securities is the selection of the appropriate connecting factor that will indicate the substantive law that shall govern the indirect securities rights. This issue is probably the most debated aspect of the conflict of laws treatment of intermediated securities and still remains controversial. The broad consensus that has been reached in relation to the rejection of the look-through approach implies nothing more than the rejection of the connecting factors that are relevant to the traditional direct holding of securities, typically the place of the paper certificate, the place of the registry of the securities, or the personal law of the issuer. Apart from that, no broad consensus or unanimous acceptance has been reached in relation to the new connecting factors that shall replace the above and outdated traditional factors in the new conflicts rule in question.

This ambiguity remains, despite the wide acceptance of the "Place of the Relevant Intermediary Approach" (PRIMA) as an approach appropriate to determining the law applicable to the modern indirect securities holding structures. The PRIMA principle expresses the undoubted need to determine the applicable law in this field by using connecting factors solely related to the relationship between the investor and his intermediary.[72] However, the broad acceptance of the PRIMA[73] is not an agreement on a specific and ready-to-apply connecting factor, but rather an agreement on the principle that this is a field where an intermediary-oriented rule shall be adopted. This becomes obvious from the fact that in the context of the PRIMA rule there are so many ways to specify the "place" of the intermediary that it can practically accommodate almost any imaginable intermediary-oriented connecting factor. Thus, in spite of the consensus that the connecting factor shall be selected among factors related to the place of the relevant intermediary, its specific determination, and in consequence, the specific connecting factor itself, is still highly ambiguous and debatable.

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[72] See J.St. ROGERS, Conflict of Laws for Transactions in Securities Held Through Intermediaries, *Cornell International Law Journal* 2006 (39), 285, at 286.

[73] Despite the relatively wide acceptance of the PRIMA, this approach is far from being unanimously adopted: One view that challenged this model is the so-called "Super-PRIMA" approach; for this approach in the context of the Hague Conference at the preparatory works of the Hague Securities Convention, see Preliminary Document No 9 of March 2002, at 23 *et seq*., Preliminary Document No 12 of May 2002 (hereafter: "*Prel. Doc. 12*"), *passim*, Preliminary Document No 14 A of May 2002, *passim*, Preliminary Document No 3 of July 2001, at 5. The Super-PRIMA concerns mainly transactions under the semi-indirect holding systems. Another interesting approach that also diverges from PRIMA, suggests the application of the law of the system or the *lex creationis* of the book-entry securities; see M. OOI, *Shares and other securities in the conflict of laws*, Oxford 2003, at 129 *et seq*., M. OOI, Intermediated Securities: The Choice of a Choice of Law Rule, in L. GULIFFER/ J. PAYNE (eds), *Intermediated Securities: Legal Problems and Practical Issues*, Oxford/ Portland/ Oregon 2010, at 231 *et seq*.

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The most well-known versions of the PRIMA rule are those sometimes referred to as the "factual" PRIMA and the "consensual" PRIMA.[74] Under the factual PRIMA, the place of the relevant intermediary is usually considered to be the place where the securities account is maintained. Under the consensual PRIMA, the contracting parties, *i.e.* the investor and the intermediary, are allowed to choose the place of the intermediary for the purposes of the conflict of laws, unrestrictedly or under certain restrictions. This ability basically equates to the freedom of the parties to choose the applicable law itself (*professio juris*). The consensual PRIMA is adopted by the Hague Securities Convention and forms the primary rule of the Convention.[75] The factual PRIMA seems to be the prevailing view under the current EU legislation and is also adopted by the HSC under its three fall-back rules,[76] which are activated in case the applicable law is not effectively determined under the aforementioned primary rule. However, both these versions of the PRIMA have received fierce criticism and raise serious concerns about their effectiveness and appropriateness as connecting factors in this context.

The consensual PRIMA enables the parties' autonomy to contractually choose the law applicable to the proprietary aspects of the indirectly held securities. As the defining characteristic of the indirect securities rights is the ability to be invoked against third parties (creditors, other contesting holders of securities rights, insolvency administrator, *etc*.), in many jurisdictions there is reasonable reluctance to permit the investor and the intermediary to select the law applicable to an issue that has a significant bearing upon third parties rights. The scepticism is quite justified, as this freedom of the investor and the intermediary to choose (and possibly also to change by a subsequent agreement) the applicable law may be susceptible to abuse, as the parties may use this ability in order to shape and change these rights in a way that may jeopardise the rights of third parties, a result that would be unfair. Besides, the consensual PRIMA has the disadvantage that the critical choice of the parties in the applicable law is not public information. Then, third parties that are affected by the indirect securities rights are not in possession of the information necessary to determine the applicable law; rather they have to rely on the investor or the intermediary in order to be informed about their contractual choice and the relevant amendments. It shall be observed that similar concerns are generally raised in relation to the broader category of proprietary rights (for example real rights in immovable or movable property), whereas the parties' autonomy is usually restricted.[77]

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[74] See Ph. PAECH (note 58) at 14.

[75] See Article 4 of the HSC. The parties' autonomy is subject to a qualification-office requirement, which practically ensures that a minimum of established contacts shall exist between the intermediary and the State whose law will be agreed as applicable. See also UCC, Article 8 - Investment Securities, §8-110, where a similar provision is adopted at §8-110(e)(1).

[76] See Article 5 of the HSC.

[77] There is, however, a tendency in favour of the parties' autonomy, even under significant restrictions, in fields where traditionally this freedom was not allowed. See, for example, the Dutch Supreme Court (*Hoge Raad*) ruling on *Brandsma q.q. v. Hansa Chemie* AG case (16 May 1997, *Rechtspraak van de Week* 1997, 126C), where the law chosen by the parties to govern their assignment contract was held also applicable to the effects of the

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In relation to the factual PRIMA, the criticism focuses primarily on the serious difficulties occurring in the process of determining the place where the securities account is maintained. An account has no real *situs*; instead, a place can be ascribed to an account only by way of a legal fiction.[78] The attribution of a location to an account can be a profoundly challenging effort. Although there are numerous possible ways and criteria for ascribing this *situs* to the account, none of them is effective enough and capable to provide reasonable results under any possible pattern of facts.[79] Some suggest that the appropriate criterion should be the place of the office of the intermediary, where the activity of maintaining the securities accounts is performed.[80] This activity involves different actions such as crediting and debiting of the accounts, managing the exercise of the rights deriving from the securities and meeting with the account-holder, *etc*.[81] However, this test is of limited help in cases where the intermediary operates through many offices and the different tasks are allocated to, and performed by, the different offices. Besides, any possible addition of further tests that would put emphasis on the one or the other task would be overcomplicated and arbitrary. The physical place of the records of the account is also not an appropriate criterion, as it is difficult to be determined, especially if the records are held by electronic means (the hardware may be sited in different and immaterial places, as servers may be leased around the world and operate online) and in most cases it will be totally irrelevant to the substance of the indirect securities rights. Other criteria, as the localisation of the account for regulatory or accounting purposes, are equally arbitrary and varying among different jurisdictions.[82] Thus, in a globalised market where the intermediaries may operate in a multi-jurisdictional environment, any attempt to localise the account for the purposes of the conflicts rule in question would be unsatisfactory, because of its artificiality, its arbitrary character and its complexity.

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assignment against third parties (also known as "proprietary aspects" of the assignment). Cf. also the new conflicts rules that permit limited parties' autonomy, in fields such as the divorce and the legal separation (see Article 5 of EU Regulation 1259/2010, OJ L 343, 29.12.2010, at 10) or succession (see Article 22(1) of EU Regulation 650/2012, OJ L 201, 27.7.2012, at 107).

[78] See J.St. ROGERS (note 72) at 304.

[79] See HSC Explanatory Report Int-43.

[80] This approach has been referred to as *"the Brand/Office approach"* – see Hague Conference on Private International Law, Preliminary Document No 13 of June 2001 (hereafter: "*Prel. Doc. No 13 of June 2001*") for the attention of the Nineteenth Session, at 20 *et seq*., J.St. ROGERS (note 72) at 305.

[81] See also Article 4 of the HSC for different criteria that are suitable or unsuitable for qualifying an office as engaged in the activity of maintaining securities accounts.

[82] See Prel. Doc. No 13 (note 80), at 23-24.

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2. The Need to Select a Connecting Factor that Leads to one Sole Applicable Law

Apart from the above serious disadvantages of each of the currently prevailing views, there are some additional and significant concerns regarding both the consensual and the factual PRIMA, in the way shaped above, and their appropriateness to determine the law applicable to indirect securities rights in a certain, predictable, reasonable and workable way. It is proposed that the main reason that compels the rejection of these connecting factors in relation to indirect securities rights is their inadequacy to uphold the legitimate interests of the parties and to lead to acceptable results *in case of a shortfall* at the pool of (interest in) securities that an intermediary holds for his clients, an issue considered of the utmost importance in this context.

As mentioned above, the most important function of indirect securities rights, is the elimination of the intermediary risk. The intermediary risk is mitigated because indirect securities rights enable their holders (investors), to invoke them against third parties and other clients of the intermediary in order to reserve for themselves the relevant pool of (interests in) securities, to exempt it from possible third-party attachments or insolvency procedures and to have priority on it over third parties' claims. This function of the indirect securities rights characterises them as *rights in rem*, since the indirect securities rights allocate a direct and immediate relationship with the asset – in this instance the asset being the pool of (interests in) securities of the intermediary – which relationship can be invoked against anyone, while the fact that these rights are not established with regard to specific assets but to assets as a whole – this instance a changing class of (interests in) securities that the intermediary holds for his clients – does not alter this classification.[83]

However, under the normal course of holding or transferring securities through the modern fully-indirect securities holding systems and in the majority of cases, the personal claims of the investor against the intermediary and the contractual relationship between them will be perfectly sufficient to address and resolve almost any potential issues or problems that may arise. For example, one of the worst conceivable scenarios in the context of the indirect securities holdings, is the appearance of a shortfall of the (interest in) securities. This may have been caused either due to intermediary's acts or omissions, or due to other reasons, such as third-parties attachments, claims, *etc*. In this case, the intermediary, to the extent that he is still solvent, is typically obliged under his contractual obligations to his clients (*i.e.* under their personal law relationship) to buy the missing securities from the market and to restore the shortfall,[84] or to otherwise reimburse his clients

[83] Cf. the concept of rights in rem as defined by M. VIRGOS/ E. SCHMIT, Report on the Convention on Insolvency Proceedings, L6500/96, Brussels 1996, at 74 *et seq*.

[84] See L. THÉVENOZ, Intermediated Securities, Legal Risk, and the International Harmonisation of Commercial Law (2007 9 1,); Duke Law School Legal Studies Paper No. 170; *Stanford Journal of Law, Business, and Finance* 2008 (13), 384; available also at SSRN: <http://ssrn.com/abstract=1008859>; at 43.

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in full, using his own financial means. In these occasions, and as long as the intermediary is solvent, the investor's personal rights against the intermediary and their contractual relationship are adequate enough to fully protect the former and no recourse to indirect securities rights is necessary.

On the contrary, in case the intermediary lacks the means to make up – voluntarily or even involuntarily – the above shortfall, then these personal rights are worthless and recourse to some kind of rights *in rem*, in this context being the indirect securities rights, is the only meaningful option (and probably the last resort) of the investor, in order to ring-fence his rights against the claims of other creditors or clients of the intermediary. Of course, such an inefficiency of the intermediary will typically render him immediately insolvent or otherwise permanently unable to meet his financial obligations. So, the indirect securities rights become important and crucial primarily when there is a shortfall at the intermediary's pool of (interests in) securities, while the latter has become insolvent or otherwise permanently unable to meet his contractual obligations. It is exactly under these circumstances that the very "*raison d'être"* and the most important functions of indirect securities rights are revealed. Correspondingly, these are particularly the circumstances where legal certainty and the highest degree of predictability are essential in relation to the applicable law.

In the event of such a shortfall, the essence of the problem is its allocation, as the quantity of (interests in) securities held by the intermediary will be insufficient to satisfy in full all the persons who have relevant claims. These persons may be the clients of the intermediary for which the latter had undertaken to hold certain number of securities, but finally the (interests in) securities that had acquired are not enough to cover all their financial positions. Also, they may be collateral takers, who have received as collateral the interests deriving from the credit to the securities accounts of the investors (usually creditors of the investors). A different category may be the creditors of the intermediary, who may purport to attach, or even may have already accepted as collateral for their exposure to the intermediary, the pool of (interests in) securities he holds for his clients. All the above categories of persons may have succeeded in acquiring valid personal law rights for any amount of (interests in) securities, simultaneously and irrespective of the amount of (interests in) securities held by the intermediary that is actually available and that may be insufficient to cover all these rights. But in relation to real rights, such as indirect securities rights, this would be impossible. Instead, only a limited number of persons may acquire real rights to this pool of (interests in) securities and this number depends on and is inextricably linked to the actual amount that is available. This differentiation is a consequence of the nature of the indirect securities rights as rights *in rem*, as the latter are closely connected to the allocation question and the determination of the issue of who will finally be entitled to this insufficient pool of (interests in) securities and who will not.

Most jurisdictions envisage detailed rules to govern issues related to the allocation of shortfalls, irrespective of the form that the indirect securities rights might have (*e.g.* co-ownership, beneficial ownership, securities entitlement, *etc*.). These rules determine the priorities among different claims concerning the same (interests in) securities, the conditions under which one person's claim prevail against others, the possible perfection requirements, *etc*. Thus, these rules deter-

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mine the exact way that this insufficient pool of (interests in) securities will be distributed among the different persons asserting it. Of course, as the legal nature and form of the indirect securities rights vary among the different legal systems, the rules and principles that govern this distribution may also be different and divergent. Each substantive law implements and applies its own rules on these issues, often pursuing different policies and leading to different results. Indicatively, in some jurisdictions the temporal priority rule may be implemented; elsewhere, it may be provided that all investors that meet certain requirements (*e.g.* a credit to their securities accounts) share the shortfall proportionately (*pari-passu* principle).[85] Some may elect to disregard all interests in securities that have been acquired without consideration; or may uphold a good-faith acquisition. Besides, these rules may be combined in various ways, or may include certain exceptions that give priority to some categories of claimants to the detriment of others, because, for example, one category may be regarded as systemically important, while other categories not.[86]

The critical importance of these priorities and the allocation-of-shortfall questions underline the need to select a connecting factor that is suitable to primarily address these very issues in a satisfactory way. Thus, it is necessary to choose a connecting factor that subjects all these questions to *a single law*, in order to be solved and settled in the same way for all the asserting parties. The reason is that all indirect securities rights of the clients of the same intermediary have as "*res"* and attach to the same (and scarce) pool of (interests in) securities. Thus, the deriving indirect securities rights are so strongly linked with each other and are so interdependent that the determination and *status* of the rights of one person automatically affects and determines the rights of the others and *vice versa*. On the other hand, connecting factors that lead to simultaneous application of different priorities rules, each of which has equal authority to govern the distribution of the very same pool of assets in different ways, may raise serious difficulties and lead to irreconcilable results.

However, both the factual and the consensual PRIMA are susceptible to indicate as applicable to the allocation of a shortfall of the same pool of (interests in) securities, more than one substantive law at the same time.[87] In relation to the factual PRIMA as described above, the problem arises if the intermediary maintains the different securities accounts of his different clients through offices located in different States. In relation to the consensual PRIMA, this situation occurs if the intermediary contractually designates different places and thus, different substantive laws as applicable, in relation to different clients and securities accounts. Under these circumstances, the relationship of the (interests in) securities of the

[85] Cf. the collusion between the principle of security of transfer and the principle of security of title in case of third party claims under the English law – J. BENJAMIN (note 11) at paras. 3.52 *et seq*.

[86] See for example the provision of UCC §8-511(c), according to which the claim of the creditor has priority over the claims of entitlement holders in case of a clearing corporation that does not have sufficient financial assets to satisfy both its obligations. This special treatment is purely a matter of policy; see C. BJERRE/ A. ROCKS (note 22) at 58.

[87] See also Opinion of the European Central Bank of 17 March 2005, at 13–14.

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same intermediary with the different investors and the indirect securities rights deriving from this relationship will be governed by different laws, which of course may adopt different tests and provisions for the priorities and allocation questions. This may lead to the irregularity of having more than one investor having priority and being fully entitled to the very same (interests in) securities simultaneously, each one according to a different applicable substantive law:[88] an irregular outcome that must be rejected as impractical and unacceptable. This is because, as a result of the scarce and insufficient quantity of the (interests in) securities that the intermediary holds for his clients, the answer to the allocation and priorities question needs to be given in a uniform and homogenous way in relation to *all* persons claiming this pool, because the satisfaction on one claim equals and leads automatically and inevitably to the rejection of another. This uniform treatment can be preserved only by subjecting all the shortfall and priorities questions that relate to one single pool of (interests in) securities to just one applicable law.

The problem that a conflicts rule simultaneously indicates as applicable for the same question more than one law, despite the fact that the nature and the characteristics of the question demand the application of just one substantive law, is neither new, nor emerges only in relation to intermediated securities.[89] If the concurrently indicated as applicable laws collide, the absurd outcome of the conflicts rule shall be disregarded and instead a different solution shall be preferred, *i.e.* to apply *in concreto* the law that is most closely connected to the question or that provides the better results or to adopt to any other solution he deems appropriate. This application of a bespoke rule to a particular case is the best means to reach the most fair and equitable results. But all the *in concreto* solutions have the drawback of lacking predictability and being a source of legal risk, a side effect that is acceptable and bearable in other kinds of legal relationships (*e.g.* family law affairs), but – as already mentioned – is absolutely undesirable and detrimental in the field of modern and highly sophisticated financial markets, where the element of predictability and *ex ante* certainty of the applicable law is regarded as vital and an ultimate priority for their smooth operation.

Instead of implementing a connecting factor that avoids this problem of substantive laws collision, which is the approach suggested in this paper, a different approach has been adopted under the HSC regime. According to the Convention, if the applicable laws indicated are in conflict, the above problem of priorities

[88] For example, only 100 pieces of a particular type of securities are held by the insolvent intermediary; investor A, whose securities account is governed by the law of the State A, has priority on these 100 securities, as the most senior account holder that has been credited with these securities (in State A the security of title is the promoted policy); at the same time, investor B, whose securities account is governed by the law of the State B, has priority on these 100 securities, as he recently bought them in good faith (in State B the security of transfer is favoured, through an innocent-acquisition rule).

[89] A characteristic example is the "*commorientes*" paradigm; cf. Article 32 of the EU Succession Regulation (Regulation No 650/2012 – OJ L 201, 27.7.2012. at 107). For similar difficulties in the context of voluntary assignments of debts see A. SIVITANIDIS, Bulk assignment of debts in the conflict of laws, *Revue hellénique de droit international* 2012 (65), 215, *passim*.

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and allocation of shortfalls is left to be governed by the *lex concursus*, *i.e.* the law governing the insolvency of the intermediary.[90] This choice spurs serious concerns for the effectiveness of the HSC regime as a whole, because it seems rather inconsistent to draft a new conflicts rule, or even an international convention, specifically in order to clarify the law applicable to the proprietary aspects of indirect securities holdings, but ultimately to refer to a law determined through an old and different conflicts rule, outside the convention, in order to govern the most important and critical aspects of these proprietary rights. Such an outcome would have been acceptable only if the Convention concerned the personal law aspects of the intermediated securities.

Further, this choice seems to be wrong in principle. The priorities and allocation of shortfall issues in relation to real rights in general, or in this context of indirect securities rights in particular, are questions concerning the person who is entitled to these rights. On the other hand, the *lex concursus* traditionally governs the totally different and separate issues of the effects of the insolvency (if any) on any real rights duly acquired under the relevant *lex causae*, as well as the distribution of the insolvency estate to the creditors that have personal claims against the insolvent. An artificial extension of the scope of the *lex concursus* in order to include indirect securities rights would not solve any problems, but instead it might prove severely unworkable and unsatisfactory in terms of legal certainty and predictability. First, because in order to become aware of the relevant *lex concursus*, one must pre-emptively be able to identify the forum that will hear the case, as different jurisdictions adopt different conflicts rules to determine the *lex concursus*. Furthermore, most conflicts rules traditionally leave some discretion to the *forum* to apply the most appropriate substantive law *in concreto*, according to the facts of each case at the time of the proceedings. An example is the connecting factor adopted under EU legislation, namely the notion of the "centre of main interests" (COMI), an indefinite and vague term that successfully leads to the application of the closest connected law, but only after considering *in concreto* the facts of a given case. As mentioned previously, any uncertainty regarding the applicable law is absolutely unwanted in this context and therefore, the application of the *lex concursus* to indirect securities rights shall be avoided.

It is therefore suggested that a very important characteristic of the appropriate connecting factor for intermediated securities shall be its ability to indicate one sole applicable law to govern all indirect securities rights that relate to one single pool of (interests in) securities and thus, to one intermediary.

3. The Time Factor

The legal certainty and predictability of the conflict of laws regime for indirect securities rights may also be jeopardised by changes of the applicable law in the process of time. This is a well-known problem in the field of private international law, usually referred to as the problem of the *"conflits mobiles"*. There are some

[90] See HSC Article 8 and HSC Explanatory Report, comments on Article 8 and especially para. 8-4 to 8-6.

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connecting factors, for example the domicile of a person or the *situs* of movable property, which are susceptible to change with the passing of time. In relation to the indirect holding of securities, connecting factors susceptible to change are the agreement between the investor and the intermediary (consensual PRIMA) or the place where the securities account is maintained (factual PRIMA). If such changes occur at some point, the determination of the applicable law may become severely complicated.

This kind of collision is inherent to conflict rules that are based on connecting factors susceptible to changes in the passing of time. One way to address the occurring problems is to form a special rule to govern them. This was the approach adopted under the HSC, which provides for a detailed rule with specific provisions and exceptions.[91] Under the Convention's regime, for every change of the applicable law, which possibly results after an amendment of the relevant account agreement, there is a distinction between the "old law" and the "new law". This distinction aims mainly to protect the rights of the persons (including third parties) that have not consented to the change, either because they had no knowledge of the amendment, or because their consent was not necessary to amend the account agreement. Thus, according to this scheme, there are two classes of right-holders, the one under the "old law" (provided that the requirements of Article 7, par. 4, apply) and the other under the "new law".

However, the problem under this approach of the HSC is that the substantive provisions of the old and new laws may implement different priorities rules and this may once again lead to the paradox of encountering persons belonging to more than one class of right-holders that have full rights on the same (interests in) securities of the intermediary at the same time. Such a solution would be perfectly acceptable in relation to contractual rights, but is definitely incompatible with real rights. Thus, this approach undermines legal certainty and predictability in relation to the allocation of the insufficient pool of (interests in) securities of the intermediary. For this reason, it is suggested that the approach adopted by the HSC, as well as any other approach similarly purporting to uphold all laws that had been applicable from time to time, by subjecting the rights to the new and old law and by stipulating exceptions and counter-exceptions, must be rejected because of its ambiguous effectiveness to provide reasonable solutions and also as over-complicated and as an obstacle to the *ex ante* knowledge of the applicable law.

Instead of this problematic approach, a very effective alternative to eliminate this source of uncertainty in a straightforward and simple manner is either to stipulate a specific provision on the critical time for the crystallisation of the applicable law (*e.g.* "the *last* place where the securities accounts are held") or, even better, to select an *a priori* stable connecting factor, *i.e.* a connecting factor not susceptible to change in the passing of time. A stable connecting factor excludes any possibility for changes of the applicable law. Thus, it eliminates the "*conflits mobiles*" problem, as well as any changes of the applicable law that relate to fraudulent motives of the intermediary. In addition, the reference to an *a priori* unchangeable connecting factor is the only realistic method to achieve the desired highest possible level of predictability in relation to the applicable law. Thus, the

[91] See Article 7 – Protection of rights on change of the applicable law.

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use of stable connecting factors appears advantageous and should be preferred to the use of connecting factors susceptible to changes.

4. The Appropriate Connecting Factor

The above observations outline the suggested characteristics of the appropriate connecting factor that will determine the law applicable to indirect securities rights. This connecting factor shall lead to one single applicable law in relation to each intermediary, in order to submit all the indirect securities rights to one single law. This reference to just one substantive law is the only viable approach to ensure that all the critical issues related to the priorities and the distribution of the – sometimes insufficient – pool of (interests in) securities that is held by one intermediary will be answered according to one system of laws and thus, no absurd results and conflicts between multiple applicable laws will emerge. Further, this connecting factor shall not be susceptible to changes during the passing of time. Ideally, the connecting factor shall also be straightforward and easily ascertainable through publicly available information. By meeting these requirements, the conflicts rule that implements this connecting factor will lead to a workable, predictable and suitable legal environment at the private international law level, which will facilitate the smooth operation of the modern securities holding systems and will eliminate the legal risks currently associated with indirect cross-border securities settlement.

It is hereby suggested that this appropriate connecting factor for the conflicts rule of the indirect securities rights should be, in case of intermediaries that are legal persons, *the law of the incorporation of the intermediary (lex incorporationis)*, *i.e.* the law under which the legal person / intermediary was created.[92] This connecting factor had been proposed in the past as the appropriate one, but it seems that subsequently this proposal was abandoned.[93] It is also a connecting factor adopted by the HSC, but only as a fall-back rule, in the event of the absence of an express agreement on the place of the account and of an inability to determine the particular office through which the intermediary entered into the account agreement.[94] In any event, from the perspective and the analysis adopted in this paper, this connecting factor has such strong advantages, especially in comparison to any other alternative, and it determines the applicable law in such efficiency,

[92] Typically, in the modern markets environment, the intermediary will be a legal person and so this paper focuses on this scenario. This connecting factor shall also apply, *mutatis mutandis*, to any unincorporated organisation that lacks distinct legal personality but nevertheless has been formed and functions according to specific rules of law; see HSC Explanatory Report, para. 5-8; cf. Article 5(2) of the HSC that refers to the law under which the "intermediary is incorporated or *otherwise organised*" (emphasis added). For the exceptional case of an intermediary that is a natural person, see below.

[93] See R. GOODE, The nature and transfer of rights in dematerialised and immobilised securities, in F. ODITAH (ed), *The Future for the Global Market: Legal and Regulatory Aspects*, Oxford 1996, at 124.

[94] See Article 5(2) of HSC.

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that shall definitely be favoured as the primary and the sole connecting factor of the conflicts rule in question.

First, the law of the incorporation is an intermediary-oriented connecting factor, as it is closely related to the intermediary. It is also a familiar concept, as a result of the fact that some jurisdictions, mostly among the common law countries, regard the law of the incorporation as the personal law of the legal persons, *i.e.* the law that governs their creation, their organisation, the internal relationships of their members, *etc*. Further, this law can be determined in a simple and straightforward way, merely by recourse to the public information that is typically filed at the relevant registries (*e.g.* company registers) in every jurisdiction in relation to the legal persons created under its law, as a mandatory step for the completion of the incorporation process. Thus, this law can be easily ascertained not only by the investor and the intermediary, but also by third parties to a securities transaction.

The *lex incorporationis* approach subjects every possible dispute in relation to indirect securities rights against a particular intermediary to the same law. Thus, all the priorities questions between the clients and the creditors of the same intermediary can be effectively resolved under the rules of one single law. Also, this connecting factor is not susceptible to changes, as once the intermediary has been incorporated under one law, this law is impossible to be modified later. Therefore, all the aforementioned problems that arise in case of change of the applicable law, as, for example, the *conflits mobiles*, are eliminated. Furthermore, despite the fact that this connecting factor inevitably prohibits the direct choice of the law applicable to indirect securities rights, it nevertheless allows a limited role for the autonomy of the parties, even in a very restricted and indirect way. Specifically, the selection of the law of the incorporation of the intermediary by its founders, or the selection of an intermediary that is known that has been created under a certain law, equates in essence to an indirect selection of the law applicable to the indirect securities rights. Accordingly, investors may choose their intermediary after evaluating – in addition of course to other important factors as well – the known-in-advance law of the incorporation of the intermediary and, by selecting a particular intermediary, they will also select a particular substantive law that will govern their securities rights. Further, nothing prevents the persons involved in the multi-national securities holding business, from creating more than one legal person under different laws, in order to act as intermediaries and to provide to their clients indirect securities holdings governed by different laws, according to each client's needs and requirements.

Of course, it is obvious that this connecting factor concerns only intermediaries that are legal persons and it cannot apply to natural persons. This is indeed a drawback of this specific connecting factor, which is nevertheless significantly mitigated by the fact that in practice it is very rare to encounter an intermediary that is a non-legal person. In some jurisdictions, it is even prohibited for a natural person to engage in the activities of an intermediary. It would also be extremely exceptional, if indeed it ever happens, for a natural person to become a participant in a modern CSD. Thus, given the current global practice and the structure of the indirect holding system, the conflicts rule for indirectly held securities by a natural person acting as an intermediary is a trivial and unimportant question that is briefly addressed here, merely for the sake of completeness.

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A connecting factor suitable for natural persons that is completely equivalent to the law of the incorporation for the legal persons does not exist. Neither the law of the place of birth nor the law of the origin (*lex sanguinis*), which are the concepts that correspond to the *lex incorporationis* in relation to natural persons, are always easy to ascertain. Also, this information belongs to the private sphere of the natural person and thus any reference to this personal data for determining the applicable law in this field might be regarded as inappropriate. Besides, these laws are not necessarily relevant to the activities of an intermediary. Instead, most relevant to the latter activities – and thus, preferable as connecting factor – is the (principal)[95] place of business[96] of the intermediary or, in cases where the individual acts equally in more than one place and it is not possible to specify with certainty one place as the principal, the place of his habitual residence. Noticeably, this is an approach that cannot guarantee the same level of legal certainty and predictability of the applicable law as the conflicts rule that concerns legal persons. However, this divergence seems to be reasonable and acceptable in the face of the rare and occasional situations (if any) where the intermediary will be a natural person. While trivial for the smooth operation of the financial markets, these rare cases are also less important from the perspective of the protection of the legitimate interests of investors and collateral takers, as it is common knowledge that when dealing with an intermediary that is a natural person, this is an unusual arrangement for securities transactions that requires special attention.

IV. Conclusion

The conclusion of the above analysis can be summarised in the following conflicts rule:

Indirect securities rights, which are the rights of a person in the pool of the (interests in) securities that an intermediary acquires in favour of his clients, are governed:

(a) in case the intermediary is a legal person, by the substantive[97] law under which this legal person was incorporated; and

(b) in case the intermediary is a natural person, by the substantive law of his principal place of business or, if this place cannot be determined with reasonable certainty, by the law of the place of his or her habitual residence.

The same law applies to direct securities rights that have been acquired through book-entries to securities accounts held by intermediaries, provided and to the

[95] In case the intermediary is active in many places.

[96] Cf. Article 5(3) of the HSC. The place of business and the principal place of business are the connecting factor of the third fall-back rule of the Convention.

[97] *Renvoi* is excluded for the sake of clarity, simplicity and predictability in the process of determining the applicable law. Cf. Article 10 of the HSC.

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extent that this acquisition is in accordance with the lex creationis *of the securities in question.*

The proposed conflicts rule diverges from the currently prevailing PRIMA approaches and the HSC conflicts rules in two key respects. Firstly, in relation to the scope of the rule, as it refers to the concept of indirect securities rights, a means for conveniently preventing the unconditional application of an intermediary-oriented conflicts rule to direct securities rights acquired through intermediaries. This feature is critical to avoid the serious problems and the unpredictable results described above, which potentially arise under the prevailing PRIMA approaches and are regarded in this paper as responsible for the reluctance of most States and the EU to adopt the Hague Securities Convention. At the same time, this analysis enables the application of the same connecting factor that is used for the indirect securities rights to the direct securities rights that have been acquired through intermediaries as well, provided that this recourse to an intermediary-oriented connecting factor is compatible with, and accepted by, the *lex creationis* of the securities. Under this structure, fully-indirect and semi-indirect holding systems are treated in the most similar way possible, according to contemporary market needs, but without raising the aforementioned insurmountable difficulties.

The second point of divergence is the suggested connecting factor. This is also a key issue, directly linked to the need for the highest possible degree of predictability and certainty in relation to the applicable law. Under the HSC primary conflicts rule that enables, under certain restrictions, the selection of the applicable law (consensual PRIMA), the appearing simplicity of the connecting factor is seriously challenged by the potentially unpredictable results of its application, particularly in the case of disputes concerning priorities and allocation of shortfalls of securities. This connecting factor, as well as the factual PRIMA or any other solution that fails to deliver sound results in relation to these critical aspects of intermediated securities, is considered inappropriate in this context. Instead, the connecting factor suggested here identifies one single law as applicable to the most critical issues; this law is also easily ascertainable, is always known in advance and is not subject to subsequent changes: features that decisively encourage its selection.

It is well understood that a conflicts rule that would determine the applicable law for all the rights resulting from a securities account indiscriminately (*i.e.* for both direct and indirect securities rights), would be very convenient and well appreciated by the markets, particularly in relation to bulk transactions on portfolios of securities. It is also recognised that the ability to select the applicable law would facilitate these transactions and would simplify the business of global custody. These considerations had a major impact on the formation of the Hague Securities Convention conflicts rules. But unfortunately, these desired effects cannot be achieved in a workable and smooth-functioning way by just drafting and adopting an accordingly shaped conflicts rule. The barrier is the very nature and the functional characteristics of the relationships involved in modern indirect holding systems, as analysed above. Therefore, the goal of the HSC to address both direct and indirect securities rights under one single conflicts rule, as well as to enable the parties' autonomy for the relevant rights *in rem*, was incompatible with the relationships involved, and for this reason it was *a priori* quite unlikely to

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provide the sound regime that is necessary for modern indirect securities holding systems.

It shall be mentioned however that, despite the criticism and its drawbacks, the Hague Securities Convention constitutes a valuable step towards a better understanding of the private international law aspects of intermediated securities and a respectable and elaborated endeavour to address one of the most challenging and complicated modern conflict of laws problems at a global level, in a way that aims at the broadest possible consensus. Besides, the HSC attempted to address a problem well beyond the sphere of the conflicts of law, *i.e.* the problem of the diversity of the substantive law provisions in relation both to direct and indirect securities rights. These disparities impose barriers on the globalised environment of the modern securities markets that can be fully eliminated only by the harmonisation of the relevant national law provisions. The aforementioned UNIDROIT Convention on substantive rules for intermediated securities is an important development regarding the unification of the law in this field. The anticipated EU securities law legislation, if ever completed and enacted, will also be a significant achievement. Another promising project is the Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets, which is currently drafted under the auspices of UNIDROIT.

It is essential, though, for the future success of any effort in this field, to go beyond the aforementioned deficiencies that gave rise to scepticism and criticism against the Hague Securities Convention and the PRIMA conflicts rules. Under the view expressed in this paper, this can be achieved only by respecting the fundamental distinction between direct and indirect securities rights and by shaping the applicable rules, both at the private international and at the substantive law level, according to the true nature and the fundamental characteristics of these rights. In any case, until the efforts for the harmonisation or the unification of the substantive laws come to fruition, the uniform adoption of national conflict of laws rules inspired by the one suggested in this paper, seems to be the only realistic approach for determining the law applicable to intermediated securities effectively and with the highest possible degree of *ex ante* certainty.

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THIRD PARTY AND CONTRACT IN THE CONFLICT OF LAWS

Sarah LAVAL*

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Party autonomy refers to the principle according to which the parties can agree in advance on the law governing their contract. After having encountered some

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 511-542
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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doctrinal resistance at the beginning of the 20th century,[1] party autonomy nowadays appears as an intangible cornerstone of Private International Law, recognized by most international or national rules.[2] Recently, The Hague Principles have promoted party autonomy at a global level[3] and even allowed the parties to choose a-national rules, such as the *lex mercatoria*.[4]

Choice-of-law rules regarding contracts generally follow the same pattern. First, parties are allowed to choose the law that will govern their contract. Absent such a choice, an objective connecting factor then determines the law applicable to the contract. The law the objective connecting factor designates varies according to the country or region of origin of the choice-of-law rule. Some rules designate the law of the most significant relationship,[5] others designate the law of the place where the contract is concluded or performed, and others designate the law of the

[1] See, for instance, in France, J.-P. NIBOYET, La théorie de l'autonomie de la volonté, *Recueil des Cours* 1927, Vol. 16, p. 1 *et seq*.; in Germany, L. VON BAR, *Theorie und Praxis des internationalen Privatrechts*, Vol. II, Hannover 1889, p. 3-5; H. LEWALD, *Das deutsche internationale Privatrecht*, Leipzig 1931, p. 199-201; in Switzerland, A. SCHNITZER, L'autonomie de la volonté des parties en droit interne et en droit international, *Rev. crit. dr. int. pr.* 1939, p. 243-266; *idem*, La loi applicable aux contrats, *Rev. crit. dr. int. pr.* 1955, p. 459-484; in the US, J. BEALE, What Law Governs the Validity of a Contract, 23 *Harv. L. Rev*. 260 (1910) and E.G. LORENZEN, Validity and Effects of Contracts in the Conflict of Laws, 30 *Yale L. J.* 565, 655 *et seq.* (1920-1921), and 31 *Yale L. J*. 53 (1921-1922).

[2] Paraguay recently adopted party autonomy (L. No. 5393 of 2015 on the law applicable to multistate contracts, inspired by The Hague Principles) but other countries, such as Ecuador (Civ. Code Arts. 15-17) or Guinea-Conakry (Codif. Art. 9), still refuse to adopt party autonomy. In Brazil, although case law begins to refer to party autonomy, Art. 9 of the Introductory Law relies on the *lex loci celebrationis* criterion. The existence of a Draft Act on the Application of Legal Rules, Projeto de Lei do Senado No 269 of 2004, that allows the parties to choose the law applicable to international contractual obligations, should be mentioned. For more details, see M.M. ALBORNOZ, Choice of Law in Latin American International Contracts, 6 *J. Priv. Int'l L*. 23 (2010) and S.C. SYMEONIDES, *Codifying Choice of Law around the World, an International Comparative Analysis*, New York 2014, p. 114 *et seq*.

[3] Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015. See more specifically the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), p. 2 "The Council invited the Permanent Bureau to continue its exploration of this topic concerning international business to business contracts with a view to promoting party autonomy." For a complete bibliography on the Principles, see the Hague Conference website (<www.hcch.net>) as well as the article by P. DE VAREILLES-SOMMIÈRES in this *Yearbook*, 2015/2016, p. 49 *et seq*.

[4] The Hague Principles, Art. 3: "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."

[5] See, for instance, the Restatement (Second) of Conflict of Laws, Section 188, entitled "Law governing in absence of effective choice by the parties": "The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties."

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habitual residence of the party that will effect the characteristic performance.[6] Nonetheless, the objective connecting factors share a common characteristic: they appear to be waivable.[7] Whereas, in substantive law, freedom of contract allows the parties to derogate from the waivable or default rules, in Private International Law, party autonomy allows the parties to derogate from a waivable connecting factor. Party autonomy embodies the policy favouring predictability, flexibility, and certainty required by international commercial transactions. Parties ascertain in advance what law will govern the validity and the effects of the contract.

Yet, party autonomy raises an important issue. In international law as well as in domestic law, contracts involve third parties. The transactions often require complex mechanisms that involve more than two contracting or immediate parties. First, some contracts, such as those involving proprietary rights or rights *in rem*, create, by definition, a situation that exceeds the interests of parties. The right of a buyer or a lien holder needs to be effective against competing third parties, such as subsequent buyers or other lienors. Besides, mechanisms such as groups of contracts, agency agreements, guaranties, or joint ventures demonstrate the growing complexity and sophistication of contractual schemes, as well as greater interactions between parties and third parties.

Substantive rules are altered to take into account third parties' expectations. The contract is no longer considered as the parties' prerogative but as a social fact likely to extend its effects to third parties. By contrast, the choice-of-law rules for contracts seem paradoxically designed to satisfy only parties' interests. Choosing law by agreement provides certainty and predictability only to the parties to the transaction. Third parties are unaware of the choice of law made by the parties. Their expectations call for an objectively determined law. One may therefore wonder if the drafters of the choice-of-law rules regarding contracts sufficiently took into account third parties in the determination of the law applicable to contracts. For instance, in the Rome I Regulation, third parties are mentioned only in Article 3 § 2, which deals with the change in the applicable law after the conclusion of the contract.[8]

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[6] See Rome I Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Art. 4. More precisely, Art. 4 §1 provides specific rules for some specific contracts, such as franchise or provision contract. When Section 1 does not cover the contract, Section 2 specifies that the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Paragraph 3 introduces an escape clause ("Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply"). Finally, paragraph 4 states that when the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

[7] See P. DE VAREILLES-SOMMIÈRES, Autonomie substantielle et autonomie conflictuelle en droit international privé des contrats, in *Mélanges en l'honneur du Professeur Pierre Mayer*, Issy-les-Moulineaux 2015, p. 869 *et seq*.

[8] Rome I Regulation, Art. 2 § 3: "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Art. or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its

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Far from being new, these observations are gaining increasing importance, as demonstrated by the race to uniform solutions in fields sensitive to conflicts between parties and third parties' expectations. For some time now, some international conventions, such as the Hague Convention of 14 March 1978 on the Law Applicable to Agency,[9] have tried to set uniform choice-of-law rules that reconcile parties and third parties' interests. More recently, the Cape Town Convention created a uniform security interest for mobile equipment in order to avoid the insufficient recognition of rights *in rem*.[10] More generally, the Sixth Working Group of the United Nations Commission on International Trade Law has periodically tried to improve international secured transactions.[11] Also, the assignment of contractual obligations constantly divides the doctrine regarding Article 12 of the Rome I Regulation.[12] Finally, direct actions are divisive at the national and European level, as demonstrated by the various rulings of the European Court of Justice.[13]

The question these observations raise is quite simple: why and how should the third party be a factor in the construction or adaptation of the choice-of-law rules regarding contracts? A satisfactory answer implies a departure from several trends. On the one hand, the desire to better integrate third parties' expectations in the choice-of-law rules concerning contracts requires setting aside all prerequisites regarding party autonomy. On the other hand, the observation that party autonomy leads to unpredictable solutions for third parties does not imply it should generally be suppressed to satisfy third parties' interests. One-handed solutions ought to be avoided. At any rate, the multiplicity of the situations in which conflicts arise between parties and third parties' expectations necessarily leads to a diversity of solutions. Third parties can be total strangers to the contract (*penitus extranei*), as well as successors, creditors, or debtors of the parties. Moreover, third parties approach the contract in different ways. Sometimes, they are interested in the very existence of the contract and in the rights the contract creates. Sometimes, they are contractually related to the parties to the contract and reached by the extension of

formal validity under Art. 11 or adversely affect the rights of third parties." The choice-of-law rule is here adapted to take into account third party interests.

[9] For a general presentation, see P. LAGARDE, La Convention de La Haye sur la loi applicable aux contrats d'intermédiaires et à la représentation, *Rev. crit. dr. int. pr.* 1978, p. 31 *et seq*.

[10] The Convention of 16 November 2001, on international interest in mobile equipment, drafted under the auspices of UNIDROIT, created a new international security interest for some particular goods (aircrafts, railway rolling stock, and space assets).

[11] See <http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html>.

[12] See H.J. SONNENBERGER, report of the meeting of the Special Commission of the German Council for private international law on the topic of Opposabilité aux tiers de la cession de créance, *Rev. crit. dr. int. pr.* 2012, p. 676 *et seq*.

[13] See, for instance, ECJ, 17.6.92, C-26/91, *Société Jacob Handte*, *ECR* [1992] I-03967; ECJ, 27.10.98, C-51/97, *La Réunion européenne*, *ECR* [1998] I-06511; ECJ, 17.9.02, C-334/00, *Tacconi*, *ECR* [2002] I-07357. According to these rulings, direct actions are subject to Art. 5 § 3 of the Brussels Convention of the 27 September 1968, relating to tort, delict and quasi-delict and not to Art. 5 § 1, relating to contractual matters.

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its effects. These multiple situations make solving the equation, with a single and uniform solution, impossible. Section I of this article will focus on the presentation of some critical issues raised by the relationship between the contract and third parties. Section II will propose several solutions as well as an organization for these solutions in an easily implementable system.

I. The Need to Consider Third Parties when Determining the Law Applicable to Contracts

The need to consider third parties when determining the law applicable to contracts comes from two series of situations in which third parties are confronted with the choice-of-law rule concerning contracts. First, conflicts of expectations between parties and third parties arise from the very nature of the contract. Such conflicts occur primarily with contracts involving proprietary rights or rights *in rem*, which not only create rights and duties between parties, but also generate consequences that affect third parties (A). Second, the environment in which contracts are concluded or executed fosters the interactions between parties and third parties (B).

A. The Nature of the Contract

Besides the rights and duties among the immediate parties, the very nature of some contracts, such as contracts involving rights *in rem*, affect third parties. The rights of a buyer or a creditor holder of a lien are only valuable if they are effective for third parties, such as subsequent buyers or other creditors likely to acquire a right on the property. Therefore, contracts involving rights *in rem* constitute an important area of antagonism between parties and third parties. In the conflict of laws, these contracts are generally subject to two choice-of-law rules. On the one hand, the conditions of validity of the contract as well as the rights and duties between the parties are characterized as contractual questions and subject to the choice-of-law rule for contracts. On the other hand, the rights *in rem* the contract creates are characterized as property questions and subject to the choice-of-law rule for property (1). Notwithstanding its apparent simplicity, implementing this distinction is hard, and it often leads to a lack of recognition of rights *in rem* at the expense of the party right holder. A new characterization of consensual rights *in rem* as contractual questions should be contemplated (2).

1. The Choice-of-Law Rule for Contracts Involving Rights in rem: lex situs *or* lex contractus

Contracts involving rights *in rem* are the source of two different kinds of rights. Much like any other contract, they create rights and duties between the parties. Unlike other contracts, they also create rights *in rem*, which are not rights against another person but rights on a certain property against the rest of the world. Third

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parties need to know the rights *in rem* the contract creates. When a property is sold, potential purchasers as well as the seller's or buyer's creditors must be aware of the sale. When a debtor grants a consensual security interest to his creditor, the other creditors of the debtor, holders of junior or senior liens, need to be aware of the transaction to determine their position in the race to payment.

Legislators and case law traditionally subject the contractual obligations, or rights *in personam*, and the rights *in rem* to different choice-of-law rules. On the one hand, rights *in personam* are subject to the choice-of-law rule regarding contracts. The law the parties choose, or the objectively applicable law absent a choice, applies to the validity of the contract and the rights and duties of the parties. On the other hand, *lex situs* and the choice-of-law rule regarding property govern rights *in rem*. No distinction is made between movable and immovable property, and between the consensual, judicial, or statutory source of the right *in rem*. Therefore, although they both find their origin in a single contract, rights *in personam* and rights *in rem* are neither characterized the same way nor, as a consequence, subject to the same choice-of-law rule.

More precisely, two choice-of-law rules are simultaneously applied to sales of goods. The choice-of-law rule applicable to the transfer of ownership is different from the choice-of-law rule applicable to the agreement of sale. The different international conventions that set uniform choice-of-law rules for sales of goods exclude from their scope the proprietary effects of the sale, and exclusively focus on the validity and the contractual obligations of the agreement.[14] Article 4 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, also known as the "CISG" or the "Vienna Convention", which provides uniform substantive rules for multistate sales of goods, similarly excludes from the scope of the Convention "the effect which the contract may have on the property in the goods sold" while it includes the validity of the sale and the rights and duties of the seller and the buyer. Contractual questions are determined by the *lex contractus*, whereas the conditions and effects of the transfer are determined by the *lex situs*. For instance, if the asset is located in France, whereas the German law is applicable to the contract of sale, the transfer is complete by the agreement of the parties (*solo consensu*), without requiring any effective transfer of the asset, according to French law and conversely to German law.[15] German law governs only the contractual questions, such as the seller's duties, like the delivery or the conformity of the property, and the buyer's duties, like the payment of the price.[16]

[14] See Art. 5 § 3 of the Convention of June 15, 1955, on the law applicable to international sales of goods and Art. 5-c of the Convention of December 22, 1986, on the Law Applicable to Contracts for the International Sale of Goods.

[15] German law distinguishes between the agreement of sale, the "Verpflichtungsgeschäft", and the transfer of ownership, the "Verfügungsgeschäft".

[16] For England, see also L. COLLINS/ A.V. DICEY/ J.H.C. MORRIS, *Dicey, Morris & Collins on the Conflict of Laws*, London 2012, No. 33-027, p. 1894: "The fact that the English Sale of Goods Act deals with both problems should not be allowed to obscure this basic difference. The principle of English domestic law that, within certain limits, the time and mode of the transfer of property in movables are determined by the intention of the parties is a rule which belongs to the law of property, not to the law of contract, and applies only to goods situated in England, irrespective of the governing law."

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The characterization of rights *in rem* as property and of rights *in personam* as contract is harder to draw for consensual security interests. The central questions regarding effectiveness and perfection, thanks to which the secured party gives public notice of his security interest to third parties, are subject to the choice-of-law rule concerning property and to the *lex situs*. The financing statement that right holders have to file in order to solve the priority conflicts is located in the state where the collateral is. The scope of the *lex contractus* is drastically reduced, and drawing the boundaries between the choice-of-law rules is difficult.

The application of the *lex situs* to consensual transfers of ownership and rights *in rem* results from the need to protect third parties' expectations that the choice-of-law rule relating to contracts otherwise disregards. The *lex situs* is clear, visible, and obvious. Its application prevents third parties from further enquiring into the origins of the asset. Wherever the asset is located indicates the place of registration of potential rights to competing third parties. On the contrary, the application of the *lex contractus*, especially when chosen by the parties, is too uncertain for third parties that legitimately ignore its identity when investigating the asset's location. The application of the *lex situs* guarantees security for local credit, otherwise named "security of transactions."[17]

According to this distinction, third parties do not directly confront the choice-of-law rule applicable to contracts. The *lex contractus* governs only the mutual rights and duties of the immediate parties, whereas the rights *in rem* affecting third parties are subject to the *lex situs*. Notwithstanding its apparent simplicity, this division falls short of satisfying both the parties' and third parties' expectations.

2. The Issues Raised by Contracts Involving Rights in rem

The application of the *lex situs* seems satisfactory for third parties' expectations but raises serious issues for parties' interests on movable property. The moving of a chattel automatically leads to a change in the applicable law and may constitute a daunting obstacle to the recognition of rights *in rem* (a). The re-characterization of consensual rights *in rem* in contractual questions could overcome this obstacle, the Achilles' heel of the choice-of-law rule in property. This new characterization reunites the effects of the contract and eludes the difficulties associated with the moving of the asset (b).

a) The Poor Recognition of Rights in rem

For immovable property, the application of the *lex situs* is as trustworthy for parties as it is for third parties. The law of the location of the immovable property continuously governs both the right's existence and regime. By contrast, the possible change of location of chattels implies a change in the law applicable to the

[17] E. BARTIN, *Etudes de droit international privé*, Paris 1899, p. 32.

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effectiveness of rights *in rem*. Which law should apply when the substantive rules on perfection or priority are different?

An example taken from French case law helps us to understand the circumstances of such an occurrence. In the *Diac* case,[18] a German company bought a car from another German company. The seller granted a credit to the buyer but held a title on the car under a reservation agreement. Later, the buyer, who remained in possession of the car, moved it to France, where a garage owner who was not paid by the buyer decided to keep it. The German seller invoked its ownership over the car. The French Supreme Court rejected the seller's demand and stated that French law exclusively governs rights *in rem* when the goods are located in France. The French garage owner's right prevails over the German seller's. Similarly, the Federal Tribunal of Switzerland refuses to recognize a German seller's retention on the title clause, which has not been properly recorded in Switzerland after the buyer has moved property there. A Swiss domestic provision requires the registration of the clause in a public record of the buyer's place of domicile. The Federal Tribunal held that "the foreign sellers have to look for the provisions of the State of destination of the asset."[19] In sum, the absence of compliance with the provisions of the new *lex situs* prevents the recognition of rights *in rem*, at the expense of the original right holder.

Because the debtor often remains in possession, these examples are strikingly representative.[20] For non-possessory interests, the perfection of the secured party's right is reached through the filing of a financing statement. To which financing statement must the parties and the third parties refer? On the one hand, third parties such as other secured parties, borrowers, or purchasers, are unaware of the right perfected in the first state of location of the asset. On the other hand, the original secured creditor who has not recorded his interest in the second state eventually loses his right against local third parties. If the third party who deals with the debtor, the possessor of chattels, without knowledge of prior claims, is protected over the right-owner, the policy consisting of encouraging credit is undermined. Indeed, how can creditors reasonably grant any loan if the risk of non-recognition of the rights *in rem* that secure these loans is constant? The application of the *lex situs* protects local third parties, but it endangers the holders' rights and constitutes an important hurdle to the development of international trade.

Similarly, the *lex situs* is sometimes retroactively applied when the property is moved before the transfer of ownership is complete.[21] If the State of the new location of the asset adopts a liberal approach, the agreement between the seller

[18] Cass. civ. 1ère, 8.7.1969, *Rev. crit. dr. int. pr.* 1971, p. 75 *et seq*., note Ph. FOUCHARD; *Clunet* 1970, p. 916 *et seq.*, note J. DERRUPPÉ; *JCP éd. G* 1970, II, 16182, note H. GAUDEMET-TALLON. More recently, Cass. civ. 1ère, 3.2.10, *JCP éd. G* 2010, p. 284 *et seq*., note L. D'AVOUT.

[19] ATF 93 III 96 = ASDI 1967, 6.7.1967, *Konkursmasse Meier gegen Peters & Co.*, p. 271.

[20] See, for instance, P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES, *Conflict of Laws*, 5th ed., St. Paul Minn. 2004, No. 19.16, p. 1258.

[21] See K. KREUZER, Movable property in Private International Law, *Recueil des Cours* 1996, Vol. 259, p. 92-134.

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and the buyer that occurred in the State of the former location is recognized. By contrast, to avoid unpredictable solutions to third parties, the State of the new location of the asset can require all the elements necessary to the transfer of ownership, even if they already took place in the State of the former location of the asset. In the end, the solution depends on the policy of the State of the new location regarding the protection of local third parties, which is a large source of unpredictability and uncertainty for the buyer and the seller.[22]

Given the importance of credit for international trade, the risks borne by the creditors led to the drafting of uniform substantive rules in the field of security interests. Upon its completion of the Guide on the Implementation of a Security Rights Registry, the Sixth Working Group of the United Nations Convention on International Trade Law (UNCITRAL) built a Model Law on Secured Transactions based on the general recommendations of the Legislative Guide.[23] This Model Law constitutes an example of soft law that national legislators should take into account when establishing secured transactions' regimes. The Cape Town Convention, adopted on 16 November 2001, and put into force on 1 March 2006, also establishes uniform rules for the constitution and effects of an international interest in aircraft engines, railway rolling stock, and space assets. It provides a new registry system for the public recording of interests in mobile equipment. Such a system should prevent the obstacles to the recognition of rights *in rem*.[24] Nonetheless, the field of secured transactions is known for its reluctance to adopt uniform rules, and the Cape Town Convention has not been globally ratified.[25] Moreover, the lack of recognition of rights *in rem* persists for goods that do not come within the scope of the Convention.

b) From a Better Recognition to a New Characterization

Absent a complete unification of substantive law, the reconciliation of parties and third parties' predictions has to be sought within choice-of-law rules. To that end, the recognition of rights *in rem* can first be improved without challenging the

[22] Art. 3 of the Convention of 15 April 1958, on the law governing transfer of title in international sales of goods, never entered into force and may be understood this way. See P. LAGARDE, Sur la loi applicable au transfert de propriété. Requiem critique pour une convention morte-née, in A. BORRÁS *et al.* (eds.), *E pluribus unum: liber amicorum G.A.I. Droz*, The Hague/ Boston 1996, p. 151 *et seq*.

[23] See <http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html>.

[24] For the justifications of the Cape Town Convention, see, for instance, among many references, R. GOODE, Transcending the Boundaries of Earth and Space: the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment, 3 *Uniform L. Rev.* 52-103 (1998); P.B. HONNEBIER/ J.M. MILO, The Convention of Cape Town: The creation of International Interests in Mobile Equipment, 1 *Eur. Rev. of Private Law* 3-8 (2008).

[25] Although 69 countries, as well as the European Union, have ratified the Convention, some European States, such as France, Germany, or Switzerland, still have not. See <http://www.unidroit.org/status-2001capetown>.

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application of the choice-of-law rule in property. The improvement of the recognition is achieved in two steps. The first step is known as the transposition of the right *in rem*: a right *in rem* that presents the same characteristics as the original right *in rem* is sought in the State of the asset's new location. For instance, if an asset subject to an English trust is moved from England to France, a French right *in rem* equivalent to trust is sought. Since 2007,[26] "fiducie" is the most adapted mechanism. Like trust, "fiducie" implies a transfer of ownership from a "fiduciant", akin to the settlor, to a "fiduciaire", akin to the trustee. Indeed, the "fiduciaire" administers the goods in favour of a beneficiary and has fiduciary duties during the exercise of its mission. The prospective recognition of a foreign right *in rem* or security interest would therefore depend on its similarities to an existing national right *in rem* of the new *situs*. The second step is known as the naturalization of the right *in rem*: the right holder has to fulfil the requirements of the State of the new location regarding the equivalent local right. For instance, trust beneficiaries have to respect the requirements of Arts. 2018 *et seq.* of the French Civil Code, applicable to the validity and perfection of "fiducie". This way, creditors' interests are not systematically threatened by the moving of the goods, and third parties' interests are not prejudiced because they are aware of the conditions and the effects of the local right *in rem*.

Such a proposal improves the current situation but remains unsatisfactory.[27] Although domestic laws continuously develop the area of secured transactions, finding equivalents between rights *in rem* coming from different States is not always easy. Consequently, the risk of assimilating rights that are different, and of ignoring their specificity, may indeed arise. Moreover, a better recognition of rights *in rem* through the search for equivalents leads to a partial alignment between parties and third parties' interests. The original creditor or right holder does not necessarily know the property is moved, nor where, and experiences some difficulties obeying the rules of the State of the new location of the good. More fundamentally, his expectations of the regime of the right will often be violated. Indeed, the regime of the local equivalent right is applied, with new elements that the right holder was not able to anticipate when he concluded the contract, although these elements might have been of such importance that he would have preferred not to have concluded the contract. Local third parties' expectations about the constitution of the right *in rem* are not followed either.

The poor recognition of consensual rights *in rem* thus comes from the application of the *lex situs* to movable property. By contrast, the application of the choice-of-law rule in contracts to consensual rights *in rem* leads to a reunification of rights *in personam* and rights *in rem* coming from the same contractual source, and eliminates the complications associated with the moving of the goods.[28] The

[26] Law No. 2007-211 of February 19, 2007.

[27] See also I. JUVET, *Des sûretés mobilières conventionnelles en droit international privé*, Berne 1990, p. 68-69.

[28] A large part of the doctrine acknowledges the need for the application of the *lex contractus* to consensual movable property; see, for instance, in France, H. GAUDEMET-TALLON, note under Civ. 1ère, *Diac*, 8.7.69, *JCP éd. G* 1970, II, 16182; G. KHAIRALLAH, *Les sûretés mobilières en droit international privé*, Paris 1984, préf. H. BATTIFOL, spec. No. 205 *et seq*., p. 181 *et seq*.; P. MAYER, Les conflits de lois en matière de réserve de propriété

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lex contractus governs the conditions for the constitution of the rights, as well as their conditions for perfection and their effects. The proposal of re-characterization implies that by filing a financing statement, the rules of perfection have an extraterritorial effect, which is conceivable[29] and does not necessarily make the task more onerous and expensive for third parties than if the information were directly accessible in the place of the location of the goods. The solution leads to a better equilibrium than the application of the *lex situs*, by restoring predictability and security for the lienors or owners.

The re-characterization of consensual rights *in rem* from property to contract would be limited to movable property for two reasons. First, movable property constitutes the main source of conflicts of expectations. Furthermore, the *lex situs*' attractive force is more important for immovable property than movable property. The legitimacy of the *lex situs* in real property comes from social, family and state concerns. By contrast, the medieval maxim "*mobilia sequuntur personae*" for a long time subjected chattels to the law of their owner.

The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition embodies such a proposal of re-characterizing proprietary rights (*in rem*) in contractual questions. Article 6 of the Convention provides that a trust "shall be governed by the law chosen by the settlor." Absent a choice, the law with which the trust is most closely connected governs it. The *situs* of the assets of the trust represents only one criterion among others to determine this law (Article 7), which governs the validity, construction, effects, and administration of the trust (Article 11). According to Article 11, "a trust created in accordance with the law specified by the preceding chapter shall be recognized as a trust." A single law, *a priori* different from the *lex situs*, governs all the elements of the trust. Due to its application, wherever the assets are located, the trust is recognized as it was created, without any transposition or naturalization.[30] Expectations of both beneficiaries and trustee are fulfilled.

The re-characterization of consensual rights *in rem* as effects of the contract, especially for contracts involving rights *in rem* on movables, leads third parties to confront the choice-of-law rule for contracts. The justifications and solutions of this rule should subsequently be redesigned to take into account third parties' interests and expectations.

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après la loi du 12 mai 1980, *JCP éd. G* 1980, I, 3019, and L. D'AVOUT, *Sur les solutions du conflit de lois en droit des biens*, Paris 2006, préf. H. SYNVET; in England, G.C. CHESHIRE, *Private international law*, 7th ed., London 1965; in Germany, U. DROBNIG, in *Festschrift Kegel*, Stuttgart 1987, p. 141 *et seq*.; H. STOLL, Internationales Sachenrecht, in *Staudinger Kommentar zum BGB*, EGBGB-IPR, 13th ed., Berlin 1996, Nos. 130 *et seq*. and Nos. 282 *et seq*.

[29] See, for instance, S. CORNELOUP, *La publicité des situations juridiques*, Paris 2003, préf. P. LAGARDE, spec. No. 267, p. 287.

[30] For the premises of a similar approach in France, see Cass. com., 13.9.11, *Rec. Dalloz* 2011, p. 2518 *et seq*., note L. D'AVOUT/ N. BORGA; *Rev. crit. dr. int. pr.* 2011, p. 870 *et seq*., note J.-P. RÉMERY: the French Cour de cassation recognizes a trust created under the law of New York without transposing it into a French equivalent institution.

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Besides these cases in which the very nature of the contract interests third parties, the environment in which the contract is concluded may also be prone to numerous relationships between parties and third parties.

B. The Environment of the Contract

Contracts are often concluded or executed in an environment that facilitates the chances of interactions between parties and third parties. Transactions often require the conclusion of collateral contracts. The relationships to these contracts can be characterized as contracts or torts (1). The main adoption of a characterization as a tort is neither appropriate nor justified and should be replaced by a characterization as a contract (2).

1. The Choice-of-Law Rules for Relationships between Parties and Third Parties: lex damni *or* lex contractus

Most national laws share the principle of the relative effect of the contract, also called the "privity of contract" in the Common Law systems.[31] The contract produces effects only between the contracting parties and not toward third parties. Third parties cannot be asked to perform a contractual obligation, nor can they invoke the binding force of the contract by asking the debtor to perform his contractual obligation.

Several factors nonetheless weaken the principle of the relative effect of the contract.[32] First, the contract creates a situation that third parties cannot legally ignore. The contract exists as a social fact and is inserted in the general legal order. Third parties shall be held responsible when compromising the performance of the contract by helping the debtor evade his contractual obligations. Second, although third parties cannot ask for the enforcement of the contract, they can invoke the bad performance of the contract when it causes them harm. For instance, a principal might seek to bring an action against a subcontractor for the loss he suffers because of the defective work of the subcontractor. A third-party purchaser might also bring an action against the builder of the property for the loss suffered because of the negligent work of the builder under its building contract with the vendor of the property. Furthermore, complex contractual mechanisms increasingly involve third parties. Groups of contracts often concur to achieve a global operation. When the collateral contracts are not concluded between the same parties, as in surety or agency, relationships are created between the parties to the different contracts. Finally, several legislations acknowledge mechanisms that

[31] The principle does not, however, rely on the same premises everywhere: in the continental systems, the principle of the relative effect of the contract is a consequence of freedom of contract, whereas in the Common Law systems, privity of contract is based on the doctrine of consideration.

[32] The weakening of the relative effect of the contract explains why the European texts do not expressly provide for it. The Principles of European Contract Law address the principle only through its exception of stipulation in favour of a third party; see Art. 6:110.

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extend the binding force of the contract toward third parties. Contracts may stipulate performance for the benefit of a third party: the third party, to whom immediate parties intended a benefit to be received, is allowed direct enforcement.[33] Thanks to direct actions, a third party can also ask for payment or performance of the contract to the promisor.

These relationships between parties and third parties lead to conflicts of expectations and interests. How should these be characterized? Should they be characterized as torts because they do not involve two immediate parties? Should they be characterized as contracts? If they are characterized as contracts, to which *lex contractus* are they subject when collateral contracts are concluded? Are the collateral contracts governed by the same law?

No real ambiguity exists regarding the characterization of the relationship between the third-party beneficiary and the promisor in case of stipulations in favour of a third party. The third party's right against the promisor is an effect of the contract between the promisee and the promisor and therefore subject to the law of the contract. On the contrary, direct actions or actions through which the third party suffers a loss due to the breach or the poor execution of the contract are generally characterized as torts. For instance, French case law subjects the action for damages of the third party against the debtor to the choice-of-law rule concerning torts. In the *Pays Fourvel* case, after the decease of some travellers during a trip to Cambodia, their next-of-kin filed a claim for damages against the travel agency that organized the trip. The French Supreme Court stated that the relationship between the travel agency, party to the contract, and the relatives, third parties to the contract, should be characterized as a tort.[34] In the *Bureau Veritas* case, goods were lost during the wreck of the ship in which they were transported. The insurer of the consignee of the goods filed a claim against the classification society, which concluded a contract with the ship owner and issued the seaworthiness certificates.[35] The Supreme Court stated again that the relationship between the classification society, party to the contract, and the insurer, third party to the contract, was a tort question. The Court applied the law of the tort that corresponded to the law of the place where the breach of contract occurred, that is, the law of the head office of the classification society.

The characterization of direct actions as torts is common to most European countries.[36] This consensus led the European Court of Justice to adopt an identical

[33] See, for instance, Art. 1121 of the French Civil Code, Art. 1411 of the Italian Civil Code, § 328 of the German BGB or the English Contracts (Rights of third parties) Act of 1999. See also Art. 6:110 of the Principles of European Contract Law.

[34] Cass. civ. 1ère, 28.10.03, *Rev. crit. dr. int. pr.* 2004, p. 83 *et seq*., note D. BUREAU; *Clunet* 2004, p. 499 *et seq*., note G. LÉGIER; *Recueil Dalloz*, p. 23 *et seq*., note Ph. DELEBECQUE.

[35] Cass. civ. 1ère, 27.3.07, *Rev. crit. dr. int. pr.* 2007, p. 405 *et seq*., note D. BUREAU; *Clunet* 2007, p. 949 *et seq*., note G. LÉGIER.

[36] See, for instance, in Italy, Cass. Civ., sez. II, 28.7.86, n. 4833, *Azienda agricola Vallunga c. Sugherificio SVAS*, *Dir. e Giur. Agr.* 1987, p. 221-223, nota R. TRIOLA: "il fabbricante venditore di una cosa è responsabile non solo ex empto verso il compratore per i vizi in essa riscontrati, ma altresì, a titolo di illecito, del danno sofferto da terzi in dipendenza di tali vizi, che rendono la cosa pericolosa." The possibility of the competing

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solution regarding jurisdiction of courts. In the *Jacob Handte* case,[37] a purchaser instituted proceedings against the manufacturer of a product. The question asked of the Court was the following: "does Article 5(1) of the Convention, which provides for special jurisdiction in matters relating to a contract, apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose?" The European Court of Justice answered that the "matters relating to a contract" in Article 5 § 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters are not to be understood as covering a situation in which there is no obligation freely assumed by one party toward another. The absence of a direct contractual relationship between the sub-buyer and the manufacturer is incompatible with the application of Article 5 § 1. In *La Réunion Européenne* case,[38] the European Court expressly characterized a direct action as a matter relating to tort, delict or quasi-delict falling within the meaning of Article 5 § 3 of the Convention. Both of these cases limit the application of Article 5 § 1 to the relations between immediate parties and withdraw from its scope the litigation commenced by a third party.

In the field of choice-of-law rules, Article 18 of the Rome II Regulation of 11 July 2007 on the law applicable to non-contractual obligations provides that "the person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides." This alternative choice-of-law rule favours the third-party victim who can bring a direct action against the tortfeasor's insurer if the law applicable to the tort or the law applicable to the insurance contract permits such an action. Article 18 deals only with the question of whether the victim can directly claim compensation from the insurer. The scope of the insurer's obligation is exclusively subject to the law of the insurance contract. The European Court of Justice was recently[39] asked whether "this article is to be interpreted to the effect that a person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation which forms the basis of the claim for damages, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract" (point 37). The Court answered that "the law applicable to the insurance contract concerned cannot be a bar to a direct action

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contractual and extra-contractual liability means a single behaviour can lead to contractual rights but also to absolute rights. Comp. for English Law, H.G. BEALE (ed.), *Chitty on Contracts*, Vol. 1, London 2015, Nos. 18-023-18-042, p. 1412-1433: except for some special hypotheses, a claimant cannot rely on the breach of a contract to which he was not a party as giving him a cause of action in tort merely because, as a result of the breach, he has suffered economic loss, that is, a loss not taking the form of either personal injury or physical damage to his property.

[37] ECJ, 17.6.92, C-26/91, *Société Jacob Handte*, *ECR* [1992] I-03967.

[38] ECJ, 27.10.98, C-51/97, *La Réunion européenne*, *ECR* [1998] I-06511. See also ECJ, 17.9.02, C-334/00, *Tacconi*, *ECR* [2002] I-07357.

[39] ECJ, 9.9.15, C-240/14, *Prüller-Frey*.

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being brought – should that be possible – on the basis of the law applicable to the non-contractual obligation" (point 44).

2. The Issues Raised by the Relationships between Parties and Third Parties

The tort characterization of direct actions or actions through which a third party files a claim against the parties to the contract mainly derives from the substantive rules favouring the claimant. In France, for instance, case law rules that "a third party to a contract may invoke, on the basis of delictual liability, a contractual failure to the extent that this failure has caused him harm."[40] The third party does not have to establish an independent delictual fault separate from the contract, because the bad execution of the contract automatically constitutes a delictual default if the third party invokes it. The delictual ground prevents the party defendant from raising defences from the contract, such as limitation or exoneration liability clauses. The third party benefits from a very favourable situation because he can rely on the contract without being subject to its limitations.

Other arguments have been put forward to justify the characterization of such actions as torts. In the *Jacob Handte* and *Réunion Européenne* rulings, the European Court of Justice explains the determination of the *locus damni* better serves the objective of certainty than the application of Article 5 § 1 of Brussels I Regulation.[41] Indeed, the "place of performance of the obligation" of Article 5 § 1 has always been uneasy to identify.[42] The Commission's explanatory memorandum for the Rome II Regulation[43] also justifies the alternative rule of Article 18 by the fact that it is not unreasonably burdensome for the insurer.

Nevertheless, these assertions are debatable. First, the determination of the *lex loci* can be more difficult than the *lex contractus*. Second, the use of substantive rules as a ground for choice-of-law rules reveals confusion between "conflict justice" and "substantial justice," according to Kegel's terminology.[44] The

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[40] Cass. ass. plén., 6.10.06, *Recueil Dalloz* 2006, p. 2825 *et seq*., note G. VINEY; *JCP éd. G* 2006, II, 10181, note M. BILLIAU; *Revue des contrats* 2007, p. 269 *et seq*., note D. MAZEAUD. See also G. WICKER, La sanction délictuelle du manquement contractuel ou l'intégration de l'ordre contractuel à l'ordre juridique général, *Revue des contrats* 2007/2, p. 593.

[41] See Points 18 and 19 of the *Jacob Handte* case: the rules of the Convention "should be interpreted in such a way to enable a normally well-informed defendant reasonably to predict before which courts […] he may be sued […] In a situation such as that with which the main proceedings are concerned, the application of the special jurisdictional rule laid down by Art. 5(1) of the Convention to an action brought by a sub-buyer of goods against the manufacturer is not foreseeable by the latter and is therefore incompatible with the principle of legal certainty."

[42] For a critique of Art. 5 § 1, see V. HEUZÉ, De quelques infirmités congénitales du droit uniforme: l'exemple de l'Article 5.1 de la Convention de Bruxelles du 27 Septembre 1968, *Rev. crit. dr. int. pr*. 2000, p. 596 *et seq*.

[43] COM(2003) 427 final, p. 25 *et seq*.

[44] G. KEGEL, Begriffs- und Interessenjurisprudenz im internationalen Privatecht, in *Festschrift Hans Lewald*, Basel 1953, p. 259 *et seq*.

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application of the choice-of-law rule in torts is a consequence of the *forum*'s substantive approach, which is favourable to third parties. However, the *lex damni* might stick to the principle of the relative effect or the privity of contract and ignore direct action or impose drastic conditions for its filing. We find no reason to believe *a priori* that the *lex damni* will be more favourable to the third party than the *lex contractus*. The solution is perhaps convenient in substantive law but completely misses its goal in international law. Finally, the current choice-of-law solution creates the same discrepancy between parties and third parties as in substantive law: third parties use breach of contract as grounds for claims without being subject to the *lex contractus*. The debtor becomes the defendant in an action filed by a third party under a law whose application he cannot legitimately anticipate. Its expectations are entirely disregarded. To that matter, the UK Government and the House of Lords' European Union Committee vigorously criticized Article 18 of the Rome II Regulation. It was argued that the rule caused considerable uncertainty and unduly favoured one party to the litigation over the other.[45]

These observations suggest the applicable law should exclusively be determined according to the principles of predictability and certainty at stake in the conflict of laws. Direct actions and actions for damages due for breach of contract extend to a third-party claimant an obligation contracted by the debtor defendant toward its co-contractor. Only the law applicable to the contract concluded by the defendant determines the situations in which the binding effect of the contract shall be extended to third parties able to directly sue him.[46] The re-characterization of these actions as contract questions and the application of the choice-of-law rule in contracts constitute solid grounds for the actions of third parties and reintroduce a balance between the various expectations.

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[45] House of Lords' European Committee, the Rome II Regulation, 8th Report of Session 2003-2004 (HL Paper 66), paras. 149-150. The English case law is in favour of the contractual characterization of the direct action of the victim to the tortfeasor's insurer and to its submission to the law of the insurance contract; see, for instance, *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Insurance Co. Ltd (The Hari Bhum)*, 2005, 1, Lloyd's Rep. 67: the insurance contract contained a so-called "pay to be paid" clause that required the insured to first discharge the liability toward the person having suffered damages, before claiming reimbursement from the insurer. Finnish law was applicable to the tort and allowed direct actions of the victim toward the insurer and contained an anti-avoidance provision that rendered void all terms and conditions that restricted this right. The Court held that Finnish law was of no relevance: the direct action is a claim arising out of a contract concluded between the insurer and the insured. The insurance contract was subject to English Law and the anti-avoidance provision of the Finnish law could be ignored. Under the Rome II Regulation, does the "pay to be paid" clause constitute a defence that concerns the existence of the direct claim or its scope? Is the question of whether an insurer may raise against the victim a defence that he is released from his obligation to pay compensation on behalf of the tortfeasor within the scope of Art. 18? Here again the boundaries are blurred between existence and exercise or scope.

[46] See, for instance, V. HEUZÉ, La loi applicable aux actions directes dans les groupes de contrats, *Rev. crit. dr. int. pr.* 1996, p. 243 *et seq*.; D. SINDRES, La violation du contrat au préjudice des tiers en droit international privé, *Clunet* 2010, p. 411 *et seq*.

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Yet, the characterization of multipartite relationships as contracts is not a cure-all. The diversity of laws applicable to collateral contracts often leads to contradictions and conflicts of expectations between the parties, especially regarding the mutual validity or nullity of the contracts. For instance, the law applicable to suretyship or guaranty and the law applicable to the principal contract may be different. The law applicable to the guaranty may state that the annulment of the guaranty is not a consequence of the annulment of the main contract, whereas the law applicable to the main contract provides the opposite solution. In case of annulment of the main contract, which law should prevail? Article 12, paragraph e, of the Rome I Regulation provides that the law applicable to contract governs the consequences of its nullity. According to this provision, the application of the law of the main contract leads to the annulment of the guaranty, which is likely to run counter to the expectations of the guarantor regarding its own contract.

The first part of this paper has been devoted to explaining that the questions involving third parties, such as consensual rights *in rem* or direct actions, should be re-characterized as contracts in order to protect the parties' expectations. Interested by the contract, the third party becomes interested by the choice-of-law rule regarding contracts. As a consequence, this choice-of-law rule can no longer provide for solutions fitting only the expectations of the parties. As such, the reign of party autonomy, hardly compatible with respect for third party interests and expectations, is one reason for which questions involving third parties are characterized as torts or relating to property. The second part of this paper will investigate how the choice-of-law rule for contracts should take into account third parties.

II. The Way to Consider Third Parties when Determining the Law Applicable to Contracts

The situations in which third parties clash with the *lex contractus* have been identified. Now comes the search for remedies. The distinction between general and specific choice-of-law rules regarding contracts shall be used as a starting point.[47] The international or regional instruments or conventions provide two types of choice-of-law rules. Some contracts, such as employment or consumer contracts, are subject to specific choice-of-law rules. These rules take into account the specificity of the contracts when determining the applicable law. When not subject to a specific choice-of-law rule, contracts are subject to a general choice-of-law rule. Sometimes, general and specific choice-of-law rules coexist in the same instrument. For instance, the Rome I Regulation consists of general and specific provisions applicable to identified contracts.[48] Other international treaties, such as the

[47] On this distinction, see J.D. GONZÁLEZ CAMPOS, Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé, *Recueil des Cours* 2000, Vol. 287, p. 9 *et seq*.

[48] Rome I Regulation, Art. 5 for contracts of carriage, Art. 6 for consumer contracts, Art. 7 for insurance contracts, and Art. 8 for individual employment contracts.

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Hague Convention of 14 March 1978 on the Law Applicable to Agency, are fully and exclusively dedicated to a specific contract. This distinction between general and specific choice-of-law rules shall be used to take into account third parties when determining the law applicable to contracts. Some specific choice-of-law rules concerning contracts might first be developed to better integrate third parties' expectations (A). When specific choice-of-law rules cannot be established, the adaptation or the adjustment of the general choice-of-law rule regarding contracts should protect third parties (B).

A. The Development of Specific Choice-of-Law Rules for Contracts

To some extent, the conflict of laws already takes into account third parties' expectations. Several contracts that create a tripartite situation are subject to specific choice-of-law rules, which withdraw the questions involving the relationship between parties and third parties from the scope of the *lex contractus* (1). A specific choice-of-law rule should also be established for contracts involving rights *in rem*, whose specificity would lie in the definition of its connecting factor (2).

1. The Existing Specific Choice-of-Law Rules

Two kinds of contracts create a tripartite situation. An agency agreement creates an internal relationship between the principal and the agent and an external relationship between the principal and a third party that deals with the agent. A voluntary assignment of claim creates a relationship between the assignor and the assignee and a relationship between the assignee and the assigned debtor. Specific choice-of-law rules have been established to take into account the expectations of the three persons involved in agency (a) and voluntary assignment of a claim (b).

a) Agency

An old example taken from German law illustrates the issues raised by agency at a multistate level.[49] The author Solzhenitsyn authorized a Zurich attorney to conclude a publishing contract. The attorney concluded the contract in Germany with a German publishing house. The problem was fairly simple: did the attorney's authority still exist at the time the contract was formed, as it would have under German law? In other words, which law would determine whether the author was bound to the publisher? Two laws were possible candidates: the law of the agency relationship between Solzhenitsyn and his lawyer, and the law of the contract between the lawyer and the German publisher. The application of the latter favoured the expectations of the German publisher, third party to the agency relationship, whereas the application of the former favoured the predictions of Solzhenitsyn, the principal. The BGH applied German law, emphasizing the importance of protecting third parties so that they could be "able to determine,

[49] BGH *RIW/AWD* 1975, 425 = *DB* 1975, 1164.

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easily, and accurately, the extent of the authority, which will be the case if the law of the authority's effectiveness governs."

A comparative study testifies of the different approaches to agency. In substantive law, some countries, such as France, do not separate the internal relationship between the principal and the agent and the external relationship between the principal and the third party. By contrast, some countries, such as Germany, distinguish between the "abstract" authority or power of the agent, the "Vollmacht," which concerns third parties, and the "internal" arrangement between the agent and the principal, the "Auftrag". The distinction finds an echo in the conflict of laws: is the external authority of the agent toward third parties governed by the law of the internal contract concluded between the agent and the principal or is it governed by another law? According to the general choice-of-law rule for contracts, the law applicable to the contract between the agent and the principal governs equally the internal and external relationships. Besides the terms of the agent's appointment, his ability to be removed from that appointment, and his remuneration, it also determines the extent to which the agent is able to bind the principal to third parties. According to party autonomy, the law chosen by the agent and the principal, unpredictable and uncertain for third parties, would govern the external relationship.

These observations led to the withdrawal of the power of the agent from the scope of the *lex contractus*. Article 1 § 2 (g) of the Rome I Regulation excludes from its scope the question of whether an agent is able to bind a principal.[50] Moreover, the Hague Convention of 14 March 1978 on the Law Applicable to Agency[51] provides a specific choice-of-law rule that dissociates the law applicable to the contract of agency and the law applicable to the power of the agent. Article 11 of the Hague Convention provides that "the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the State in which the agent had his business establishment at the time of his relevant acts." The rule includes exceptions in favour of the place of acting of the agent.[52] The determination of the law applicable to the external relationship lays the emphasis on the person of the agent,

[50] See, for instance, the Report on the Convention of Rome on the law applicable to contractual obligations by M. GIULIANO/ P. LAGARDE: the exclusion on the authority of the agent from the scope of the *lex contractus* by the Art. 1 § 2(f) of the Rome Convention, identical to Art. 1 § 2(g) of Rome I Regulation, point 7: the exclusion is "justified by the fact that it is difficult to accept the principle of freedom of contract on this point."

[51] For a general presentation, see P. LAGARDE, La Convention de La Haye sur la loi applicable aux contrats d'intermédiaires et à la représentation, *Rev. crit. dr. int. pr.* 1978, p. 31 *et seq.* See also P. HAY/ W. MÜLLER-FREIENFELS, Agency in the Conflict of Laws and the 1978 Hague Convention, 27 *Am. J. Comp. L.* 1 (1979).

[52] The Hague Convention, Art. 11 § 2: the law of the place of acting applies in substitution for the place of the agent's business establishment whenever: (a) the principal has his business establishment or, if he has none, his habitual residence in that State, and the agent has acted in the name of the principal; (b) the third party has his business establishment or, if he has none, his habitual residence in that State; (c) the agent has acted at an exchange or auction; (d) the agent has no business establishment.

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who is the central actor contracting with both the principal and third party.[53] The expectations of the principal, of the agent, and of the third party tend to be satisfied. The specificity of the choice-of-law rule lies in the distinction between two kinds of relationships. The *lex contractus* governs the relationship between the principal and the agent, whereas the power of the agent toward third parties is subject to another law, predictable for the principal and for third parties.

b) Voluntary Assignment of Claims and Contractual Subrogation

Voluntary assignment of claims and contractual subrogation also create tripartite situations. A first relationship, contractual or extra-contractual, is created between a creditor and a debtor. The creditor then assigns its claim against the assigned debtor to the assignee that becomes the new creditor. A third relationship arises between the assignee and the assigned debtor.

The reasoning is similar to the ideas developed for agency. The application of the general choice-of-law rule to voluntary assignment and contractual subrogation leads the *lex contractus* to govern all the effects of the contract, between the parties as well as toward third parties. More specifically, the rights of the assignor toward the debtor are subject to this law, which the assignor and the assignee can choose. As a consequence, the claim toward the debtor may be assigned under circumstances the debtor cannot reasonably predict. Furthermore, the debtor cannot invoke the defences provided by the law applicable to its original contract with the assignor. The conditions of the discharge of the debtor are completely modified without its consent.

A possible solution lies in the setting of uniform substantive rules. The United Nations Convention on the Assignment of Receivables in International Trade, concluded in New York on 12 December 2001, applies to international assignments of receivables and sets rules for the effectiveness of the assignment, the rights and obligations of the assignor, assignee and the defences of the debtor. However, the insufficient number of ratifications stopped the Convention from entering into force.[54]

The Rome I Regulation sets a uniform and specific choice-of-law rule applicable to voluntary assignment and subrogation. Article 14 establishes a distinction between the scope of the law governing the relationship between the assignor and the assignee and the scope of the application of the law governing the assigned claim. According to Article 14 § 1, the validity and the effects of the assignment between the assignor and the assignee are governed by the law applicable to the assignment. According to Article 14 § 2, the law governing the assigned or subrogated claim determines its assignability, the relationship between the assignee and the debtor and the conditions under which the assignment or subrogation can be

[53] Some scholars had already pleaded for the application of the law of the agent's place of business and sometimes for the law of the place of acting; see for Swiss Law, F. VISCHER, Grundlagen des schweizerischen internationalen Privatrechts, in M. GUTZWILLER (ed.), *Schweizerisches Privatrecht*, Vol. 1, 1969, p. 685 *et seq*.

[54] Only Liberia ratified the Convention on the 16 September 2005.

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invoked against the debtor, and whether the debtor's obligations have been discharged.[55] The conditions of the notification to be effective against the debtor and the defences of the debtor, for instance, the circumstances under which the debtor can set off toward the assignee, are subject to the law of the assigned claim. The change in the position of the creditor does not prejudice the assigned debtor, whose rights and duties continue to be governed by the law of the assigned claim.

Agency and contractual assignment of claim are subject to specific choice-of-law rules that exclude the questions interesting third parties from the scope of the *lex contractus*. Contracts involving rights *in rem* should also be subject to a special choice-of-law rule concerning contracts. The specificity of this choice-of-law rule lies in the definition of the *lex contractus* more than in the definition of its scope.

2. A Proposal for Additional Specific Choice-of-Law Rules

Making the distinction between relationships among parties and relationships between parties and third parties is difficult for contracts involving rights *in rem*. These contracts affect the rights of third parties by definition. Furthermore, the application of the *lex situs* hinders the recognition of rights *in rem* across borders. These observations led to the re-characterization of consensual rights *in rem* as contractual questions, at least for rights *in rem* on movables. Nevertheless, party autonomy does not easily fit the effectiveness of rights *in rem*: how to reconcile the objective character of a right *in rem* with the choice of the law applicable to the contract, subjective, unpredictable, and uncertain for third parties? The drawbacks of the general choice-of-law rule for contracts (1) require a proposal for a specific choice-of-law rule (2).

a) The Application of the General Choice-of-Law Rule to Contracts Involving Rights in rem

The existence of party autonomy as a general principle in the determination of the law applicable to the contract is the reason consensual rights *in rem* are withdrawn from the scope of the choice-of-law rule in contracts. This rule is clearly inappropriate for the effectiveness of consensual rights *in rem* toward third parties. Indeed, how could a third party search for the place of record of previous liens or transfers of ownership if this place depends on an agreement to which he is a complete stranger? The connecting factor of the choice-of-law rule for perfection and priority, which directly affect the rights of third parties, must be immutable and objective. It cannot be subject to contractual variation by the debtor and the secured party. These observations call for a way to protect third parties without returning to the application of the choice-of-law rule in property, which is often inappropriate for movable property.

[55] See also Arts. 28 and 29 of the CNUDCI Convention.

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To protect the third party from the application of the general choice-of-law rule concerning contracts, several scholars have contemplated the possibility of reintroducing the *lex situs* as an exception to the application of the choice-of-law rule for contracts. Indeed, whenever the provisions of the *lex contractus* regarding the constitution or perfection of the rights *in rem* differ from the provisions of the *lex situs* (new *lex situs* in case of mobility conflict), the application of the *lex contractus* hinders the local third parties' expectations. In this situation, the *lex situs* could be a limit to the right *in rem*'s effectiveness toward local third parties.

More precisely, third parties might be protected by an intervention of the public policy of the State of location of the asset. For instance, the *Bundesgerichtshof* stated that, although a change of location implies a change of statute, the statute of the new location recognizes, as a principle, the rights completed upon the statute of the former location, unless these rights violate a fundamental policy of German law. Therefore, rights *in rem* unknown to German law are nonetheless recognized if a right *in rem* exists in German law that looks like these foreign rights.[56] The attitude of German law is welcoming for foreign rights *in rem*. As opposed to French case law, according to which the foreign right is transformed into an equivalent local right if such a right exists, the existence of equivalent German rights only helps to determine the content of fundamental policies, but the foreign right is not transformed.

The application of the *lex situs* as an overriding mandatory rule of the State of the new location of the asset has also been considered.[57] The protection of local third parties would be so important that it would lead to setting aside the normally applicable law, which is the *lex contractus*. The derogatory application of the *lex situs* would serve the objectives of security of transactions and protection of the local commerce.

These proposals are attractive but do not fundamentally improve the problem of multistate competing rights. From a theoretical point-of-view, justifying the use of the public policy exception or the characterization of the *lex situs* as an overriding mandatory rule is difficult. Article 9 § 1 of the Rome I Regulation defines overriding mandatory rules as "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."[58] Generally, overriding mandatory rules apply to ensure

[56] BGH, 20.3.63, BGHZ 39, p. 173.

[57] In France, see P. MAYER, Les conflits de lois en matière de clause de réserve de propriété après la loi du 12 mai 1980, *JCP éd. G* 1980, I, 3019, No. 14; P. MAYER/ V. HEUZÉ, *Droit international privé*, 10th ed., Paris 2010, No. 644 *et seq*., p. 490 *et seq*.; L. D'AVOUT, *Sur les solutions du conflit de lois en droit des biens*, Paris 2006, préf. H. SYNVET. In Germany, H. STOLL proposed a "veto" of the State where the asset is situated: the rights *in rem* subjected to the *lex contractus* cannot be invoked in the State of the location of the asset if they are incompatible with its provisions; see *Internationales Sachenrecht,* in *Staudinger Kommentar zum BGB*, *EGBGB-IPR*, 13th ed., Berlin 1996, Nos. 282 *et seq*.

[58] See also ECJ, 23.11.99, C-6369/96, *Arblade*, *ECR* [1999] I-08453.

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the respect of a given legislative policy of a State.[59] Here, by contrast, the derogatory method is used to protect the expectations of the third parties of the State of the location of the goods, otherwise surprised by the application of the *lex contractus*. The protection of the individual expectations of third parties about the applicable law, rather than the protection of the interests of the State of the location of the asset, is what matters. The protection of transactions and local credit casts too wide a net to justify the method of public policy or overriding mandatory rules.[60] They do not embody a policy that is specific enough. From a practical point-of-view, the characterization of the *lex situs* as an overriding mandatory rule to protect third parties might lead to its systematic application whenever third parties' interests are at stake. Indeed, invoking the protection of local third parties as grounds for applying the law of the *situs*, instead of identifying a given policy, is tantamount to adopting a functional approach of mandatory rules or public policy. The law of the *situs* will probably be applied as soon as a conflict of expectations regarding the applicable law arises between the right holder and the local third party. In fact, the application of the law of the *situs* as an overriding mandatory rule will probably lead to the same solution as the application of the choice-of-law rule in property.[61]

If the protection of third parties' expectations is a purpose unfit for the derogatory method of mandatory rules or public policy, it might be reached through the conflict method and more precisely through the determination of the law applicable to the contract.

b) The Need for a Specific Choice-of-Law Rule

Party autonomy is roughly compatible with third parties' expectations regarding the nature of rights *in rem*. Contracts involving rights *in rem* need a specific choice-of-law rule that sets a non-waivable or mandatory objective connecting factor. In accordance with the national and international choice-of-law rules, for movable property, this connecting factor is the habitual residence of the party that is to effect the characteristic performance. Parties should not be able to depart from this connecting factor by choosing the applicable law. The expectations of the rights holders and the third parties shall thus be reconciled: the application of the choice-of-law rule in contracts fulfils the expectations of the rights holders, and the identity of the connecting factor set by this choice-of-law rule fulfils the expectations of the third parties.

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[59] See, for instance, P. DE VAREILLES-SOMMIÈRES, Lois de police et politiques législatives, *Rev. crit. dr. int. pr.* 2011, p. 207.

[60] G. KHAIRALLAH, *Les sûretés mobilières en droit international privé,* Paris 1984, préf. H. BATIFFOL, No. 171, p. 138, according to which the protection of private interest differs from the protection of public policies in which a State has a real interest. The State of the location of the asset does not have a vital interest in the application of the statutes determining the rules of effectiveness of rights *in rem*.

[61] Comp. A. HEINI, Von der neuen Idee bleibt nur der karge Knochen, *Rev. dr. suisse* 99 (1980) I 88, according to which the "veto" contemplated by H. STOLL practically annihilated the benefits of the application of the *lex contractus*.

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In the previously described *Diac* case, the application of the choice-of-law rule in property leads to the application of French law of the new *situs* of the asset after the debtor has moved it. The application of French law jeopardizes the expectations of the right holder, the German seller. By contrast, the application of the general choice-of-law rule regarding contracts would lead to the application of a law chosen by the seller and the buyer to the conditions of existence and perfection of the right *in rem*. This law may be completely disconnected from the place of location of the moving asset and unpredictable for the third parties of the State of the location of the goods.

The application of a specific choice-of-law rule in contracts that would prevent the parties from choosing the law is more satisfactory for consensual rights on movable goods. Thanks to the re-characterization, the right *in rem* is subject to the law of its contractual source. Thanks to the application of a non-waivable connecting factor, this law is the law of the habitual residence of the person who is to perform the characteristic performance of the contract. This person is the debtor for non-possessory security interest and the seller for sales of goods, which appear to effect the characteristic performance in the majority of the contracts involving rights on the asset. Indeed, this person is the debtor for the different security interests that might successively be concluded; he is the debtor of the different creditors who want to repossess or acquire the goods, and the seller of the different contracts of sales. In other words, this debtor or seller is the co-contractor of the majority of the third parties whose rights compete. Thus, wherever the property is located, third parties, who desire to ascertain if other persons already hold prior charges or interests over the asset, simply need to verify the system of publicity and public records of the State of the habitual residence of their co-contractor. This system gives them notice of whether the property is subject to any lien.

A special choice-of-law rule for consensual rights *in rem* already exists in some countries. For instance, the 2001 version of the Uniform Commercial Code (UCC) takes into account the effectiveness of the security interest against third parties when determining the applicable law. The UCC's drafters acknowledged the debtor and the secured party should not be able to choose the applicable law so as to affect the rights of third parties. They created a special choice-of-law rule that determines the law applicable to perfection and the effects of perfection or non-perfection of the non-possessory secured interest.[62] According to Paragraph 9-301(1) of the UCC, "[e]xcept as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effects of perfection or non-perfection and the priority of a second interest in the collateral."[63] The location of the debtor is defined by paragraph 9-307 as his

[62] For possessory security interests, which are perfected by the creditor's possession, the law of the State in which the collateral is located governs perfection and priority.

[63] Comp. the 1972 version, in which Section 9-301 provided that issues relating to the perfection of a security interest in collateral "are governed by the law of the jurisdiction where the collateral is when the last event occurs." For the debates and discussions, see, for instance, P.F. COOGAN, The new UCC Art. 9, 86 *Harv. L. Rev*. 477, 537 (1973); F.K. JUENGER, Non-possessory Security Interests in American Conflicts Law, 26 *Am. J. Comp. L.* 145, 166 (1978 Supp.); P.L. MURRAY, Choice of Law and Art. 9, Situs or Sense?, 9 *Hofstra L. Rev*. 72 (1980), according to which commercial transactions involving the competing

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place of business if it is an organization, or his principal residence if it is an individual. Logically, this rule applies only to non-possessory security interest. Possessory security interests create neither the same discrepancy between appearance and reality nor the same risks of confrontations between predictions. They remain governed by the State of location of the collateral. Comment 4 clarifies the reasons for the rule: "[i]t is likely to reduce the frequency of cases in which the governing law changes after a financing statement is properly filed […]. It also eliminates some difficult priority issues and the need to distinguish between mobile and ordinary goods, and it reduces the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions."

Similarly, a new specific choice-of-law rule might be introduced in the Rome I Regulation. As opposed to the conventions relating to international sales of goods, the Rome I Regulation does not expressly exclude the rights *in rem* from its scope. Nonetheless, this silence has been interpreted as an exclusion of proprietary rights.[64] This implicit rule should be changed and rights *in rem* included in the scope of the choice-of-law rule for contracts when they have a contractual origin. A specific choice-of-law rule might be introduced for contracts involving rights *in rem*, which mainly refer to consensual security interest and transfers of ownership, in order to take into account third parties. A new article, entitled "*Consensual security interests*", could be inserted between Articles 4 and 5, which corresponds to the beginning of specific choice-of-law rules. The first section of this article might be drafted as follows: *"§ 1. For non-possessory consensual security interests on movable property, parties cannot depart from the connecting factor as defined in Article 4 § 2*." The second section should provide that "*for possessory consensual security interests on movable property and for consensual security interests on immovable property, the property rights are subject to the law of the location of the asset. The contractual obligations are subject to the law defined in Articles 3 and 4 of the present Regulation*." Indeed, possessory security interests and security interests on immovable property do not raise the same conflicts of expectations between parties and third parties. Nonetheless, if the difficulty in distinguishing between the contractual obligations and the property rights is considered paramount, the second section could instead provide that "*apart from the application of the overriding mandatory rules of the State of location of the asset, as defined at Article 9 § 1, possessory consensual security interests on chattels and*

claims of multiple creditors, secured parties and purchasers, appeal for one single law to govern the rights of all parties has obvious appeal: "Third parties legally affected by a secured transaction usually derive their relationship with the transaction through the debtor, rather than through the secured party. This suggests the location of the debtor as the jurisdiction to regulate the transaction."

[64] See the Report on the Convention of Rome on the law applicable to contractual obligations by M. GIULIANO/ P. LAGARDE, point 2: "since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community."

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security interests on immovable property are subject to the law defined at Article 4."

Another article, entitled "*Transfer of ownership*", might then specify that *"§ 1. The transfer of movable property is subject to the law of habitual residence of the seller, whereas the sale agreement is subject to the law defined by Article 4 § 1-a*" and that *"§ 2. The transfer of immovable property is subject to the law of the location of the immovable property*." The transfer of ownership is distinguished from the agreement about contractual obligations, such as the obligation to deliver the property or the payment of the price, subject to Article 4 § 1, a. Both questions are now contract questions and both are subject to a special choice-of-law rule for contracts. Yet, these specific choice-of-law rules are different, with one allowing parties to choose their law for governing their mutual rights and obligations, and the other preventing any choice of law for the proprietary questions of interest to third parties.

The reasoning also applies to the contractual assignment of claim. As explained above, the contractual assignment of claim is subject to a special choice-of-law rule in the field of contracts, which takes into account the tripartite dimension of the contract. However, besides the relationships between the assignee, the assignor, and the assigned debtor, the proprietary aspects of the assignment relate to the effectiveness of the assignment toward third parties. According to the new specific choice of law for transfer of ownership, the law of the seller, which means the law of the assignor, governs these proprietary aspects. Although the Rome I Regulation remains silent, the application of the law of the assignor is in line with the proposal of the Rome I Regulation, according to which the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time governs the question of whether the assignment or subrogation may be relied on against third parties. Article 22 of the 2001 UNCITRAL Convention on the assignment of receivables in international trade also provides that the law applicable to competing rights is the law of the State in which the assignor is located; this law governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant. Again, the assignor is the central party. The law of his habitual residence determines the requirements that must be satisfied to transfer the claim from the assignor to the assignee with effects against third parties, such as the assignees of the same claim or the creditors of the assignor.[65]

The third party is the source of specific choice-of-law rules for contracts. For agency and voluntary assignment of claim or contractual subrogation, the specificity of the already existing choice-of-law rules lies in the restricted scope of the *lex contractus*. Only the internal relationship between the agent and the principal is subject to the *lex contractus*, whereas the external relationship between the principal and the third party with whom the agent deals is subject to another law, more predictable to the third party. Similarly, only the relationship between the assignor

[65] For a detailed analysis, see F.J. GARCIMARTÍN ALFÉREZ, Assignment of claims in the Rome I Regulation: Article 14, in F. FERRARI/ S. LEIBLE (eds.), *The Rome I Regulation: the law applicable to contractual obligations in Europe*, Munich 2009, p. 217 *et seq.*, spec. p. 239.

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and the assignee is subject to the *lex contractus*, whereas the relationship between the assignee and the assigned debtor is subject to another law, more predictable to the assigned debtor. By contrast, all third parties are, by nature, interested in contracts involving rights *in rem*, and distinguishing between the internal and external relationship is harder. For these contracts, the protection of third parties is not achieved through the process of characterization and restriction of the scope of the *lex contractus*' scope, but through the definition of the connecting factor. More precisely, a special choice-of-law rule should be elaborated, whose connecting factor is non-waivable. The objective way to determine the applicable law better fits the *erga omnes* effects of the contract. What about the other contracts? How can third parties be protected from the general choice-of-law rule and from party autonomy whenever their interests are affected?

B. The Adjustment of the General Choice-of-Law Rule for Contracts

Even contracts that do not involve rights *in rem* or create a tripartite situation affect third parties. Contracts that create only mutual rights and duties between parties can extend their effects to third parties, for instance, through direct actions or claims for damages due to the poor execution of the contract. Again, the application of the general choice-of-law rule in contracts and the principle of party autonomy are hardly compatible with respect for third party expectations. The law that the parties choose determines the extent to which a third party may be related to an immediate party and more specifically, may file a direct action or claim for damages, although the third party is a stranger to this choice. By contrast, an objective connecting factor is certain, predictable, and fair. Third parties easily identify the law designated by an objective connecting factor, and their rights do not depend on the choice of the immediate parties.

Yet, the suppression of party autonomy for contracts that create only rights and duties between parties is not a satisfactory solution. It amounts to making the connecting factor of the general choice-of-law rule non-waivable. Party autonomy would be suppressed for all contracts because of potential conflicts of expectations. Indeed, the conflicts of expectations and interest arising from the environment in which the contract is concluded or executed depend on the content of the applicable law and can only be identified *a posteriori*. The objectively determined law is not guaranteed to be more favourable to the third party than the law the parties choose. The creation of an *a priori* specific choice-of-law rule is inefficient and inappropriate. Parties cannot be deprived of choosing their law because this choice might perhaps undermine third party interests. The general suppression of party autonomy would also constitute a tremendous hindrance to international commercial transactions that need flexibility and certainty. For contracts other than those creating a tripartite situation or involving rights *in rem*, amendments to the general choice-of-law rule for contracts could protect third parties. These amendments introduce some flexibility in the application of the general choice-of-law rule for contracts. The adaptation of the choice-of-law rule for contracts (1) and the application of overriding mandatory rules (2) come out as the best remedies.

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1. The Adaptation of the General Choice-of-Law Rule for Contracts

The competition between the different laws applicable to intimately related contracts often leads to contradictions and conflicts of expectations between the different parties to the contracts. Therefore, some States subject the collateral contracts to the same law. For instance, Section 194 of the Restatement (Second) on Conflict of Laws provides for the application of the law governing the principal, underlying obligation, to contracts of suretyship or guaranty. Other States do not apply a single law in principle but use exceptions. More specifically, according to Article 4 § 5 of the Rome I Regulation, a contract can be subject to a law other than that designated by § 1, 2, and 3, when this other law has an obviously closer connection to the contract. Recitals 20[66] and 21[67] of the Rome I Regulation recommend considering the connection between contracts as a way to trigger the exception device. The European Court of Justice recently invited State courts to "compare the connections existing between the contract and, on the one hand, the country in which the party who effects the characteristic performance has his or its habitual residence at the time of conclusion of the contract and, on the other, another country with which the contract is closely connected."[68] The exception clause of Article 4 § 5 of the Rome I Regulation derogates from the presumption of Article 4 § 2 and leads to apply to the contract a law applicable to another related contract. In this case, although the habitual residence of the subcontractor was located in Germany, the use of the exception device led to applying the French law to the subcontract, because the main contract was subject to the French law. Identical solutions exist in national case law. The French Supreme Court recently used the exception device to submit a guaranty to the law applicable to the main contract, although this law was not designated by any choice of law or by the presumption of Article 4 § 2 of the Rome I Regulation.[69] These solutions rely on

[66] Rome I Regulation, Recital 20: "Where the contract is manifestly more closely connected with a country other than that indicated in Art. 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."

[67] Rome I Regulation, Recital 21: "In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts."

[68] ECJ, 23.10.14, C-305/13, *Recueil Dalloz*, p. 136 *et seq*., note Ph. DELEBECQUE/ D. ARIÉ LÉVY; *Rev. crit. dr. int. pr.* 2015, p. 221 *et seq*., note C. LEGROS; *Clunet* 2015, p. 671 *et seq*., note S. LAVAL.

[69] See Cass. com., 16.9.15, No. 14-10.373. The Supreme Court had already embraced this solution in Cass. civ 1ère, 1.7.81, *Total Afrique*, *Rev. crit. dr. int. pr.* 1982, p. 336 *et seq*., note P. LAGARDE; *Clunet* 1982, p. 148 *et seq*., note P. BOUREL: "if the guaranty is subjected to its own law, one should assume that, when parties remained silent regarding this question, it is subjected to the law of the guaranteed convention."

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the idea that, in groups or collateral contracts, some contracts are accessory or subsidiary to others and should be subject to the same law. In a sense, they create a specific choice-of-law rule for collateral contracts.

Yet, the escape device should be carefully applied. The desire for uniformity in the rights and duties of the parties cannot be achieved at the expense of respect for expectations. The expectations of the subcontractor or the guarantor, parties to the accessory or subsidiary contract, are not properly integrated. A law different from the law applicable to their contract governs their rights, and they are strangers to the determination of this law and cannot necessarily anticipate it. Furthermore, the desire for uniformity reveals another point of confusion between substantive law and conflict law: only the law applicable to the contract can determine whether the contract is an accessory or subsidiary to another contract. The connection between contracts is rather more the result of the applicable substantive law than grounds to determine what law should be applied.

The adaptation of the general choice-of-law rule for contracts can improve the solutions of conflicts between parties and third parties' expectations without trying to unify the laws applicable to the collateral contracts. The need for adaptation of the choice-of-law rule comes from the evolution of the continental private international law. Unlike Common Law countries, the European private international law has often been perceived as being too abstract, setting large and comprehensive choice-of-law rules disconnected from any concern for justice.[70] As a result, continental choice-of-law rules have been narrowed and single situations have often been subject to several laws. This issue-by-issue approach, otherwise called "dépeçage", sometimes led to unfair or confused solutions. The adaptation of the choice-of-law rule was therefore implemented to correct the incoherencies stemming from the application of diverse laws to close questions.[71]

In the case of collateral contracts, the general choice-of-law rule should be adapted to take into account the economic and functional unity of the group and avoid the contradictions coming from the diversity of applicable laws. For instance, Article 12 § 1, e, of the Rome I Regulation, according to which the law applicable to the contract governs the consequences of the nullity of the contract, might be changed and drafted this way: "*The law applicable to the contract governs the consequences of the nullity of the contract to the extent of the application of the choice-of-law rule applicable to the contract that suffers the consequences*." This new rule introduces a hierarchy between two choice-of-law rules applicable to connected contracts. The expectations of the parties regarding the future of their own contract are protected prior to the expectations of the third parties, who are parties to connected contracts. Moreover, the solution fits the *in concreto* and *a*

[70] See, for instance, B. AUDIT, Le caractère fonctionnel de la règle de conflit, *Recueil des Cours* 1984, Vol. 186, p. 219 *et seq*.; G. KEGEL, The crisis of conflict of laws, *Recueil des Cours* 1964, Vol. 112, p. 91 *et seq*.

[71] See, for instance, G. CANSACCHI, Le choix et l'adaptation de la règle étrangère dans le conflit de lois, *Recueil des Cours* 1953, Vol. 83, p. 83 *et seq*.; H. LEWALD, Règles générales des conflits de lois, *Recueil des Cours* 1939, Vol. 69, p. 136 *et seq*.; L. RAAPE, Les rapports entre parents et enfants (comme point de départ d'une explication pratique d'anciens et de nouveaux problèmes fondamentaux du droit international privé), *Recueil des Cours* 1934, Vol. 50, p. 49 *et seq*.

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posteriori character of the difficulties that arise in these contexts. The so-modified choice-of-law rule will be applied only when the application of several laws to a single situation actually leads to contradictions.

2. The Amendments to the General Choice-of-Law Rule for Contracts

As previously explained, the application of overriding mandatory rules does not properly protect third parties affected by contracts involving rights *in rem* from party autonomy. The derogatory method does not fit the general incompatibility of party autonomy and respect for third party expectations. On the contrary, overriding mandatory rules can be used to protect third parties related to immediate parties through a direct action or a claim for damages due to poor execution or breach of contract. These relationships are characterized as contractual matters because they appear to be effects of the contract concluded by the party defendant to the action. Nevertheless, it is inequitable for third parties to be subject to a law, that is completely foreign to them and that might deprive them of their rights. Overriding mandatory rules set aside the law designated by the general choice-of-law rule when that law undermines third party rights.

An example taken from the protection of subcontractors in French law illustrates the idea. The characterization of the direct action in payment filed by the subcontractor against the employer as a contractual question leads to applying the law of the contract concluded between the main contractor and the employer. According to the general choice-of-law rule for contracts, the main contractor and the employer can choose a law that ignores direct actions or imposes restrictive conditions. The subcontractor, third party to the main contract, might therefore suffer from the agreement of the main contractor and the employer. In France, a law dated 31 December 1975, was designed to improve the situation of subcontractors by providing them with a series of rights ensuring effective payment of the amount due under the subcontract. The French Supreme Court characterized this law as an overriding mandatory rule.[72] The policy underlying the French law is the protection of a certain category of professionals as well as the avoidance of a series of bankruptcies of main contractors. As opposed to the purposes of security of transaction or protection of local credit in contracts involving rights *in rem*, these purposes are specific enough to characterize an overriding mandatory rule. When more favourable to the subcontractor, the French law is applied instead of either the law chosen by the main contractor and the employer or the law objectively identified by the waivable connecting factor of the general choice-of-law rule for contracts. Indeed, the law designated by the objective connecting factor – if it denies guarantees to the subcontractor – can violate the policy underlying the law of 1975. In other words, the application of French law as an overriding mandatory

[72] Cass. chambre mixte, 30.11.07, *Rev. crit. dr. int. pr.* 2009, p. 728 *et seq*., note M.-E. ANCEL; *Clunet* 2008, p. 1073 *et seq*., note L. PERREAU-SAUSSINE; *Recueil Dalloz* 2008, p. 753, note W. BOYAULT/ S. LEMAIRE; *JCP éd. G* 2008, II, 10000, note L. D'AVOUT. See also, Cass. com., 27.4.2011, *Rev. crit. dr. int. pr.* 2011, p. 624 *et seq*., report A. MAITREPIERRE, obs. M.-E. ANCEL; *Clunet* 2012, p. 148 *et seq*., note P. DE VAREILLES-SOMMIÈRES; *Recueil Dalloz* 2011, p. 1654 *et seq*., note Y.-E. LE BOS.

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rule defeats party autonomy but is not applied to defeat it. The use of overriding mandatory rules does not aim to suppress party autonomy because it undermines third party expectations, but rather to protect third party substantive interests when the application of the *lex contractus* is unfair to them.[73]

In conclusion, a hierarchical classification of contracts can be established depending on the proximity and the importance of third parties affected by the contract. The closer third parties are to the contract, the less the parties will be able to choose the law governing all its effects.

Contracts involving rights *in rem* are at the top of the hierarchy. Specifically, security interest would be subject to a special choice-of-law rule for contracts with a non-waivable connecting factor designating the law of the habitual residence of the debtor for movable property and the law of the location of the asset for immovable property. Transfer of ownership or proprietary rights on im–movable, movable, and intangible property would be subject to a special choice-of-law rule for contracts with a non-waivable connecting factor respectively designating the law of the location of the immovable property, the law of the habitual residence of the seller, and the law of the habitual residence of the assignor. For both types of contracts, which, by definition, interest an indefinite and important number of third parties, the specificity of the special choice-of-law rule lies in the definition of the applicable law. Parties cannot choose the applicable law, which is objectively determined.

Underneath these contracts, we find the agency agreement and the contractual assignment of claim. Agency is subject to a special choice-of-law rule for contracts that withdraw the relationships between parties and third parties from the scope of the *lex contractus*. The identity of the *lex contractus* has no particularity but the *lex contractus* applies only to the internal relationship between the agent and the principal, whereas the external relationship between the principal and the third party, or the power of the agent, is subject to another law, more predictable for the third party. Similarly, the contractual assignment of claim is subject to a special choice-of-law rule that withdraws the relationships between parties and third parties from the scope of the *lex contractus*: the *lex contractus* applies only to the internal relationship between the assignor and the assignee, whereas the external relationship between the assignee and the assigned debtor is subject to another law, which is more predictable for the assigned debtor. For both of these types of contracts that, by definition, create a tripartite situation, the specificity of the special rule lies in the definition of the scope of the *lex contractus*. Parties can choose the applicable law, but this choice will not extend to the relationship with the third party.

At the bottom of the hierarchy, we find all the other contracts, which do not involve rights *in rem* or create a tripartite situation, and are subject to the general

[73] The formulation of Art. 9 § 1 of the Rome I Regulation, which gives the definition of overriding mandatory rules and lays the emphasis on safeguarding "public interests," does not prevent the use of these rules to protect certain categories of persons. See, for instance, ECJ, 17.10.13, C-184/12, *Unamar*, in which the European Court of Justice stated that a law governing the situation of commercial agents may be characterized as an overriding mandatory rule. Although the case was decided under the auspices of the Convention of Rome, it is to be understood as a will to read the Rome I Regulation in the same direction.

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choice-of-law rule for contracts. Third parties that are nevertheless interested by the contract, especially when they are contractually related to a party, are protected by the use of amendments such as the adaptation of the choice-of-law rule or the application of overriding mandatory rules.

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THE ROLE OF INDEPENDENT ADMINISTRATIVE AUTHORITIES IN GLOBAL GOVERNANCE

Réka Ágnes PAPP*

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I. Introduction

In an effort to rethink the role of private international law in global governance and to contribute to the attempt to resolve contemporary challenges, this article will explore a relatively new phenomenon in private international law: the emergence of independent administrative authorities and their relevance in resolving transnational governance issues. These administrative authorities have wide ranging powers of regulation in certain sectors, including powers to render decisions and impose sanctions. They are often faced with situations involving a foreign element, which sometimes also entails interacting and cooperating with their foreign counterparts.

The notion of "independent administrative authority" appeared for the first time in French law, namely in the 1978 statute establishing the National

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 543-567
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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Commission for Information Technology and Liberties.[1] According to a report, published by the French Senate in 2015, today there are fifty independent administrative authorities in France that carry out missions in various areas with diverse powers and status.[2] However, there are a number of characteristics that are common to all independent administrative authorities. These authorities are created to regulate specific sectors or sensitive issues. Some authors consider that the common denominator between the different authorities can in fact be found in the regulatory function these authorities fulfil.[3] They are supposed to represent a more flexible, more efficient and more responsive form of administration; as well as to guarantee a higher level of impartiality of state action in their particular field of activity. Moreover, the fulfilment of their tasks requires technical expertise and constant dialog with other actors in the sector. The functioning of independent administrative authorities is usually characterized by the independence of their members and the autonomy they enjoy with respect to their management. They are not under any form of hierarchical control, however they are subject to judicial oversight.[4]

Independent administrative authorities, otherwise called regulatory authorities, are not unique to French law. Authorities with similar powers and status exist in many other legal systems.[5] They have become ubiquitous in the economic sector: this is unsurprising given their inherent impartiality and specific knowledge – these characteristics fit well the rapidly changing and highly technical environment.

The emergence of new and intensified interactions between authorities of different States are a consequence of general trends, both regional and global. One of these trends is the creation of multilateral cooperation structures in various fields. In a globalized world where markets are interconnected to such an extent that it is no longer possible to take or implement economic decisions in isolation, a degree of cooperation between States and their administrative organs has become unavoidable and indispensable. The international mobility of people and the growing number of international families also require the cooperation of States in order to resolve the complex problems that may arise. The structures of multilateral cooperation are very divergent and they reflect the specific needs of the field

[1] La loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés. This statute established the Commission nationale de l'informatique et des libertés.

[2] *Un État dans l'État: canaliser la prolifération des autorités administratives indépendantes pour mieux les contrôler (rapport)*, retrieved from http://www.senat.fr/rap/r15-126-1/r15-126-11.html#toc41.

[3] N. DECOOPMAN, Le désordre des autorités administratives indépendantes: l'exemple du secteur économique et financier, Mayenne 2002, p. 197.

[4] M. GENTOT, Les autorités administrative indépendantes, Paris 1991, p. 48; M.-J. GUEDON, Les autorités administratives indépendantes, Paris 1991, p. 49 to 59; N. DECOOPMAN (note 3) at 195-200.

[5] They are called *regulatory agencies* in the United States, *quasi non-governmental organizations* (quangos) in Britain, Ireland and Australia, *Unabhängige Bundesbehörden* in Germany and *le autorità garanti* in Italy.

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in which they operate. The intensity and the characteristics of the cooperation between authorities can also vary widely from one structure to the other.

As to regional trends, it is undeniable that, the creation of the European Communities and of the European Union (EU) was a determining factor in the emergence of new phenomena relating to administrative authorities. As an extremely developed form of regional integration, the EU's primary function is to establish and organise the internal market. The EU works together with its Member States in order to achieve this objective. These circumstances, and in particular the high level of economic integration of the Member States, have given rise to specific needs of coordination and collaboration between the Member States, their national authorities and the institutions of the EU.

The role and the potential of independent administrative authorities in global governance are yet to be fully explored. As a first step, it is important to establish a theoretical framework that is able encompass and describe the main features of the interactions between national administrative authorities (II). Given the richness of the experience at the European level, a detailed analysis of the functioning of the European Competition Network (ECN) reveals important lessons for multilateral cooperation structures of administrative authorities (III). Finally, the relevance of the theory of conflict of authorities is not limited to competition law or even to the European context (IV).

II. Understanding the Interactions between Independent Administrative Authorities

Given the complex nature of the issues and cross-border situations that independent administrative authorities deal with, it is hardly surprising that their relations and interactions cannot be captured by a single theory. The theory of conflict of authorities provides a general framework of private international law, describing the methods to designate a competent authority, the particular laws applied by such an authority, as well as the possible recognition and enforcement of its decision in another legal system. The theory of network governance sheds light on the concrete ways these authorities interact and cooperate and on how to further strengthen their cooperation and the cohesion of the network they form.

A. The Theory of Conflict of Authorities

It was Niboyet, a French professor of private international law, who developed the theory of conflict of authorities with the goal of clarifying the relationship between administrative law and private international law.[6] Despite the fact that the theory of conflict of authorities has never had any real success, the merit of Niboyet's work

[6] J.-P. NIBOYET, Traité de droit international privé français (2ème édition), Paris 1947, Tome IV, para. 1571.

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is indisputable. It recognizes the growing importance of decisions by administrative authorities in transnational relationships, as well as the problems that their possible extraterritorial effects might create. However, the original theory was created in a different context and therefore must be adapted to the new reality of administrative authorities. It should be reviewed in light of the emergence of new types of authorities and decisions, in particular in the EU.

The theory of conflict of authorities has its roots in the 1930s. It was developed at a time when private international lawyers could no longer ignore the reality of relations between States, and they had begun to turn their attention to the possible interactions between administrative law and private international law. In 1929, Fedozzi delivered a lecture at The Hague Academy on the extraterritorial effects of administrative laws and decisions.[7] He observed that the interactions between national administrative laws had multiplied to such an extent that the doctrine of private international law could no longer delay acknowledging and analysing them.[8] Fedozzi examined in particular the exceptional hypothesis of the extraterritorial application of administrative laws. More importantly, he was also interested in whether administrative decisions could have extraterritorial effect. He argued that due to the coexistence and mutual recognition of States, foreign administrative decisions should also be given full effect in national legal systems.[9]

Private international law owes to Niboyet the first theorization of the phenomena already observed by Fedozzi. Niboyet arranges conflicts not in two, but in three categories: conflict of laws, conflict of jurisdictions and conflict of authorities.[10] After Niboyet, it was only in the 1990s that the fate of foreign administrative decisions once again sparked private international lawyers' interest. Several works dealing with essentially the same issues were published during this period.[11] The authors of these works analyse in depth the nature of administrative decisions and they attempt to define and categorize them. However, the central question of these publications remains the recognition and the enforcement of foreign administrative decisions, i.e. their reception in a foreign legal order.

On the contrary, for Niboyet, the real question is to which administrative body the parties must turn to obtain a certain decision. He argues that any issue of conflict of laws is absent, because administrative authorities can only make decisions according to their own laws. Thus, the issue is not to determine the law applicable to a certain legal relationship, but to determine the administrative authority qualified to make the decision in question. This is due to the absolute link between the administrative authority and its national law that allows no exceptions.[12] For instance, a French notary may only draft a certificate according to the

[7] P. FEDOZZI, De l'efficacité extraterritoriale des lois et des actes de droit public, *Recueil des Cours*, Paris 1929, p. 145.

[8] P. FEDOZZI (note 7), at 148.

[9] P. FEDOZZI (note 7), at 184.

[10] J.-P. NIBOYET (note 6), at 1571.

[11] C. PAMBOUKIS, L'acte public étranger en droit international privé, Paris, 1993; L. BARNICH, Les actes juridiques en droit international privé, Essai de méthode, Brussels 2001; P. CALLÉ, L'acte public en droit international privé, Paris 2004.

[12] J.-P. NIBOYET, Cours de droit international privé, Paris 1947, para. 382.

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rules of his profession. The essence of Niboyet's theory is crystallised in the principle *auctor regit actum,* which has since become a well-established principle of private international law.[13]

However, in the examples listed by Niboyet, the law applicable to the substance will still be determined by conflict of law rules. When a French civil registar is requested to celebrate a marriage, he will follow the procedure established by French law and draft the marriage certificate according to the forms required by that very same law, excluding the application of any other national law. However, as regards the substantive conditions of marriage, they will be assessed according to the personal laws of each of the spouses. Therefore, and despite the absence of clarifications in Niboyet's work on this issue, it is clear that the author intended to apply the principle *auctor regit actum* only to the form of administrative decisions.

In the context of independent administrative authorities, the principle of *auctor regit actum* has to be extended not only to the law applicable to the *procedure*, but also to the law applicable to the *substance*. Independent administrative authorities apply their national law to the entirety of a case without exception. The application of national law to the procedure is justified by the delegation of sovereignty by the State in favour of the authorities. As Callé rightly points out through the example of notaries, these authorities are entrusted with a public service and thus their activities are based on a partial delegation of sovereignty.[14] In order to respect this delegation of sovereignty, these authorities obey the procedural rules of the State that created them. [15] This observation holds even more true in respect of independent administrative authorities. These authorities are established by the State to regulate the functioning of certain sectors for which the State is directly responsible. Regulatory authorities are part of the State's administrative system, even if they carry out their mission in full independence. In sum, the principle of *auctor regit actum* represents a classic solution of private international law that can be considered the equivalent of the principle that the procedure before national courts is always governed by the *lex fori*.

The automatic application of national law to the substance is justified by the objectives that the national legislation pursues. Pierre Mayer explains with his usual lucidity that when the State decides to entrust the regulation of a sector to a non-judicial body, most often it has a specific interest in that sector. The decisions taken by such bodies must contribute to the achievement of a certain State policy, which excludes the intervention of any foreign rule.[16] The delegation of sovereignty is therefore also present in the law applicable to the substance before independent administrative authorities. The concept of sovereignty is understood here as the implementation of an important State policy. The objective pursued by the national law is the expression of this State policy. The absence of any conflict

[13] J.-P. NIBOYET (note 6), at para. 1571; J.-P. NIBOYET (note 7) Tome III at para. 850.

[14] P. CALLÉ (note 11), at para. 75 et seq.

[15] *Ibid*.

[16] P. MAYER, La distinction entre règles et décisions et le droit international privé, Paris 1973, para. 185.

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of laws considerations is therefore justified by the overriding interest of the State in the regulation of the sector in question.

It follows from the above that, knowing which independent administrative authority will deal with a given case has important consequences, because the nationality of the authority will determine the law applicable to the entirety of the legal issues involved. Rules determining the competent authority to deal with a case, as well as the rules resolving jurisdictional conflicts between authorities have a paramount importance in the theory of conflict of authorities, similarly to the conflict of jurisdictions. Niboyet's original theory does not consider these rules, because at the time situations that might have been of interest to several national administrative authorities were virtually non-existent. However, today, in particular in the context of the EU and the internal market, cross-border situations that can trigger the intervention of several national administrative authorities are not only more numerous, but they can also occur in several sectors.

Finally, the original theory of conflict of authorities completely ignores the possible recognition and enforcement of the decisions rendered by independent administrative authorities in another country. Once again, this is quite understandable given the historical context in which Niboyet developed his theory. Today, however, the decision of an independent administrative authority might be relied upon in another legal system. Therefore, the extra-territorial effects of these decisions must be included in the redesigned theory of conflict of authorities.

Given the quasi-jurisdictional functions of these authorities, the recognition and enforcement regime of their decisions should ideally be closer to that of judgments. First, these decisions are characterized by the active role that the administrative body plays in the creation of the legal relationship. In Pamboukis' words, the administrative body, by making a decision, actively determines the rights and duties of individuals.[17] Secondly, the functions of independent administrative authorities and the functions of courts of law are identical to the extent that both bodies apply abstract rules of law to concrete situations in a binding manner.[18] It follows that the decision making function of independent administrative authorities is very close to that of courts.[19]

However, it must be kept in mind that on a procedural level there are significant differences between courts and independent administrative authorities, which suggest that the functions of these public bodies cannot be considered equivalent.[20] For instance, one of the main differences is that independent administrative authorities investigate and prosecute unlawful behaviour as well as sanction that same behaviour, whereas courts remain neutral decision makers not investigating or prosecuting cases, but only deciding them. Therefore, we prefer to

[17] C. PAMBOUKIS, L'acte quasi-public en droit international privé, *RCDIP* 1993, paras. 9 and 11.

[18] L. BARNICH (note 11), at para.154; C. S. DELICOSTOPOULOS, L'encadrement processuel des autorités de marché en droits français et communautaire, Paris 2002, para. 73.

[19] See for instance, R. POÉSY, La nature juridique de l'Autorité de la concurrence, *Actualité Juridique Droit Administratif*, 2009, p. 350-351.

[20] C. S. DELICOSTOPOULOS (note 18), at para.175.

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describe the function of regulatory authorities as quasi-judicial, because this term expresses the strong similarities between the functions of regulatory authorities and courts, without creating a false idea of equivalence. The recognition and enforcement regime of decisions of independent administrative authorities must take into account not only the difference between courts and independent administrative authorities, but also the specificity of the sector in which the authorities operate. This latter factor has a direct impact on the nature of every decision rendered by an independent administrative authority.

B. The Relevance of the Theory of Network Governance

As regards the more specific question of the methods of coordination and cooperation between authorities, the doctrine of private international law constitutes a non-negligible source of inspiration and of concrete solutions. Since Batiffol, it has been generally accepted that the methods of private international law seek to achieve the coordination of systems.[21] The latest conventions in the field of family law adopted in the framework of the Hague Conference also illustrate that methods of cooperation are apprehended by private international law.[22] However, the theory of conflict of authorities cannot constitute the only framework of analysis of the interactions between independent administrative authorities. The theory of network governance paints a more accurate picture, and allows a better understanding of the relationship between the different authorities.

The term "network" means a structure composed of elements that are connected by links ensuring their interaction.[23] The concept of a network typically involves an open and non-hierarchical structure. It allows the coexistence of divergent values and rules, and it embodies flexibility, pluralism and permanent learning.[24] Networks are particularly well suited to managing complex relations with both horizontal and vertical aspects, between actors that are responsible for the implementation of the same policy or set of rules.[25]

The definition of the notion of network has been formulated in many different ways. Nevertheless, the essential elements of the concept can easily be identified. First of all, networks are built on the basis of relations and extensive exchanges and interactions between essentially equal and interdependent members.

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[21] H. BATIFFOL, *Aspects philosophiques du droit international privé*, Paris 1956.

[22] A. BUCHER, La dimension sociale du droit international privé, *Recueil des Cours,* Dordrecht/ Boston/ London 2009, p. 9-526.

[23] F. OST/ M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Brussels 2002, p. 24.

[24] F. OST/ M. VAN DE KERCHOVE (note 23), at 18.

[25] F. CENGIZ, Management of networks between competition authorities in the EC and the US: Different polities, different designs, *European Competition Journal* 2007, p. 416; A. JORDAN/ A. SCHOUT, *The Coordination of the European Union,Exploring the Capacities of Networked Governance*, Oxford 2007, p. 271.

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The members of a network develop and implement policies, and they reach their objectives by way of cooperation and consensus.[26]

The structure and organization of networks can be very divergent following the circumstances of their emergence, as well as the specificities of the sector in which they operate. Some networks emerge spontaneously and self-organize, others are created intentionally to pursue a predetermined objective. At one end of the spectrum we find networks that are nothing more than a sum of informal meetings. At the other end of the spectrum, networks are more integrated with a central administrator performing tasks related to the functioning of the network.[27] Even in this latter category, networks differ widely with regard to the powers and the tasks of the central administrator.[28] Different networks may provide different solutions to problems of coordination that are common to all networks. These issues include the organization of the participation of the members, tools of cooperation, methods of information exchange as well as ways to resolve conflicts between members.[29]

Within the EU, networks are often created in order to strengthen and coordinate the cooperation between national authorities, with a view to a more effective implementation of the rules of the internal market, as evidenced by the creation of the European Competition Network (ECN).[30] A closer look at the functioning of the ECN reveals how the theories of conflict of authorities and network governance can together describe the entirety of interactions between independent administrative authorities in any given sector.

III. The European Competition Network

Competition policy has long held a crucial role among European policies and it has gradually become a powerful instrument for the establishment of the internal market. It follows from the importance of competition law that the effective enforcement of competition rules has always been a priority for EU institutions. This, in turn, led to increased attention on the question of how national authorities and EU institutions could best fulfil this mission. Thus, the field of competition law became a real laboratory of innovative procedural solutions, starting with the creation of the ECN.

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[26] A. JORDAN/ A. SCHOUT (note 25), at 16 and 34; F. CENGIZ (note 25), at 417; F. CENGIZ, Multi-Level Governance in competition policy: the European Competition Network, *European Law Review* 2010, p. 664.

[27] A. JORDAN/ A. SCHOUT (note 25), at 23.

[28] A. JORDAN/ A. SCHOUT (note 25), at 23-24.

[29] F. CENGIZ (note 25), at 419; A. JORDAN/ A. SCHOUT (note 25), at 44-49.

[30] S. BRAMMER, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford/ Portland/ Oregon 2009, p. 492.

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A. The Functioning of the ECN

The ECN is composed of twenty-eight national competition authorities representing the Member States of the EU, and the Commission. These authorities can all be considered independent administrative authorities notwithstanding the differences in their structure and powers. The members of the ECN are responsible for the enforcement of EU competition rules, namely Articles 101 and 102 TFEU. The members of the network must ensure the effective and uniform application of these provisions.[31] To this effect, the authorities are empowered to conduct investigations, to take decisions and to punish severely anti-competitive behaviour.[32] The cooperation between competition authorities is very close; it consists of the allocation of cases among ECN members, extensive information exchange and mutual assistance in investigations.[33]

The ECN is based on a system of parallel competencies;[34] that is to say that a case can be dealt with either by a single national authority, by several national authorities acting in parallel, or by the Commission.[35] The maintenance of the system of parallel competencies was inevitable due to political considerations and the reality of competition law cases. In the internal market, the economies of Member States are interconnected to such an extent that an anticompetitive behaviour that is likely to affect trade between Member States could easily have an effect on or a link with the territory of several Member States.[36] These Member States have the right to intervene in order to ensure the protection of their national markets, irrespective of the fact that the market of other Member States might also be affected. Therefore, in this scenario, several national competition authorities would be competent to deal with the same case.

The ultimate objective of the ECN and hence of the allocation of cases in the network, is to ensure the effective application of EU competition rules. In order to achieve this goal, it is necessary to avoid the duplication of investigations and procedures as well as the waste of the authorities' resources, not to mention the excessive burden and additional costs that such duplication might entail for companies operating in the internal market. The functioning of the network is characterized by the paramount importance of the designation of the authority or authorities that will deal with a case. The designation of the competent authority will determine the law applicable to the entire procedure, because the members of the ECN implement Articles 101 and 102 TFEU following their own national rules of procedure. Therefore, in order to ensure the efficient handling of a case and to

[31] Recital 1 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation No. 1/2003) *Official Journal* (*OJ*) L 1 04.01.2003, p. 1.

[32] In French law, article 464-1 of the *Code de commerce*.

[33] Articles 11, 12 and 22 of Regulation No. 1/2003 (note 31); Commission Notice on cooperation within the Network of Competition Authorities (Notice on cooperation) (2004/C 101/03), *OJ* C 101 27.04.2004, p. 43, paras. 5-8 and 16-30.

[34] Notice on cooperation (note 33) at para. 15.

[35] *Ibid*.

[36] S. BRAMMER (note 30), at 150.

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introduce at least some degree of predictability to the system, it was necessary to establish appropriate criteria to determine the competent authority and to set up certain mechanisms to allocate cases to the designated authority.[37]

The legislator of the EU has not laid down the rules governing the allocation of cases within the ECN. Regulation No. 1/2003 on the implementation of rules on competition remains silent on this issue, and entrusts the task of drafting detailed case allocation rules to the Commission.[38] Thus, the main source of these rules remains the Commission Notice on Cooperation within the Network of Competition Authorities (the Notice on Cooperation). It is important to recall the legal nature of this text. The Commission is in general required to act in accordance with the provisions of its notices, but *a priori* they do not bind the national competition authorities. Nevertheless, these have signed a declaration in which they undertake to follow the principles set out in the Notice on Cooperation.[39] It follows, that every competition authority within the EU must act in accordance with the provisions of the Notice on Cooperation.

1. Principles of Case Allocation

The allocation of cases is based on the notion of "well-placed authority", namely the competition authority of the Member State in which the case has its main centre of gravity. This notion is determined by three qualitative criteria.[40] In contrast, the question of whether the Commission is well-placed to deal with a case will be determined according to the rather vague notion of "community interest".[41]

a) Designation of the Competent Authorities

The situation seems, at least at first sight, rather simple. If the three cumulative conditions defined by the Notice on cooperation are fulfilled, the competition authority is well placed to deal with the case. First of all, the agreement or practice must have actual or foreseeable effects on competition within the territory of the State, and must be implemented within or originating from its territory. Secondly, the competition authority must be able to bring to an end the entire infringement, including adequately sanctioning the infringement if necessary. Finally, the well-placed authority must be able to gather the evidence required to prove the infringe-

[37] S. BRAMMER (note 30), at 149-150.

[38] Recital 15 of Regulation No. 1/2003 (note 31).

[39] Notice on cooperation (note 33), at para. 72. See Annex to the Notice on cooperation http://ec.europa.eu/comm/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf.

[40] MONOPOLKOMMISSION, *Folgeprobleme der Europäischen Kartellverfahrensreform Sondergutachten der Monopolkommissiongemäß § 44 Abs. 1 Satz 4 GWB*, Bonn 2001, p. 25-26.

[41] MONOPOLKOMISSION (note 40), at 27.

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ment.[42] These three criteria reflect a pragmatic approach and the desire to establish a strong material link between the case and the competent authority, or more precisely between the infringement and the territory of a Member State.[43] According to the Notice on Cooperation, the application of these conditions will most likely lead to the designation of the authorities of the Member State in which competition is substantially affected by the infringement, provided that the authorities are able to effectively put an end to the violation of the competition rules.[44] These criteria will always be at least partially respected by the members of the ECN, because the very logic of competition law requires the establishment of a substantial link between the anti-competitive conduct and the authority, in the form of an anti-competitive effect on the market.

These three criteria do not have a binding nature.[45] Within the ECN, each member retains full discretion in deciding whether to investigate or not any given case.[46]

It should be noted that the majority of the cases dealt with by the ECN relate to practices that affect the territory of only one Member State. However, in certain cases, the parallel action of several authorities is conceivable and can be desirable. In particular, when an agreement or practice has substantial anti-competitive effects on the territories of several Member States and the intervention of one single authority is not sufficient to put an end to the infringement and/or to adequately sanction it. Unfortunately, in practice there are hardly any concrete examples of parallel actions by members of the ECN. In case of parallel interventions, no authority is truly able to put an end to the entirety of the infringement; otherwise the parallel intervention would not be necessary. The authorities can only bring the infringement to an end on their respective national territory, hence the need for the coordinated action of several authorities. These authorities are only well-placed *together* to ensure the most effective application of EU competition rules.

In case of situations where elements of an anti-competitive behaviour can be found in the territory of several Member States, the territorial limitations of each national authority can hinder the application of articles 101 and 102 TFEU. The authorities may in principle only act in their own territory. However, Regulation No. 1/2003 in its Article 22 creates the possibility for ECN members to ask their foreign counterparts to carry out investigative measure in their territory, but on behalf and for the account of the requesting authority.[47] To date, the majority of applications under Article 22 have been accepted and carried out by national authorities.[48]

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[42] Notice on cooperation (note 33), at para 8.

[43] Notice on cooperation (note 33), at para. 9.

[44] *Ibid*.

[45] Case T-339/04 *France Télécom v Commission* [2007] *ECR* II-521, para. 84.

[46] Notice on cooperation (note 33), at para. 5.

[47] Article 22 of Regulation No. 1/2003 (note 31).

[48] *Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003* COM(2009)206 final *(Commission staff working paper)*, para. 246.

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The Notice on Cooperation stipulates that in the event of parallel interventions by national authorities, the authorities shall endeavour to coordinate their actions to the extent possible.[49] In order to facilitate this task, they can designate a lead authority, which could for example coordinate investigative measures. Notwithstanding the designation of a lead authority, the competence and the responsibility of each authority for their own procedure remains intact. Once again, the authorities have no obligation to coordinate their procedures; the designation of a lead authority, and the implementation of other means of coordination, are simply options that are available to authorities. In practice, it seems that members of the ECN prefer to coordinate their parallel interventions without the designation of a lead authority.[50]

It follows from the above, that it is perfectly possible for national authorities to pursue the same transnational anti-competitive behaviour in the territory of several Member States. The more frequent occurrence of parallel interventions depends solely on the good will of national authorities. Given the benefits and the effectiveness of parallel actions by the members of the ECN, it seems surprising that the authorities do not make use of this possibility more often.

The Commission is considered to be particularly well-placed to deal with a case if the agreement or practice in question affects competition in more than three Member States. The Commission will also be well-placed if the case is closely linked with other Community provisions or if a new issue of the competition law arises that requires developing EU competition policy.[51] However, it must be noted that this list of criteria is in no way exhaustive or mandatory. In fact, the Commission retains its right to initiate proceedings in all cases where an infringement of EU competition rules is reasonably suspected. The General Court expressly stated in the *France Télécom* judgment that "the regulation does not call into question the general power that the Commission is acknowledged to enjoy by the case-law" and that the Commission can intervene even when a national authority would be well-placed to deal with the case under the Notice on Cooperation.[52] As a general rule, the Commission would therefore always be well placed to deal with a case in which EU competition law is applicable, should it wish to initiate proceedings.[53]

Finally, under Article 11 §6 of Regulation No. 1/2003, when the Commission decides to initiate proceedings with respect to an infringement, national authorities will be automatically relieved of their competence to apply Articles 101 et 102 TFEU. Consequently, the ECN excludes parallel proceedings involving the Commission.

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[49] Notice on cooperation (note 33), at para. 13..

[50] S. BRAMMER (note 30), at 179.

[51] Notice on cooperation (note 33), at paras. 14-15; *Joint statement of the Council and the Commission on the functioning of the Network of Competition Authorities (Joint statement)*, < http://ec.europa.eu/competition/ecn/joint_statement_en.pdf >para. 19.

[52] *France Télécom v Commission* (note 45), at paras. 79 and 84.

[53] *Commission staff working paper* (note 48), at para. 210.

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b) (Re)allocation of Cases

The objective envisaged by the regulation and by the Notice on Cooperation is that a single authority should handle each case.[54] In particular, the authority that receives a complaint or starts an ex-officio procedure should remain in charge of the case.[55] As a general rule, the principle of "first come first served" applies. As such, the allocation of cases does not require active participation by the authorities; it is an automatic occurrence since the authority that first starts the proceedings will be expected to bring it to an end. In contrast, the reallocation of a case requires close and active cooperation by the authorities.

Information provided by the authorities to the network can reveal a situation in which the reallocation of a case from the authority that first initiated proceedings becomes necessary. The reasons for reallocation are twofold. On the one hand, another authority could deem itself better placed to deal with the case. On the other hand, it is also possible that several other authorities could also be well-placed to deal with the same case by way of parallel interventions. In any case, the issue of reallocation must be resolved as quickly as possible, in principle in the two months following the first notification concerning the case to the network by an authority.[56] The reallocation of a case is always the result of exchanges and cooperation between the authorities concerned. The problems are resolved in an informal and flexible manner.

Decisions rendered by national authorities generally do not contain any detailed analysis of their jurisdiction under the Notice on cooperation. In fact, most often than not, no reference is made to this question.[57] Despite the formal equality of members of the ECN,[58] it is very likely that the discussions concerning the reallocation of cases take into account all the legal, economic or even political factors that may influence the effective application of EU competition law rules.

Finally, it should be noted that negative conflicts may be present in the ECN, in particular when a case is not pursued by any authority, despite the fact that one or several authorities would be well-placed to deal with the case. In addition, negative conflicts may also arise when certain aspects of an anti-competitive behaviour are not dealt with by any authority. Even the Commission recognizes the risk of negative conflicts within the network.[59] In the current system, members of the ECN are free to initiate proceedings or not. They have no obligation to intervene, even when they would be well placed to do so. Unlike positive conflicts, which seem to be rare and well managed by the members of the

[54] Recital 18 of Regulation No. 1/2003 (note 31).

[55] Notice on cooperation (note 33), at para. 6

[56] Notice on cooperation (note 33), at para. 18.

[57] For example, the German *Bundeskartellamt*, expressly declares in its decisions that it is competent to deal with the case in the meaning of the Notice on cooperation. However, it does not analyze in detail whether the three jurisdictional criteria are fulfilled.

[58] *Joint Statement* (note 51), at para. 7

[59] *Commission staff working paper* (note 48), at para. 222.

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network, negative conflicts present a real challenge for the functioning of the network and for the effective enforcement of EU competition rules.[60]

c) Enforcement of decisions

The question of the enforcement of decisions in another Member State is dealt with for the first time in the Commission's Proposal for a Directive to empower competition authorities to be more effective enforcers.[61] The Proposal provides for the enforcement of the final decision of a national authority in the territory of another Member State if the undertaking against which the fine or periodic penalty payment is enforceable does not have a presence or sufficient assets in the Member State of the authority.[62] The enforcement of the decision will be automatic, unless it would be manifestly contrary to public policy of the Member State in which enforcement is sought.[63] This is certainly an important development, even though a legislative provision encompassing all decisions of the members of the ECN as well as the recognition of these decisions would have been welcome.[64]

2. Mechanisms Supporting the Allocation of Cases

The designation of a well-placed authority is not the result of a decision rendered by a forum specifically designed to resolve conflicts of jurisdiction between members of the ECN. The resolution of problems related to the allocation of cases is based on an optional and flexible mechanism. The allocation and reallocation of a case occurs through individual decisions by the authorities, which can only be influenced by other members of the network.[65] Regulation No. 1/2003 provides the possibility for national authorities to settle such conflicts if they consider it necessary, without however compelling them to do so.

The efficient allocation of cases is based on several essential pillars. The first pillar is the exchange of information among competition authorities. Article 11 §3 of Regulation No. 1/2003 stipulates that when national authorities act under articles 101 and 102 TFEU, they are required to notify the Commission "in writing

[60] S. BRAMMER (note 30), at p. 183.

[61] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, of 22 March 2017 COM(2017) 142 final (Proposal for a Directive to empower competition authorities).

[62] Article 25 of the Proposal for a Directive to empower competition authorities (note 62).

[63] Ibid.

[64] For more details on the theoretical foundations and the exact parameters of such a legislative provision see R.Á. PAPP, *Le fonctionnement du Réseau européen de la concurrence*, Thesis, Nancy 2013, p. 309 et s.

[65] A. ANDREANGELI, The impact of the modernisation regulation on the guarantees of due process in competition proceedings, *European Law Review* 2006, p. 345.

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before or without delay after commencing the first formal investigative measure". The Notice on Cooperation goes one step further and creates an obligation for national authorities to notify not only the Commission, but also the other members of the ECN.[66] The authorities have also introduced on their own initiative a standard form that allows them to also inform the network of the completion of individual proceedings.[67]

In practice, authorities exchange information by means of a standard form, which contains certain details concerning the infringement.[68] When a significant change occurs in the data, the members update the form.[69] The information exchange takes place through an intranet system that links all of the twenty-nine members of the network. It is a secure platform that allows members of the network not only to exchange information, but also to interact in an easy and instantaneous manner.[70]

The second essential pillar consists of the mechanism foreseen by Article 13 §1 of Regulation No. 1/2003. According to this article, when several national competition authorities receive a complaint or initiate proceedings *ex officio* against the same anti-competitive practice, the fact that another authority already handles the case constitutes sufficient ground for the other authorities to suspend their proceedings or reject the complaint. In this regard, as stated by the General Court in the *Toshiba* judgment, Article 13 of Regulation No. 1/2003 reflects the wide discretion enjoyed by ECN members in order to achieve an optimal allocation of cases within the network.[71]

As we have already mentioned, article 11 §6 of Regulation No. 1/2003 excludes parallel proceedings involving the Commission and national authorities. In addition, article 16 §2 of Regulation No. 1/2003 prohibits national authorities from making a decision that would be contrary to the decision of the Commission in the same case. Finally, Article 11 §4 confers significant monitoring powers on the Commission. According to this provision, no later than thirty days before they intend to adopt a decision, national authorities shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. It is clear from these provisions that the Commission has a crucial role in the functioning of the ECN, which is attributable to several factors.

First, the ECN was established in 2004 at the wake of the modernisation of EU competition law following the initiative of the Commission. The Commission was entrusted with responsibility for designing a system able to minimize the risk of divergences in the application of EU competition law by a large number of national competition authorities. Essentially, the Commission wanted to ensure

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[66] "Information should therefore be provided to NCAs and the Commission", Notice on cooperation (note 33), at para. 17.

[67] S. BRAMMER (note 30), at 332.

[68] Notice on cooperation (note 33), at para. 17.

[69] Ibid.

[70] M. KEKELEKIS, The European Competition Network (ECN): It does actually work well, *EIPAscope* 2009, p. 37.

[71] Case T-113/07 *Toshiba v Commission* [2011] *ECR* II-3989*,* para. 90.

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that the rapid and quasi-total decentralization of the enforcement of articles 101 and 102 TFEU would not endanger their uniform application.[72] Moreover, the Commission intended to lay down the foundations of a system on which closer cooperation could be built in the future.[73]

Finally, it must be borne in mind that the EU was created and evolved on the basis of the so-called "community" method of legislation. As a general rule, EU decisions are taken by the use of the ordinary legislative procedure, as defined in Article 294 TFEU. Thus, policy goals are pursued by means of binding legislation. The community method still remains predominant in European governance, where spontaneous and voluntary cooperation between authorities and the emergence of self-organised networks have virtually no antecedents. Moreover, in most sectors, cooperation between authorities is limited to relations and interactions between the Commission and the national authorities, these latter implementing in general the laws and policies of the EU under the leadership of European institutions. The emergence of transnational or cross-sectional networks is a relatively young phenomenon in the EU. Moreover, the creation of such networks may require a first impetus from binding rules to create, at least at a first stage, the voluntary horizontal cooperation between national authorities.[74]

B. The Key to the Success of the ECN

Despite the strong criticism and the justified fears that many scholars and practitioners expressed, the first twelve years of the ECN have been a real success. Nevertheless, there are several centrifugal forces within the network, which may still represent a risk to the smooth and coherent functioning of the network. These forces include the absence of a binding mechanism for the resolution of conflicts, the concerns related to the lack of transparency and the increased risk of negative conflicts occurring in the network, not to mention the sometimes substantial differences between resources of national authorities.[75] Moreover, much depends on the sole good will of the authorities and on their inclination to cooperate.[76] However, the ECN has so far managed to overcome these problematic trends and has avoided serious conflicts between members. The question therefore arises: what is the key to the success of this network? The answer to this question can easily be found on the basis of the general theory of network governance.

ECN members are not limited to the mechanisms of cooperation expressly provided for by Regulation No. 1/2003 and the Notice on Cooperation. They are free to establish, on their own initiative, other more informal means of cooperation. Since the creation of the ECN, its members have been in constant dialogue at all

[72] F. CENGIZ (note 26), at p. 665.

[73] Ibid.

[74] F. CENGIZ (note 25), at 433.

[75] See, for a more comprehensive list of centrifugal forces, S. WILKS, Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement, *European Competition Journal* 2007, p. 442 and 448-449.

[76] I. SIMONSSON, *Legitimacy in EC Cartel Control*, Thesis, Stockholm 2009, p. 96.

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levels.[77] They regularly exchange their points of view and share their experience on various issues of competition law, which enables the authorities to further develop their expertise in the field. This dialogue has also contributed to the strong atmosphere of mutual trust between the authorities. According to the Commission, this evolution is greatly appreciated by the ECN members and can be regarded as the greatest success of the network.[78]

Certain forms of structured but voluntary cooperation have also emerged in the ECN. First, the directors of national authorities meet a few times per year with the Commission to define the priorities of the network and to validate the work of all subgroups in the ECN.[79] A plenary session of the ECN is also held regularly with the participation of all interested members. [80] During these sessions, the authorities prepare the directors' meeting and they adopt the general common guidelines of competition policy.[81]

ECN members also have the possibility of participating in the work sectorial subgroups chaired by the Commission. During these meetings, experts from national authorities and the Commission discuss their practices and actions to be taken in order to protect competition in that specific sector. Other subgroups bring together experts working on abuse of dominant position issues, as well as the chief economic experts of competition authorities. Members of sectorial subgroups meet a few times per year, but they communicate regularly in the meantime.[82]

Moreover, members can join working groups encompassing "horizontal" issues, such as sanctions, mergers, procedural guarantees or the fight against cartels.[83] The number of national authorities represented in a working group remains generally between fifteen and eighteen.[84] The work of these horizontal groups is extremely important. Members of the groups exchange their experiences and discuss necessary changes in the legislative framework.[85] For instance, the working group dealing with leniency developed the ECN model leniency programme of the network, which was adopted in its original form by the plenary meeting in 2006.[86]

In addition, the frequent cooperation between authorities in the course of investigations contributes to strengthening the links between the members of the network. The officials of the authorities know each other personally; they often meet and help each other. This contributes strongly to the mutual trust and good relations between authorities. Interestingly, despite the non-binding nature of the

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[77] *Commission staff working paper* (note 48), at para. 249.

[78] Ibid.

[79] *Rapport d'activité de l'Autorité de la concurrence,* 2014, p. 39-40.

[80] *Rapport d'activité du Conseil de la concurrence,* 2014, p. 41.

[81] Ibid.

[82] S. BRAMMER (note 30), at p. 135.

[83] *Rapport d'activité du Conseil de la concurrence,* 2014, p. 41-44.

[84] S. BRAMMER (note 30), at p. 136.

[85] *Rapport d'activité du Conseil de la concurrence,* 2014, p. 41.

[86] *Rapport d'activité du Conseil de la concurrence*, 2005, p. 74; *Rapport d'activité du Conseil de la concurrence,* 2006, p. 62.

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mutual assistance in investigations in the ECN, this has become one of the most successful aspects of the cooperation between competition authorities in the EU.

Similarly, article 11 §1 of Regulation No. 1/2003 provides that the Commission and the competition authorities of the Member States shall apply EU competition rules in close cooperation. This is a general legal obligation weighing on every competition authority in the EU, which governs the entire functioning of the ECN. As formulated by the General Court in the *France Télécom* judgment, "the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network".[87]

The general theory of network governance considers that the forces that can integrate and hold together networks are mutual trust and loyalty between members.[88] Mutual trust and loyalty generally stem from repeated interactions between the members and from the common values they share.[89] According to the theory of network governance, homogeneous networks whose members share a specific expertise function better.[90] Network members' common culture can be a very powerful cohesive force.[91] Moreover, the strong political will to create and maintain a network contributes enormously to its success.[92] A limited number of members also facilitates peaceful cooperation in a network.[93] For the same reasons, sectorial networks, compared to networks whose activities are more wide-ranging, have a greater chance of successful self-organization and endurance.[94] To summarize, networks with a limited number of members who share common values and who interact regularly are very likely to succeed in creating an atmosphere of mutual trust, which is the ultimate key to the effective functioning of a network.

It follows from the foregoing that the reasons for the success of the ECN can be traced back to the very same characteristics identified by the general theory of network governance. First, the creation of the network was the result of a strong political will, not only on the part of the EU and the Commission, but also on the part of the Member States. Therefore, the ECN members were committed to participating in a constructive manner in the network from the very beginning. Secondly, the ECN is a network with the sole aim of enforcing EU competition rules in an effective and uniform manner. The ECN is therefore not only a sectorial network, but also a network with a very concrete objective and limited scope of activities.[95]

The ECN is relatively small with only twenty-nine members. It is a network whose members share the same knowledge and expertise, as well as a common

[87] *France Télécom v Commission* (note 45), at para. 79.

[88] A. JORDAN/ A. SCHOUT (note 25), at p. 16.

[89] Ibid.

[90] A. JORDAN/ A. SCHOUT (note 25), at p. 35 and 37.

[91] A. JORDAN/ A. SCHOUT (note 25), at p. 48.

[92] A. JORDAN/ A. SCHOUT (note 25), at p. 49.

[93] A. JORDAN/ A. SCHOUT (note 25), at p. 36.

[94] A. JORDAN/ A. SCHOUT (note 25), at p. 56 and 257.

[95] I. SIMONSSON (note 93), at p. 85; F. CENGIZ (note 26), at p.666.

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vision of the objectives to be pursued by the ECN.[96] It is thus an epistemic community[97] *par excellence* that is held together by what one author has called a "unifying discourse" based on the common competition culture in the EU.[98] The common competition culture is a set of rules, mostly legal but also increasingly economic in nature, to which the Court of Justice conferred a quasi-constitutional value in the EU. The Commission, as well as the experts in the field who most often have a legal background, feed this discourse constantly and they intend to maintain its central role in the European integration. National competition authorities and their personnel therefore share the values of this common competition culture as well as a sense of importance and mission.

Finally, it needs to be emphasised that the ECN does not link the EU institutions and the Member States in general, but rather the Commission and national independent administrative authorities. The Member States that generally act as necessary intermediaries for the implementation of EU law in national legal systems disappear in this context.[99] National competition authorities enjoy a certain independence vis-à-vis their governments, an independence that they must sometimes defend or even strengthen. The ECN community is therefore composed of sectorial authorities, which hold similar positions in their national legal systems and have common objectives. Consequently, the solidarity between these independent authorities is strong, they are loyal not only vis-à-vis their governments, but also vis-à-vis the community of their peers in the EU.[100] The functioning of the ECN is therefore influenced by the dynamism between these two loyalties, in particular when the interests of EU competition law and national interests collide.[101]

The ECN is a relatively young network; it is thus possible that its dynamics may change over time. The relationship and the importance of the vertical and horizontal aspects of cooperation in the network may change, one becoming more important than the other.[102] The adequate balance between binding rules and flexibility will also be difficult and delicate to maintain, since this balance must often be adjusted so that the network can quickly adapt to new problems.[103] The

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[96] I. MAHER, Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement ?, *Fordham International Law Journal* 2008*,* p. 1733.

[97] The notion of "epistemic community" was defined by Peter Haas. P.M. HAAS, Epistemic Communities and International Policy Coordination, *International Organization* 1992, p. 1-35.

[98] S. WILKS (note 72), at p. 428.

[99] F. BASSAN, Recent Developments in the Relations between the European Community Administration and the Administrations of the Member States, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Naples 2004, p. 1285.

[100] S. WILKS (note 72), at p. 450.

[101] Ibid.

[102] P. LAROUCHE, Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects, in D. GERADIN/ R. MUNOZ/ N. PETIT, *Regulation through Agencies in the EU: A New Paradigm of European Governance: Cheltenham UK 2005*, p. 174.

[103] F. CENGIZ (note 26), at p. 665.

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Commission, in its capacity as the manager of the ECN, the *primus inter pares*, is responsible for finding this delicate balance in consultation with national authorities. In this regard, the Commission could influence the voluntary cooperation between authorities in a certain direction or adopt new binding rules in case of a failure of softer methods. However, national authorities could always develop themselves other mechanisms to facilitate interactions or to increase the effectiveness of their actions and procedures.

IV. Networks of Independent Administrative Authorities in Other Sectors and Outside the EU

Despite the fact that the ECN has a legal nature and was created by the European legislator,[104] it is a perfect example of a pragmatic network that works well and that manages complex interactions and complex cases. In this regard, it can serve as a model to other networks established in other sectors, be it inside or the outside the EU. As we will see, this is not a mere hypothesis, since administrative authorities today are often at the forefront of European and international efforts of coordination and cooperation in several fields, which directly affect the lives of individuals.

A. The Propagation of Networks in the EU

The example of the ECN is not as isolated as it may seem. Several other independent administrative authorities active in different sectors have similar powers and participate in a network at the European level.

Following the financial crisis in 2008, the European Union decided to implement a new framework for the supervision and regulation of the financial sector in Europe. Firstly, three new European Supervisory Authorities (ESAs) were created. Together with the national supervisory authorities, these European authorities form the European System of Financial Supervision (ESFS). The ESFS was created as a decentralised, multi-layered system of micro- and macro-prudential authorities. The goal of this network is to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services".[105] The underlying rationale for setting up the ESAs was also to establish a closer cooperation and exchange of

[104] F. CENGIZ (note 25), at p. 419; F. CENGIZ (note 26), at p.663.

[105] Article 2 of Regulation (EU) NO 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ* L 331 15.12.2010, p. 84.

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information among national supervisors.[106] As a result, the cooperation between national supervisory authorities in the EU has also become more intensive; the cooperation between EU and national authorities is being strengthened once again to increase the coherence and effectiveness of the enforcement of EU rules. The authorities continue to apply only their national laws, but when it comes to the application of EU law, they exchange information, provide mutual assistance and interact on a regular basis with their peers from other Member States.

In the field of data protection, the role and cooperation of independent administrative authorities will soon become very close to the enforcement system set up in the field of competition law. Following the issuance of a European directive in 1995, all twenty-eight Member States adopted legislation relating to the processing of personal data and the free movement of such data; and have established independent supervisory authorities.[107]

However, due to rapid technological developments, this system of data protection established in 1995 has become obsolete. In May 2018, the General Data Protection Regulation will replace the Directive.[108] In this new system, the independent national supervisory authorities are responsible for monitoring the application of the Regulation with the objective to protect the fundamental rights of natural persons in relation to the processing of personal data and to facilitate the free flow of such data in the European Union.[109] The supervisory authorities have investigative and corrective powers, including the power to impose fines and penalties.[110] Each authority carries out its tasks and exercises its powers on the territory of its own Member State.[111]

These authorities do not form an official network, but have two ways to deal with cross-border situations. First, in case of cross-border processing of data, the supervisory authority of the main establishment or the single establishment of the processor will be the so-called lead authority in charge of the case.[112] It will cooperate with the other national supervisory authorities concerned: it will communicate relevant information and submit its draft decision to them as well as

[106] *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* 8.8.2014 COM(2014) 509 final, p.3.

[107] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive on the protection of personal data), *OJ* L 281 of 23 November1995, p. 31.

[108] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

[109] Article 51 (1) of the General Data Protection Regulation (note 108).

[110] Articles 58, 83 and 84 of the General Data Protection Regulation (note 108).

[111] Article 55 (1) of the General Data Protection Regulation (note 108).

[112] Articles 56 (1) and 60 of the General Data Protection Regulation (note 108).

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take their views into account.[113] In case of a conflict, the European Data Protection Board will issue a binding decision.[114]

Second, it is also possible for supervisory authorities to conduct joint operations, for instance joint investigations and enforcement measures when the data processor has establishments in several Member States or when a significant number of persons might be substantially affected in several Member States by the data processing operation.[115] Moreover, mutual assistance between supervisory authorities in the form of requests for information exchange, supervisory measures, inspections and investigations, is a crucial pillar of the new data protection system.[116] Finally, the heads of national supervisory authorities together with the European Data Protection Supervisor form the European Data Protection Board.[117] The Board is entrusted, among other tasks, with ensuring the correct and consistent application of the General Data Protection Regulation, with promoting the cooperation of the national authorities as well as resolving their conflicts.[118]

It is true that supervisory authorities do not form a formal network similar to the ECN. However, the General Data Protection Regulation established a sophisticated system of cooperation between national authorities, which is less centralised, the Commission not playing any crucial role in the functioning of this informal network. The only organ created by the regulation, the European Data Protection Board, is composed of national authorities and one EU official. The network is based on the cooperation of equal peers, which is supported by certain tools and coordination mechanisms. It will be very interesting indeed to observe, after May 2018, the functioning of this informal network and to see whether it will be as successful as the ECN; and whether there will be room for mutual learning between the two networks.

These examples demonstrate that the European legislator more and more often uses networks of independent administrative authorities in order to better capture and manage cross-border situations and to ensure the effective enforcement of EU law. It is true that substantial differences exist between the functioning of these networks, in particular with regard to the intensity of the cooperation between authorities. Nevertheless, all these networks are composed of independent administrative authorities, which have considerable supervisory, investigative and sanctioning powers, and who perform their mission in cooperation with their counterparts in the EU. The difference in the intensity of the cooperation between members in these networks is essentially due to the different degree of importance these sectors represent to the EU. Their importance is determined by their contribution to the better functioning of the internal market or to a crucial current policy of the EU. The position of a sector or a field of law in the EU

[113] Article 60 (3) of the General Data Protection Regulation (note 108).

[114] Article 65 (1) of the General Data Protection Regulation (note 108).

[115] Article 62 (1) and (2) of the General Data Protection Regulation (note 108).

[116] Article 61 (1) of the General Data Protection Regulation (note 108).

[117] Article 68 (3) of the General Data Protection Regulation (note 108).

[118] Articles 64, 65 and 70 of the General Data Protection Regulation (note 108).

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can rapidly change, as illustrated by the examples of the financial and data protection sectors in the EU.

B. The Global Network of Tax Authorities

Similar developments in the international arena are still rare. However, the intensification of the fight against tax evasion and tax avoidance has led to the progressive intensification of the cooperation between national authorities in the framework of the OECD. The Convention on Mutual Administrative Assistance in Tax Matters (Convention) was developed in 1988 jointly by the OECD and the Council of Europe, and was amended in 2010 by a Protocol. Today, 109 jurisdictions participate in the Convention.[119] According to its provisions, mutual administrative assistance includes exchange of information, simultaneous tax examinations and participation in tax examinations abroad, as well as assistance in recovery and service of documents.[120] The Convention is accompanied by a Multilateral Competent Authority Agreement (MCAA), which provides for the automatic exchange of information between signatory authorities. To date, 88 authorities have agreed to be bound by the provisions of the MCAA.[121]

It is true that the Convention, and in particular the MCAA, only regulates certain well-defined and narrow interactions between tax authorities. The authorities continue to apply their own national laws, and the question of conflicts of authorities or that of the recognition and enforcement of their decisions seemingly never arises. However, after a closer look, it becomes clear that the Convention does in fact deal with these problems in an indirect manner. In particular, under article 8, Parties to the Convention may consult with one another and decide "to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain". According to the Explanatory Report to the Convention, the main objectives pursued by this provision are the avoidance of double taxation and the detection of aggressive tax planning agreements.[122]

Therefore, there can be discussions between tax authorities that might influence their otherwise unilateral decision to initiate proceedings. This dialogue might also encourage the authorities to take into account external factors when they exercise their jurisdiction. This is of course far from being the precisely defined jurisdictional criteria established in the framework of the ECN. The

[119] The list of signatory States can be found at: <http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf>

[120] Article 1.2 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters Amended by the 2010 Protocol (Multilateral Convention)

[121] The list of signatory States can be found at: <http://www.oecd.org/ctp/exchange-of-tax-information/MCAA-Signatories.pdf>

[122] *Text of the revised explanatory report on the Convention on Mutual Administrative Assistance in Tax Matters, as amended by the Protocol* (*Explanatory Report*), 2011, paras. 72-73

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Convention poses one single condition to the application of article 8, namely it requires the authorities to have a common or related interest in the tax affairs of the person or persons concerned. The Explanatory Report clarifies certain crucial points; it provides in particular that the authorities should consult at the request of one of them to determine cases and procedures for simultaneous tax examinations.[123] In addition, the Explanatory Report specifies that the terms "common or related interest" must be interpreted in a broad manner.[124] Simultaneous tax examinations are appropriate when a person resides in a State, but carries out its activities in another.[125] Similarly, intra-group transactions by multinational companies or transactions between companies maintaining close trade relations are also covered by article 8.[126] Moreover, the Explanatory Report contains suggestions with regard to the optimal organization of simultaneous tax examinations.[127] It follows from the above that the contours of a closer international cooperation emerge gradually in the field of tax control. However, similarly to the MCAA, a future multilateral agreement between authorities could further clarify the exact terms of simultaneous tax examinations and could possibly establish criteria indicating the authority or authorities that would be the best placed to end and sanction tax offences with a transnational component.

In addition, according to article 11 of the Convention, "at the request of the applicant State, the Requested State (…) shall take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims". This provision implies the automatic recognition and enforcement of the decision of the tax authority of the applicant State, under the condition that the amount of tax due is not contested.[128] It is therefore a very powerful tool that allows tax authorities to overcome the considerable hurdles related to the recovery of taxes abroad when the taxpayer has no assets in the territory of the State.

The *de facto* network of tax authorities is a true global network, which has the potential to contribute in a significant manner to introducing a more healthy balance in the international tax system, and thus to contribute to the better distribution of wealth in the world. Compared to the ECN, the *de facto* network of tax authorities is not a well-developed network. The distribution of cases could be more efficient and the exchange of information should be multilateral in order to facilitate the detection of cases that may interest several national authorities. However, already by laying down the basic framework of a truly international cooperation between tax authorities, the Convention and the MCAA enabled them to interact, to maybe form an epistemic community and eventually to develop more adequate methods to achieve their objectives. These developments in and of themselves represent a qualitative leap in international tax matters. Despite the absence of a leading authority, such as the Commission within the ECN, this

[123] *Explanatory Report* (note 122), at para. 74-76.

[124] *Explanatory Report* (note 122), at para. 78.

[125] *Explanatory Report* (note 122), at para. 78-79.

[126] *Explanatory Report* (note 122), at para. 80.

[127] *Explanatory Report* (note 122), at paras. 81-82.

[128] *Explanatory Report* (note 122), at para. 113.

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global network of tax authorities might have a similar success in the upcoming years if there continues to be a strong political will behind the goals it tries to achieve.

V. Conclusions

It is clear that global governance poses more serious challenges than governance on a regional level, largely due to the absence of hierarchical structures and powerful institutions, which could facilitate the coordination of national systems.[129] Nevertheless, the role of independent administrative authorities in global governance deserves more attention given their regulatory and enforcement powers that allow them to effectively and rapidly influence a given sector.[130] In addition, the analysis of the functioning of these networks also unveils interesting and innovative procedural solutions for private international law. These solutions encompass the settlement of conflicts of authorities through more flexible criteria, mechanisms for the exchange of information and for the (re)allocation of cases between authorities, a regime for the recognition and enforcement of administrative decisions abroad and many other informal means of cooperation capable of strengthening the cohesion of networks of authorities.

Networks formed by administrative authorities offer an alternative when it is not possible to introduce international conflict of law rules or to harmonise the substantive law. Regulatory authorities generally enjoy a wide margin of manoeuvre when carrying out their missions, in particular when they decide to pursue a case or not. These authorities are mainly active in sectors that directly affect the lives of businesses and individuals. Therefore, strengthening the coordination and cooperation between national regulatory authorities by designating a concrete and common political goal, as has occurred in the fight against international tax evasion, could rapidly bring about concrete results, even on a global scale. Such concrete results can include better coordination of cross-border enforcement efforts as well as harmonisation of procedural tools and substantive rules.

[129] See in this sense A. MILLS, "Variable geometry, peer governance, and the Public International Perspective on Private International Law" in H. MUIR WATT/ D. P. FERNÁNDEZ ARROYO, Private International Law and Global Governance, Oxford 2014, p. 252-260.

[130] See above, p. 217-218 as well as p. 224 and p. 236-237.

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THE CMR 1956 CONVENTION: SOME SPECIFIC ISSUES FROM A PRIVATE INTERNATIONAL LAW PERSPECTIVE

Unai BELINTXON MARTÍN*

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I. Preliminary Considerations

This paper endeavours to address some of the disparate, legally relevant and yet controversial issues that arise out of the international carriage of goods by road.

Given the multiple perspectives from which road transport law may be observed and assessed,[1] a certain degree of definitional work is essential in order to identify the issues involved from a private law perspective. This is not to say that

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[1] C. LEGROS, Contrat de transport international par route de marchandises et de voyageurs, *J.-Cl. dr. int.* 2012, p. 13 *et seq*.

Yearbook of Private International Law, Volume 18 (2016/2017), pp. 569-590
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Printed in Germany

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other perspectives will be neglected.[2] On the contrary, they will have to be occasionally relied on so as to provide an analytical response that is consistent with the multi-faceted features of current transport law, which is characterised by a suggestive specialisation based on the particular mode of transport at stake.[3]

Countless technological and legal advances have marked the development of the international carriage of goods by road and provided improved vehicles and increased road infrastructure. Such improvements have made the movement of goods beyond national borders a reality. The rise of cross-border mobility soon brought the need to comprehensively regulate an activity with inherent international characteristics to the fore. Even though it is subject to geographical constraints, this activity demanded a harmonised response beyond the internal laws of each State.[4] National regulations were no longer sufficient to handle cases in which international elements appeared. Road transport law has been in turn a crucial element in the development of international trade over the last fifty years. As the basic idea of economic sovereignty of States was diluted under the pressure of a developing international market in favour of a globalised economy, international transport law in general and international road transport in particular acquired a transcendental role, accompanied with complex legal developments.[5] The contract for the international carriage of goods by road is part of a broad category of international contracts that have prospered along with economic progress.

The legal framework applicable to road transport in the European Union poses some specific challenges. Part of those challenges flow from the continuous and systematic interaction between the different and sometimes irreconcilable regulatory regimes: domestic, European and international.[6] These multiple sources

[2] See here C. AGOUÉS MENDIZABAL, La intervención administrativa en el transporte por carretera, *RDT* 2011, p. 51-59.

[3] On the specialisation of private law in its international dimension, see crucially J.D. GONZÁLEZ CAMPOS, Diversification, Spécialisation, Flexibilisation et Matérialisation de règles de Droit International Privé, *Recueil des Cours* 2002, p. 156 *et seq*. Also see J.J. ÁLVAREZ RUBIO, *Las Lecciones Jurídicas del Caso Prestige: Prevención, Gestión y Sanción frente a la contaminación marina por hidrocarburos*, Pamplona 2011, p. 13-32.

[4] Reference of course is made to the fact that the transport of goods by road, unlike the maritime transport of goods, is limited by a geographical boundary, beyond which it makes no economic or business sense to offer a transport service. Imagine the case of the carriage of goods by road from Paris (France) to Los Angeles (United States), the only alternative being multimodal transport that not only includes the goods but also the vehicle used for transport. This alternative makes no sense, because the business logic behind the transport of such goods would be road transport from Paris to the ship's port of exit, and the road transport would conclude once the goods are loaded on the vessel.

[5] For the characterization of transport as an economic activity linked to human behaviour as well as for a thorough analysis of the existing international conventions on road transport, see M. ALTER, *Les Conventions sur les transports routiers: Convention sur les transports internationaux de marchandises par route (CMR) et Convention relative aux transports internationaux de voyageurs par route (CVR), Droit des transports terrestres, aériens et maritimes internes et internationaux,* 3rd ed., Paris 1996, p. 54-114.

[6] J.C. FERNÁNDEZ ROZAS, La comunitarización del Derecho internacional privado y Derecho aplicable a las obligaciones contractuales, *RES* 2009, p. 600 *et seq*.

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should prompt European and international legislatures to explore new alternatives for shaping legislation that makes it possible to simplify the complex task of trying to coordinate them.[7] Despite the fact that it is barely possible to expect peculiarities of national contract law in Europe to be removed in the short term, the trend towards international uniformity is defined today in the European Union by the Europeanisation of private law initiated with the Treaty of Amsterdam.[8] The unification of conflict of laws is regarded by doctrine as a necessary step towards the Europeanisation of contract law,[9] which will perhaps finally culminate in a substantive harmonisation, at least in some sectors.

Private international relations in road transport are currently governed by the Geneva Convention 1956 (CMR).[10] The CMR has been for more than 50 years the key instrument in this area.[11] The unification of private law through international substantive rules is intended to offer a higher level of legal certainty for operators.[12] The CMR establishes a basic scheme of rights and obligations for the parties involved and simplifies the resolution of the disputes arising between them.[13] Both before and after the dispute, the parties and their counsels have to identify the conventional rules that are applicable and may, as a consequence, disregard the conflict rules of the countries involved.

The doctrine steadfastly agrees that the CMR is the uniform law on road transport in Europe.[14] Having said that, and as a result of the acquisition by the

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[7] In relation to the diversity of sources and the current trend towards harmonisation of laws applicable to the area of transport law, see among others I. BON GARCIN/ M. BERNADET/ Y. REINHARD, *Droit des transports,* Paris 2010, p. 2 *et seq*.

[8] A.L. CALVO CARAVACA, El Derecho internacional privado de la Comunidad Europea, *Anales de Derecho*, Universidad de Murcia 2003, p. 49-69. In the aftermath of the entry into force of the Treaty of Lisbon, as well as for the external projection of this process, see A. BORRÁS, La Comunitarización del Derecho Internacional Privado: pasado, presente y futuro, in *Cursos de Derecho Internacional de Vitoria-Gasteiz (2001)*, Vitoria-Gasteiz 2002, p. 285-318; M. GUZMÁN ZAPATER, Cooperación civil y tratado de Lisboa: ¿Cuánto hay de nuevo?, *La Ley* 2010, p. 713 *et seq*.

[9] Among others U. BELINTXON MARTÍN, La confluencia de los distintos bloques normativos aplicables en materia de transporte internacional por carretera: divergencias y efecto distorsionador, in M.V. PETIT LAVALL/ F. MARTÍNEZ SANZ/ A. RECALDE CASTELLS (eds), *La nueva ordenación del mercado de transporte,* Madrid 2013, p. 15-20.

[10] BOE No. 109, 7 May 1974. Amended by the Geneva Protocol of 5 July 1978, BOE No. 303 of 18 December 1982, correction of errors in BOE of 15 June 1995.

[11] G. SILINGARDE/ M. RIGUZZI/ E. GRANOLI, *Il Contratto di transporto internazionale di merci su strada: trenta anni di dottrina e giuriprudenza sulla CMR*, Roma 1989, p. 31 *et seq*.

[12] See A. MALINTOPPI, *Diritto uniforme e diritto internazionale privato*, Milan 1955, p. 38-84.

[13] In this regard, P. IVALDI, *Diritto Uniforme dei trasporti e Diritto internazionale privato*, Milan 1990, p. 1-45.

[14] A. RECALDE, La carta de porte CMR: La documentación en el transporte internacional de mercancías por carretera, in F. MARTÍNEZ SANZ (ed), *Problemas en la aplicación del CMR: Especial referencia a la responsabilidad*, Madrid 2002, p. 5-28; see

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European Union of its own legal personality in the field of international law, the evolution of European law has been remarkable in recent years.[15] The transfer of jurisdiction in transport-related matters by the Member States to the European Union is allowing the European Union to develop bodies of rules applicable to intra-European and international transport of both goods and passengers, thereby promoting the free movement of persons, services, goods and capital.[16]

The CMR, however, fails to address all the questions and put to rest all the controversies that may arise from an international carriage of goods by road. On the one hand, the list of the jurisdictional bases under Article 31 CMR raises some particular difficulties. On the other hand, the broad scope of the conventional regime often leads to situations where the courts of a State that is not party to the CMR have jurisdiction with respect to a dispute generated by an international transport which has strong connections with one or more signatory States.

This paper will discuss a series of controversial points related to international road transport that may stand in the way of the proper performance of this activity by legal and business operators who sometimes feel affected by the legal uncertainty flowing from those controversies. Such distortions deserve being scrutinized in detail at both European and international level. They require a response that in turn calls for an in-depth understanding of the specific issues raised by this sector.

II. Origin of the CMR Convention

In 1948, UNIDROIT, the International Road Transport Union (hereinafter, IRU) and the International Chamber of Commerce (ICC) formed a commission of experts, who after an exhaustive study of comparative European transport law, highlighted the challenges posed international carriage of goods by road and emphasized the need to adopt uniform and effective legal measures, including the unification of substantive laws.[17] However, it was not until 19 May 1956 that drawing on the views and the study carried out by UNIDROIT, IRU and the ICC, the UNECE presented the CMR for signing. Its entry into force was delayed until 2 July 1961, when five states ratified it (Austria, France, Italy, Yugoslavia and the

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also J. BASEDOW/ K. SCHMIDT *et al.* (eds), *Münchener Kommentar zum Handelsgesetzbuch – Aktualisierungsband zum Transportrecht*, *Band 7 a*, München 2000.

[15] P.A. DE MIGUEL ASENSIO, La evolución del Derecho Internacional Privado Comunitario en el Tratado de Amsterdam, *REDI* 1998, p. 373-376.

[16] See P.A. DE MIGUEL ASENSIO, Integración Europea y Derecho Internacional Privado, *RDCE* 1997, p. 413-445.

[17] See here R. LOEWE, Commentary on the convention of 19 may 1956 on the contract for the international carriage of goods by road, *Europ. trans. law* 1976, p. 503-540.

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Netherlands). The majority of European countries would subsequently join, as well as certain North African and Asian countries.[18]

The CMR emerged with the purpose of providing a harmonised, easily accessible and predictable response to many of the actions surrounding a contract for the carriage of goods by road in exchange for payment where the place for loading the goods and the place designated for unloading are located in two different countries.[19] Moreover, the text deals with the extent of liability of the carrier or transport operator, as well as with the jurisdiction to hear any claim arising from the transport.

The CMR is a latecomer in the field of unification of laws when compared to other transport sectors.[20] However, its practical value is undeniable, since it has provided a reference model for the development of national transport legislation in a considerable number of States that are party to the CMR[21], in addition to offering a more than acceptable degree of legal certainty over the past 50 years.[22]

[18] See here the number of States party to the Convention: Albania, Armenia, Austria, Azerbaijan Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Mongolia, Montenegro, Morocco, the Netherlands, Norway, Poland, Portugal, Moldova, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the FYR of Macedonia, Tunisia, Turkey, Turkmenistan, United Kingdom and Uzbekistan.

[19] R. RODIÈRE, Règles particulières: transports soumis à la CMR*,* in *Manuel des Transports terrestres et aériens*, Paris 1969, p. 196-204.

[20] Other transport sectors such as rail, marine or air had unified rules long before. See among others the International Convention on the Carriage of Goods by Rail of 14 October 1890 (Berne Convention), the International Convention for the unification of Certain Rules relating to bills of lading signed in Brussels on 25 August 1924 (Rules of the Hague) and the Warsaw Convention for the Unification of certain Rules Relating to international Carriage by Air of 2 October 1929 (Warsaw Convention).

[21] However, there have been several attempts to reform the Convention over the past 50 years, which include the proposals made in 1972 by the Inland Transport Committee of the Economic Commission for Europe of the United Nations which were not successful (see M.A. CLARKE, *International Carriage of goods by Road: CMR*, London 1991). See also the proposed reform entitled "Proposal for a revised Convention on the contract for the international carriage of goods by road", by the FIATA Ad-hoc working group, in November 1983 (C. LLORENTE, El contrato de Transporte Internacional de Mercancías por Carretera, in A.L. CALVO/ L. FERNANDEZ (eds), *Contratos Internacionales,* Madrid 1997, p. 474).

[22] J. CAPEL, La Convention CMR – Pilier du transport international par route, *ULR* 2006, p. 521-544.

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III. Scope of the CMR (Art. 1)

A. Initial Consideration and Definition

The European harmonisation in the international carriage of goods by road currently embraces two legal perspectives that necessarily complement each other and are developed in an area of converging application: European law and the international treaties.

Both regulatory systems seek to ensure uniformity of treatment of an identical situation affecting various legal systems. The CMR contains a set of uniform rules that are applicable regardless of the domicile or nationality of the parties. In a similar vein, the scope of European law on road transport, though physically much smaller than the one covered by the international system – as it focuses exclusively on the European continent – is also applicable regardless of the carrier's nationality.

The carriage of goods by road is essentially the means *par excellence* for door-to-door operations inside and outside Europe.[23] Consequently, the coexistence of both regulatory systems is required.

One of the main features of the international regulatory system, and certainly one of the most far-reaching despite the geographic limitation, focuses on the extent or scope of its target application area. The text seeks to cover the maximum number of international operations possible, even when the loaded vehicle itself has to be transported by sea, rail, inland waterways or air on a part of its route to comply with the performance of the contract at the point or points of delivery agreed (Art. 2).

Compared to other existing international instruments on transport, the CMR contains a definition of its scope that is striking to say the least. For its provisions to be applicable, the locations for loading and unloading of goods *do not need to be both* in countries party to the CMR.[24] It is only necessary *for one country* in either of the two locations to be a signatory State.[25] This peculiarity allows the target scope to be rather expansive, but sometimes, as we will see later, this is also contentious.

Art. 1(1) CMR establishes the scope of the Convention through the subject-matter and the location of the place of loading and unloading of the goods carried.[26] In particular, the CMR applies to contracts of carriage of goods by road in exchange for payment by means of vehicles, provided that the place of transfer of the goods and the place designated for delivery in the contract are located in two

[23] A. DJORIC, *Le contrat de transport international terrestre des marchandises*, Belgrad 2005, p. 64 *et seq*.

[24] See on rail transport the study carried out by A. EMPARANZA/ A. RECALDE CASTELLS, *El Contrato de transporte internacional de mercancías por ferrocarril*, Cizur Menor 2008, p. 30 *et seq*.

[25] Among others, and with reference to international road transport, J. GOMEZ CALERO, *El transporte internacional de mercancías*, Madrid 1989, p. 39-64.

[26] R. LOEWE, *Note explicative sur la convention relative au contrat de transport international de marchandises par la route (CMR) du 19 mai 1956*, Genève 1975.

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different countries, one of which at least is a contracting country, irrespective of the place of residence and nationality of the parties to the contract.

B. Lack of Definition for Contract of Carriage

The doctrine has emphasised that the CMR does not contain a pure definition of contract for the international carriage of goods by road. However, in actual practice, this has not been a hindrance in achieving a common understanding of the intended scope of the CMR. This peculiarity is not entirely unique to the international legislation. The Spanish legal system lacked, for example, a definition in this regard until the enactment of Law 15/2009 on the contract of the carriage of goods by road.[27] The Spanish Commercial Code does not include any definition in its articles related to transport in this regard (Art. 349-379). However, Art. 2 of Law 15/2009 has brought about an innovation in this context.[28] For the international carriage of goods by road, it is necessary to add to the definition provided by the Spanish legislation the international element: the places of loading and unloading of goods have to be in two different countries, *i.e.* the transport has to be a cross-border transport, at least potentially, because a variation *en route* to the orders or to the destination is notoriously possible and frequent.

The CMR excludes the so-called own-account international transport from this definition, which may undoubtedly and essentially involve international transport, but which is not covered by the provisions of the CMR due to the absence of any payment. In short, the doctrine has largely defined the contract for the international carriage of goods by road as a bilateral contract, consensual, in exchange for payment.[29]

C. The Concept of Remuneration and the Essential Elements of the Contract of International Carriage by Road

Remuneration is an essential condition for the CMR to apply. Any international carriage of goods by road that is not remunerated falls outside the purview of the

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[27] Ley 15/2009, de 11 de noviembre, del contrato de transporte terrestre de mercancías (BOE, No.273, 12 November 2009).

[28] Here is the Spanish text of this provision: "*el contrato de transporte de mercancías es aquél por el que el porteador se obliga frente al cargador, a cambio de un precio, a trasladar mercancías de un lugar a otro y ponerlas a disposición de la persona designada en el contrato*": C. GORRIZ LOPEZ, El contrato de transporte terrestre de mercancías, in P. MENENDEZ (dir.) *Régimen Jurídico del Transporte Terrestre: Carreteras y Ferrocarril,* Cizur Manor 2014, p. 709-715.

[29] F.J. SÁNCHEZ-GAMBORINO, *El contrato de transporte internacional: CMR*, Madrid 1996; M.A. CLARKE (note 21); A. CABRERAS, *El Contrato de transporte por carretera: Ley 15/2009*, Barcelona 2010, p. 17-24; C. LLORENTE (note 21), at 467-545; J.C. SÁENZ GARCIA DE ALBIZU/ M.T. HUALDE MANSO, El contrato de transporte, in E. RUBIO TORRANO/ J.C. SÁENZ GARCIA DE ALBIZU (eds), *Lecciones de Contratación Civil y Mercantil*, Cizur Menor 2012, p. 430-455.

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CMR. Remuneration does not necessarily require payment in cash and allows the carrier to be paid by any other means.

To summarise, three essential elements identify a contract for the international carriage of goods by road to which the CMR is applicable. First, payment; international transport which is free of charge, such as own-account transport, is excluded. Second, the loading and unloading of the goods have to take place in two different countries,[30] or at least this has to be specified in the consignment note, or if it exists, in the contract.[31] Third, it is necessary that either the country of loading or the country of destination is party to the CMR. Thus, it is not necessary for both countries to have ratified the CMR. As an additional element, the transport has to be carried out by a motor vehicle authorised for this purpose under the Convention on Road Traffic of Geneva of 19 September 1949.[32] Instead, the place of residence or nationality of the contracting parties, or even the nationality of the carrier that offers and performs the service, are irrelevant when it comes to characterizing the carriage as international.

D. The Non-Applicability of the CMR between Two Neighbouring Countries and the Use of the Consignment Note as a Representative Title of the Goods

Finally, it is important to highlight a special point specified in Art. 1(5) on the mandatory application of the CMR. It is about the possibility for the CMR not to apply to cross-border transport between two neighbouring countries to the extent that there is a special agreement between the States concerned that so provides. Art. 1(5) reads as follows:

> "The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, *except to make it inapplicable to their frontier traffic* or to authorise the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods" (emphasis added).[33]

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[30] This is an element that is also reflected in other conventions, such as the CIM uniform rules, which were influenced by the CMR.

[31] In the event of any conflict between the provisions of the consignment note and the contractual document, the latter shall prevail.

[32] F.J. SÁNCHEZ-GAMBORINO, CMR Commentary, by Professor Roland Loewe, published by the United Nations, in F.J. SÁNCHEZ-GAMBORINO/ A. CABRERA (eds), *El Convenio CMR: el contrato de transporte internacional de mercancías por carretera*, Barcelona 2012, p. 58; C. LLORENTE (note 21), at 469-534.

[33] The English version is the official version the Convention alongside the French version. The Spanish version reads as follows: "*Las partes contratantes se comprometen a no modificar en absoluto este Convenio por medio de acuerdos particulares entre dos o varios de ellas, a no ser que tal modificación consista en la no aplicación del Convenio al tráfico fronterizo o en autorizar el uso de la Carta de porte representativa de las mercancías a los transportes efectuados exclusivamente en su territorio*".

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This alternative has not been really exploited by the contracting States, or at least not that this author is aware of. Nevertheless, such a provision may have an interesting potential in the current context of intra-European transport for the EU and the EFTA States. Simplifying the numerous administrative formalities that have to be performed every day when carrying the goods loaded in a French port, for example, and bound for a Spanish port or even a location in a steel mill, is not a minor issue.

In relation to transport documentation, it should be noted that private transport, being of consensual nature, does not require any formality whatsoever. As a result, it is possible to perform a road carriage of goods without issuing a written document, any oral agreement being fully enforceable. However, despite the fact that the international carriage of goods by road does not require any supporting documentation, the fact remains that the issuance of a consignment note as evidence facilitates the activity of the carrier.[34] The consignment note provides *prima facie* evidence of the performance of a contract of carriage, the terms and conditions of that contract, and the receipt of the goods by the carrier.[35] This is a consequence of Article 4 CMR, which states that "The contract of carriage shall be confirmed by a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention".

Indeed, the consignment cannot *a priori* be considered as a title to the goods (contrary to a bill of lading when it comes to transport by sea), but rather as a document that confirms the existence as well as the terms and conditions of the contract. The fact remains, however, that Article 1(5) CMR subtly sets out an exemption for international carriage performed exclusively between two or more States that are party to the Convention, enabling authorisation of the use of the consignment note as a representative title of the goods for the carriage performed on their territories. Let us reproduce once again the text of Article 1(5):

> "The contracting parties agree not to vary any of the provisions of this Convention by special agreements *between two or more of them*, except to make it inapplicable to their frontier traffic or to authorise the use in transport operations entirely confined *to their territory* of consignment notes representing a title to the goods."[36]

The importance that such an exception might have had in the actual activity tends to go unnoticed. Those non-strict "disconnection clauses" allowing one or more signatory States to "disconnect" the Convention in specific cases may, however, assist to determine the degree to which such provisions affect the desired legal certainty pursued that the Convention expressly pursues.

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[34] Among others, D.A. GLASS/ D. CASHMORE, *Introduction to the law of carriage of goods,* London 1989, p. 84-136.

[35] A. MESSENT/ D.A. GLASS, *CMR: Contracts for the international carriage of goods by road,* London 1995, p. 69-87. See also Article 9 of the CMR.

[36] Emphasis added.

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IV. Effects of the Extensive Scope of the CMR Convention on the Rules of International Jurisdiction Laid Down in Art. 31

A. Preliminary Considerations

Doctrine and case law have at times dealt with the rules on international jurisdiction contained in the CMR. However, the importance of this issue in the field of private international law, together with the development of different legislative systems with rules on jurisdiction in international transport, requires careful investigation into the variety of solutions in this field. This leads in the first place to define the ability for the parties to contractually select the court having jurisdiction over disputes arising out of the contractual relationship (including by submitting to arbitration),[37] and the applicable laws and regulations when it comes to their substantive rights and obligations.

It is necessary to identify first the role that the parties' freedom of choice plays in the context of the CMR, both in terms of general jurisdiction (Art. 31 CMR), and in relation to arbitration (Art. 33 CMR), as well as to consider the relevant provisions under European regulations. Here again, a study of the evolution of international discipline on the carriage of goods by road indeed requires identifying the different regulatory systems that operate in this sector (domestic law, treaty law and European law). Those systems often offer divergent legislative solutions.[38]

In the field of road transport law, the parties' freedom of choice deserves a particular attention as the deregulation of the sector is completed.[39] It should be emphasised that, with the existence of multiple fora available for litigants based on the jurisdictional factors laid down by the Convention, the parties may be well-advised to determine themselves the single forum that is exclusively competent to hear the disputes.

Nevertheless, the margin imparted to the parties' freedom of choice in the international carriage of goods by road is considerably smaller than that available in maritime transport, where the idea of freedom of contract as a basic concept of private law is evidenced through a number of particular manifestations.[40]

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[37] In this regard, U. BELINTXON MARTIN, Jurisdicción/arbitraje en el transporte de mercancías por carretera: ¿Comunitarización frente a internacionalización?, *Revista de Arbitraje* 2014, p. 708-711.

[38] In relation to the diversity off normative blocks, see J.J. ÁLVAREZ RUBIO, *Los Foros de competencia Judicial internacional en materia marítima (Estudio de las relaciones entre los diversos bloques normativos)*, Bilbao 1993, p. 29 *et seq*.

[39] C. LLORENTE GOMEZ DE SEGURA/ D.J. JIMENEZ-VALLADOLID DE L´HOTELLERIE-FALLOIS/ Y.C. MARTINEZ, El contrato internacional de transporte de mercancías por carretera (CMR), in M. YZQUIERDO TOLSADA/ J.M. ALMUDI CID/ M.A. MARTINEZ LAGO (coords), *Contratos: civiles, mercantiles, públicos, laborales e internacionales, con sus implicaciones tributarias*, Cizur Menor 2014, p. 339-400.

[40] J.J. ÁLVAREZ RUBIO, Jurisdicción y Arbitraje en el nuevo Convenio Uncitral, in A. EMPARANZA (ed), *Las Reglas de Rotterdam: la regulación de contrato de transporte*

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The CMR restricts the possibility for the parties to choose a forum in that it requires the chosen forum to be in one of the contracting States. However, despite this limitation, a choice of forum agreement should be beneficial for both parties in terms of predictability.

B. Regulation of Jurisdiction in the CMR

The CMR provides for a set of rules in Art. 31 and 33 dealing with jurisdiction and the resolution of disputes arising out of an international carriage of goods by road if the parties are unable to resolve their differences amicably. After a fruitless negotiation, the plaintiff must identify the courts before which it is possible to bring a lawsuit. Art. 31 provides that

> "In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory: (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated."

Art. 31(1) contemplates two scenarios: choice of forum by the parties (C) and, failing this, a limited list of objective bases for jurisdiction (D).

C. Free Will: The Agreement Conferring Jurisdiction

The CMR does not mention any formal requirement for a jurisdiction clause or agreement to be valid. In order to avoid any uncertainty and potentially diverging interpretations by different courts, the jurisdiction agreement should be incorporated in the consignment note, or failing that, in any document that provides a record of its existence, including any contractual document or any type of letter, telegram, fax, registered fax or even email, provided that it is established that both parties agreed to that selection of forum.[41]

On the other hand, the essential validity of the clause conferring jurisdiction on the courts of a State shall be assessed according to the law of the jurisdiction chosen, and its judicial organisation and allocation of jurisdictional power among various courts, including specialised ones.[42]

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internacional de mercancías por mar, Madrid 2010, p. 313-336 (A study which deals with jurisdiction and arbitration, floating jurisdiction clauses and freedom to choose any court).

[41] This has been the view of, among others, the French courts which have tended to require that the choice of forum clause is stated in writing in any of the documents exchanged between the contracting parties.

[42] S. GRIGNON-DUMOULIN, The National Judge and the Silences of the CMR: French Case-Law, *ULR* 2006, p. 609-618.

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The CMR provides that the chosen forum needs to be located in a signatory State. The purpose of this provision is to ensure the effective application of the Convention to all cases of international carriage of goods by road covered by it. It would seem that, under Art. 41(1), any jurisdiction agreement conferring the power to hear the dispute to a court of a non-signatory country is null and void, regardless of whether the laws of that other State ultimately permit the full application of the CMR.[43] Indeed, nothing prevents a non-signatory country to apply the CMR, as the Convention does not require that both the country of the place where the goods were taken over and the country of the place designated for delivery are signatory countries. Be that as it may, this restriction on the freedom to choose a court for the international carriage of goods by road is very significant.

The wording of Art. 31(1) CMR is unclear when it comes to another important issue, which concerns the exclusive or non-exclusive character of the choice of forum. This textual ambiguity sparked intensive doctrinal and judicial debates: some take the view that a choice of forum clause simply adds up a forum to those provided under Article 31(1) [44] and others take the view that a choice of forum excludes those alternative *fora*.[45] Each of the two opposing positions are aimed to satisfy legitimate yet irreconcilable interests involved in international transport law: The doctrine favouring exclusivity stresses the need to ensure party autonomy and to permit the parties to bind themselves through an exclusive choice of forum while requiring them to honor that binding mutual undertaking. The doctrine favouring non-exclusivity, which is popular in Anglo-American circles, considers that the plaintiff should be able to choose between the widest possible range of competent courts, *i.e.*, between the court designated by the parties and any of the alternative fora designated by the CMR through objective criteria. Such disturbing interpretative uncertainty has regrettable consequences in practice, most notably a far less uniform application by national courts than would be expected for an international text of this kind.

Leaning *a priori* towards a doctrinal position that considers the choice of jurisdiction to be non-exclusive, including in the event of unambiguous characterization by the parties as exclusive, may be seen as constraining unnecessarily the freedom of the parties. This would mean that one party is able to walk away from a reciprocal promise of bringing any dispute before the chosen forum with impunity, even if such a promise has been made once the event giving rise to the dispute occurred. In this regard, it is arguably justifiable to consider that such an opinion would breach the fundamental legal principle that contracts made in good faith are binding for the parties and they have to be honoured. Allowing the plaintiff to choose between what is expressly agreed as the single available forum and any alternative fora designated through the objective jurisdictional bases provided by the CMR would mean that one party could initiate proceedings in the

[43] J. PUTZEYS, *Le contrat de transport routier de marchandises*, Brussels 1981, p. 373-375; F.J. SÁNCHEZ-GAMBORINO (note 29), at 270-271.

[44] A. MESSENT/ D.A. GLASS (note 35), at 242; R. LOEWE (note 26), at 240; J. PUTZEYS (note 43), at 1090.

[45] F.J. SÁNCHEZ-GAMBORINO (note 29); R. RODIÈRE, La CMR, *Bulletin des Transports* 1974, p. 338-339.

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jurisdiction most favourable to its claims. This approach would allow for "forum shopping" and generate significant levels of uncertainty for operators of the branch, possibly leading in some cases to undermining the equality between the contracting parties and the desired predictability that rules of jurisdiction aim to provide.

On the other hand, the opinion under analysis has the positive result of restoring a certain degree of equality between the parties in situations where a the choice of forum clause is incorporated by default in the consignment note. The elimination of any abuse of a dominant position in the negotiations is necessary in the international context of transport. The distribution of risks and responsibilities between shippers and carriers has to be just and fair. Accepting concurrent fora despite any jurisdiction agreement between the parties seeks to minimize the risk of one party imposing its preferred forum on to the other,[46] thereby reducing a potentially pre-existing imbalance between shipper and carrier.

The designation of a competent court through an inter-party agreement may entail different effects depending on whether such an agreement is incorporated into the contractual document or into the consignment note. If the choice of forum clause is contained in a contractual document which is initially binding for the parties who sign it, a third party may possibly be unaware of the existence of such a clause. The fact is that operations involved international carriage of goods by road become increasingly complex, with various carriers or operators being involved at various stages in the same transport service. For these cases, the jurisdiction agreement should be included in the consignment note in order to make this agreement binding not only for the shipper and the initial carrier, but also for any other operator, whether they be called the successive carrier, consignee or even the recipient of the goods.[47] However, the choice of forum is not specified amongst the "particulars" that the "consignment note shall contain" under Art. 6 CMR. Nor is the consignment note required for the essential validity of the contract of carriage, performing an evidentiary function only. If it does exist and includes an agreement conferring jurisdiction, such a note allows any third party, even if this party was not a party to the original transport contract, to be acquainted with the terms and conditions of the agreement, including the choice of forum clause.

In this respect, we deem it useful to reproduce the para. 47, 48 and 49 of the judgment by the High Court of Justice (Queen's Bench Division – Commercial Court) dated 23 March 2012,[48] which emphasize the need for the clause conferring jurisdiction to be stated in the consignment note, so that it can be binding on successive carriers:

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[46] Each of the contracting parties may draft and complete the consignment note. Art. 350 Spanish Commercial Code states that the sender and the carrier may require each other to issue such a document. However, there is no indication about who has to complete it.

[47] On this point see A.E. DONALD, *The CMR: The Convention on the contract for the international carriage of goods by road*, London 1981, p. 87, expressly stating that: "it is vitally necessary for this agreement to be endorsed on the Consignment Note; the claimant may be the consignee and the defendant may be a successive carrier, neither of whom would be bound by the agreement unless shown on the Consignment Note".

[48] 2012 EWHC 694 (Comm).

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> "47. This argument [is founded] on the express words of Article 34 since the contract to which each successive carrier becomes a party is the contract set out in the Consignment Note. The Article expressly says that each succeeding carrier becomes a party to the contract of carriage «under the terms of the Consignment Note» on acceptance of the goods and the Note. If the Consignment Note contained an exclusive jurisdiction clause, which it could if the sender and the first carrier incorporated such a provision in it, as they are able to do under the terms of Article 6.3, then that clause would be binding upon all successive carriers who accepted the goods and the Consignment Note. If no such clause appears in the Consignment Note, it is not part of the contract of carriage to which the successive carriers are party.
>
> 48. Any other result would be entirely contrary to principle because a carrier cannot be bound by an exclusive jurisdiction clause to which he has not agreed and the wording of Article 31.1 requires there to be a «court […] designated by agreement between the parties». There would be no such court designated by agreement between the parties, where one of the relevant parties had not agreed to designation.
>
> 49. It would be contrary to principle for any carrier to be subject to a jurisdiction clause to which he did not agree and of which he had no notice, both as a matter of English law and European law, as Article 23 of the Regulation shows. The policy which underlies the conferring of jurisdiction on a country which is «designated by agreement» between the parties, self-evidently requires there to be an agreement between the parties in question to that jurisdiction and in European and civil law there is a greater emphasis on «consensus» in the sense in which such law understands the concept."

The above considerations leads us to ask another question: Should the regime be different depending on whether the choice of forum is initially agreed as part of the contractual clauses or consignment note, or it is negotiated only after the event giving rise to the dispute? One might argue that if the agreement conferring jurisdiction is included in the contractual clauses or the consignment note from the outset, the plaintiff is not bound to bring the action before the court designated by the agreement. This solution would neutralise any possible abuse by one party of its contractual position of dominance to the detriment of the other. Art. 41 establishes the mandatory nature of the Convention, stating that its rules cannot be derogated from by agreement of the parties:

> "1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

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> 2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void."

However, if the choice of court agreement is made once the disputed events have occurred, there is less justification to allow the parties to walk away from it. In our view, once the dispute has occurred, there is nothing to prevent the parties from referring any kind of dispute to the court they deem most appropriate, provided that the designated court is that of a contracting State, or even to arbitration. Indeed, a post-dispute choice of forum agreement should as a matter of policy and principle be regarded as exclusive and preclude either party to rely on the alternative courts foreseen under the Convention, unless of course the parties provide otherwise.

D. Alternative Grounds of Jurisdiction Set Out in the CMR

The CMR lists a number of alternative grounds of jurisdiction in Art. 31 that refer to the ordinary residence of the defendant (the head office may also be used as the *de facto* address of the activity), branch or agency through which the contract was made, or the place of loading of the goods or the place of destination, which is understood as the place designated for delivery of the goods in the consignment note or any other contractual documents (the fact that the goods are actually delivered or being immaterial). The applicant may then choose from among all those alternative courts. The limitation of the freedom of the parties to choose the competent jurisdiction – here is the text again of Art. 31(1): "*the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory*" –, coupled with the number of potentially available fora[49] stimulates the "race to the forum", rewards the fastest in filing the action, allows differences in the outcome of the dispute depending on whether the action is filed before the court of one contracting State or another, or before the court of one contracting State or that of third country. This is due to the fact that there are substantial differences in the way domestic courts tackle with certain loopholes left by the CMR, as well as substantial differences on how the law applicable to the international carriage of goods by road is designated in a non-contracting State, notably in such important areas as limitation of liability, compensatory damages, statute of limitation, enforcement of judgments, etc.

The very extension of the substantive scope covered by Art. 1 is indeed controversial. Because Art. 1 requires that only one of two countries where the loading of the goods or the delivery or unloading to the recipient occurs is a party to the CMR, the courts of a third State may hear a case of breach of contract which may eventually trigger both contractual and non-contractual liability, as this is allowed by the grounds of jurisdiction established under the CMR for cases in which there is no jurisdiction agreement. Additionally, it should not be forgotten

[49] In this regard, U. BELINTXON MARTÍN, *Derecho europeo y transporte internacional por carretera*, Cizur Menor 2015, p. 183 *et seq*.

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that a State that is not party to the CMR has no obligation to enforce it. The court of that State will turn to its own system of private international law which may well refer to its own domestic law or rely on a special treaty that is in force in that country.[50] It may further be argued by the courts of non-signatory countries that the foreign law designated by their conflict rules, including CMR if that law is one of the contracting States, is contrary to mandatory national provisions or inconsistent with public policy (*ordre public*) in order not to apply the substantive provisions of the CMR.[51]

V. Application of the Rule of Specialty in the Relations of the Convention Signed in Geneva in 1956 (CMR) and European Law (Brussels I Regulation Recast and the Lugano Convention)

A. The Coexistence of the CMR Convention with the Brussels I Regulation (Recast) and the Lugano Convention 2007

The peculiarity of the international carriage of goods by road in Europe lies, as has been shown above, in the different and potentially diverging regulatory systems involved: national law, European law and international conventions.[52] The CMR, which is the key substantive instrument, is complemented in areas of international jurisdiction by the 1968 Brussels Convention, now Brussels I Regulation (Recast) No 1215 / 2012[53] (former Brussels I Regulation) with respect to the EU Member States,m and by the Lugano Convention of 1988, now the Lugano Convention 2007, with respect to the Member States of the European Free Trade Association (Norway, Switzerland and Iceland) in their relations with each other, and in their relations with the EU Members. Both Brussels I Regulation (Recast) and the Lugano Convention 2007 make it clear that respect for international commitments made by the Member or Contracting States means that both instruments are intended to operate without prejudice to international conventions to which one of

[50] The OHADA Act on the international carriage of goods by road – in force in a number of West African countries – is also an international legal regime on transport. While greatly influenced by the CMR, it forms an autonomous set of international rules.

[51] In this regard, see B. LASA, Competencia judicial internacional y regulación del arbitraje en el convenio CMR, *Anuario Español de Derecho Internacional Privado* (*AEDIPr*) 2004, p. 287-308; J. PUTZEYS (note 43), at 88-89.

[52] A. BORRÁS, La proyección externa de la comunitarización del Derecho Internacional privado: los datos del problema, *La Ley* 2002, p. 1-8; J. BASEDOW, The communitarisation of the conflict of laws under the treaty of Amsterdam, *CMLR* 2000, p. 687-708.

[53] Regulation (EU) 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 (Official Journal of the European Union, of 20 December 2012 L 351/1).

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them is party at the time of their adoption.[54] In this regard, Art. 57 of the original Brussels Convention of 27 September 1968, Art. 71 of the current Brussels I Regulation (Recast) No 1215/2012 (the former Regulation No 44/2001), and Art. 67 of the Lugano Convention 2007 deserve special attention. Here is the text of Art. 71 of Brussels I Regulation:

> "1. This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.
>
> 2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner: (a) this Regulation shall not prevent a court of a Member State which is party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not party to that convention. The court hearing the action shall, in any event, apply Article 28 of this Regulation; (b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.
>
> Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation on recognition and enforcement of judgments may be applied."

These provisions have to be assessed against the backdrop of the ECJ ruling of 4 May 2010 in the *TNT* case.[55] The Court of Justice first notes that the power of preliminary interpretation only extends to rules that constitute EU law. As a result, the ECJ has in principle no jurisdiction to interpret the provisions of an international agreement concluded between EU Member States and third countries.[56] The Court further makes clear that the rule of specialty laid down in Art. 71 operates in relation to special conventions including the CMR, provided however – and here lies the originality of the approach embraced by the Court – that the objectives of the free movement of judgments and mutual trust within the EU are achievable

[54] On the regulatory evolution of a uniform system of law in the European judicial area, see among others S.M. CARBONE, *Lo spazio giudiziario europeo: le Convenzioni di Bruxelles e di Lugano*, Torino 1997, p. 11 *et seq*.

[55] ECJ, Case C-533/08, 4 May 2010.

[56] See on this aspect the reference given by J.J. ÁLVAREZ RUBIO (note 57).

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under conditions which at least as favourable as those leading to the provisions set forth in the Regulation.[57] Here is the relevant passage of the ruling:

> "Art. 71 of Regulation (EC) No. 44/2001 [...] must be interpreted as meaning that, in a case such as the main proceedings, the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter, such as the *lis pendens* rule set out in Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956 […], and the rule relating to enforceability set out in Article 31(3) of that convention, apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (*favor executionis*)."

In other words, the judgment promotes the idea that the EU is not unconditionally bound by rules of jurisdiction, recognition and enforcement contained in a special convention such as the CMR. This suggests that there is indeed a margin of discretion, a room for judicial interpretation of the rule of specialty, that will depend on the circumstances of the particular case.

Another case sheds some light on the position of the ECJ is the *Nipponkoa Insurance* case, which gave rise to a preliminary ruling dated 13 December 2013.[58] The dispute arose between *Nipponkoa Insurance* and *Inter-Zuid Transport* about the compensation of 500,000 Euro for damages suffered as a result of an international carriage of goods by road. *Nipponkoa Insurance* brought an action for compensation against *Inter-Zuid Transport* before the German courts (*Landgericht Krefeld*) claiming reimbursement of the 500,000 Euro that, being the insurance company, it had to pay to the company Canon for the loss suffered as a result of the theft of part of its goods. However, prior to the commencement of this action, *Inter-Zuid Transport* initiated proceedings before the *Rechtbank Haarlem* (the Netherlands) seeking a negative declaration requiring the Dutch court to limit the compensation to the maximum amount allowed on the basis of Art. 23 of the CMR. The German court decided then to stay the proceedings and to refer the following preliminary questions to the ECJ:

(1) Does Article 71 of [Regulation No 44/2001] preclude an interpretation of a convention which is exclusively autonomous or are the objectives and principles of the regulation also to be taken into account when applying such conventions?

[57] J.J. ÁLVAREZ RUBIO, La regla de especialidad como cauce para superar los conflictos normativos entre el Derecho comunitario y los Convenios internacionales en materias especiales, *La Ley* 2010, p. 1-6.

[58] ECJ, Case C-452/12, 13 December 2013.

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(2) Does Article 71 of [Regulation No 44/2001] preclude an interpretation of a convention by which an action for a declaration decided in one Member State does not preclude an action for performance brought later in another Member State, where that convention also makes an interpretation possible in that respect under Article 27 of Regulation No 44/2001?

As to the first question, the ECJ again reiterated, as stated in the *TNT* judgment, that it has no jurisdiction to interpret Art. 31 of the CMR and yet it does have jurisdiction to hear any matters relating to the interpretation of EU law, in particular the Brussels I Regulation as set out in Art. 267 TFEU. Despite this self-restraint, the ECJ further reiterated that Article 71 requires nevertheless that an international convention, which is in principle preserved by the Regulation, should not be interpreted in a way that is inconsistent with the "underlying objectives and principles" of that Regulation. Here is the language used by the ECJ:

> "Article 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed".

Regarding the second question, which concerns the *lis pendens* situation, and in particular the notion of identity of "cause of action", the ECJ considers that the international conventions covered under Article 71 should not be construed in a way that would ultimately undermine the "*effet utile*" of the European rules. Here is what the ECJ said:

> "Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978, according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State".

The 2010 and 2013 rulings may provide a hermeneutical criterion to inspire the Swiss, Norwegian, Icelandic courts when applying Article 67 of the Lugano Convention 2007.

In summary, the specialty rule is not applicable to all cases falling under the scope of all special international conventions. Each specific case must rather be carefully evaluated in order to assess whether application of the substantive instrument at stake, including its rules on direct or indirect jurisdiction and *lis pendens*, would satisfy this sort of "Euro-compatibility" requirement prescribed by the ECJ. Should this answer be negative, the specialty rule shall be set aside and

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uniform common jurisdiction under Brussels I Regulation and, as the case may be, the Lugano Convention will come into play, unrestraint.[59]

B. The Rules of International Jurisdiction Set Forth in the Brussels Convention and the Lugano Convention on International Road Transport

Finally, one must briefly mention the rules of international jurisdiction contained in Brussels I Regulation (Recast) and in the Lugano Convention of 2007. Sections 2 of both instruments, each entitled "special jurisdiction", contain special rules on international jurisdiction with respect to contracts. Articles 7(1) Brussels I Regulation (Recast) and 5(1)(b) Lugano Convention 2007 are divided into a regime applicable to contracts in general and a special regime applicable to two particular categories of contracts only: sale of goods and provision of services.[60] Here is the text of Art. 7(1) Brussels I Regulation (Recast):

> "A person domiciled in a Member State may be sued in another Member State: (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered; – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided."

Article 5(1)(b) Lugano Convention 2007 states in similar terms that

> "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued: 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: – in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered; – in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided."

[59] F.F. GARAU SOBRINO, La literalidad interpretada desde la coherencia del sistema. Las relaciones entre Reglamento Bruselas I y los convenios sobre materias particulares según el TJUE, *Cuad. Der. Trans.* 2011, p. 270-281.

[60] M. VIRGÓS SORIANO/ F.J. GARCIMARTÍN ALFÉREZ, *Derecho procesal civil internacional: Litigación internacional*, 2nd ed., Cizur Menor 2007, p. 141-158.

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When it comes to international carriage of goods, the attention will naturally focus on the second paragraph of Article 7(1)(b) Brussels I Regulation (Recast) and of Article 5(1)(b) Lugano Convention 2007 on the *provision of services*.[61] This is a broad concept that must be interpreted autonomously[62] and it certainly includes the international carriage of goods, as can be inferred from the ECJ ruling of 9 July 2009 in the *Peter Rehder* case.[63] This decision is important in two respects: on the one hand, it identifies the relevant services for the purpose of determining jurisdiction with respect to international transport contract; on the other hand, it specifies how to identify the place where those transport services are provided.[64] Here are the relevant parts of the *Rehder* ruling:

> "40. The services the provision of which corresponds to the performance of obligations arising from a contract to transport passengers by air are the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, the disembarkation of the passengers in conditions of safety at the place of landing and at the time scheduled in that contract. From that point of view, places where the aircraft may stop over also do not have a sufficient link to the essential nature of the services resulting from that contract."
>
> "41. […] The only places which have a direct link to those services, provided in performance of obligations linked to the subject-matter of the contract, are those of the departure and arrival of the aircraft, since the words «places of departure and arrival» must be understood as agreed in the contract of carriage in question, made with one sole airline which is the operating carrier.
>
> 43. [...] In those circumstances, both the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract.

---

[61] Among others, P.A. DE MIGUEL ASENSIO, El lugar de ejecución de los contratos de prestación de servicios como criterio atributivo de competencia, in J. FORNER DELAYGUA/ C. GONZÁLEZ BEILFUSS/ R. VIÑAS FARRE (coords), *Entre Bruselas y la Haya: Estudios sobre la unificación internacional y regional del Derecho internacional privado*, *Liber Amicorum Alegria Borras,* Madrid 2013, p. 291-307.

[62] See among others, in relation to Article 5(1) of the Brussels and Lugano Conventions and their application to maritime matters, J.J. ALVAREZ RUBIO, Los foros de competencia judicial internacional en materia marítima en los Convenios de Bruselas y Lugano, *AEDIPr* 1997, p. 143-173.

[63] ECJ, Case C-204/08, 9 July 2009.

[64] See A.L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, Contratos internacionales (I): Competencia judicial y Ley aplicable*,* in *Derecho del Comercio Internacional*, Madrid 2012, p. 493-497.

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> 44. […] Each of those two places has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, the close connection required by the rules of special jurisdiction set out in Article 5(1) of Regulation No 44/2001. Accordingly, a person claiming compensation on the basis of Regulation No 261/2004 may sue, as a matter of choice which he must make, the defendant in the court in whose jurisdiction one of those places may be found on the basis of the second indent of Article 5(1)(b) of Regulation No 44/2001."

While the *Rehder* case was concerned with *air transport*, it is safe to assume that the principles developed by the ECJ also apply *mutatis mutandis* to *road transport*. In short, when it comes to dispute arising out of international carriage of goods by road, as long as the conditions for application of the Brussels I Regulation (Recast) and the Lugano Convention 2007 are met, which means that the rules on jurisdiction contained in the CMR cannot apply for the reasons stated above (impossibility of providing a high level of predictability or facilitating the sound administration of justice, minimising the risk of parallel proceedings and ensuring, in conditions at least as favourable as those provided for in Regulation 1215/2012 and in the Lugano Convention, the free movement of judgments in civil and commercial matters and mutual trust in justice) – the plaintiff may bring an action before the court located in a Member State (Regulation Brussels I) or in Contracting State (Lugano Convention) "where, under the contract, transport services have or should be provided". This means that the plaintiff may bring an action either at the *place of origin or at the place of destination of the international carriage of goods,* being it unterstood that each of those two fora are additional to the general forum at the domicile of defendant.[65] While the general forum is justified based on the guarantees offered to the defendant and in order to facilitate enforcement of the prospective judgment, the place of origin and the place of destination are justified based on the close relationship that exists between the transport contract and each of those two places, *i.e.* each of the countries where those two places are located.[66]

[65] Articles 4(1) and 5(1) of the Brussels I Regulation (Recast) (Articles 2(1) and 3(1) of the former Brussels I Regulation), and Articles 2(1) and 3(1) of the Lugano Convention 2007. On the general forum at the defendant's domicile, see the points made by J.L. IRIARTE ANGEL referring to international shipping contracts, *El contrato de embarque internacional*, Madrid 1993, p. 100 *et seq*.

[66] J.J. ÁLVAREZ RUBIO, *Derecho Marítimo y Derecho Internacional Privado: algunos problemas básicos*, Vitoria-Gasteiz 2000, p. 53-55.

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Yearbook of Private International Law, Volume 18 (2016/2017), pp. 591-597

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Printed in Germany

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