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Yearbook of Private International Law

Vol. XIX
2017 / 2018

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 2:30 PM via
AN: 1985384 ; Andrea Bonomi, Gian Paolo Romano.; Yearbook of Private International Law Vol. XIX - 2017/2018
Account: ns335141

YEARBOOK OF PRIVATE INTERNATIONAL LAW

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VOLUME XIX – 2017 / 2018

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PUBLISHED IN ASSOCIATION WITH

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) 978-3-504-08013-6
ISBN (eBook) 978-3-504-38607-8

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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

The Doctrine section of this XIXth volume reflects the variety and complexity of articles in the *Yearbook of Private International Law*. From national, European, conventional, and comparative private international law perspectives, Yearbook contributors examine issues of jurisdiction, applicable law, and the recognition of foreign decisions. Classical questions such as *forum non conveniens* and exception clauses, foreign overriding mandatory provisions, and reciprocity are revisited from a modern perspective. Besides these broad and fundamental questions, one contribution discusses the very specific and difficult problem of the law applicable to the right of recourse in the field of liability insurance law.

A second specific section is devoted to some of the difficult questions addressed by the European regulations on matrimonial property and the property effects of registered partnerships. The first contribution of this section deals with the very fundamental (but unclear) issue of the applicability of these new instruments to new couple regimes. It is followed by a detailed analysis of the complex rules on jurisdiction and applicable law, and by a thorough discussion of the relevant questions of party autonomy, public policy and overriding mandatory provisions.

Another section is devoted to cultural property and heritage, including obstacles to claims for the restitution of looted art and new mechanisms leading to the proper resolution of cultural property-related disputes. The two contributors, both acclaimed experts in the field, observe a gradual transition in the judicial practice, particularly when it comes to the critical conflict-of-laws issue of statutes of limitation from the *lex rei sitae* – which may be fortuitous and whose application may lead to injustices – to the primacy of law of the country of origin, however complex that country may sometimes be to identify. They also point to the slow but steady development of a body of transnational rules forming a true *lex culturalis*.

One of the truly first codifications of the latter is offered by the new Hungarian Private International Law Act, that we are pleased to present in our National Reports Section. The contribution provides the non-Hungarian reader with the background, principles and theoretical approach adopted by the Hungarian legislator in the most recent methodical reform of a national system of private international law. The need to adapt private international law legislation has led to a sectorial reform in New Zealand. In relation to torts, the traditional, and indeed discriminatory, double actionability rule has now disappeared in favour of a more modern solution, clearly inspired by European Union regulations.

The National Reports further include an essay on how Russian authorities implement both the 1996 Hague Children's Convention and the 1980 Hague Abduction Convention, with a detailed review of Russian case-law grappling with such notions as a child's residence, removal and retention, or the legitimate reasons to refuse return of the child. Another paper features the first

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English-language contribution on Mongolian private international law – trade, commerce, family and people-to-people relationships between Mongo-lians and other State communities being constantly on the rise. Turkish law is once again present through a meticolous account of jurisdiction agreements and the favour they increasingly enjoy both in Turkish adjudication and academia. Two papers on international surrogacy offer French and Italian perspectives, as these countries were involved in the *Mennesson*, *Labassée* and *Paradiso* ECtHR cases. They both show, among other things, that although the potential for a *fraude à la loi* cannot be overlooked, a simple non-recognition of the human relationship between a child and an intentional parent, arising from surrogacy, cannot in many cases offer the ultimate solution. An adaptation to European values does not necessarily lead to a global rejection of foreign unfamiliar institutions, as the recent decisions on punitive damages also confirm.

Those who are curious as to "What's new" in terms of work-in-progress of The Hague Convention on Judgments will devour the section devoted to relevant contributions with articles on the exclusion of privacy and the relationship with other existing multilateral instruments, in particular certain instruments in force in Latin America.

As to the Forum section, a paper by two "insiders" laudably reviews the activities carried out by the International Social Service, whose offices are present in 140 countries. Through its cross-border daily casework in both children and vulnerable adult protection, the "ISS" may not attract much media attention but its work proves remarkably effective in many cases. Its silent, painstaking contribution is a testament to the importance of a cross-cultural and sociological perspective in international family relationships, which are too often approached through both a "mono-national" and a purely or predominantly judicial perspective. On a similar vein, the dilemma between a universalist approach and one more focused on the common core of European values has lead a Greek author to question the trends demonstrated by the European Private International Law legislator in solving cases connected with third States. On the commercial front, another paper focuses on the experiments made in the insolvency banking sector, where reliance on "protocols" tends to be increasing. Half contracts and half treaties, these multi-national arrangements struck by judges, authorities, and stakeholders of various countries for the benefit of individual cross-border insolvency proceedings raise a number of novel issues. But they also show a pathway to multi-national coordination that may be tested in other areas, such as cross-border inheritance.

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

FORUM NON CONVENIENS AND EXCEPTION CLAUSES

COORDINATING CONFLICTING LEGAL SYSTEMS IN CIVIL LAW JURISDICTIONS IN A GLOBAL CONTEXT*

Gérald GOLDSTEIN**

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* This paper is based on a presentation given by the author on December 11th, 2016 at Doshisha University, Kyoto (Japan), during the international symposium entitled "Globalization and Private International Law", organized by the RECITAL (Research Center for International Transactions and Law, Doshisha University).

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 1-29
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Printed in Germany

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1. Exclusive Choice of Jurisdiction and Choice of Law Clauses
2. *Ex lege* Exclusive Jurisdiction and Mandatory Rules
V. Conclusion

I. Introduction

The topic of this paper[1] covers two notions related by their nature and functions: the doctrine of *forum non conveniens* and some frequently found rules of private international law called exception clauses. While the former relates to the international jurisdiction of a court, the latter belong to conflict of law methodology.

Our purpose is, first, to focus on their function within a general strategy aiming to coordinate conflicting legal systems in a context believed to present new features: *globalization*. It will be necessary to examine the main manifestations of this phenomenon in international situations in order to understand how *forum non conveniens* doctrine and exception clauses could work in this new perspective. Four problematic consequences, clearly and recently singled out by Professor Basedow,[2] will be covered here from our specific point of view: a loss of knowledge by States of the particular features of international transactions favoring "private ordering" by individuals; an increasing delocalization of situations forcing conflict of law rules to cope with multiple connecting factors; an emerging legislative competition between States favouring forum shopping and fraud; and finally a growing need for cooperation in order to avoid a race to the bottom in terms of quality of rules.

Our second purpose is to present some comparative comments on *forum non conveniens* doctrine and exception clauses in order to elucidate some problems of interpretation which might impair their smooth functioning, since it is our underlying opinion that the adoption of both notions will strongly favour a good response to the normative needs of such a globalized context.

In this paper, however, we are not going to discuss the reality of globalization, nor directly its definition, nor even whether globalization as a

---

[1] This paper uses the following abbreviations: *Arch. phil. Droit*, Archives de philosophie du droit; *C.c.Q.,* Code civil of Québec; *Colum. J. Transnat'l L*, Columbia Journal of Transnational Law; *D.,* Recueil Dalloz; *ed.*, editor or edition; *eds.* editors; *J.* Journal; *J. Bus. L.* Journal Of Business Law; *JOCE* Journal Officiel des Communautés Européennes; *Journal of Japan. L.* Journal of Japanese Law; *Mich.J.Int'l L.* Michigan Journal of International Law; *OJEU* Official Journal of the European Union; *QCCA* Cases of the Court of Appeal of Quebec; *Rev. Int. Dr. Comp*. Revue internationale de droit comparé; *Rev. trim. dr. europ*. Revue trimestrielle de droit européen; *SQ* Statutes of Quebec; *Trav. Com. Fr.* Travaux du comité français de droit international privé; *U.B.C.L. Rev*. University of British Columbia Law Review; *U.Pa.L.Rev.* University of Pennsylvania Law Review; *Vol.* volume.

[2] J. BASEDOW, *The Law of Open Societies. Private Ordering and Public Regulation in the Conflict of Laws*, Brill 2015, No. 90 *et seq.* (*Recueil des cours*, vol. 360, 2013).

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phenomenon would be good or not in terms of governance or from other points of view.[3] The only topic, that will be discussed here, is whether or not the adoption and use of *forum non conveniens* doctrine and exception clauses in a private international law system would be coherent within a strategy to respond to the needs of international situations in a globalized context. In other words, globalization will be considered in a neutral way as an existing variable pertaining to international situations.[4]

In addition, we are going to limit our developments to private international systems of *civil law countries*, while only mentioning common law countries when it could be useful.[5] Excluding common law countries from the scope of this paper may seem debatable, notably since we deal with the *forum non conveniens* doctrine, which is mainly and widely used in the common law countries.[6] However, two main reasons justify this choice.

First, under a well-known rule of comparative law methodology, it is more fruitful to limit one's research to systems who present enough similarity in order to allow for a meaningful comparison.[7] From this perspective, although common law systems of private international law would seem to present enough commonalities with civil law systems, especially from a functional perspective applied to conflict of law, its methodology has mainly been driven by civil law scholars (with the notable exception of the American revolution which is not linked with our study). Conversely, such a methodology has never been at the forefront of classical common law thinking. While common law scholars would very easily outcompete

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[3] See among numerous other scholars: S. SASSEN, *Losing Control? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996; R. WAI, Transnational Private Litigation and Transnational Governance, in P. MUELLER/ M. LEDERER, eds., *Criticizing Global Governance*, London: Palgrave Macmillan 2005 p. 243; T. BUTHE/ W. MATTLI, *The New Global Rulers: Privatization of Regulation in the World Economy*, Princeton 2011.

[4] On this topic, see among others: J. BASEDOW, *The Law of Open Societies* (note 2); R. MICHAELS, Globalisation and Law: Law Beyond the State, in R. BANAKAE/ M. TRAVERS (eds), *Law and Society Theory,* Hart Publishing 2013, p. 287.

[5] For a very comprehensive study on this topic, see A. NUYTS, *L'exception de* forum non conveniens. *Étude de droit international privé comparé*, Bruyant/L.G.D.J. 2003 (pref. by A.T. VON MEHREN).

[6] On this topic, see among others: P. MEYER, The Jurisdiction of the Courts as Affected by the Doctrine of "Forum non conveniens", *Revue du Barreau* [Quebec], Vol. 25, 1964, p. 565; B. SCHNEIDER, Le *forum conveniens* et le *forum non conveniens* (en droit écossais, anglais et américain), *Rev. Int. Dr. Comp.* 1975, p. 608; P. HERZOG, La théorie du *forum non conveniens* en droit anglo-américain: un aperçu, *Rev. crit. dr. int. pr.* 1976, p. 1; E.L. HAYES, *Forum non conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation, *U.B.C.L. Rev*., Vol. 26, 1992, p. 41; J.J. FAWCETT, General Report, in J.J. FAWCETT (ed.), *Declining Jurisdiction in Private International Law,* Clarendon Press 1995; A. NUYTS, *ibid.* (note 5); *Cheshire and North's Private International Law*, by P.M. NORTH/ J.J. FAWCETT, 13th ed., Oxford Univ. Press 2004, p. 334 *et seq.*; CH. CLARKSON & J. Hill, *The Conflict of Laws*, 4th ed., Oxford Univ. Press 2011, p. 122 *et seq*.

[7] In general, on this methodological debate, see for instance: P. LEGRAND, The Same and the Different, in P. LEGRAND/ R. MUNDAY (eds.) *Comparative Legal Studies: Traditions and Transitions,* Cambridge University Press 2003.

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their civil law colleagues in terms of practical solutions, nonetheless, we believe it is not *absolutely* necessary to look towards common law systems in order to acquire a deep understanding of the general fundamental principles underlying private international law.[8]

Second, since this paper is essentially concerned with the adaptation of principles and rules of private international law in a global context, common law systems are naturally much more flexible than their civil law counterparts are, since their basic rules are often expressed in a less rigid form. As a result, adaptation never presents a serious challenge in a pure common law system where distinguishing one case from the other is often the crucial activity. Conversely, the classical rigid approach conveyed by the civil law systems seems to clash with the needs of international situations in a globalized context.[9] So, even if it might be interesting to dwell on the common law rules, we shall generally avoid this approach in this paper.

Therefore, before embarking on a comparative analysis of *forum non conveniens* and exception clauses (part 3), as useful tools to coordinate different legal systems in a global context, we shall address two preliminary topics: what are the relations between those two specific notions and the very general idea of *coordination* of legal systems (part 1), on the one hand, and the general phenomenon called *globalization*, on the other hand (part 2).

II. Coordination, Proximity, *Forum Non Conveniens* and Exception Clauses

Cultural diversity and history have influenced each legal system.[10] However, cross-border international relationships might induce a clash between systems involved in a single situation, since parties will come under the jurisdiction of a foreign authority that could apply a foreign law, as in a foreign marriage whose validity abroad is an issue, or as in a contract between parties having their residence in

[8] With the notable exception of the American scholars discussing the American methodologies, most of their writing will not be directed towards researches on conflict of law methodology.

[9] In addition, a more practical justification is the fact that many civil law countries have codified their private international law rules, which include general methodological dispositions directly concerned with this paper, providing us with an easy access to a formal content. The content of the same rules in common law countries is more difficult to ascertain since it is usually found in a multitude of cases, often expressed under different forms, sometimes even in the same case by different judges. See on this topic: A. NUYTS, *L'exception de* forum non conveniens (note 5), *passim*.

[10] See among others: L. GANNAGÉ, Les méthodes du droit international privé à l'épreuve des conflits de cultures, *Recueil des cours*, Vol. 357, 2011, at 238 *et seq*.; M-C. FOBLETS/ N. YASSARI, Cultural Diversity in the Legal Framework: Modes of Operation, in M-C. FOBLETS/ N. YASSARI (eds.), *Legal Approaches to Cultural Diversity*, Leiden/Boston 2013, p. 3 *et seq*.

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different countries. This might lead to a disruption of their expectations and of their status[11] (being married, divorced, creditor and so on) as soon as one party (or both) tries to take advantage of the diverging concrete rules of each system, either by presenting their case to a single judge, or by introducing parallel proceedings in different countries. Thence a possibility of facing a "limping" situation under which a right could be recognized in one country while it could be deemed non-existent in another.[12]

One way to avoid such a schizophrenic situation and the disturbing notion of a general relativity of any right in international matters is to strive to *coordinate* the hometown and foreign laws or to try at least to coordinate the *result* of their application. Coordinating different legal systems applicable to the same situation will generally entail striving to keep the same status for persons involved in cross border transactions through the sophisticated rules and principles of conflict of law methodology.[13] Among those principles, the well known "proximity principle" constitutes a powerful tool.

A. Coordination and Proximity

The "proximity principle",[14] or the quest of the designation of the law having *objectively the closest connection* to the situation, is a method originally proposed by the great German author von Savigny,[15] which entails researching the *objective center of gravity* of a situation according to its "nature" (being contractual, extra contractual and so on). The reasoning behind Savigny's methodology being that, hopefully, different judges seized by parallel proceedings would *objectively* agree on the designation of the same law and will reach the same material result, thereby reaching coordination of legal systems and avoiding a disruption of a person's status in cross-border situations: the marriage or the contract will be valid or invalid everywhere.

Such a proximity principle manifests itself in the adoption of some modern rules of conflict of laws, by way of exception, called *escape clauses* or *exception clauses*, and by way of some rules relating to international jurisdiction.

[11] See in general: E. JAYME, Identité culturelle et intégration: le droit international privé postmoderne, *Recueil des cours*, Vol. 251, 1995, p. 33 *et seq*.; A. FISCHER-LESCANO/ G. TEUBNER, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Mich.J.Int'l L.*, Vol. 25, 2004, p. 999.

[12] See among others, H. MUIR WATT, Les modèles familiaux à l'épreuve de la mondialisation (aspects de droit international privé), *Arch. phil. droit*, Vol. 45, 2001, p. 272; P. BERMAN, The Globalization of Jurisdiction, *U.Pa.L.Rev.*, Vol. 151, 2002, p. 311; A. FISCHER-LESCANO/ G. TEUBNER (note 11), *ibidem*.

[13] See P. MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé, *Recueil des cours*, Vol. 217, 2007, p. 9 *et seq*.

[14] P. LAGARDE, Le principe de proximité dans le droit international privé contemporain, *Recueil des cours*, Vol. 196, 1986-I, p. 9 *et seq*.

[15] F.K. VON SAVIGNY, *System des heutigen römischen Rechts*, Vol. 8, Berlin 1849, at 2 *et seq*.

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B. Proximity and Conflict of Laws: Exception Clauses

Art. 15 of the 1987 Swiss federal law on private international law[16] states the following exception clause:

> The law designated by this Code shall not be applied in those exceptional situations where, in light of all the circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law.

Following the Swiss example, Quebec private international law[17] also adopted a general exception clause, art. 3082 of the Civil Code of Quebec[18] (thereafter: C.c.Q.) and art. 19 par. 1 of the 2004 Belgium Code of Private international law,[19] which reads as follows (non official translation):

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[16] *Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP)*, RO 1988.1776, RS 291: <http://www.admin.ch/ch/f/rs/c291.html>. For an English (non official) translation: *Switzerland's Federal Code on Private International Law* (CPIL), Umbricht Attorneys, Zurich (Switzerland) 2007: <http://www.umbricht.com>. See among others, on the Swiss law: B. DUTOIT, *Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987*, 5ème éd., Helbing & Lichtenhahn 2016; A. BÜCHER & A. BONOMI, *Droit international privé*, 3ème éd., Helbing & Lichtenhahn 2013; F. KNOEPFLER/ P. SCHWEIZER/ S. OTHENIN-GIRARD, *Droit international privé suisse*, 3ème éd., Staempfli Ed. SA 2005.

[17] *Civil Code of Quebec*, Book X, CQLR, C-1991; SQ 1991, c 64: <http://www.canlii.org/en/qc/laws/stat/cqlr-c-c-1991/latest/cqlr-c-c-1991.html>; The new Civil Code of Québec was adopted in 1991 (SQ 1991, c 64) and came into force in 1994. See H.P. GLENN, Droit international privé, in *La réforme du Code civil*, t. 3, Presses de l'Université Laval 1993, p. 669; J.A. TALPIS/ J.-G. CASTEL, Le Code civil du Québec: Interprétation des règles du droit international privé, in *La réforme du Code civil*, t. 3, Presses de l'Université Laval 1993, p. 801; G. GOLDSTEIN/ E. GROFFIER, *Traité de droit civil. Droit international privé*, t. 1, Théorie générale, Yvon Blais 1998; t. 2, Règles spécifiques, Yvon Blais 2003; G. GOLDSTEIN, *Commentaires sur le Code civil du Québec. Droit international privé*, Vol. 1, *Conflits de lois: dispositions générales et spécifiques (art. 3076 à 3133 C.c.Q.)*, Yvon Blais 2011; Vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères*, Yvon Blais 2011; C. EMANUELLI, *Droit international privé Québécois*, 3rd ed, Wilson & Lafleur, 2011; see also, *Droit international privé* in *JurisClasseur Québec*, col. *Droit civil*, LexisNexis Canada.

[18] Art. 3082 C.c.Q.: "Exceptionally, the law designated by [the conflict of law rule] is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country". See *infra* at III A.

[19] *Loi portant le Code de droit international privé,* 16 juillet 2004, http://www.juridat.be/cgi_loi/legislation.pl; http://www.dipr.be/databank.aspx*; Code de droit international privé*, Loi du 16 juillet 2004, in N. WATTÉ/ C. BARBÉ (ed.), *Droit international des affaires. Recueil de textes*, Larcier 2005, pp. 17-46, Art. 19 par. 1: "*Le droit désigné par la présente loi n'est exceptionnellement pas applicable lorsqu'il apparaît manifestement qu'en raison de l'ensemble des circonstances, la situation n'a qu'un lien très faible avec l'Etat dont le droit est désigné, alors qu'elle présente des liens très étroits avec un autre Etat. Dans ce cas, il est fait application du droit de cet autre Etat*" (official text).

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> By way of exception, the law designated by the present statute does not apply if from the combined circumstances it appears manifestly that the matter has only a very slight connection with the State of which the law was designated, but is very closely connected to another State. In such case, the law of that other State will be applied.

Moreover, the 2001 Korean law[20] (art. 8) adopted such a general escape clause, although neither the 2006 Japanese law[21] nor the 2011 Chinese law[22] followed this trend. Art. 8 of the Korean law states:

> If the governing law designated by this act is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is most closely connected with the legal relationship, the law of the other country shall apply.

As a result, whenever the law designated by the conflict rule is only remotely linked with the situation and therefore does not correspond to its apparent center of gravity, then the seized judge is allowed to start the reasoning again in order to apply the law of the place which according to the circumstances will be the objective center of gravity.

In addition to those *general* exception clauses, more and more legal systems include *specific* exception clauses, such as art. 4 of the Rome II Regulation[23] which states the following:

On this code see among others, F. RIGAUX/ M. FALLON, *Droit international privé*, 3ème éd., Larcier 2005.

[20] *Law amending the Conflict of Laws Act of the Republic of Korea*, (Law No 6465, promulgated on 7th April 2001, effective as of 1st July 2001, Non official translation by K.H. SUK, *This Yearbook*, 2003, Vol. 5, pp. 315-336. See K.H. SUK, The New Conflict of Laws Act of the Republic of Korea, this *Yearbook* 2003, Vol. 5, pp. 99-141.

[21] *Act on the General Rules of Application of Laws* (Hô No Tekyiyô Ni Kansuru Tsûsokuhô), Law No 10 of 1898, as newly Titled and Amended on 21st June 2006, original Japanese version: <http://law.e-gov.go.jp/announce/H18HO078.html>; non official English translation by K. ANDERSON/ Y. OKUDA, this *Yearbook* 2006, Vol. 8, pp. 427-441.

[22] *Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China*, Oct 20th 2010: <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (Chinese version); Unofficial English translation by W. CHEN/ K.M. MOORE, this *Yearbook*, 2010, Vol. 12, p. 669. See W. CHEN, *Chinese Civil Procedure and the Conflict of Laws*, Tsinghua University Press 2011; Z. HUO, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, *Revue Juridique Thémis,* Vol. 45, 2011, p. 637; An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China, *I. C. L. Q.*, 2011, p. 60, pp. 1065-1093. For further comparative law researches on this topic, see also Taiwan's new legislation of 2010 called "*Act Governing the Choice of Law in Civil Matters Involving Foreign Elements*": <http://law.moj.gov.tw/ENG/LawClass/LawContent.aspx?pcode=B0000007>, see J. BASEDOW/ K.B. PISSLER (ed.), *Private International Law in Mainland China, Taiwan and Europe*, Mohr Siebeck 2014. The law of Taiwan does not include any general escape clause.

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> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs […]
>
> 3. 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 […].

In the same vein, art. 21 of the recent European Regulation No 650/2012 on jurisdiction and on the law applicable to successions[24] states:

> 1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.
>
> 2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law

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[23] *Regulation (EU) 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)*, OJEU, L-199/40, 31.7.2007, p. 44. See T. KADNER GRAZIANO, Le nouveau droit international privé communautaire en matière de responsabilité extracontratuelle (Règlement Rome II), *Rev. crit. dr. int. pr.* 2008, p. 445; T.M. DE BOERS, Party Autonomy and its Limitations in the Rome II Regulation, this *Yearbook*, 2008, Vol. 10, p. 19; C. BRIÈRE, Le règlement CE No. 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles, *Clunet* 2008, p. 31. See also art. 4 of the Rome I Regulation (*Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, OJEU, L-177/6, 4.7.2008, p. 11) which states: "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 […], the law governing the contract shall be determined as follows: […] 2. 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". See among others: S. BOLLÉE/ S. LEMAIRE/ L. D'AVOUT, T. AZZI/ O. BOSKOVIC, Le règlement No. 593/2008 sur la loi applicable aux obligations contractuelles, *D.* 2008, p. 2155; P. LAGARDE/ A. TENEMBAUM, De la convention de Rome au Règlement Rome I, *Rec. crit. dr. int. pr.* 2008, p. 767; A. BONOMI, The Rome I Regulation on the Law Applicable to Contractual Obligations. Some General Remarks, *this Yearbook*, 2008, Vol. 10, p. 165; S. FRANCQ, Le règlement "Rome I" sur la loi applicable aux obligations contractuelles., *Clunet* 2009, p. 4; E. CASHIN RITAINE/ A. BONOMI (eds.), *Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles. Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*, Schulthess 2008.

[24] *Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, OJEU, L-201/107, 27.7.2012, p. 118. See among others: P. LAGARDE, Les principes de base du nouveau règlement européen sur les successions, *Revue crit. dr. int. pr.* 2012, p. 69; A. BONOMI/ P. WAUTELET, avec la collaboration d'I. PRETELLI et A. ÖZTÜRK, *Le droit européen des successions. Commentaire du Règlement No. 650/2012 du 4 juillet 2012*, 2ème éd., Larcier/Bruylant 2016.

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> would be applicable under paragraph 1 the law applicable to the succession shall be the law of that other State.

C. Proximity and Jurisdiction: *Forum Non Conveniens*

When international jurisdiction issues are involved, the same policy favoring coordination is expressed through the adoption of rules aiming to avoid parallel litigations leading to multiple decisions contradicting each other concerning the same situation. Modern systems of private international law strive to make sure there will be a *real and substantial connection* between the court and the dispute. Such a requirement could be seen as a functional equivalent or an expression of the same proximity principle working at the jurisdictional level of conflicts. In addition to providing for rigid rules respecting such a requirement, more and more civil law systems are adopting a general theory, the *forum non conveniens*, usually accepted by the common law countries.

In this respect, it is worth mentioning the adoption by Quebec law of art. 3135 C.c.Q., which codifies the *forum non conveniens* theory[25] in the following terms:

> Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

Such a rule gives a Quebec judge a discretionary power to decline jurisdiction whenever a foreign judge is in a better position to decide, notably in terms of close connection with the dispute. As a result, there will not be two contradictory decisions in Quebec and abroad.

One could also cite the recent art. 3-9 of the *Civil Procedure Act* of Japan[26], which codifies the doctrine of the "exceptional circumstances" in the following terms:

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[25] On this topic, see: G. GOLDSTEIN, Chap. Canada (Québec), in J.J. FAWCETT (éd), *Declining Jurisdiction in Private International Law* (note 6), pp. 146-157; S. GUILLEMARD/ A. PRUJINER/ F. SABOURIN, Les difficultés de l'introduction du *forum non conveniens* en droit québécois, *Les Cahiers de Droit*, Vol. 36, 1995, p. 913; G. GOLDSTEIN/ E. GROFFIER, *Traité de droit civil. Droit international privé*, Vol. 1 (note 17), No. 134; G. SAUMIER, *Forum non conveniens*, Where are we now?, *Supreme Court Law Review*, (2d), Vol. 12, 2000, p. 121; J.A. TALPIS/ S.L. KATH, The Exceptional as Commonplace in Quebec *Forum non conveniens* Law: *Cambior*, a case in Point, *Revue Juridique Thémis*, Vol. 34, 2000, p. 761; F. SABOURIN, Motifs permettant de ne pas exercer la compétence: *forum non conveniens* et litispendance internationale, fascicule 9, *JurisClasseur Québec*, Vol. *Droit international privé*, LexisNexis; G. GOLDSTEIN, *Commentaires,* vol. 2 (note 17), No. 3135-500 to 3135-590; G. GOLDSTEIN, Le *Forum non conveniens* en droit civil. Analyse comparative à la lueur du droit international privé du Québec et du Japon, *Rev. crit. dr. int. pr.* 2016, p. 51 *et seq*.

[26] *Civil Procedure Act*, Law No. 109 of 1996, am. by Law No. 36 of 2011 (non official translation by Y. OKUDA, New Provisions on International Jurisdiction of Japanese

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> Even where the Japanese courts have jurisdiction over an action, the court may dismiss the action in whole or in part (except where the action has been filed according to an agreement on the exclusive jurisdiction of the Japanese courts); if the court finds that there are exceptional circumstances under which having Japanese courts adjudicate the matter would be prejudicial to the fair treatment of the parties or the proper and efficient proceedings, considering the nature of the case, the burden of the defendant for appearance, the location of evidences, and any other circumstances.

In addition, art. 15 of the Brussels II bis Regulation[27] provides for a similar rule according to which, exceptionally, the court of a Member State seized of an action relating to parental responsibility may stay the action if it considers that a court of another Member State with which the child has a particular connection would be better placed to deal with it where this is in the best interest of the child.[28] In a similar vein, art. 6 (a) of the recent European regulation in matters of succession[29] states:

Courts, this *Yearbook*, 2011, Vol. 13, p. 367, pp. 369-380). See also: M. DOGAUCHI, Forthcoming Rules on International Jurisdiction, *Japanese Yearbook of Private International Law*, Vol. 12, 2010, p. 212; D. YOKOMIZO, The New Act on International Jurisdiction in Japan: Significance and Remaining Problems, *Journal of Japan. L.*, Vol. 34, 2012, p. 95; K. TAKAHASHI, Japan's Newly Enacted Rules on International Jurisdiction: with a Reflection on Some Issues of Interpretation, *Japanese Yearbook of Private International Law*, Vol. 13, 2011, p. 146; *Japan's New Act on International Jurisdiction*, ebook ISBN: 978-1-4660-5756-2 (2011) <http://papers.ssrn.com/>; The Jurisdiction of Japanese Courts in a Comparative Context, *J. of Private international Law*, vol. 11, 2015, p. 103; Y. NISHITANI, International Jurisdiction of Japanese Courts in a Comparative Perspective, *Netherlands International Law Review*, Vol. 60, 2013, p. 251; S. MASUDA, R. USHIJIMA/ Y. FURUTA, General Rules Concerning International Jurisdiction, in *New Legislation on International Jurisdiction of the Japanese Courts - A Practitioner's Perspective*, Japan Federation of Bar Associations (ed), *New Business Law* (NBL), No. 38, p. 141 *et seq.*; B. ELBATI/ D. YOKOMIZO, La compétence internationale des tribunaux japonais en matière civile et commerciale à la lumière de la nouvelle législation, *Rev. crit. dr. int. pr.* 2016, p. 416 *et seq.*

[27] *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*, OJEU, L-338, 23.12.2003, pp. 1-29.

[28] Art. 15 *Transfer to a court better placed to hear the case*: "1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5. […]".

[29] *Regulation (EU) No 650/2012* (note 22).

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Declining of jurisdiction in the event of a choice of law

> Where the law chosen by the deceased to govern his succession […] is the law of a Member State, the court seized […]: (a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; […]

In previous paragraphs, we have explained the logical connection between the general need to coordinate conflicting legal systems and the proximity principle, as expressed at the conflict of laws level by the notion of exception clauses and at the jurisdictional level by the *forum non conveniens* doctrine. However, we still have to understand the connection between those two types of rules and the general new context of globalization.

III. *Forum Non Conveniens* and Exception Clauses in a Global Context

Among other scholars, Professor Basedow recently defined globalization as being a *general process leading to …* "*a growing permeability of national borders in social and economic matters carrying various consequences in all fields*"[30] and, notably, in legal matters. More precisely, he strives rather convincingly to connect globalization to the idea of a *new open society*, where *world culture partly supersedes national cultures*, where the old "congruence of cultural, economic and political space characterizing the nation-States"[31] has partly ceased to exist.

Sociologically speaking, the basic trend consists of getting rid of an old international system of legal relationships centered around Nation-States and their power to regulate life in general, to the benefit of a new system more centered on the interconnections between "civil" societies where the sources of power and regulation would be handled more and more by individuals acquiring a new freedom to evolve beyond and across State lines and to fully participate in "transnational forms of life".

More precisely, for the purpose of our research it is essential to understand what globalization concretely implies in the perspective of *conflict of laws.*[32]

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[30] J. BASEDOW*, The Law of Open Societies* (note 2), No. 55, p. 36.

[31] J. BASEDOW*, ibidem,* No. 67.

[32] See among others on this topic, in general: E. JAYME, Le droit international privé du nouveau millénaire: La protection de la personne humaine face à la globalisation, *Recueil des cours*, Vol. 282, 2000, pp. 9-40; P. BERMAN, The Globalization of Jurisdiction, *U.Pa.L.Rev*., Vol. 151, 2002, p. 311; R. WAI, Transnational Lift-off And Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization, *Colum. J. Transnat'l L*, Vol. 40, p. 209; H. VAN LOON, Quelques aspects de la mondialisation dans le domaine des conflits de juridictions, *Trav. Com. Fr.*, 2004-2006,

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According to Professor Basedow,[33] at least four fundamental consequences stem from the emergence of this new globalized context, which must be addressed from a private international law perspective:

a. A loss of knowledge by States of the particular features of international transactions which deprives those States of the justification and relevancy of their rules, which also favors "private ordering" by individuals.
b. An increasing delocalization of situations.
c. An emerging situation of legislative competition between States.
d. A new trend towards harmonization, transfer of sovereign powers to international organisations and a growing need for cooperation.

Looking into these four main consequences of globalization should allow us to understand how the *forum non conveniens* doctrine and exception clauses fit into a modern approach of a private international law system aiming to accommodate the needs of such a globalized context.

A. Loss of Knowledge by States of Specific Features of International Transactions

According to this line of reasoning, which we shall not contest here (although we are far from being convinced), private rule making should take the lead over State rules. The logical link between this idea and the notions under study in this paper is quite clear.

Even though legislators will provide for general jurisdiction rules and conflict of law rules, obviously there still might be some new and specific situations when those general rules will not help to designate a court or a law which respects the proximity principle. In such cases, the parties themselves will have to take things into their own hands.

It will be their role to signal to a judge that the reality of the specific situation does not correspond to the broad perception held by the legislator when the rule was adopted. When the general prediction envisaged by the jurisdictional or the conflict rule will fail to grasp this reality, it will be up to the parties to tell the court to depart from the rule and to take a new concrete view of the situation.

Such a need will be very aptly dealt with by an escape clause such as art. 3082 C.c.Q. which states:

> Exceptionally, the law designated by [the conflict of law rule] is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country.

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p. 227; Y. NISHITANI, Global Citizens and Family Relations, *ELR*, 2014 Vol. 3, p. 134; H. MUIR WATT, Globalization and Private International Law, in *Encyclopedia of Private International Law*, by J. BASEDOW/ G. RÜHL/ F. FERRARI/ P. DE MIGUEL ASENSIO (ed.), chapter G3, Edward Elgar Publishing 2017.

[33] J. BASEDOW*, The Law of Open Societies* (note 2), No. 90 *et seq*.

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Under this article, it will be up to the parties to underline all the circumstances of the case which will prove that another law than the law designated by the conflict rule will respect the proximity principle.

The same type of power will be given to the parties when a private international law system includes a rule allowing the judge to use the *forum non conveniens* doctrine. For instance, under art. 3135 C.c.Q., even though a Quebec court has jurisdiction to hear a dispute, it may exceptionally decline jurisdiction if, *on application by a party*, it considers that a foreign court is in a better position to decide. Here again, it will be up to the defendant to raise the *forum non conveniens* exception and to strive to convince the judge that the normal jurisdiction rule does not lead to a case where the seized authority has sufficient connections with the dispute, while another court abroad would be in such a position.

In both cases, what matters from a global perspective, is that, under those modern rules, individuals will be allowed to rebut the general presumptive rule adopted by the legislator and to proceed towards a specific "private ordering".

B. Increased Delocalization

Professor Jürgen Basedow points out that single connecting factors become increasingly meaningless in a global context and the link between a situation and any given jurisdiction can only be established by an accumulation of a number of connecting factors.[34]

Hence, a well know criticism (usually raised by common lawyers); private international law rules are too rigid and more flexibility is needed. There is, according to Basedow, a "widely felt need for flexible […] rules allowing for an adjustment to factual situations which exhibit a growing variety of connections with a multitude of States".[35]

Obviously, such a wide flexibility needed in a global context will be assured in general either by the *forum non conveniens* doctrine or by exception clauses since both notions imply a consideration by the court of all the circumstances of the case materializing in a wide power of interpretation (a discretionary power). Alternatively, some measure of flexibility could also be assured by the adoption of conflict rules with alternative connecting factors.

C. Emergence of Legislative Competition between States and Forum Shopping or Fraud

Another consequence of the impact of globalization seems to be that individuals are assuming a more active role in the determination of those factual circumstances that are relevant to private international law. As a result, States are placed in a competitive legal market, notably since applying their laws more frequently translates into a better reputation, more business, and more power. At the same

[34] *Ibidem* and at No. 99.

[35] *Ibidem* at No. 100.

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time, individuals will try more and more to take advantage of such competition which could result in unilateral forum shopping or fraud by a manipulation of the connecting factors of the conflict of law rule applicable to the case.

However, applying the doctrine of *forum non conveniens* is widely considered as an excellent solution to forum shopping, since declining jurisdiction on the motive that the seized court is not in a good position to hear the dispute will indeed reflect a decision to favor a good and efficient administration of justice and equitable fairness to both parties.

Similarly, exception clauses could also be seen as powerful instruments against fraud upon the law. Since, by hypothesis, a legal system has been artificially designated following a legal manipulation of the connecting factor of the conflict of law rule, while it does not have the closest connection with the situation but, instead, the reality of it remains connected with another law, the exception clause will allow a court to apply such a law having objectively the closest or the only connection with the situation.

Once again, from this point of view, both instruments fit perfectly well within a comprehensive strategy to respond to the needs of globalization.

D. A Trend in Favor of Harmonization and a Growing Need for Cooperation

In addition to being a normal consequence of the very classical need to reach coordination, a (new?) trend favoring harmonization and cooperation between States could be understood, as intimated by Professor Basedow, as a counter movement to regulatory competition in order to prevent a race to the bottom by State laws.

In this perspective, it is obvious that the doctrine of *forum non conveniens* is a powerful tool to be used to produce cooperation and coordination between tribunals, since it will allow a court to decline jurisdiction in order to make sure that a foreign court in a better position to decide will actually do it. Coordination will naturally result of the avoidance of parallel proceedings potentially leading to contradictory decisions.

But what about exception clauses? How could they promote some form of cooperation? Some scholars actually argue that using those clauses will bring an additional layer of particularism since each court will be called to decide on its own discretionary power, which result could run counter to the objective determination of the center of gravity approach. While such a reasoning appears irrefutable, it should be viewed in perspective. It could be argued that, only in some exceptional and very specific set of circumstances, exception clauses still aim at the designation of the law having objectively the closest connection to the dispute, without favoring the *lex fori* or any other foreign law and pertains to the same objective approach. As a result, we believe that exception clauses will generally add a measure of harmonization of results based on a specific analysis of multiple connecting factors.

After having secured a solid anchor to *forum non conveniens* and exception clauses in a modern strategy aiming at the coordination of conflicting legal

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systems in a (new?) globalized context, we may now proceed to the next part of our research: a comparative analysis of *forum non conveniens* and exception clauses in the perspective of their common functions and common nature in civil law countries.

IV. *Forum Non Conveniens* and Exception Clauses – Some Comparative Comments

We shall not present a fully-fledged comparative analysis of both notions since we are not writing a doctoral dissertation here. Our more modest goal will be to select some rather concrete problems which have already arisen in practise. Our essential basis of reasoning being that such a comparative analysis of both notions, allowed by their common nature and common functions, should present us with some interesting answers.

The first one pertains to the *underlying reasoning* of those rules since there have been at least two different approaches in civil and common law jurisdiction: a comparative and a unilateral version. Which one should be preferred in a globalized context (A)? The second problem resides within the *exceptional* nature of those rules: what does it exactly imply? Various answers have been given to this question mainly by case law and we believe it is necessary to discern between them in order to adopt the most logical one (B). Finally, we shall address the troublesome and very concrete problem posed by the *uncertainty* induced by those notions. How best should a modern private international law system which includes them manage to limit such an unfortunate lack of foreseeability in a global context (C)?

A. The Underlying Reasoning: Comparative or Unilateral Approach?

Under art. 3135 C.c.Q., a Quebec court may decline to exercise jurisdiction if it considers that the authorities of another country are *in a better position* to decide. Such a rule implies drawing a *comparison* between Quebec and foreign courts. The reasoning requires a decision as to which court – between the Quebec court already seized of the dispute and a presupposed foreign one, which is usually not seized yet - has the closest connection with it, taking into consideration all the various factual circumstances.

The same approach is shared by art. 15 of the Brussels II bis Regulation[36] which states that the court of a Member Stare seized of an action relating to parental responsibility may stay the action if it considers that a court of another member state with which the child has a particular connection *would be better*

[36] "By way of exception, the courts of a Member State [..] may, if they consider that *a court of another Member State* […] *would be better placed* the hear the case, and where this is in the best interests of the child: (a) stay the case and invite the parties to introduce a request before the court of that other Member State [...]".

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placed to deal with the parental responsibility where this is in the best interest of the child.

In fact, such a reasoning belongs to one well-known form of *forum non conveniens* found in common law countries, including all the Canadian provinces and most of the United States, which could be called the *comparative approach.*[37] A foreign court should be considered in a better position to decide, after a careful comparison of the links between the litigious situation and both local and foreign courts. The comparison should manifestly favour the foreign court, or else the local court will keep jurisdiction.

However, the Japanese version of *forum non conveniens* (the doctrine of the "exceptional circumstances") seems to belong to another form, which could be called the *unilateral approach*. Art. 3-9 of the *Civil Procedure Act* of Japan[38] states only:

> Even where the Japanese courts have jurisdiction over an action,
> the court may dismiss the action […][39].

Under art. 3-9, no comparison seems to be needed: the rule simply allows a Japanese court to decline jurisdiction as long as Japanese courts are not in a good position to decide: it is a negative requirement. Some scholars may argue that such a requirement would be more difficult to respect than the comparative one. We do not think so since the comparative analysis of the various connections between the two courts involved has usually been a very heavy burden for the defendant in Quebec courts. However, the most important question lies within the choice of approaches since in practice both may or may not be burdensome according to the circumstances.

Which one should be favored in order to better accommodate the needs of international commerce in a global context?

If we turn towards exception clauses, we should see which approach has been favored: a comparison between the law designated by the conflict of law rule or another law, or a unilateral analysis based on the lack of connection between the former and the dispute?

A simple reading of art. 15 of the Swiss law,[40] of art. 3082 C.c.Q.[41] and of art. 8 of the Korean law[42] obviously shows that it is necessary for an exception

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[37] See A. NUYTS, *L'exception de* forum non conveniens (note 5), No. 104 and 227.

[38] Law 109, 1996, am. by Law No. 36, 2011.

[39] See above, at II C, the non official translation of art. 3-9 *Civil Procedure Act*, Law No. 109 of 1996, am. by Law No. 36 of 2011 by Y. OKUDA (note 27).

[40] "The law designated by this Code shall not be applied in those exceptional situations where, in light of all the circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law" (note 17).

[41] "Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country". See *infra* at IV C n. 1.

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clause to apply that another law than the one designated by the conflict rule is more closely connected than the latter one. In other words, there must be a *comparison* between those laws.

However, under all three articles an additional requirement must be respected: the law designated must be only "slightly" connected or "remotely" connected with the situation. Here we find the *unilateral* approach. So, far from excluding one or the other, it is very clear that exception clauses involve a *cumulative* approach. For instance, in order to fulfil its requirements, art. 3082 C.c.Q. contains a negative requirement: it requires that the law designated by the conflict rule (a foreign law or even the *lex fori*) must be only remotely connected with the situation. Therefore, it will not be applied where the law designated has a reasonable link with the situation. In addition, *positively*, another law (the *lex fori* or a foreign law) must have a much better connection with the situation.

Moreover, art. 19 of the Belgium Private International Law code of 2004 states the following (in French):

> Le droit désigné par la présente loi n'est exceptionnellement pas applicable lorsqu'il apparaît manifestement qu'en raison de l'ensemble des circonstances, la situation n'a qu'un lien très faible avec l'Etat dont le droit est désigné, *alors qu*'elle présente des liens très étroits avec un autre Etat. Dans ce cas, il est fait application du droit de cet autre Etat. [official text; our emphasis][43]

Arguably, and this is our position, art. 19 clearly points to the one fundamental requirement: there should be *no close connection* between the law designated and the situation: that is the fundamental problem which must be addressed. Similarly, such a lack of connection is also the fundamental requirement of art. 3-9 of the Japanese Code of civil procedure which seems to accentuate the unilateral approach. In addition, the name of the *forum non conveniens* doctrine aptly illustrates that the lack of connection with the forum is the fundamental problem that was supposed to be solved with this notion, and *not* the fact that another court was in a better position to decide.

However, the Belgium formulation adds a new layer of information to the appropriate logical reasoning: positively, there must be an alternative law having a very close connection with the situation, other wise, it would be difficult to solve the dispute without resorting to the *lex fori*, since one law has to apply in order to avoid a denial of justice.

One could argue that such a problem is linked to the conflict of law question, since there always must be an applicable law in order to do justice, and does not apply to the jurisdictional question. We disagree, since a denial of justice

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[42] "If the governing law designated by this act is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is most closely connected with the legal relationship, the law of the other country shall apply" (note 21).

[43] "By way of exception, the law designated by the present statute does not apply if from the combined circumstances it appears manifestly that the matter has only a very slight connection with the State of which the law was designated, but is very closely connected to another State. In such case, the law of that other State will be applied." (non official translation).

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could also result from a lack of competent court, so there must also be a foreign court able to be seized and to render a decision.

To conclude, a comparison between *forum non conveniens* and exception clauses leads to the following insights:

> 1. The primary and essential *negative* requirement of those rules must be that there is a *lack of connection* between the law or the court designated by the normal rule. This is the *basic* problem those rules are aiming to solve, *not* that another court or another law has a better connection with the dispute or the situation. Therefore, from this point of view, a comparison should only play a secondary role, if any, when using those rules.
>
> 2. However, in order to avoid a denial of justice, there should be proof that *another court or another law has a closer connection* with the situation. Such a *positive* comparative requirement should only be considered as auxiliary, although necessary.

From this perspective, the basic approach underlying art. 3-9 of the Japanese Code of civil procedure seems very coherent. However, Japanese judges should take into consideration the availability of an alternative forum to avoid a denial of justice. In fact, the Japanese case law confirms that Japanese courts respect such a positive requirement even though it is not expressly found in art. 3-9.[44]

Those conclusions also imply that, conversely, it should be clear to Quebec courts that, when they apply 3135 C.c.Q., the *main negative requirement* should be that there is a *lack of connection* between them and the dispute, even though such a requirement is not expressly found in art. 3135 C.c.Q. (although, somehow illogically, it is expressly formulated in the exception clause of art. 3082 C.c.Q.). Actually, it is precisely the absence of such a requirement in art. 3135 C.c.Q. which lies at the heart of the next problem of interpretation, that we address in the following paragraph.

B. The Meaning of "Exceptional"

Exception clauses and *forum non conveniens*, or its Japanese equivalent, the doctrine of the *exceptional circumstances*, share the same characteristic of being exceptions to general rules of conflict of laws or of jurisdiction. For instance, art. 15 of the Swiss law of 1987 states that "The law designated by this Code shall not be applied *in those exceptional situations* where, in light of all the circumstances, it is manifest that […]". Similarly, art. 3082 C.c.Q. starts by using the following words: "*Exceptionally*, the law designated by […]". Finally, art. 19 of the 2004 Belgian Code of Private international law states that "*By way of exception*, the law designated by the present statute does not apply if […]".

As previously mentioned, at the jurisdictional level, art. 3-9 of the *Civil Procedure Act* of Japan refers to the existence of "*exceptional circumstances under*

[44] See, among others, G. GOLDSTEIN, Le *Forum non conveniens* en droit civil (note 26).

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which having Japanese courts adjudicate the matter would be prejudicial to the fair treatment of the parties or the proper and efficient proceedings".[45]

In a similar vein, as mentioned earlier, art. 3135 C.c.Q. in codifying the *forum non conveniens* theory in Quebec law, allows an authority to decline jurisdiction also "*exceptionally* ".[46]

One should first note that the exceptional requirement of those articles seems basically a distinguishing characteristic of Quebec and other civil law rules dealing with *forum non conveniens*. In the common law jurisdictions, such a theory has usually been part of a general determination of jurisdiction: the establishment of direct jurisdiction and the use of a discretionary power to check whether or not there is a real and substantial connection between the situation and the court has usually been mixed in a single step reasoning.

On the contrary, the exceptional nature of the doctrine of *forum non conveniens* as expressed in art. 3135 C.c.Q. reflects a dual approach in civil law. First, a general or specific rule will govern the determination of the existence of direct jurisdiction. Then, at the second step of the analysis, a court will analyse whether or not *forum non conveniens* should allow dismissing the exercise of such a jurisdiction. The exceptional nature of the rule is supposed to make sure that unlike what is seen in common law countries, the normal rules will not be displaced by a general *forum non conveniens* reasoning occupying the heart of the determination.

However, a fierce debate opened in Quebec law about the question of knowing *when* a court dealing with *exceptional circumstances* would allow the use of the *forum non conveniens* doctrine and a dismissal of the action.[47]

In a globalized context, it is all the more important to know which type of power will be given to private parties. Should they be allowed to disrupt at will the general rule and replace it by their own specific rule, or should their freedom be restrained to a few particular situations where the general rule clearly does not fit the general presumption? The answer given to this question reflects the value given in any exception clause or *forum non conveniens* rule to the requirement of proof of *exceptional* circumstances. Therefore, the exact meaning of "exceptional" should be clarified.

Various meanings have been given to this requirement. It seems that the context of the rule cannot be ignored in order to give a coherent answer. However, such a context by itself is not sufficient to warrant an exclusive answer.

1. Pre Codification Context of Private International Law

In a context where international jurisdiction rules have not been codified, but are simply an extension of domestic rules, it is necessary to set a limit to this extension

[45] See above, at II C, the non official translation of art. 3-9 *Civil Procedure Act*, Law No. 109 of 1996, am. by Law No. 36 of 2011 by Y. OKUDA (note 27).

[46] See above, at II C.

[47] On this topic, see J.A. TALPIS/ S.L. KATH, The Exceptional as Commonplace in Quebec *Forum non conveniens* Law (note 26).

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whenever domestic rules would not provide for a satisfactory result in terms of good administration of justice and fairness between the parties. As a clear illustration, one could cite what the Supreme Court of Japan had to say in *Family Co. Ltd.* v. *Shin Miyahora*[48] before Japanese law codified specific international rules:

> [In the absence of any] recognized international principles […] it is reasonable to determine the jurisdiction in accordance with the principles of justice and reason, based upon the ideas of promoting fairness between the parties and equitable and prompt administration of justice […] .Furthermore, in civil litigation where the action is brought before a Japanese court, if one of the local venues provided for in the Code of Civil Procedure is found in Japan, in principle it is reasonable to make the defendant subject to the jurisdiction of the Japanese court. However, if we find some *exceptional circumstances*, where a trial in a Japanese court would result in contradicting the ideas of promoting fairness between the parties and equitable and prompt administration of justice, the international adjudicatory jurisdiction of the Japanese court should be denied.

This citation defines the origin of the *exceptional circumstances* doctrine in Japan. The *exceptional* character of the rule translates into a *restrictive interpretation* of a limit to the general principle allowing the extension of the domestic rules to international situations. Sometimes, in some *rare* cases, such an extension should not be accepted since it would contradict the "*principles of justice and reason, based upon the ideas of promoting fairness between the parties and equitable and prompt administration of justice*".

2. *In a Context of Specific Codified Private International Law Rules*

With the adoption of new jurisdictional rules specific to international situations, most cases should fit into those rules without allowing for forum shopping. However, if after looking at all the circumstances of the case, it is obvious that they point to *a rare case* that does not fit well within the general rule, then the exceptional nature of the situation could allow a court to decline jurisdiction on the basis of the *forum non conveniens* doctrine, as codified in rules such as art. 3135 C.c.Q. or 3-9 of the Japanese Code of civil procedure. In this new context, the exceptional characteristic of the rule will also reflect the need for an *a posteriori* look at the situation, a result quite similar to the reasoning held before the adoption of specific rules, without expressing any additional requirement.

Such an *a posteriori* analysis would also follow from a simple reading of the English (but unofficial) translation of the Swiss exception clause (art. 15 of the 1987 Swiss federal law) which also refers to *"those exceptional situations where*,

[48] Supreme Court, 11 November 1997, Minshû 51-10, 4055; *Japanese Annual of International Law*, Vol. 41, 1998, p. 117; *Clunet* 2001, 572, note D. YOKOMIZO. See also, for previous cases, *Clunet* 1995, 401 *et seq*.

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in light of all the circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law".

Under art. 15, the exceptional nature of the rule is not an additional requirement but only the result of an analysis of all the circumstances pointing to a lack of connection with the law designated by the conflict rule and a much closer connection with another law.

3. Broad Interpretation: An Equivalent of a Closest Connection Test

After the adoption of specific international jurisdiction rule, Quebec courts were systematically asked to apply art. 3135 C.c.Q. and declined jurisdiction in half of the cases. As a result, the exception almost ousted the general rules in a trend which saw a broad interpretation of the *forum non conveniens* doctrine.[49]

As a matter of fact, the comments made by the Quebec legislator under art. 3135 C.c.Q. were inducing such a broad interpretation. The Minister of Justice stated that, as *exceptional* circumstances justifying the use of art. 3135 C.c.Q. one could cite: "the witnesses availability, the foreignness of the law applicable to the merits and *the dispute and its relative closeness to a foreign judge*".[50] According to this line of reasoning, it would be enough that a comparison showed that a foreign court was in a better position than Quebec courts to deal with the dispute to consider that one was facing the exceptional situation mentioned in art. 3135 C.c.Q. The exceptional characteristic of the rule was thus presented as the result or the *equivalent of a closest connection test*.

However, some scholars[51] have suggested that it might not be so exceptional in itself that a foreign court would be in a better position to decide than the Quebec court. In order to give it a proper meaning, the exceptional requirement of art. 3135 C.c.Q. should be seen as an additional and *separate* requirement, and not merely the result of an analysis of the closeness of the situation with each forum.

4. A Specific and Additional Requirement to a Comparative Approach

According to this opinion, in order to respect the exceptional character of the rule, one was supposed to prove that such difference of closeness, far from being quite normal or usual, was in itself exceptional. The aim of this opinion was to limit the broad use of *forum non conveniens* by Quebec courts.

However, since new international jurisdiction rules had been adopted in Quebec, it was very disputable to argue that, despite those carefully crafted rules, it would *not* be exceptional that foreign courts could be in a better position than

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[49] See S. GUILLEMARD/ A. PRUJINER/ F. SABOURIN, Les difficultés de l'introduction du *forum non conveniens* en droit Québécois, (note 26); J.A. TALPIS/ S.L. KATH, (note 26).

[50] *Commentaires du Ministre de la Justice*, t. 2, Publications du Québec 1993, p. 2000.

[51] S. GUILLEMARD/ A. PRUJINER/ F. SABOURIN (note 26); J.A. TALPIS/ S.L. KATH (note 26).

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Quebec courts to decide. If, on the contrary, one would take as a starting point that normally those news rules pointed to a real and substantial connection between Quebec courts and the dispute, then it would by itself be *exceptional* when the contrary occurred, as shown by the reasoning exposed in a preceding paragraph (4). It would follow that accepting those scholars' reasoning and adding a specific requirement to prove that the situation was exceptional meant looking for an *exceptional exception* which would reflect an *extremely* restrictive interpretation, based on a conceptual difficulty to define such a super-exception.

In a recent case,[52] the Quebec Court of Appeal accepted nonetheless the reasoning of those scholars. While the inferior court had decided that 3135 C.c.Q. should be used to decline jurisdiction since an American court in Georgia was in a better position than Quebec courts to deal with the situation, the court of Appeal held that it was a logical mistake: *even though* it was proven that, indeed, the *Georgia court was in a better position*, that alone was *not sufficient to show how exceptional* the situation would be under art. 3135, therefore Quebec courts should keep their jurisdiction.

If (by following the theory of some scholars and this jurisprudential trend) it is accepted that the exceptional character of the *forum non conveniens* doctrine constitutes a specific and additional requirement, what exactly should it qualify? The fact that the forum lacks any closeness with the situation, or the fact that a foreign court has a closest connection than the forum (Quebec) courts?

5. An Equivalent of a Requirement of a Lack of Connection of the Forum with the Dispute

If one would accept the position held by some scholars that it might not be so exceptional that a foreign court would be in a better position than the Quebec court, then, in order for this specific exceptional requirement to make sense, it should only concern the (negative) lack of close contact with Quebec courts, not the (positive) fact that a foreign court could have a closest connection than Quebec courts. As previously argued, since Quebec rule of direct jurisdiction have been carefully conceived, it would still really be exceptional that those rules would not point to a close connection between a Quebec court and the dispute, as mentioned earlier (paragraph 4). In those *rare* situations, art. 3135 would naturally *exceptionally* be used to decline jurisdiction.

Therefore, the additional requirement of an *exceptional application of the rule* should be seen as a functional equivalent of a requirement that the seized court has no substantial connection with the dispute.[53] As previously seen (paragraph A), such a requirement is fundamental to the theory, whereas the circumstance that another court is in a better position to decide is less relevant.

However, since this requirement is not expressly found in art. 3135 C.c.Q., Quebec courts could use the exceptional requirement instead.

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[52] *Stormbreaker Marketing and Productions Inc v Weinstock* 2013 QCCA 269.

[53] Compare with: S. GUILLEMARD/ A. PRUJINER/ F. SABOURIN (note 26); J.A. TALPIS/ S.L. KATH (note 26).

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It follows that it might not even be necessary to mention the exceptional character of the rule as long as those two above requirements are expressly found in the rule. For instance, art. 8 of the law of Korea shows the logic of this reasoning. In art. 8, the exceptional characteristic of the rule is merely mentioned in its title, *not in the rule itself*, since those two requirements are found in it under the following terms:

> Art. 8
>
> *Exception* to the Governing Law Designated
>
> If the governing law designated by this act is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is most closely connected with the legal relationship, the law of the other country shall apply.

Finally, two cumulative requirements could efficiently reduce the use of *forum non conveniens*. Under the first one, a defendant should prove after a factual comparison that a foreign court is in a better position to deal with the dispute.[54] In addition, proof could be required that the fact pattern points to a rare (*exceptional*) situation where the forum (Quebec) rule of direct jurisdiction does not lead to a case where the *forum* (*Quebec*) *court* has a close (or real and substantial) connection.[55]

This cumulative interpretation of two forms of *forum non conveniens* represents a serious potential to limit the use of the theory[56] and could raise the

[54] This is the most common form of *forum non conveniens* among common law countries.

[55] Such a second rule is a second form of *forum non conveniens*, also found in some common law countries, as well as in Japan; see also A. NUYTS, *L'exception de* forum non conveniens (note 6), No. 228-229.

[56] For instance, in *Droit de la famille - 131 294* (2013 QCCA 883 [Court of Appeal, Quebec]), an Algerian lady was suing her husband in Quebec in order to get a separation from bed and board and custody of their children. She was residing in Quebec while both her husband and the children were residing and were domiciled in Algeria. In the first instance, the Quebec court had jurisdiction over the separation action because of her residence there but could not get jurisdiction over the custody since the rule required that the children be domiciled in Quebec. However, the court was ready to extend its jurisdiction to the custody matter as an accessory measure to the separation (according to art. 3139 C.c.Q. which specifically allows it). The court of Appeal reversed the decision and held that art. 3135 C.c.Q. should be used to decline jurisdiction. Suing in Quebec for the separation would mean applying the law of Algeria, according to the conflict rule of Quebec. However, since Algerian law does not allow separation, a Quebec judge would have to refuse it. Therefore, the accessory measure relating to custody would have to be considered independently and there would not be any jurisdiction over it. No separation and no jurisdiction over the custody. It was thought that under those truly exceptional circumstances Quebec courts were not in a good position to decide. However, most Quebec courts have not seriously analyzed this double requirement yet. The "exceptional" lack of closeness between Quebec and the dispute has not been independently considered. Whenever all the circumstances point to a foreign court having *closer connections* than a Quebec court, then, for jurisdiction purposes, it will almost automatically be held that

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level of certainty without losing its inherent flexibility. The limits legislators have set to those rules share the same goal to lessen the uncertainty they produce.

C. Limiting the Uncertainty

Providing for legal certainty, which induces a feeling of justice, and striving to stabilize the personal status in cross borders relationships has been at the core of the modern rules in private international law. Its main expression has been a strong tendency to promote parties' will to choose a law or a court. In this perspective, the efforts of the promoters of globalization are only a continuation of this long term trend.

Even though it could bring uncertainty, as previously mentioned, some civil law systems have adopted the doctrine of *forum non conveniens* in order to provide for flexibility. Since this flexible rule gives a court a wide discretionary power to consider all the circumstances in order to decline jurisdiction, a litigant may always contest the opportunity to exercise its jurisdiction. A deep level of uncertainty grips the defendant who will never be sure that the jurisdiction rule will be applied to the situation until the court decides. Several solutions have been proposed in order to limit the uncertainty.

One of them was to list all the circumstances that should be considered. However, the following list of factors used by Quebec courts shows that it is not a very effective solution. A Quebec court should look at the place of residence of the parties and the witnesses, the situation of the proofs, the place of performance of an act, the location of property belonging to the defendant, the interests of both parties, the law applicable to the merits, the interests of justice, the advantages for the plaintiff to stay in Quebec, the existence of a parallel action abroad and the necessity to enforce the Quebec judgement abroad. Two of those factors are so broad they include all the others: the *interests of justice* and the *interests of both parties* are indeed the two fundamental underlying principles of international jurisdiction. Furthermore, Quebec courts have justifiably held that this list of factors should not be exhaustive and that the weight given to any factor could vary according to the case, since it would otherwise illogically limit the discretionary powers of the courts. Similarly, in Japan, art. 3-9 provides for the same discretionary power to decline jurisdiction without limiting the circumstances that could be considered.

As previously explained (in paragraph B), another, and more effective solution, was to interpret art. 3135 C.c.Q. in such a way as to require two cumulative conditions.

One additional and more efficient way to limit such uncertainty is to avoid using *forum non conveniens* theory when parties have chosen a court, or to exclude exception clauses when they have chosen a law (1). Another limit to those rules giving parties a wide range of freedom should cover situations where imperative rules have been implemented in order to make sure a stringent State policy will be respected (2).

Quebec courts are *exceptionally* not in a good position to decide. Therefore, no additional requirement will limit the use of *forum non conveniens*.

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1. Exclusive Choice of Jurisdiction and Choice of Law Clauses

As stated previously, modern systems of private international law tend to include a general escape clause, such as art. 3082 C.c.Q., which states the following:

> Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country. This provision does not apply where the law is designated in a juridical act.

The aim of this rule is to avoid the automatic application of the law designated by the conflict rule. Adopting escape clauses constitutes a sophisticated and efficient answer to the American critics of the rigid character of the classical Savignian method. However, having to look at all the circumstances for a determination of the applicable law brings unpredictability since only a judge could do it and there is no way to know in advance which law will apply. As a consequence, escape clauses should never apply when predictability, as opposed to proximity, is the underlying principle of the conflict rule governing the issue. It is the reason why all exception clauses state that they will not apply "where the law is designated in a juridical act" by parties.

Following the same reasoning, it should also be expressly mentioned in the rules relating to *forum non conveniens* that courts should avoid applying it when parties have chosen an exclusive court. Moreover, when the non-chosen courts respect the parties' will, one could be faced with a denial of justice if the chosen court would decline its jurisdiction on the basis of *forum non conveniens.*[57]

Accordingly, under art. 3-9 of the Japanese code of civil procedure, the Japanese legislator expressly mentioned that the special circumstances exception should be avoided when parties have agreed on the exclusive jurisdiction of Japanese courts. However, under Quebec law, art. 3135 C.c.Q. does not expressly state such a limit, even though courts have never used it in when parties have chosen Quebec courts. Still, it would have been a wiser idea to have mentioned it.

Unfortunately, the Swiss law of 1987 and Belgian Code of 2004 have expressly taken an opposite position since art. 6 par. 2 of the Belgian Code (more or less following art. 5 par. 3 and art. 6 of the Swiss law) states the following:

> 1. When parties, in a matter in which […] they can freely dispose of their rights, validly agreed to confer jurisdiction on the Belgian courts or a Belgian court to hear the dispute, which have arisen or may arise in connection to a legal relationship, the latter courts or court shall have exclusive jurisdiction […].
>
> 2. […] the court may however decline its jurisdiction when it appears from the combined circumstances that the dispute has no meaningful connection with Belgium.

[57] Unless the seized court has adopted a forum of necessity rule, or if the chosen court uses a *forum non conveniens* theory conditional on the proof of the availability of a non-chosen court.

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The same position has been adopted in art. 19 of the 2005 Hague Convention on choice of court agreements.[58] One possible explanation for what we consider such a counterproductive rule would be that, in a civil law system, grounds of jurisdiction provided by the legislators cannot fail to present a real and substantial connection, but such a lack of connection would very well happen when private parties are allowed to choose a court in the absence of any other connecting factor.

However, such a reasoning reflects a completely different view from the modern trend supported by the promoters of globalization, where parties to international relationships are supposed to know better than the legislator when they need a court and where. In addition, it also ignores the logic underlying choice of forum clauses whereby *certainty* and *adaptation* are the two fundamental tenets of the freedom given to the parties. It really does not matter that there is no sufficient connection between the dispute and the court if parties, for their own specific motives (deep knowledge of a specific matter, for instance) have exclusively chosen it.

Moreover, it could be argued that the Belgium and Swiss position seems to lack coherence[59] since both systems provide for the opposite solution at the conflict of law level. Both have adopted exception clauses (art. 15 of the 1987 Swiss law and art. 19 of the 2004 Belgian Code) which expressly exclude them when parties have chosen a law!

Following the same line of reasoning, Quebec law would have been more coherent if art. 3135 C.c.Q. had mentioned such a limit since the exception clause

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[58] *Convention of 30 June 2005 on Choice of Court Agreements*, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> Art 19 states: "A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute", See, among others: C. KUSSEDJIAN, La Convention de La Haye du 30 juin 2005 sur l'élection de for, *Clunet* 2006, p. 813; A. SCHULTZ, The Hague Convention of 30 June 2005 on Choice of Court Agreements, this *Yearbook*, Vol. 7, 2005, p. 1; *J. of Private International Law*, Vol. 2, 2006, p. 243; A. BUCHER, La Convention de La Haye sur les accords d'élection de for, *Revue suisse de droit international et européen*, Vol. 16, 2006, p. 29; J. TALPIS/ N. KRNJEVIC, The Hague Convention on Choice of Court Agreements of June 30, 200: The elephant that gave birth to a mouse, *Southwestern Journal of Law and Trade in the Americas*, Vol. 13, 2006, p. 1; B. AUDIT, Observations sur la convention de La Haye sur les accords d'élection de for, in *Liber Amicorum Hélène Gaudemet-Tallon,* Dalloz 2008, p. 171; R. GARNETT, The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?, *J. of Private International Law*, Vol. 5, 2009, p. 161; L. USUNIER, La convention de La Haye du 30 juin 2005 sur les accords d'élection de for: Beaucoup de bruit pour rien?, *Rev. crit. dr. int. pr.* 2010*,* p. 37; 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*, Vol. 12, 2010, p. 399. See also R.A. BRAND/ S.R. JABLONSKI, *Forum Non Conveniens, History, Global Practice, and the Future Under the Hague Convention of Choice of Court Agreements*, Oxford University Press, 2007. For a more complete list, see: <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=98>.

[59] Cf. P. LAGARDE, (note 15), No. 147; J. TALPIS/ G. GOLDSTEIN, The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law, *this Yearbook*, 2009, Vol. 11, p. 339, at p. 352; A. NUYTS (note 6), No. 493.

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(art. 3082 C.c.Q.) expressly mentions it. It is also to be hoped that the future rule of Korea dealing with *forum non conveniens* will mention such a limit since the Korean exception clause (art. 8 of the Korean law of 2001) already does admit it expressly.

2. **Ex lege *Exclusive Jurisdiction and Mandatory Rules***

State intervention in the realm of socio-economic activities must be maintained in order to keep the coherence of any legal system. So modern systems of private international law openly accepted the theory of mandatory rules or "laws of immediate application", not only when domestic rules are concerned but also when foreign rules are involved.

By mandatory rules, or "laws of immediate application", or *lois de police*, we mean the type of super imperative norms of one system whose function will force a court to apply it to an international situation, even though it is not part of the applicable law under the conflict rule. It is also called overriding mandatory provisions as defined by art. 9 of the Rome I Regulation relating to the law applicable to contracts[60] as follows:

> Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political social or economic organisation, to such an extent that they are applicable to any situation falling within their scope irrespective of the law otherwise applicable to the contract [under the conflict rule…].

Modern private international systems had to make room for those imperative rules through which a State will aggressively intrude into situations of a private nature whenever it deems necessary to reach its vital interests, like the protection of some type of weak parties or if exclusive jurisdiction is given to a State's authorities when only public authorities may have the means and will to assure the maintenance of public goods, like situations involving registration of intellectual property rights.

Since it is clear that the content of those rules should not be subject to a discretionary power given to a court to avoid them, *forum non conveniens* and exception clauses should not be used when those rules are involved. As a matter of fact, art. 3-10 of the Japanese Code of civil procedure states the following:

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[60] *Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, see above note 24. This regulation followed the Rome Convention (80/934/EEC *Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980*, OJEC No L 266 /1: http://eur-lex.europa.eu/resource.html?uri=cellar:22cc5c49-2b36-4962-aa60-e928a52efa66.0008.02/DOC_1&format=PDF). See among others: M. GIULANO/ P. LAGARDE, Report on the Convention on the Law Applicable to Contractual Obligations, JOCE No. C-282, 31.10.80; H. GAUDEMET-TALLON, Le nouveau droit international privé européen des contrats, *Rev. trim. dr. europ.* 1981, p. 215; P.M. NORTH, The E.E.C. Convention on the Law Applicable to Contractual Obligations, *J. Bus. L.* 1980, p. 382.

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> The provisions of […] art. 3-9 [the doctrine of exceptional circumstances] shall not apply where the exclusive jurisdiction of Japanese courts is prescribed by any law.

One could also cite art. 19 of the 2004 Belgian Code of private international law which reads as follows:

> [The exception clause] does not apply if […] the designation of the applicable law is based on its content.

Unfortunately, those very wise limits are not found elsewhere. For instance, it would be important to realize that exception clauses should not apply when consumer protection is involved.

V. Conclusion

Due to the emerging globalization of human relationships, new aspirations transcend borders. In a context of potential legal competition,[61] it is no longer enough to provide for unilateral and automatic answers previously designed for private local consumption. People will try to find happiness under better skies. Today more than ever, modern rules of private international law must strive to find a balance between two faces of *material justice*: *predictability* and *proximity*.

Whenever issues relating to which court should take jurisdiction, which law should apply and whether or not a foreign decision should be given effects by local courts, judges need to take into consideration *predictability* or legal certainty and the legitimate expectations of private parties in order to convince their public that material justice had be rendered. Moreover, *avoiding limping situations* through coordination and respect of the *proximity* principle belongs to the fundamental aims of any modern legislator in any given international situation and even more so in a global context.

In this global perspective, *forum non conveniens* and exception clauses could be seen as efficient tools to coordinate diverging legal systems.

Allowing private parties to depart from the general rules and to respond to their specific needs under the circumstances represents one key element of a regulatory scheme in such a global context. Enhancing flexibility within private international law rules is another key element offered by those two types of rules and they provide good countermeasures to forum shopping and fraud stemming from a new competitive legal market. Finally, enhancing cooperation between States, therefore avoiding a race to the bottom and providing for a better quality of legislative schemes, is also a welcome by-product of those rules.

On the other hand, one should realize that some problems must be dealt with. Flexibility enhances *uncertainty*, and a higher level of freedom might easily threaten some fundamental State policies. Hence the diverse answers given by

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[61] On this topic, see H. MUIR WATT, Aspects économiques du droit international privé, *Recueil des cours*, Vol. 307, 2004, p. 25 *et seq*.

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different legislators to those issues. They have not always shown a perfect level of coherence as incidentally seen in our study.

However, those developments show that a comparative look at exception clauses and *forum non conveniens* could bring inner coherence within a system of private international law and could induce logical answers to some difficult questions raised by their interpretation.

In terms of reasoning, the essential requirement is a lack of connection between the court or the law and the situation. It is only a secondary requirement that a subsidiary court has better connections in order to avoid a denial of justice.

Moreover, it seems clear that the exceptional nature of those rules do not need to be a separate and additional requirement. Such an exceptional characteristic will only be an *a posteriori* conclusion as long as the normal rules respects the proximity principle, which should usually be the case when they have been specially crafted for international situations.

Finally, in terms of limitations, a conciliation has to be made between flexibility and legal certainty, and each legal system must keep on respecting the imperative rules forced upon the parties by the general needs of the global society (the so called market defaults). Those conciliations should maintain a coherent approach between the rules of each system.

Understanding those three variables will allow *forum non conveniens* and exception clauses to play a vital role within a well-reasoned policy striving to reach coordination between legal systems in a global context.

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THE LAW APPLICABLE TO THE RIGHT OF RECOURSE IN THE FIELD OF LIABILITY INSURANCE LAW

Georgina GARRIGA SUAU*

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I. Introduction

In the field of Liability Insurance Law, some legal systems impose on insurance companies the obligation of assuming their own insured party's liability to third parties as a result of not being permitted by law to raise certain contractual defences against such third parties. The aforementioned third parties are either the non-defaulting party of a contract or the person suffering the damage in tort cases. In such situations, the same legal system provides for a right of recourse in favour of the insurance company and against its own insured party to claim reimbursement of what the former has been compelled by law to pay to the third party.

The Court of Justice of the European Union referred to this "right of recourse" in the specific context of motor vehicle compulsory insurance when it tackled the prohibition of some exclusion clauses from being included in insurance policies, as we will see later when we cover a broader range of topics. Other than

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 31-52
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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the field of motor vehicle compulsory insurance, some Member State legal systems also regulate such a right in the broader field of liability or third party insurance.

In a Private international law scenario, this legal discipline gives rise to the question of which law should govern the mentioned right of recourse; the answer depends on the rule that is applied. Consequently, the issue that I will tackle in this paper, is the characterization of the right of recourse as exercised by insurers against their own insured parties as a result of the former having been obliged to pay the indemnity to third parties, for not being permitted by law to rely on certain contractual defences that derive from the insurance contract in the framework of European Private international law.

In this regard, I will first put into context the right of recourse so as to analyse its main features. Second, I will deal with the main solutions that the current conflict-of-laws Regulations offer to characterize the aforementioned right. This will lead to the discussion and to the identification of the most suitable rule to determine the law governing the right of recourse in this particular field of Liability Insurance Law.

II. The Right of Recourse

A. Concept

Some State legal systems compel insurance companies to indemnify third parties (creditors) as a result of the insured party (the debtor) having been declared contractually or non-contractually liable, in circumstances in which the insurer has been precluded from alleging some form of defence arising from the insurance contract. Since the law imposes an obligation on the insurance company to pay off the insured party's debt in such circumstances, the same legislation establishes a simultaneous right of recourse for the benefit of the insurer, in order to be reimbursed by the insured party.

This explanation of the right of recourse stresses that this right is closely tied to the defences upon which the insurer cannot rely against the third party (or creditor) in order to be released from having to pay compensation on behalf of the insured party, when that third party or creditor has exercised the direct action against the insurer.[1] In B. Dubuisson's words "*L'action directe et l'action récursoire ont partie liée. L'une ne se concevrait sans l'autre*."[2]

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[1] See eg B. DUBUISSON, L'action directe et l'action récursoire, in B. DUBUISSON/ P. JADOUL (eds), *La Loi du 25 juin 1992 sur le contrat d'assurance terrestre, Dix annés d'application*, Paris 2003, at 177; R. BISENIUS, *L'assurance du particulier,* Luxembourg 2007, at 185; Y. LAMBERT-FAIVRE/ L. LEVENEUR, *Droit des assurances,* Paris 2011, at 550-551; F. SÁNCHEZ CALERO, Artículo 76. Acción directa contra el asegurador, in F. SÁNCHEZ CALERO (dir), *Ley de Contrato de seguro, Comentarios a la Ley 50/1980, de 8 de octubre, y a sus modificaciones,* Fourth edn, Cizur Menor 2010, at 1780.

[2] B. DUBUISSON (note 1), at 177.

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Indeed, from an insurance law perspective, the insurer may rely on some defences in order to refuse payment. Among them, only a few may be raised against the insured party, but not against third parties exercising direct action. These defences are the only ones that enable the insurer to exercise the right of recourse because they compel the insurer to pay the third party, when the insurer could otherwise invoke such defences against its own insured party to refuse compensation.

An example may be found in Article Seventy-six of the Spanish Insurance Contract Act of 1980,[3] which attributes a right of direct action to third parties against insurers. Indeed, this provision also establishes a right of recourse in favour of the insurer, to be compensated for being obliged to pay the indemnity to third parties in cases not covered by the insurance policy, such as in the event of the insured's wilful or intentional wrongdoing. In line with this provision, Article 10 of the Spanish motor vehicle compulsory insurance Act of 2004[4] also sets out a right of recourse, albeit in the motor vehicle compulsory insurance class. Indeed, although it is well known that any wilful or intentional wrongdoing cannot be covered by liability insurance contracts, the Spanish legislator compels insurers to pay third parties the indemnity caused by their own insured parties having acted wilfully, despite the wilful conduct being uninsurable. In such scenarios, the insurer is not allowed to rely on the *exceptio doli* against third parties, although it could allege it against its own insured party. The reason for such an obligation is

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[3] Under Art. Seventy-six, first indent, of the Spanish Insurance Contract Act: "*El perjudicado o sus herederos tendrán acción directa contra el asegurador para exigirle el cumplimiento de la obligación de indemnizar, sin perjuicio del derecho del asegurador a repetir contra el asegurado, en el caso de que sea debido a conducta dolosa de éste, el daño o perjuicio causado a tercero*."

"The person sustaining damage or his or her heirs will hold direct action against the insurer to claim the indemnity payment fulfilment, irrespective of the insurers' right to bring an action for indemnity against its own insured in case of the latter having acted wilfully causing damages to a third person" (translation mine).

[4] BOE no. 250, 17 October 1980. Pursuant Art. 10. a and c of the Spanish motor vehicle compulsory insurance Act, of 2004 (BOE no. 267, 5 November 2004): "*El asegurador, una vez efectuado el pago de la indemnización, podrá repetir:*

a) Contra el conductor, el propietario del vehículo causante y el asegurado, si el daño causado fuera debido a la conducta dolosa de cualquiera de ellos o a la conducción bajo la influencia de bebidas alcohólicas o de drogas tóxicas, estupefacientes o sustancias psicotrópicas; [...] c) Contra el tomador del seguro o asegurado, por las causas previstas en la Ley 50/1980, de 8 de octubre, de Contrato de Seguro, y, conforme a lo previsto en el contrato, en el caso de conducción del vehículo por quien carezca del permiso de conducir".

"The insurer, after having satisfied the indemnity, shall recoup: a) from the driver, the owner of the vehicle and the insured party, if the damage was caused as a result of the wilful conduct of any the aforementioned parties or as a result of them being under the influence of alcohol or of any intoxicating agent at the time of the accident; […] c) from the policyholder or insured party in accordance with the grounds established in the Spanish Insurance Contract Act of 1980, and in accordance with the insurance contract in the case of the driver not holding a driving licence; […]" (translation mine). On this right of recourse see A. TATO PLAZA, *La subrogación del asegurador en la ley del contrato de seguro*, Valencia 2002, at 78-81.

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found in the 'deep pocket' theory that seeks to prevent third parties or creditors from having to bear the potential insured party's insolvency. However, in such cases, the Spanish legislator grants insurers the right of recourse, as a right subject to the defences that the insurer is not allowed to invoke against third parties. Additional impermissible contractual defences could be unpaid premiums on the part of the policyholder, or a failure by the insured party to provide prompt notice of the loss, etc.

The right of recourse is not exclusive to the Spanish legal system and other State legal systems widely recognize this right in favour of liability insurers. Examples include the Belgian Insurance Act of 2014[5] and the Luxembourg Insurance Contract Act of 1997.[6] Both[7] provide for the right of recourse together with direct action for the benefit of third parties, although the conditions for the right of recourse to be exercised vary from country to country. For example, Article 91 of the Luxembourg Insurance Contract Act of 1997 requires the express mention of the right of recourse in the insurance contract in order for this right to be validly exercised.[8] Otherwise, that legislation assumes that the insurance company has renounced its right of recourse. In contrast, the Spanish legislation does not require any such express contractual condition.

The case law of the Court of Justice of the European Union also referred to the right of recourse in the previously mentioned field of motor vehicle compulsory insurance. In its judgment of 28th of March 1996, in the case C-129/94 *Rafael Ruiz Bernáldez*, the Court of Justice stated that the Directives on motor vehicle compulsory insurance "do not preclude statutory provisions or contractual clauses under which it is possible for the insurer to claim against the insured in certain cases. That applies in particular to provisions or clauses which allow the insurer to claim against the insured with a view to recovering the sums paid to the victim of a road traffic accident caused by the intoxicated driver".[9] As a result, the harmonization achieved by the European Directives on motor vehicle compulsory insurance enable the Member States' legislators to regulate the right of recourse, at least in this particular field of liability or third party insurance.

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[5] Art. 152 of the *Loi du 4 avril 2014 relative aux assurances (Moniteur belge du 30 avril 2014)*.

[6] Art. 91 of the *Loi du 27 juillet 1997 sur le contrat d'assurance (Journal Officiel du Gran-Duché de Luxembourg, A – Nº 65, 3 septembre 1997)*.

[7] The French legal system also attributes the right of recourse to insurers although this right is not envisaged by the French Code on Insurance (*Code des assurances*) save for the motor vehicle compulsory insurance class (Art. R211-13.4 of the French Code on Insurance). In relation to this right, see Y. LAMBERT-FAIVRE/ L. LEVENEUR (note 1), at 550-551.

[8] R. BISENIUS (note 1), at 185.

[9] Judgment of 28 March 1996, *Rafael Ruiz Bernáldez*, C-129/94, ECLI:EU: C:1996:143.

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B. The Right of Recourse and Unjust Enrichment

From the foregoing explanation, the right of recourse could be understood as a manifestation of the compulsory discharge of another's debt ground. This is one of the unjust factors or grounds that can trigger the right of action of unjust enrichment at Common law.[10] The compulsory discharge of another's debt arises when one party pays the debt of another party under compulsion of law. For example, in the liability insurance scenario, the insurer must satisfy its insured party's obligation in cases excluded from the insurance coverage. In addition, the right of recourse serves to re-establish the equilibrium of the contractual insurance relationship, which otherwise falters when the insurer is obliged by law to pay the indemnity because it is not allowed to raise certain defences stemming from the insurance contract against the creditor, when it could otherwise allege them against the insured party to reject the payment. In effect, the right of recourse makes the insured party responsible for their acts. Yet, in A. Burrow's words, when referring to the rule regulating the legal compulsion unjust factor, "the reason for this rule is the avoidance of the defendant's undeserved escape from liability."[11]

In fact, in Restatement of the English Law of Unjust Enrichment, A. Burrows provides as an example of legal compulsion the situation where "(b) the claimant and the defendant are under a common liability to X, which the claimant discharges, but the claimant's liability is secondary to the defendant's."[12] The right of recourse fits into this category of an unjust ground.

This explanation makes it clear that the right of recourse falls within the broader category of unjust enrichment. Before analysing its projection on the conflict-of-laws field, it is worth noting that from a substantive domestic law perspective, the definition of the concept of unjust enrichment may vary from Member State to Member State.

The only common thread from a comparative law perspective consists of defining such a legal technique as the remedy whereby the impoverished person (the *solvens* or claimant) claims for reimbursement from the enriched person (the debtor or defendant) as a result of the debtor's enrichment or benefit[13] at the *solvens'* expense.[14] Thus, the general idea underlying the unjust enrichment remedy

[10] See eg A. BURROWS, *The Law of Restitution,* Third edn, Oxford 2011, at 107-108 and at 436-468; G. VIRGO, *The Principles of the Law of Restitution*, Second edn, Oxford 2006, at 220-243; G. of CHIEVELEY/ G. JONES, *The Law of Restitution,* Sixth edn, London 2002, at 423-441; A. BURROWS, Absence of Basis: the New Birksian Scheme, in A. BURROWS/ R. OF EARLSFERRY (eds), *Mapping the Law, Essays in Memory of Peter Birks,* Oxford 2006, at 43-44; P. BIRKS, *Unjust Enrichment,* New York 2005, at 158-159.

[11] A. BURROWS, *A Restatement of the English Law of Unjust Enrichment,* Oxford 2012, at 98-100.

[12] *Ibid*, at 98.

[13] Although for the difference between the concepts of "enrichment" and "benefit" see G. VIRGO (note 10), at 62-64.

[14] P. BIRKS (note 10), at 39-40 and at 73-98; G. of CHIEVELEY/ G. JONES (note 10), at 40-44; G. VIRGO (note 10), at 105-16; A. BURROWS, *The Law of Restitution* (note 10), at 27 and at 63-85; L. DIEZ-PICAZO, *Fundamentos del Derecho civil patrimonial, Introducción,*

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consists of a transfer of assets or of value from the impoverished person (*solvens* or claimant) to the enriched person, which entails an unjust enrichment of the defendant corresponding to a loss for the claimant. If this general definition applies to the particular case of the compulsory discharge of another's debt, then the transfer of assets or of value from the *solvens* (the impoverished person or claimant) to the defendant (the enriched person or debtor) consists of a negative benefit (*damnum cessans*),[15] since the defendant's enrichment or benefit involves an expense that he or she does not have to pay. Indeed, if it was not for the *solvens*' payment, then the defendant would have incurred that expense. As a result, although the *solvens* pays the creditor (in other words, the tangible transfer of value operates from the *solvens* to the creditor), that transfer benefits the defendant, who does not incur any expense thanks to the *solvens*' payment. This is the reason why the defendant is benefitted negatively. In addition, this benefit must be unjustified in order for the enrichment to be qualified as unjust.[16] This means that the defendant must not be legally entitled to the enrichment. There must not be a legal obligation attributing the enrichment or the benefit to the defendant, in such a case the *solvens* would not be entitled to claim for reimbursement.

In the same sense, the Unjustified Enrichment Principles of European Law drafted and prepared by the Study Group on a European Civil Code would support the aforementioned explanation, as its Basic rule (Article 1:101, paragraph 1) states that "a person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment."[17] Furthermore, Article 4: 101 (e) of the same Principles addresses the issue regarding which situations trigger the requirement that the defendant's enrichment is attributable to the claimant's disadvantage. Particularly, letter (e) states that "an enrichment is attributable to another's disadvantage in particular where: (e) the enriched person is discharged from a liability by that other person."[18] The right of recourse, which is the object of the present study, fits perfectly well with this situation since, as mentioned previously, this right corresponds to the compulsory discharge of another's liability.

However, beyond this general outline, a more concrete definition of what unjust enrichment is cannot be offered, since this concept encompasses a great variety of situations. The European Commission itself expressed this difficulty in the Proposal for a Regulation of the European Parliament and the Council on the

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Teoría del contrato, Madrid 1996, at 102-103; M. OROZCO MUÑOZ, *El enriquecimiento injustificado*, Cizur Menor 2015, at 226.

[15] A. BURROWS, *The Law of Restitution* (note 10), at 49; L. DIEZ-PICAZO, *Fundamentos del Derecho civil patrimonial, Introducción, Teoría del contrato* (note 14), at 101-102; M. OROZCO MUÑOZ (note 14), at 87.

[16] G. OF CHIEVELEY/ G. JONES (note 10), at 44-49; A. BURROWS, *The Law of Restitution* (note 10), at 27; L. DIEZ-PICAZO, *Fundamentos del Derecho civil patrimonial, Introducción, Teoría del contrato* (note 14), at 103-104; M. OROZCO MUÑOZ (note 14), at 137-250.

[17] PEL/ von BAR/ SWANN, *Unjustified Enrichment,* Munich 2010, at 181-212.

[18] *Ibid.* at 375 and at 399-402.

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law applicable to non-contractual obligations, that was published in 2003. In its Proposal, the European Commission highlighted that:

> "To reflect the wide divergences between national systems here, technical terms need to be avoided. [...]. Both the substantive law and the conflict rules are still evolving rapidly in most of the Member States, which means that the law is far from certain. The uniform conflict rule must reflect the divergences in the substantive rules. The difficulty is in laying down rules that are neither so precise that they cannot be applied in a Member State whose substantive law makes no distinction between the various relevant hypotheses nor so general that they might be open to challenge as serving no obvious purpose. Article 9 *[the current Article 10]* seeks to overcome the problem by laying down specific rules for the two sub-categories, unjust enrichment and agency without authority, while leaving the courts with sufficient flexibility to adapt the rule their national Systems."[19]

Finally, it is worth mentioning that the right of recourse engenders a non-contractual relationship between the insurer and the insured party even though the right of recourse is regulated by the insurance legislation. Indeed, the insurance contract is an aleatory contract, whereby the insurer is compelled to indemnify the creditor even if that obligation results in an economic loss for the insurer. However, in the context of the particular right of recourse, it must not be overlooked that it is the law that makes the payment compulsory, since this payment is excluded from the insurance contract.

C. The Right of Recourse Versus the Right of Subrogation

Another aspect tied to the right of recourse, as developed by all of the State legal systems that regulate such a right, lies in distinguishing this right from the right of subrogation attributable to the insurer (the *solvens*) when paying the indemnity to its own insured party for the insured loss. Indeed, these rights should be distinguished. Thus, as far as the right of subrogation is concerned, this right consists of allocating the victims' rights to the insurer (to step into the victim's shoes) so as to enjoy the benefits of the victim's former rights against the person liable (the third party).[20] Subrogation thus amounts to substitution.[21] And this substitution operates as a result of the guarantee that the *solvens*' payment represents for the creditor. Thereby, by way of subrogation, the *solvens* takes advantage of any security and

[19] COM(2003) 427 final, Brussels, 22 July 2003, at 21.

[20] See A. BURROWS, *The Law of Restitution* (note 10), at 145; R. MERKIN (ed), *Colinvaux's Law of Insurance,* 10th edn, London 2014, at 622; M. CLARKE (ed), *The Law of Insurance Contracts,* 14th edn, London 2002, at 1059; F. SÁNCHEZ CALERO, Artículo 43. Subrogación del asegurador, in F. SÁNCHEZ CALERO (note 1), at 967-969; A. TATO PLAZA (note 4), at 50.

[21] CH. MITCHELL, *The Law of Subrogation,* Oxford 1994, at 3.

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privileges that the creditor had in respect of his or her claim against the defendant, in order to be reimbursed by him or her.[22] In contrast, the right of recourse, as noted initially, renders the insurer capable of independently claiming compensation from the person liable (the insured party), without prejudging any kind of substitution, because in this situation the *solvens*' payment does not guarantee either the creditor's right or its own right but rather protects the debtor's assets.

In fact, when differentiating these rights of action, all State legal systems attach the right of subrogation to the insurance against loss or damage, while subjecting the right of recourse to liability or third party insurance. In practical terms, this difference means that when exercising the right of subrogation, the insurer's payment does not extinguish the debtors' liability as it does in the context of the right of recourse. Thus, by operation of the right of subrogation, the insurer (the *solvens*) takes the place of its insured party, who is the victim. So, in the case of subrogation, the insurer acquires or enforces the victim's or insured party's rights against the person liable, who is the third party in this case of insurance against loss or damage. In contrast, by way of the right of recourse, the insurer exercises a distinct and original right against its own insured party, who is the person liable.[23] As noted previously, this difference is embraced by all of the State legal systems that distinguish between the two legal techniques. Let me take again, as an example, the Spanish Insurance Contract Act, whose article Forty-three deals with the right of subrogation in the field of the insurance against loss and damage, and whose article Seventy-six encompasses the right of recourse in the context of liability or third party insurance. With regard to subrogation, the first two paragraphs of Article Forty-three state that "the insurer, having paid the indemnity, will be able to exercise the insured's loss rights and actions against the person liable, up to the indemnity limit.

The insurer will not be able to exercise the rights in which it has subrogated in prejudice of the insured."[24]

In relation to the right of recourse, Article Seventy-six, first indent, of the same Act declares that "the person sustaining damage or his or her heirs will hold direct action against the insurer to claim the indemnity payment fulfilment, irrespective of the insurers' right to bring an action for indemnity against its own

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[22] L. DIEZ-PICAZO, *Fundamentos del Derecho civil patrimonial, Las relaciones obligatorias,* Madrid 1993, at 832; A. CAÑIZARES LASO, *El pago con subrogación*, Madrid 1996, at 131.

[23] F. SÁNCHEZ CALERO, Artículo 76 (note 4), at 50-51 and at 81; G. RAVARANI, *La responsabilité civile des personnes privées et publiques,* 3rd edn, Luxembourg 2014, at 1013; B. DUBUISSON (note 1), at 178; M. FONTAINE, *Droit des assurances,* 4th edn, Bruxelles 2010, at 475.

[24] Translation mine. The two first paragraphs of Article Forty-three state: "*El asegurador, una vez pagada la indemnización, podrá ejercitar los derechos y las acciones que por razón del siniestro correspondieran al asegurado frente las personas responsables, del mismo, hasta el límite de la indemnización.*

El asegurador no podrá ejercitar en perjuicio del asegurado los derechos en que se haya subrogado. El asegurado será responsable de los perjuicios que, con sus actos u omisiones, pueda causar al asegurador en su derecho a subrogarse".

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insured in case of the latter having acted wilfully causing damages to a third person."

The same regulation may be found in the Luxembourg Insurance Contract Act, whose Article 52 provides for the right of subrogation[25] and whose Article 91[26] establishes the right of recourse. Finally, whereas Article 152[27] of the Belgian Insurance Act embraces the right of recourse; Article 95[28] of the same Belgian Insurance Act regulates the right of subrogation.[29]

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[25] Under Art. 52 of the Luxembourg Insurance Contract Act: "*Subrogation de l'assureur. L'assureur qui a payé l'indemnité est subrogé, à concurrence du montant de celle-ci, dans les droits et actions de l'assuré ou du bénéficiaire contre les tiers responsables du dommage. Si, par le fait de l'assuré ou du bénéficiaire, la subrogation ne peut plus produire ses effets en faveur de l'assureur, celui-ci peut lui réclamer la restitution de l'indemnité versée dans la mesure du préjudice subi. La subrogation ne peut nuire à l'assuré ou au bénéficiaire qui n'aurait été indemnisé qu'en partie. Dans ce cas, il peut exercer ses droits, pour ce qui lui reste dû, de préférence à l'assureur. Sauf en cas de malveillance, l'assureur n'a aucun recours contre les descendants, les ascendants, le conjoint et les alliés en ligne directe de l'assuré, ni contre les personnes vivant à son foyer, ses hôtes et les membres de son personnel domestique. Toutefois l'assureur peut exercer un recours contre ces personnes dans la mesure où leur responsabilité est effectivement garantie par un contrat d'assurance*."

[26] Pursuant Art. 91 of the Luxembourg Insurance Contract Act: "*Droit de recours de l'assureur contre le preneur d'assurance. L'assureur peut se réserver un droit de recours contre le preneur d'assurance et, s'il y a lieu, contre l'assuré autre que le preneur, dans la mesure où il aurait pu refuser ou réduire ses prestations d'après la loi ou le contrat d'assurance. Sous peine de perdre son droit de recours, l'assureur a l'obligation de notifier au preneur ou, s'il y a lieu, à l'assuré autre que le preneur, son intention d'exercer un recours aussitôt qu'il a connaissance des faits justifiant cette décision. Un règlement grand-ducal peut limiter le recours dans les cas et dans la mesure qu'il détermine*."

[27] Art. 152 of the Belgian Insurance Act states: "*L'assureur peut, dans la mesure où il aurait pu refuser ou réduire ses prestations suivant la loi ou le contrat d'assurance, se réserver un droit de recours contre le preneur d'assurance et, s'il y a lieu, contre l'assuré autre que le preneur d'assurance, à concurrence de la part de responsabilité incombant personnellement à l'assuré. Sous peine de perdre son droit de recours, l'assureur a l'obligation de notifier au preneur d'assurance, s'il y a lieu, à l'assuré autre que le preneur d'assurance, son intention d'exercer un recours aussitôt qu'il a connaissance des faits justifiant cette décision.*

Le Roi peut limiter le recours dans les cas et dans la mesure qu'Il détermine."

[28] Under Art. 95 of the Belgian Insurance Act: "*L'assureur qui a payé l'indemnité est subrogé, à concurrence du montant de celle-ci, dans les droits et actions de l'assuré ou du bénéficiaire contre les tiers responsables du dommage./ Si, par le fait de l'assuré ou du bénéficiaire, la subrogation ne peut plus produire ses effets en faveur de l'assureur, celui-ci peut lui réclamer la restitution de l'indemnité versée dans la mesure du préjudice subi./La subrogation ne peut nuire à l'assuré ou au bénéficiaire qui n'aurait été indemnisé qu'en partie. Dans ce cas, il peut exercer ses droits, pour ce qui lui reste dû, de préférence à l'assureur. Sauf en cas de malveillance, l'assureur n'a aucun recours contre les descendants, les ascendants, le conjoint et les alliés en ligne directe de l'assuré, ni contre les personnes vivant à son foyer, ses hôtes et les membres de son personnel domestique. En cas de malveillance occasionnée par des mineurs, le Roi peut limiter le droit de recours de l'assureur couvrant la responsabilité civile extra-contractuelle relative à la vie*

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Although both rights -the right of subrogation and the right of recourse- operate in different insurance categories, the former in insurance against loss or damage and the latter in liability insurance, there could still be room for the right of subrogation to intervene in the field of liability or third party insurance in two particular cases: first, when the insured party's liability is vicarious or relates to people specially close to him or her, in which case, the insurer could be subrogated into its insured's rights against the person liable.[30] Situations in which the person liable is a member of the insured party's family or the insured party's workforce provide examples of such cases. However, it should be emphasised that, in practice, these cases tend to be excluded from subrogation because the insurer cannot be allowed to take over or enforce the insured party's rights against this same person. This is why, from a Comparative Law perspective, many legal systems exclude cases in which the insured party is liable for the acts of other people closely related to him or her, from subrogation.[31] However, this exclusion may also be subject to a subsequent exception in cases in which those related people act wilfully.[32]

Second, subrogation may still play a role in the context of liability insurance when the insured party is jointly or jointly and severally liable with another debtor. In this scenario, the insurer could be subrogated into the insured party's rights against the other debtor. The European Court of Justice in its judgment of the 21st of January 2016 in the *Ergo Insurance*[33] case has, for the first time, coped

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privée./Toutefois l'assureur peut exercer un recours contre ces personnes dans la mesure où leur responsabilité est effectivement garantie par un contrat d'assurance."

[29] As far as the French legislation is concerned, the French Code on Insurance deals with the right of subrogation (Art. L121-12), whilst Art. L124-3 embraces the right of direct action. By contrast, as noted initially, the French Code on Insurance only envisages the right of recourse in relation to the motor vehicle compulsory insurance (Art. R211-13.4). On this right, see note 8.

[30] A. Tato Plaza (note 4), at 76-77; Ch. Mitchell, *The Law of Subrogation* (note 21), at 74-75.

[31] In this regard, for example, Art. 10:101 (3) of the Principles of European Insurance Contract Law states: "The insurer shall not be entitled to exercise rights of subrogation against a member of the household of the policyholder or insured, a person in an equivalent social relationship to the policyholder or insured, or an employee of the policyholder or insured, except when it proves that the loss was caused by such a person intentionally or recklessly and with knowledge that the loss would probably result"; J. Basedow et al., *Principles of European Insurance Contract Law (PEICL),* 2nd expanded edn, Köln 2014, at 47 and at 264-267.

[32] See note 31.

[33] Judgment of 21 January 2016, *Ergo Insurance,* C-359/14 and 475/14, ECLI:EU:C:2016:40. For comments on this judgment see J. Forner Delaygua, Insurers and third parties in transnational disputes: teachings from the ECJ, in F. Guillaume/ I. Pretelli (eds), *Les nouveautés en matière de faillite transfrontalière et les banques et les assurances face aux tiers,* Genève – Zurich 2016, at 134-142; G. Garriga, El derecho de repetición de la aseguradora *solvens* contra la aseguradora del corresponsable de un accidente automovilístico, 16 *Anuario Español de Derecho internacional privado* 2016, at 1004-1010; G. Garriga, La ley aplicable al derecho de repetición de la aseguradora *solvens* contra la aseguradora del corresponsable. Comentario a la STJUE de 21 de enero de 2016,

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with this exception, when referring to the action for indemnity brought by the insurer of the person liable, who had compensated the victim for all the damage sustained as a result of a traffic accident, against the insurer of the person co-responsible for the same traffic accident.

Indeed, in considering this action for indemnity, the Court invoked Article 19 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[34] (hereinafter, Rome II Regulation) stating that "that provision applies in particular to the situation in which a third party, namely an insurer, has compensated the victim of an accident, the creditor of an obligation in tort/delict of damages owed by the driver or owner of a motor vehicle, in order to satisfy that obligation" (paragraph 56). As a result, the Court of Justice has tied the action for indemnity held by the insurance company of the person liable against the insurance company of the co-responsible for the road traffic accident, to the legal subrogation rule contained in Article 19 of the Rome II Regulation, rather than to the multiple liability rule laid down in Article 20 of the Rome II Regulation. The Court of Justice' solution is in line with the prevailing opinion among legal scholars, favouring the application of the provision on legal subrogation to situations in which debtors do not hold the same equal position with regard to the basic contractual or non-contractual obligation.[35] In other words, those scenarios in which debtors are not primarily and jointly, or jointly and severally liable for the same claim toward the creditor fit better within the scope of application of the legal subrogation rule than within the rules on multiple liability, although neither of these rules could expressly envisage such situations.

In addition, while the function of subrogation is to prevent the insured party's unjust enrichment, the right of recourse works as the reverse of that unjust enrichment.[36] In other words, subrogation operates *ex ante* and the right of recourse

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asuntos acumulados C-359/14 y C-475/14, *Ergo Insurance*, *La Ley Unión Europea* (2016), at 1-13.

[34] Regulation 864/2007 [2007] OJ L199/40.

[35] M. ALTENKIRCH, Art. 19 Rome II, in P. HUBER (ed), *Rome II Regulation. Pocket Commentary,* Munich 2011, at 384-388; D. BAETGE, Article 20 Rome II, in G.-P. CALLIESS, *Rome Regulations, Commentary,* 2nd edn, The Netherlands 2015, at 775; HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW, Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, 67 *RabelsZ* 2003, 1-56, at 46-48; W. DORNIS, Contribution and indemnification among joint tortfeasors in multi-state conflict cases: a study of doctrine and the current law in the US and under the Rome II Regulation, 4 *J. Priv. Int'l L.* (2008) 237-277, at 243-244.

On the other hand, the Court of Justice of the European Union referred to Art. 16 of the Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) as the provision to be applied in the context of a recourse claim between jointly and severally liable debtors under a credit agreement (paragraph 32), although the controversial situation concerned the Regulation 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. See judgment of 15 June 2017, *Kareda*, C-249/16, ECLI:EU:C:2017:472.

[36] CH. MITCHELL, *The Law of Subrogation* (note 21), at 9-10.

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operates *ex post* to the unjust enrichment. The reason for such a difference may be found in the rationale underlying both rights of action. The rationale for the right of subrogation is twofold: first, subrogation seeks the protection of the principle of indemnity whereby the insured party must not be paid twice over or more than fully indemnified for his or her loss.[37] Indeed, if it was not for the right of subrogation, then the insured party could still bring an action against the debtor for compensation since the *solvens*' payment does not extinguish the debtor's liability. This is why subrogation is considered to operate as a prevention rather than as a reversal of the unjust enrichment. Second, the right of subrogation prevents the debtor from not being declared liable for the insured party's loss in the event that the insured party did not sue him or her.[38]

On the other hand, in terms of right of recourse, the unjust enrichment takes place when the *solvens* (the insurer) pays the third party or creditor by compulsion of law, even though its payment is beyond the contractual insurance terms. In this situation in which the *solvens*' payment extinguishes the debtor's liability, the right of recourse seeks to reverse the unjust enrichment that the *solvens*' payment beyond the contractual insurance terms caused to the insured party. From this perspective, the right of recourse, far from being tied to the creditor's right, is closely linked to the wrongful payment under the insurance contract, although otherwise imposed by law.

In conclusion, from a substantive law perspective, the State legal systems that regulate both legal devices apply them in diverse factual situations, which results in the fact that the insurer's entitlement to exercise either the right of subrogation or the right of recourse depends on the particular situation it finds itself in. In other words, both legal devices are mutually exclusive since their respective assumptions are different, except for the two exceptions concerning the insured party's liability for the acts of other people closely related, and when such liability is joint or joint and several with another debtor.

In summary, the foregoing explanation of the right of recourse presents it as a manifestation of the broader institution of unjust enrichment, different from subrogation, and closely attached to the contractual defences that the insurer cannot invoke against the third party, although they could be alleged against the insured party. This explanation leads to the conflict-of-laws aspect of the right of recourse in order to fit it in either of the rules related to the features of the right of recourse, namely, the conflict-of-laws rule on direct action or the conflict-of-laws rule on unjust enrichment.

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[37] CH. MITCHELL, Subrogation: Persistent Misunderstanding, in A. BURROWS/ R. OF EARLSFERRY (eds), *Mapping the Law, Essays in Memory of Peter Birks,* New York 2006, at 106; Ch. MITCHELL, *The Law of Subrogation* (note 21), at 74; F. SÁNCHEZ CALERO, Artículo 26. Principio indemnizatorio y determinación del daño, in F. SÁNCHEZ CALERO (note 1), at 609 and at 950.

[38] CH. MITCHELL, *The Law of Subrogation* (note 21), at 74; F. SÁNCHEZ CALERO, Artículo 76 (note 1), at 950.

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III. The Right of Recourse in the Conflict-of-Laws Scenario

A. The Rejection of the Rules on Multiple Liability and Legal Subrogation

If we turn now to the Private International Law scenario, this legal discipline raises the question of which rule should apply to the particular right of recourse whereby the insurer claims for reimbursement against its own insured party. In this regard, if we take into account the inextricable connection between the insurer's obligation imposed by law to pay its insured party's indemnity, and the insurer's right of recourse against its own insured party as a mechanism to compensate the insurer, then (as mentioned previously) two different rules could be put forward as the most appropriate solutions: first, the conflict-of-laws rule on direct action, included in Article 18 of the Rome II Regulation, and second, the conflict-of-laws rule on unjust enrichment, embedded in Article 10 of the same Rome II Regulation. Therefore, other options such as the rule on multiple liability, laid down in Article 16[39] of the Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[40] (hereinafter, Rome I Regulation) and Article 20 of Rome II Regulation,[41] and the rule on legal subrogation, included in Article 15 of the Rome I Regulation and in Article 19 of the Rome II Regulation,[42] are rejected to determine the law applicable to the right of recourse, although both rules embrace triangular relationships in the same way as the right of recourse.

Indeed, the rejection of the provisions dealing with multiple liability lies in the fact that these provisions only apply when debtors are primarily and jointly or jointly and severally liable for the same claim.[43] The adverb "primarily" refers to the nature of the respective obligations to indemnify,[44] rather than to the chronological position of the parties whose liability is involved to satisfy the indemnity. Accordingly, debtors are primarily or ultimately liable when all of them

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[39] Under Art. 16 of the Rome I Regulation: "If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor."

[40] Regulation 593/2008 [2008] OJ L177/6.

[41] Pursuant to Art. 20 of the Rome II Regulation: "If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor."

[42] See I. PRETELLI, Droit international privé et situations juridiques trilatérales, in F. GUILLAUME/ I. PRETELLI (eds) (note 33), at 93-95.

[43] See the authors quoted in note 35.

[44] G. OF CHIEVELEY/ G. JONES (note 10), at 134.

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directly share a common liability, as is the case when two or more wrongdoers commit a particular tort, together causing damages to a third party. In contrast, debtors are secondary, accessory or ancillary liable when they guarantee the primary debtor's liability, in the same manner as sureties or insurers.[45] Indeed, while the primary person liable holds the debt, the secondary person liable guarantees that debt. Yet, the insurer's position is secondary regardless of whether the creditor exercises the direct action or not.[46]

If this latter requirement applies to the right of recourse, then we should reject the application of the provisions on multiple liability to this right since the insurer's and the debtor's position towards the creditor are unequal. Indeed, the insurer holds a secondary obligation towards the third party or creditor imposed by law, albeit on the grounds of the existence of an insurance contract. The insurer is liable to the third party to discharge its insured party's debt by virtue of the insurance contract, the guarantee. In contrast, the debtor's liability to the third party or creditor arises out of the contractual or non-contractual obligation concerned.

As far as the rule on legal subrogation is concerned, this rule could be used to designate the law applicable to the right of recourse because the different debtor's obligations displayed are not on an equal footing. Indeed, the insurer (*solvens*)'s obligation is secondary or ancillary to the insured party (debtor)'s obligation, regardless of whether the secondary obligated is the party who satisfied the indemnity. However, the connecting factors established in the rule on legal subrogation of either Article 15 of the Rome I Regulation or Article 19 of the Rome II Regulation, depending on whether the liability's characterization attributable to the debtor is contractual, in the first case, or non-contractual, in the second case, make these rules unsuitable for designating the law governing the right of recourse.

Indeed, under both provisions, -Article 15 of the Rome I Regulation and Article 19 of the Rome II Regulation- legal subrogation is subject to the law that governs the *solvens*' duty to satisfy the creditor. This law shall determine whether, and the extent to which, the *solvens* is entitled to exercise against the debtor the rights, which the creditor had against the debtor under the law governing their relationship. For instance, this law will establish whether the *solvens* may sue for the total amount or not, and the category of persons excluded from subrogation. On the other hand, the debtor's defences are subject to the law governing his or her relationship with the original creditor since subrogation ought to not worsen the debtor's position.[47] Some scholars[48] and also the Court of Justice of the European

[45] G. VIRGO (note 10), at 229; M. J. CALVO SAN JOSÉ, La fianza solidaria, in M. J. HERRERO GARCÍA (dir), *Contratos de distribución commercial – Garantías personales,* Salamanca 2010, at 304 and at 311.

[46] HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW (note 35), at 47.

[47] On the scope of application of the law governing the third party's obligation to satisfy the creditor and the law aplicable to the creditor's claim against the debtor see F. RÖDL, Article 19 Rome II, in G.-P. CALLIES (note 35), at 772; M. ALTENKIRCH (note 35), at 386-388; J.J. FORNER DELAYGUA (note 33).

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Union in its judgment in the *Ergo Insurance* case (paragraphs 57 and 58),[49] when dealing with this provision, associate the law that creates the obligation to satisfy the creditor with the law governing the insurance contract between the insurer (the *solvens*) and its own insured party, since this law creates the insurer's duty to satisfy the insured party's obligation.

However, the exercise of the right of direct action by a third party or victim against the insurer of the person liable should alter this automatic association when triggering the right of recourse in favour of the insurer and against its own insured party. Indeed, as I pointed out before, the insurer's obligation to satisfy the creditor should be established pursuant the concrete payment obligation, in particular when the insurer (the *solvens*) is prevented by the law governing the insurance contract from raising certain defences arising out of the insurance contract against the third party, which the insurer could otherwise raise against its own insured party. In this situation in which the insurance contract does not guarantee the debtor's liability, the insurer's obligation to pay the creditor does not derive from the insurance contract but from the law applicable to the admissibility of the right of direct action, that can be either the law applicable to the non-contractual obligation or the law applicable to the insurance contract. Let's take again as an example the insured party's wilful conduct that releases the insurer from its liability towards the insured party but not towards the creditor (victim). In this situation, the insurer's obligation to satisfy the payment to the creditor does not stem from the insurance contract, because the wilful conduct is not insurable, but from the legislation regulating the right of direct action.

As a result, the insurer's duty to satisfy the creditor should be governed by the law governing the non-contractual obligation, rather than by the law applicable to the insurance contract in those situations where the former law enables that creditor to exercise direct action and the law otherwise applicable to the insurance contract did not admit such direct action.[50] Therefore, the legal subrogation's subjection to the law governing the insurance contract demonstrates that this connection is not appropriate to be used in the context of the right of recourse, since this right does not arise from the insurance contract but rather from the law that enables the right of direct action to be exercised.

Finally, I would add to the aforementioned rules two more options in order to determine the law applicable to the right of recourse: the voluntary assignment and the contractual subrogation of the assigned or subrogated claim, since the insurer could rely on both in order to seek reimbursement by its insured party (the

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[48] HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW (note 35) at 47; A. DICKINSON, *The Rome II Regulation, The law applicable to non-contractual obligations,* New York 2008, at 619.

[49] See note 33.

[50] Connecting the rule on legal subrogation enshrined in Art. 19 of the Rome II Regulation to the exercise of direct action, see O. BOSKOVIC, Le domaine de la loi applicable, in S. CORNELOUP/ N. JOUBERT (dirs), *Le règlement communautaire "Rome II" sur la loi applicable aux obligations non contractuelles*, Dijon 2008, at 191, footnote 13; P. FRANZINA, Il Regolamento R. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II"), *Le nuove Leggi Civili commentate* (2008) 971-1044, at 1036-1037, footnote 260.

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debtor). However, since both devices additionally require the agreement between the assignor and the assignee under both the voluntary assignment and the contractual subrogation, I will set them aside and instead focus on the right of recourse as established by law. It is important to bear in mind, however, that both legal devices are not precluded from being used by the insurer, so long as the law governing each of them so allows.

Having considered all of the aforementioned, I could conclude by submitting the right of recourse either in the conflict-of-laws rule on direct action or in the conflict-of-laws rule on unjust enrichment as enshrined in Article 10 of the Rome II Regulation,[51] since both rules are closely linked to the primary features attributable to the right of recourse.

B. The Relevance of the Conflict-of-Laws Rule on Direct Action and the Conflict-of-Laws Rule on Unjust Enrichment

If we return now to the legal nature of the right of recourse, it seems logical to tie this right to the law governing the admissibility of the direct action to be exercised by the third party against the insurer of the person liable. Indeed, as I noted earlier,[52] the right of recourse is closely linked to the defences that the insurer is prevented from raising against the third party, when it could otherwise allege them against its own insured party.

1. The Conflict-of-Laws Rule on Direct Action

In terms of Private International Law, these defences are subject to the law governing the admissibility of the direct action. Indeed, the law applicable to the defences that the insurer may invoke to refuse payment depends on the nature of such defences. Thus, while the law governing the insurance contract governs the defences that the insurer may raise against either the insured party or any third party (the creditor or victim), the law applicable to the admissibility of direct action governs those defences that the insurer may only allege against third parties.[53] It follows that the same law that governs the admissibility of direct action should also govern the right of recourse. If the right of recourse may be understood, as it was expounded, as the reversal of the obligation imposed upon the insurer to pay compensation to the third party in circumstances in which the insurer is not allowed to raise certain contractual defences, then the law imposing

[51] See as well P. JIMÉNEZ BLANCO, Acción directa y protección del perjudicado en el Reglamento Roma II, 140 *Revista Española de Seguros* (2009) 741-765, at 760, footnote 54; P. JIMÉNEZ BLANCO, El régimen de las acciones directas en el Reglamento “Roma II”, VII *Anuario Español de Derecho internacional privado* (2007) 287-314, at 309, footnote 62.

[52] See *supra* paragraph II.A.

[53] On this issue see U. P. GRUBER, Article 18 Rome II, in G.-P. CALLIESS (note 35), at 768; G. GARRIGA, Conflict of Laws and Direct Action against Insurers, 3 *The European Legal Forum* 2015, 57-64, at 63.

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such an obligation ought to govern the right of recourse. Indeed, both issues -the insurer's obligation to pay the third party and the insurer's right of recourse- are inextricably connected. The law binding the insurer to satisfy the indemnity is the law applicable to the admissibility of direct action, as is the law that prevents the insurer from relying on the defences that it could raise under the insurance contract against its insured party.

The importance of connecting the law applicable to the admissibility of the right of recourse to the law governing the defences on which the insurer cannot rely on and, therefore, to the law governing the admissibility of direct action, is particularly sensitive when the law applicable to the direct action does not coincide with the law governing the insurance contract.

Indeed, the general conflict-of-laws rule on direct action is laid down in Article 18 of the Rome II Regulation[54] (for the purpose of this paper I lay aside Article 9 of the Hague Convention on the law applicable to traffic accidents, of 1971[55]). Art. 18 grants the third party an option to choose the law that permits the exercise of direct action.[56] The option is limited to either the law governing the insurance contract or the law applicable to the non-contractual obligation. As a result, the third party could rely on this latter law so as to exercise the right of direct action in those cases where the law governing the insurance contract did not contemplate this action or even providing such a right, if the conditions for it to be exercised were stricter than those imposed by the law applicable to the non-contractual obligation. For example, if the law governing the insurance contract only provided such a right in the case of the defendant's insolvency, whilst the law applicable to the non-contractual obligation generally offered the right of direct action regardless of the defendant being insolvent.

If we return momentarily to the definition of the right of recourse and to its connection to the defences that the insurer cannot allege against the third party, and which compel the insurer to pay the indemnity, then it may be appropriate to tie this right of recourse to the law governing the admissibility of the direct action and, therefore, to the aforementioned defences. Otherwise, the insurer could be compelled to pay the indemnity pursuant to the law applicable to the non-contractual obligation, if the third party had chosen that law to exercise the direct action. While, on the contrary, the same insurer could not exercise the right of recourse against its own insured party, if the law governing the insurance contract

[54] In accordance with Art. 18 of the Rome II Regulation: "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."

[55] Under Art. 9 of the 1971 Hague Convention: "Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable [to the traffic accident]. If the law of the State of registration [of the vehicle(s) involved] is applicable [to the traffic accident] and that law provides no right of direct action, such a right shall nevertheless exist if it is provided by the internal law of the State where the accident occurred. If neither of these laws provides any such right it shall exist if it is provided by the law governing the contract of insurance".

[56] Judgment of 9 September 2015, *Prüller-Frey,* Case C-240/14, ECLI:EU: C:2015:567, paragraphs 41 and 43.

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did not provide for such a right of recourse or if it did contemplate it but in a stricter way.

2. The Conflict-of-Laws Rule on Unjust Enrichment

However, since the right of recourse is an independent and autonomous legal device different from the right of direct action, then the right of recourse should also be the object of an autonomous rule. In this regard, the conflict-of-laws rule on unjust enrichment would be the alternative best option since the right of recourse is included in the broader category of unjust enrichment.[57] It is worth noting, however, that the option for this rule does not modify the nature of the right of recourse at stake. This means that the option for the application of the conflict-of-laws rule on unjust enrichment in the conflict-of-laws scenario does not affect the scope of the substantive rule on the right of recourse in the legal system so identified.

Nevertheless, for the conflict-of-laws rule on unjust enrichment to be applied to the right of recourse, the law governing the admissibility of the direct action should be envisaged. I already remarked that the close connection that exists between the insurer's obligation to pay its insured party's indemnity, as a result of the direct action having been exercised by the creditor, and the insurer's right of recourse justifies the application of the same law to both issues. Here again, the tandem "insurer's obligation based on the direct action, on the one hand, and the right of recourse, on the other hand" should be maintained in order for the conflict-of-laws rule on unjust enrichment to appoint the law governing the admissibility of direct action as the law governing the right of recourse as well.

However, if we analyse the provision dealing with the unjust enrichment laid down in Article 10 of the Rome II Regulation,[58] it is unfortunate that this provision does not provide a particular rule for this category of unjust enrichment, that is to say, the type that involves triangular constellations like the compulsory discharge of another's liability. Indeed, this provision establishes three hierarchical connecting factors ending up with an escape clause that seems of no easy application to triangular relationships. In addition, the provision on unjust enrichment applies insofar as the parties involved do not choose the law applicable

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[57] See s*upra* paragraph II.B.

[58] According to Art. 10 of the Rome II Regulation: "1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship. 2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply. 3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place. 4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."

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in line with Article 14 of the Rome II Regulation, as this provision takes precedence over the rule on unjust enrichment.

In relation to the rule on unjust enrichment and, in particular, to the three connecting factors listed in hierarchical order, the first refers to an existing relationship, the law of which should also regulate the unjust enrichment obligation. If this relationship does not exist but the parties have a common habitual residence, then the second connecting factor appoints the law of the common habitual residence to be applied. In accordance with the third connecting factor, lacking the former two connections, then the law governing the unjust enrichment obligation will be the law of the country in which the unjust enrichment took place. This is the place where the enrichment itself occurred, rather than the place where the events giving rise to the enrichment took place, as clarified by the European Commission in its Proposal for a Regulation on the law applicable to non-contractual obligations, of 2003.[59] This place corresponds to the enrichment of the defendant, that is to say, to the benefit received by the defendant that is the object of the claim.[60] Finally, the conflict-of-laws rule concludes with the aforementioned escape clause, whereby courts are allowed to apply the law of another country if they find the case to be manifestly more closely connected with that of another country.

As far as Article 10.1 of the Rome II Regulation is concerned, the definition of the term "parties" is essential given the fact that including in such a provision the right of recourse depends on how broadly that term is interpreted. In accordance with the first paragraph of Article 10, "if a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship". If the term "parties" in the context of this provision only corresponds to the parties in the unjust enrichment relationship, as some scholars have suggested,[61] this narrow interpretation could exclude the right of recourse from the scope of its first paragraph. Indeed, in line with this interpretation, the term "parties" would only include the impoverished person and the enriched person of the unjust enrichment obligation, excluding then third parties involved in the unjust enrichment relationship. This strict interpretation leaves aside triangular relationships such as the compulsory discharge of another's debt in which three different relationships are closely tied: first, the basic relationship between the *solvens* and the debtor (in the case study, this would be the insurance contract between the insurer and the insured party); second, the relationship between the *solvens* (the insurer) and the debtors' creditor, and third, the relationship between the creditor and the debtor.

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[59] COM(2003) 427 final, Brussels, 22 July 2003, 22.

[60] B. SCHINKELS, Article 10 Rome II, in G.-P. CALLIES (note 35), at 672. In this sense, see A. DICKINSON (note 48), at 505.

[61] G. LÉGIER, Le règlement "Rome II" sur la loi applicable aux obligations non-contractuelles, 47 *La Semaine Juridique* 2007, 13-32, at paragraph 84; A. CHONG, Choice of law for Unjust Enrichment/Restitution and the Rome II Regulation, 57 *I.C.L.Q.* 2008, 863-898, at 877-878 [doi: 10.1017/S0020589308000614].

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Regarding the right of recourse in the context of Liability Insurance Law, the first abovementioned relationship corresponds to the insurance contract and confronts the debtor (insured party) with the *solvens* (insurer). This relationship constitutes the origin of the *solvens*' payment because the insurer, by virtue of this contract, agrees to cover the debtor's liability according to the contractual insurance terms. However, it is important to note that in the context of the right of recourse, the insurance contract does not cover the insurer's payment since this payment stems from the obligation imposed by the law governing the admissibility of direct action. This law may be either the law applicable to the non-contractual obligation or the law governing the insurance contract. In addition, from an unjust enrichment approach, the insurance relationship is the only one which opposes the impoverished person (the insurer or *solvens*) vis-à-vis the enriched person (the insured or debtor). Indeed, I already explained that the compulsory *solvens*' payment produces the debtor's enrichment at the *solvens'* expense. This is the reason why only the insurance relationship confronts the *solvens* (the insurer) with the debtor (its insured party). If the strict interpretation of the term "parties" is sustained, as it could literally be defended, then the underlying relationship between the parties, to whom Article 10, first paragraph of the Rome II Regulation refers, ought to correspond to the contractual insurance relationship. As a result, the law applicable to the unjust enrichment obligation would be the same law that governs the insurance contract.

Nevertheless, in my view, this law should not be applied to the right of recourse unless its application derives indirectly from the relationship established between the *solvens* and the debtor's creditor. This is the relationship imposed by law when this law compels the *solvens* (the insurer) to pay the creditor. This second relationship is the result of the right of direct action being exercised by the creditor against the debtor's insurer (the *solvens*). In the unjust enrichment scenario, this relationship causes the unjust enrichment: the law that governs the right of direct action is also the law that obliges the insurer to pay the creditor in circumstances uncovered by the insurance contract and, by doing so, breaks the balance of the contractual insurance relationship between the insurer and the insured party (since it does not allow the insurer to raise any defence arising from the insurance contract to refuse payment).

Yet, in terms of unjust enrichment, the law which imposes on the insurer the obligation to pay the creditor is the same law that regulates the transfer of assets or of value from the *solvens* to the creditor[62] and which consequently causes the discord between the insurer (the *solvens*) and its insured party (the debtor). In other words, the law compelling the *solvens* to pay the creditor unduly pursuant to the contractual insurance terms, at the same time makes the insured party unjustly enriched.

On the other hand, the law governing the right of direct action may be either the law applicable to the non-contractual obligation or the law applicable to the insurance contract (Article 18 of the Rome II Regulation). Only the latter option

[62] Stressing the relevance of the relationship based on the transfer of assets, see H. CHANTELOUP, *Les quasi-contrats en Droit international privé*, Paris 1998, at 232; A. BURROWS, Absence of Basis: the New Birksian Scheme (note 10), at 44.

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corresponds to the *solvens*-debtor relationship articulated by Article 10.1. Thus, if the literal approach to the Article 10.1 of the Rome II Regulation was correct, the application of this provision would only take place in case the creditor opted for the law governing the insurance contract. Indeed, the creditor's option for the law governing the non-contractual obligation in order to exercise the right of direct action would confront the creditor with the debtor. And the literal interpretation of Article 10.1 of the Rome II Regulation does not cover this sort of relationship.

The foregoing explanation shows that only the law governing the *solvens*-creditor relationship ensures the application of the law applicable to the right of direct action to the right of recourse in terms of unjust enrichment, despite it not fitting smoothly in the first paragraph of the Article 10 of the Rome II Regulation. Indeed, since this relationship does not oppose the impoverished person (the *solvens* or insurer) vis-à-vis the enriched person (the debtor or insured), then a literal interpretation of the term "parties" would lead to this solution being discarded. However, it has been advocated for a broader teleological interpretation of the first paragraph of Article 10 of the Rome II Regulation in the sense that in multi-party constellations "the restitution of assets voluntarily transferred should be subject to the law that governs the legal relationship with regard to which the transfer was effectuated."[63] In the context of the right of recourse, this interpretation would permit the application of the law governing the admissibility of direct action to the aforementioned right of recourse, in line with Article 10 of the Rome II Regulation, despite the insurer's payment to the creditor being compulsory rather than voluntary.

Finally, I will also leave aside from the term "parties" used by Article 10.1 of the Rome II Regulation, the debtor-creditor relationship which causes the debtor's liability towards the creditor, because the right of recourse is closely tied to the defences that the insurer is prevented from raising against the creditor, although it is allowed to invoke them against its own insured party. And those defences only play a role in the *solvens*-creditor relationship in which direct action operates. However, the law governing the debtor's contractual or non-contractual liability towards the creditor could still be applied as the law governing direct action, if that law was chosen by the creditor in order to exercise the right of direct action. Thus, the intervention of the law governing the debtor's liability would be used in the *solvens*-creditor relationship as the law governing the right of direct action, i.e. the law that obliges the insurer to pay the creditor.

Nevertheless, if the literal interpretation of Article 10.1 of the Rome II Regulation ends up prevailing, then the exclusion from the first paragraph of Article 10 of the Rome II Regulation of the *solvens*-creditor relationship allows the right of recourse to be included in the other paragraphs of that same provision. Thus, two other connecting factors could still be used to ascertain the law applicable to the right or recourse. First, the common habitual residence of the parties involved in the unjust enrichment obligation (Article 10.2) and only in case such parties did not have a common habitual residence, then the applicable law would be the law of the country in which the unjust enrichment takes place (Article 10.3). Again, as neither of these connecting factors refers in a clear-cut

[63] B. SCHINKELS (note 60), at 668.

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manner to the law governing the direct action, one should displace them in favour of the escape clause (Article 10.4), unless in a case-by-case analysis one particular connecting factor renders the law governing the right of direct action applicable. Otherwise, the most reasonable solution is provided by the escape clause, according to which "Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."

In summary, if we interpret the term "parties" in a literal sense as embracing only the impoverished person and the enriched person, then the most appropriate connecting factor to be applied to the right of recourse, in order to allow the application of the law governing the admissibility of direct action, would be the escape clause (Article 10.4 of the Rome II Regulation). This clause would permit the application of the same law that governs the right of direct action to the right of recourse which, in practice, would be in line with the insurer's legitimate expectations. Indeed, the "manifestly more closely connection" should not only be interpreted as a territorial factor but also as a related or accessory connection in the same way as the accessory connection embedded in the first paragraph of the same Article 10 is. Thus, pursuant to this interpretation, the non-contractual obligation arising out of the unjust enrichment, as envisaged by Article 10.4 of the Rome II Regulation, would be manifestly more closely connected with the law governing the direct action, being either the law applicable to the non-contractual obligation or the law applicable to the insurance contract. In conclusion, Article 10.4 of the Rome II Regulation would complete the accessory connection as enshrined in the first paragraph of the same Article 10, including those triangular relationships excluded from the literal interpretation of Article 10.1.

IV. Final Remarks

The right of recourse in the field of Liability Insurance Law demonstrates once again that the characterization of legal categories at the conflict-of-laws level may differ from the characterization of the same legal categories at domestic or national levels. This results in a very cumbersome requirement in the search for coherence in the production and interrelation of European Private international law.

Contextualising the right of recourse, my preference is to allocate this right to the unjust enrichment conflict-of-laws rule for two main reasons: first, the very nature of the right of recourse as a manifestation of the broader category of unjust enrichment; and second, the impossibility of applying the rule of direct action directly, since its scope of application does not extend to the insurer's rights or obligations. Nevertheless, it must not be overlooked that the practical application of this conflict-of-laws rule to the right of recourse is not entirely clear-cut.

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APPLYING OR TAKING ACCOUNT OF FOREIGN OVERRIDING MANDATORY PROVISIONS – SOPHISM UNDER THE ROME I REGULATION

Comments on the ECJ Case C-135/15 – *Nikiforidis*

Matthias LEHMANN*/ Johannes UNGERER**

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I. Introduction

The Grand Chamber of the European Court of Justice (ECJ) held in *Nikiforidis*[1] that Member State courts may "take into account" foreign overriding mandatory provisions (public policy provisions) as a matter of fact. This shall be possible even if the conditions of Art. 9(3) Rome I Regulation[2] for the "application" of foreign law are not fulfilled, namely when neither the contract is to be performed

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1 ECJ, 18 October 2016, *Republik Griechenland v Grigorios Nikiforidis*, ECLI:EU:C:2016:774.

2 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008.

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 53-82
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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in the country that has enacted the public policy provisions nor when these provisions render the performance of the contract unlawful.

This paper will subject this decision as well as other findings of the ECJ judgment to a critical analysis. It will show that the ruling has the potential to undermine the European unification of the conflict-of-laws regime for contracts. In the end, the paper suggests a proposal for legislative reform.

II. Facts of the Case

The preliminary ruling by the ECJ under Art. 267 TFEU dates back to a request by the highest German labour law court, the Federal Labour Court (*Bundesarbeitsgericht*).[3] In the underlying case, Mr Nikiforidis, a teacher at a Greek school in Nuremberg (Germany), claimed his full salary from his employer, the Greek State (the "Hellenic Republic").[4] Mr Nikiforidis had been employed by the school since 1996. From October 2010 to December 2012, he had received only a reduced salary. His colleagues in Nuremberg were treated likewise,[5] and teachers at other Greek schools in Germany, such as in Düsseldorf,[6] were also affected. The teachers were told that the pay cuts were based on a Greek law of 2010,[7] which had been adopted in the Greek government debt and economic crisis. The act was instigated by the so-called "Troika", which consisted of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF); they obliged the Greek government to diminish public expenses in return for financial support. The Greek government argued in the German court that it was left with no other choice than to lower the salaries of its employees, that the

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[3] German Federal Labour Court (*Bundesarbeitsgericht*), 25 February 2015, file No. 5 AZR 962/13 (A), ECLI:DE:BAG:2015:250215.B.5AZR962.13A.0.

[4] The case was initially brought before the Labour Court at the school's location in Nuremberg (*Arbeitsgericht Nürnberg*), which ruled in favour of the Hellenic Republic (decision of 30 March 2012, file No. 10 Ca 59/11). However, this decision was reversed on appeal in favour of Mr Nikiforidis by the Higher Labour Court at Nuremberg (*Landesarbeitsgericht Nürnberg*, judgment of 25 September 2013, file No. 2 Sa 253/12, ECLI:DE:LAGNUER:2013:0925.2SA253.12.0A). The Hellenic Republic appealed that judgment to the Federal Labour Court.

[5] Their claims were similarly handled by the German courts in parallel proceedings, cf. the final judgments by the Federal Labour Court, file Nos 5 AZR 739/16 through till 758/16.

[6] See, for instance, Labour Court (*Arbeitsgericht*) Düsseldorf judgment of 26 May 2011 (file No. 5 Ca 7637/10); Higher Labour Court (*Landesarbeitsgericht*) Düsseldorf judgments of 17 November 2011 (file No. 15 Sa 864/11) and of 31 July 2014 (file No. 15 Sa 1133/13); Federal Labour Court (*Bundesarbeitsgericht*), judgment of 25 April 2013 (file No. 2 AZR 960/11).

[7] Art. 1 of the Greek Law No. 3833/2010 (Official Gazette A 40 of 15 March 2010) imposes a reduction of 12 % and Art. 3 of the Greek Law No. 3845/2010 (Official Gazette A 65 of 6 May 2010) another 3 %.

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general salary cut was part of its austerity legislation, and that it was applicable *ipso iure* to the contract of the teacher without any further steps.[8]

The Greek government's submission that it would enjoy state immunity and could therefore not be sued abroad for full payment was accepted by the court of first instance, which subsequently dismissed the claim.[9] The higher instances, however, followed Mr Nikiforidis's counterargument that his claim was admissible and did not interfere with the defendant's sovereignty.[10]

The employment contract of Mr Nikiforidis expressly provided that his salary is determined in accordance with the German collective wage agreement for the public sector.[11] There was, however, no explicit choice of law governing the contract. Since Mr Nikiforidis carried out his work as schoolteacher in Nuremberg, German law was applicable according to Art. 8(2) Rome I Regulation.[12] Under German labour law, the salary of Mr Nikiforidis could not have been reduced unless he had been given a formal notice of dismissal in combination with an offer of a new contract with different terms to be accepted by him.[13] A Greek school in Düsseldorf complied with these requirements.[14] However, in the cases of the teachers in Nuremberg such as Mr Nikiforidis, the German Federal Labour Court neither found nor considered that a notice of dismissal had been given. This gave rise to the question of whether the salary was reduced directly by the operation of Greek law.

The German Federal Labour Court assumed that the Greek austerity legislation would qualify as an overriding mandatory provision in the sense of Art. 9 Rome I Regulation.[15] The ECJ did not subsequently question this characterisation.[16] The point was therefore not whether the Greek law fulfilled the conditions of the definition in Art. 9(1) Rome I Regulation, but to what extent it could affect an employment contract governed by German law. The main issue of the referral by the German Federal Labour Court can be phrased as follows: is it

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[8] Cf. Federal Labour Court (note 3) para. 2.

[9] Cf. Higher Labour Court Nuremberg (note 4) para 21, based on sec. 20 of the German Judiciary Act (*Gerichtsverfassungsgesetz*); Opinion of Advocate General SZPUNAR, 20 April 2016, ECLI:EU:C:2016:281, para. 17.

[10] Cf. Higher Labour Court Nuremberg (note 4) paras 24 and 77–80, and Federal Labour Court (note 3) para. 10; Opinion of AG SZPUNAR (note 9) paras 17–18.

[11] Cf. Higher Labour Court Nuremberg (note 4) paras 3–11.

[12] The result would have been the same under the previous rule of Art. 6(2)(a) Rome Convention (Convention on the law applicable to contractual obligations 1980, OJ L 266/1, 9.10.1980).

[13] The conditions for a notice of dismissal pending a change of contract are set out by relevant decisions of the Federal Labour Court, judgment of 23 June 2005 (file No. 2 AZR 642/04, published in the case reporter BAGE 115, 149); judgment of 12 January 2006 (file No. 2 AZR 126/05, published in the journal NZA 2006, 587); judgment of 1 March 2007 (file No. 2 AZR 580/05, published in BAGE 121, 347); judgment of 26 March 2009 (file No. 2 AZR 879/07, published in NZA 2009, p. 679).

[14] Federal Labour Court (note 6) para. 5.

[15] Federal Labour Court (note 3) paras 10 and 15.

[16] Cf. ECJ (note 1) paras 40 *et seq*.

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permissible under Art. 9 Rome I Regulation to apply or take into account foreign overriding mandatory provisions, which neither originate from the law of the forum nor the law of the place of contractual performance and which do not render the performance unlawful?

III. Rome I Regulation *versus* Rome Convention: Temporal Scope

Before it could address this main question, the ECJ had to clarify whether the Rome I Regulation governs the case in the first place. The Regulation sets out in Art. 28 that it "shall apply to contracts concluded after 17 December 2009." For previously concluded contracts, the 1980 Rome Convention, which both Germany and Greece had ratified, continues to apply.[17]

At first glance, given that the employment of Mr Nikiforidis dated back to before the Millennium,[18] it seems clear that the Rome I Regulation does not govern the case. However, employment relations are typically long-term contracts. If these contracts were indefinitely governed by the conflicts rules in force at the time they were entered, they would be shielded from any law reform. The same is true of rent, supply, service and similar contracts, which represent a major share of turnover recorded in the national economies across the Single Market. The German Federal Labour Court therefore sought clarification as to the applicability *ratione temporis* of the Rome I Regulation and posed this as the first question of its reference for a preliminary ruling.

Whether the Rome I Regulation or the Rome Convention applies is not merely a technicality but of particular importance because the two conflict-of-laws instruments differ with regard to giving effect to provisions that are foreign to the actually applicable substantive law. The relevant Art. 9(3) of the Rome I Regulation is stricter than its respective predecessor in Art. 7(1) Rome Convention, which allowed the application of overriding mandatory provisions from States other than that in which the contractual obligations have to be performed.[19] It must be noted, however, that some Member States had made use of the possibility to declare a reservation against the application of Art. 7(1) Rome Convention.[20] Germany was among these Member States. If the Rome I Regulation was not applicable, German courts would have to follow their domestic conflict-of-laws regime. Art. 34 of the Introductory Act to the German Civil Code (EGBGB), predating the Rome I Regulation, unilaterally stated that overriding mandatory rules of *German* law would apply regardless of the law governing the contract.[21]

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[17] Art. 24 Rome I Regulation; for the Rome Convention see above note 12.

[18] Cf. Higher Labour Court Nuremberg (note 4) para. 3.

[19] See *infra* part 4.

[20] Art. 22(1)(a) Rome Convention.

[21] This domestic provision simply copies Art. 7(2) Rome Convention ("Nothing in this Convention shall restrict the application of the rules of the law of the forum in a

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The situation with regard to *foreign* overriding mandatory provisions remained unclear.[22] If one accepts that Art. 9(3) Rome I Regulation is subject to the same intertemporal regime as the rest of the Regulation, then the applicability of the provision – over Art. 7(1) Rome Convention and respective domestic conflict-of-laws rules – depends on Art. 28 Rome I Regulation, *i.e.* the question of when the contract was concluded.[23]

Difficulties in temporal delineation arise from the fact that the Rome I Regulation itself does not specify when a contract is to be regarded as concluded for the purpose of its Art. 28. The ECJ held in *Nikiforidis*, based on its previous judgments in *Kozłowski*[24] and in *Dworzecki*[25] (on very different areas of EU law), that a European autonomous interpretation of the Rome I Regulation would apply in this respect.[26] This would be necessary for the uniform and equal application of the EU law across all Member States.

In contrast, Advocate General SZPUNAR had suggested that the term "conclusion of a contract" would not have to be regarded as a European autonomous concept because the European unification efforts resulting in the Rome I Regulation concerned conflict-of-laws for contracts and did not touch on the substantive laws of contracts in the Member States on issues such as contract formation.[27] This view, which is in line with Art. 10 of the Rome I Regulation and

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situation where they are mandatory irrespective of the law otherwise applicable to the contract.").

[22] See for the different approaches that had been developed, *infra* part 6.

[23] For a different view, see K. SIEHR, Deutsche Arbeitsverträge mit der Republik Griechenland und Gehaltskürzungen nach griechischem Recht, *Recht der Arbeit (RdA)* 2014, p. 206 *et seq.*, at 208-209, who argues that it is always the current public policy rule that applies. While it is correct that the content of public policy is constantly updated, it is not beyond doubt that the conflicts rule permitting the application of overriding mandatory provisions would also have to apply to events before its entry into force. This would undermine legal certainty because the parties to a contract could never be sure about the legal rules with which they must comply. Furthermore, the legislator of the Rome I Regulation treats Art. 9 and the rest of the Regulation indifferently with regard to their intertemporal application: see Art. 28 Rome I. It follows that specific provisions cannot be applied retroactively to contracts entered into before 18 December 2009.

[24] ECJ, 17 July 2008, *Kozłowski*, EU:C:2008:437, para. 42.

[25] ECJ, 24 May 2016, *Dworzecki*, PPU, EU:C:2016:346, para. 28.

[26] ECJ (note 1) paras 28-29. This view had little support from scholars, see *e.g.* K. THORN, in P. BASSENGE *et al.* (eds), *Palandt: Bürgeliches Gesestzbuch (BGB)*, 75th ed., CH Beck 2016, Art. 28 Rom I para. 2. Appreciation of the decision showed K. DUDEN, Anwendung griechischer Spargesetze auf Arbeitsvertrag in Deutschland, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, p. 940 *et seq.*, at 943; F. MAULTZSCH, Griechische Spargesetze und Internationales Privatrecht der Rom I-Verordnung, *Europäische Zeitschrift für Arbeitsrecht (EuZA)* 2017, p. 241 *et seq.*, at 246. For criticism expressed, see S. LEMAIRE/ L. PERREAU-SAUSSINE, Applicabilité du règlement "Rome I" et prise en considération des lois de police étrangères: la CJUE met en danger la sécurité contractuelle, *La Semaine Juridique* 2017, p. 124.

[27] Opinion of AG SZPUNAR (note 9), paras 36-45. The ECJ itself had highlighted this point in *Nikiforidis*, see ECJ (note 1) para. 52, first sentence: "[t]he Rome I Regulation

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has been supported by the majority of scholars before the ECJ judgment in *Nikiforidis*,[28] is still convincing. It follows that the time and other circumstances of the conclusion of a contract have to be determined in accordance with the *lex causae, i.e.* in the case of Mr Nikiforidis the German *lex contractus*.[29]

In the end, it was not decisive which side one takes in this doctrinal dispute. In the absence of EU substantive rules on the issue of contract formation, the ECJ could not establish any conditions for the conclusion of a contract and merely highlighted that it matters when the "mutual agreement of the contracting parties [is] manifested".[30] It therefore assumed that the employment contract of Mr Nikiforidis was concluded prior to the cut-off date, 17 December 2009. The result would of course have been the same under German contract law. Regardless of whether one follows a European autonomous approach or the applicable substantive law in this respect, it is clear that the Rome I Regulation does not apply to the *original* employment contract in the case at hand.

However, both the Advocate General and the ECJ envisaged the possibility that the contract could have been renewed and could therefore be considered as being concluded at a time after 17 December 2009.[31] According to the ECJ, this would be conceivable when the parties make a variation to the contract.[32] A slight modification by simple updating or amending will, of course, be insufficient, as this would endanger the principles of legal certainty and the predictability of the outcome of litigation. Yet, if the contracting parties significantly alter their contract so as to create in fact "a new legal relationship", the ECJ is ready to apply the Rome I Regulation to this newly concluded contract.[33] This test is based on a European autonomous interpretation of the Regulation, yet it is left to the national courts to apply it.[34] Though the national courts are familiar with novation of contracts under domestic law, since it is a legal concept known across the EU,[35]

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harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract."

[28] S. OMLOR, in F. FERRARI (ed), *Rome I Regulation*, Munich 2015, Art. 28; P. MANKOWSKI, in U. MAGNUS/ P. MANKOWSKI (eds), *Rome I Regulation*, Otto Schmidt 2017, Art. 28 para. 5; U. MAGNUS, in U. MAGNUS/ R. HAUSMANN *et al.* (eds), *Staudinger, BGB, Internationales Vertragsrecht 2*, Sellier/de Gruyter 2016, Art. 28 Rom I-VO para. 8; G.J. SCHULZE, in F. FERRARI/ E.-M. KIENINGER/ P. MANKOWSKI *et al.* (eds), *Internationales Vertragsrecht*, 2nd ed., CH Beck 2011, Art. 28 VO (EG) 593/2008 para. 2; D. MARTINY, in R. RIXECKER/ F.J. SÄCKER/ H. OETKER (eds) *Münchener Kommentar zum BGB*, vol. 10, 6th ed., CH Beck 2015, Art. 28 Rom I-VO para. 3, and maintained after *Nikiforidis* in vol. 12 (7th ed., München 2017), Art. 28 Rom I-VO para. 4; T. PFEIFFER, Neues Internationales Vertragsrecht – Zur Rom I-Verordnung, *Europäische Zeitschrift für Wirtschaftsrecht* 2008, p. 622 *et seq*.

[29] See text to note 12.

[30] ECJ (note 1) para. 31.

[31] Opinion of AG SZPUNAR (note 9), paras 49–50; ECJ (note 1) paras 32-37.

[32] ECJ (note 1) para. 32.

[33] ECJ (note 1) para. 37.

[34] ECJ (note 1) para. 38.

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they are prevented from applying their national standards when assessing the conclusion and variation of contracts for the purpose of determining the applicability of the Rome I Regulation.

Unfortunately for legal practice and certainty, the ECJ has not provided any criteria as to when a variation of the employment contract is to be regarded as a matter of such magnitude that it would give rise to a new contract falling under the Rome I Regulation. It is particularly regrettable that the ECJ created the requirement for European autonomous criteria in the first place but has not provided further assistance on how to identify them. Since standards of national law cannot be applied, Member State courts will need to request clarification in a preliminary ruling procedure from the ECJ. One can think of criteria such as assignment to different tasks or as modifications of salary or working hours.[36] What seems indispensable is that the job role has changed, *i.e.* that a new job is contracted. Admittedly, this can only be used as a rule of thumb and does not establish the threshold of necessary variation for permanent contracts in other areas of law.

In the decision subsequent to the ECJ's judgment in *Nikiforidis*, the German Federal Labour Court held that there had been no significant variation of the contract between Mr Nikiforidis and his employer.[37] Therefore, the court did not apply the Rome I Regulation to the case. It is somewhat curious that the rest of the preliminary ruling concerned precisely this Regulation, but that is far from being the only peculiarity of the case.[38]

IV. Exhaustive Nature of Art. 9 Rome I Regulation

The ECJ then tackled the main issue of the case. It held that Art. 9 Rome I Regulation lists exhaustively the scenarios in which foreign overriding mandatory provisions can be applied.[39] This is a major ruling. In practice, it means that a national court cannot give effect to public policy rules of other States where the conditions set out in Art. 9(3) Rome I Regulation are not met.[40] In other words, the Regulation is authorising, and at the same time, limiting, the application of foreign mandatory laws.

This interpretation of Art. 9 Rome I Regulation is in line with the classic canon of statutory construction. Already the Preamble of the Regulation highlights the exceptional nature of applying public policy provisions.[41] In this sense, the ECJ

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[35] O. LANDO/ H. BEALE/ E. CLIVE *et al.* (eds), *Principles of European Contract Law*, vol. 3, Kluwer 2003, p. 126.

[36] F. MAULTZSCH (note 26) at 248.

[37] Bundesarbeitsgericht, judgment of 26 April 2017 (file No. 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0, forthcoming in BAGE), para. 32.

[38] See on the peculiar aftermath of the case before the German courts, *infra* part 7.

[39] ECJ (note 1) para. 49.

[40] But see on the taking into account as a matter of fact, *infra* part 6.

[41] Recital 37 Rome I Regulation.

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has a point when it states, as a "derogating measure", Art. 9 Rome I Regulation is to be interpreted strictly.[42] Though this statement about exceptions, which is often used, begs the question as to what to "interpret strictly" generally means, it is clear what it means here: not to extend the provision beyond its wording.

The limiting purpose of Art. 9 Rome I Regulation as a whole is already evident from its first paragraph which, for the first time, makes an attempt at a legislative definition of overriding mandatory provisions.[43] On this basis, the third paragraph of Art. 9 Rome I Regulation submits the application of foreign overriding mandatory provisions to very specific conditions, namely that they have been adopted by the country where the obligations arising out of the contract have to be or have been performed and that they render the performance of the contract unlawful. These conditions would hardly make any sense if national courts were allowed to follow foreign public policy provisions from other sources as well.

The intention behind the introduction of Art. 9(3) Rome I Regulation was to allow, and at the same time to contain, the application of foreign public policy rules. This can be evidenced by the history of the provision, to which the ECJ refers.[44] The rather liberal proposal by the Commission was gradually hardened in the legislative process.[45] The goal was to curtail judicial freedom in applying foreign public policy provisions and thereby discard the otherwise governing law. Whatever one may think about this restriction, it can be said that it is at least in line with the general ambition of the Regulation to "improve the predictability of the outcome of litigation" and "certainty as to the law applicable".[46]

Even more important than these hermeneutic arguments is a conceptual consideration. The application of public policy is like a black hole in the universe of private international law. It allows the provisions of a certain state, whose law is otherwise inapplicable, to supersede the law that governs the contract.[47] If national courts were allowed to extend this black hole further to draw in situations that are not expressly covered by Art. 9(3) Rome I Regulation, then the universe of private international law could collapse. Savigny's conception of legal relationships having their "seat" in a certain country would give way to a new kind of statutist

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[42] ECJ (note 1) para. 49, referring "by analogy" to the decision in Case C-184/12, *Unamar*. This case concerned the interpretation of Art. 7(2) of the Rome Convention.

[43] The definition given in Art. 9(3) Rome I Regulation is influenced by the writings of Franceskakis, see *e.g.* P. FRANCESKAKIS, Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles sur les conflits de lois, *Rev. crit. dr. int. priv.* 1966, p. 1 *et seq*. His conception had later been taken up by the ECJ in Case C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453, para. 31.

[44] ECJ (note 1) para. 45.

[45] Draft Report of the European Parliament on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 2005/0261(COD), p. 15, as cited by the ECJ.

[46] Recital 6 Rome I Regulation.

[47] This has been rightly called an "inherently negative process" by J. HARRIS, Mandatory Rules and Public Policy in the Rome I Regulation, in F. FERRARI/ S. LEIBLE (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publisher 2009, p. 269 *et seq*., at 297.

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theory in which public policy rules determine the cases that fall within their scope, without any checks and limits. Courts could then, for instance, thwart a choice of law made expressly by the parties – simply by following a provision of another law that purports to be applicable even if the enacting State has no legitimate reason for regulating this contract. This situation has to be avoided at all cost because it threatens the achievements of private international law. Parties could neither effectively exercise their party autonomy nor trust in the objective connecting factors in the absence of a choice of law. While it is important to respect foreign rules in the public interest, their role must not be overemphasised at the expense of private justice and the general principles of conflict-of-laws.

One therefore has to applaud the ECJ's characterisation of Art. 9 Rome I Regulation as exhaustive. The vast majority of the literature before the judgment had arrived at the same conclusion.[48] But the ruling was by no means unnecessary. There has been a proposal in the literature to consider Art. 9 Rome I Regulation as the "unfinished part" of European private international law and to supplement it with other, unwritten rules, thereby effectively allowing and even requiring the application of overriding mandatory provisions to situations not provided for in the Regulation.[49] After *Nikiforidis*, this option is off the table.

Yet the fact that the Court has correctly interpreted the provision does not exclude that Art. 9(3) Rome I Regulation is misconceived. The defects of this provision have been long described.[50] Essentially, there are two.

First, the limitation to the law of the country in which the contractual obligations have been or are to be performed seems too restrictive. Other States may have a legitimate interest in their laws being applied too. One can imagine a provision of State A prohibiting the sale of its cultural goods. Why should it apply only if a contract, which the parties have submitted to the law of State B, is to be performed in State A? Of course, in many instances the law of State B or the law of the forum will have a rule against the sales of cultural goods as well, but whether this law covers the sale of a foreign cultural object is often not entirely certain. There may be good reasons to apply the law of State A from the viewpoint of international cooperation. Other examples include prohibitions of the sale of weapons, the financing of terrorism or agreements to manipulate the stock prices in

[48] See *e.g.* L. GÜNTHER, *Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I- und Rom II-Verordnungen*, Alma Mater 2011, p. 173 *et seq.*; J. HARRIS (note 47) at 310 *et seq.*; P. HAUSER, *Eingriffsnormen in der Rom I-Verordnung*, Mohr Siebeck 2012, p. 105 *et seq.*; W.-H. ROTH, Savigny, Eingriffsnormen und die Rom I-Verordnung, in G. KÜHNE/ J.F. BAUR (eds) *Festschrift für Gunther Kühne zum 70. Geburtstag*, Recht und Wirtschaft 2009, p. 859 *et seq.*, at 873 *et seq.*

[49] A. KÖHLER, *Eingriffsnormen – Der unfertige Teil des europäischen IPR*, Mohr Siebeck 2013.

[50] See *e.g.* A. BONOMI, in U. MAGNUS/ P. MANKOWSKI (eds), *The Rome I Regulation*, Otto Schmidt 2017, Art. 9 para. 135 *et seq.* ("a step backwards"); L. D'AVOUT, Le sort des règles impératives dans le règlement Rome I, Dalloz 2008, p. 2167 ("suscite les plus vives réserves"); S. FRANCQ, Lois de police étrangère, in *Répertoire Dalloz de droit international* 2013 (actualisation 2016), para. 208 ("la clarté a perdu son chemin"); P. MANKOWSKI, Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge, *Internationales Handelsrecht (IHR)* 2008, p. 133 *et seq.*, at 148 ("Rückschritt in die Steinzeit des IPR").

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a certain country. In each of these cases, solidarity amongst nations commands the application of the foreign law, yet Art. 9(3) Rome I Regulation does not allow it.

The second defect of Art. 9(3) Rome I Regulation is that it allows courts to follow only those overriding mandatory provisions that render the performance of the contract *unlawful*. It thereby excludes those provisions that determine the way in which a contract shall be performed without rendering it a nullity. Examples are standards of conduct and safety (*e.g.* the respect for environmental and labour standards), information duties (*e.g.* with regard to the goods sold) or provisions designed to avoid contractual imbalances (*e.g.* the requirement of an indemnity for a commercial agent in case of termination). Though none of these provisions render the performance of the contract unlawful, they try to steer the performance in a way that is compatible with public interests. Nevertheless, they cannot be applied under Art. 9(3) Rome I Regulation.

The two restrictions that the Rome I Regulation imposes on the application of foreign public policy provisions can hardly be explained by the goal of international cooperation or public justice. They only make sense from the point-of-view of private justice: Art. 9(3) Rome I Regulation saves individual debtors from a situation of conflicting duties under the law applicable to the contract and under the law of the place of performance. The provision is designed mainly to cater to obstacles of performance and not for co-operation in the enforcement of other laws. Its purpose is clearly at odds with Art. 9(2) Rome I Regulation, which is a pure rule for the protection of public interests (in this case, of the forum). The difference between the two paragraphs of Art. 9 Rome I Regulation can also be seen from their wording: while Art. 9(2) speaks of the "application" of the law of the forum, Art. 9(3) is only "to give effect" to foreign overriding mandatory provisions. What the latter provision does, then, is to allow the court to take account of foreign law, but not to apply it. Also, Art. 9(3) Rome I Regulation seems somewhat superfluous because already Art. 12(2) Rome I Regulation allows national courts to have regard to the law of the place of performance with regard to the manner of performance. The legislator could have easily extended this clause to the illegality of performance instead of establishing a separate rule in Art. 9 Rome I Regulation. Finally, by ignoring overriding mandatory provisions of States other than that of the place of performance, Art. 9(3) Rome I Regulation fosters international disharmony and invites forum shopping.[51]

It is well-known that these shortcomings of Art. 9(3) Rome I Regulation are due to the fact that the provision had been restricted in comparison to its predecessor, Art. 7(1) Rome Convention, during the legislative process in Brussels.[52] It is equally public knowledge that these restrictions were favoured by the British government which threatened, during the negotiations, to use its right to opt out if the application of foreign overriding mandatory rules was not restricted.[53]

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[51] A. BONOMI (note 50), para. 136.

[52] See the references *supra* note 50.

[53] See, for the position of the British government, A. DICKINSON, Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf

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The UK's intention was to avoid legal uncertainty over the application of foreign public policy rules in the courts of other Member States, in particular concerning financial contracts governed by English law.[54] It was only satisfied after it had been reassured that the Regulation was in line with two English precedents, *Foster v Driscoll*[55] and *Ralli Bros. v Cia Naviera Sota y Aznar*.[56]

In the first case, the Court of Appeal for England & Wales declared a partnership, which aimed at financing of a shipment of whisky to the United States, illegal because of the prohibition of alcohol that was in force on the other side of the Atlantic. The application of US law in *Foster v Driscoll* can indeed be considered as a showcase of solidarity with a friendly nation (or as the court called it: "international comity"). There is no doubt that the partnership contravened US law because the whisky was destined for America. Yet the place of performance of the financing partnership was not in America, given that the parties only agreed to deliver whisky on board in London and not to ship it themselves to the US; furthermore, all payments had to be made in Europe. The place of performance did not play any role in the reasoning of the Court of Appeal. Instead, the driving motive was to avoid a complaint by the US government as a friendly nation to the UK. So the rationale of the judgment is not fully in line with the logic underlying today's Art. 9(3) Rome I Regulation.

In the second case, the English company *Ralli Bros* had chartered a ship from Spanish owners to ship jute from Calcutta to Barcelona. Part of the payment was to be made in Spain by the Spanish receivers of the jute directly to the shipowners. In the meantime, a Spanish decree had been adopted that limited the freight of jute to a certain rate, which was exceeded by the freight rate agreed in the charterparty. The recipients of the goods in Barcelona paid the amount up to the maximum rate set by the Spanish decree, but refused to pay the remainder to the shipowners. The latter then started proceedings in the English courts against *Ralli Bros.* The Court of Appeal dismissed the claim.

English authors have described the status of this judgment and its continuing relevance under English law as "controversial".[57] It is in particular unclear whether the decision relates to conflicts-of-laws or to the substantive-law

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Wiedersehen, Adieu?, *Journal of Private international Law (JPIL)* 2007, p. 53 *et seq*., at 71 *et seq*.; J. HARRIS (note 47) at 305–306.

[54] See Council Document 22 September 2006, 13035/06, Interinstitutional File: ADD 4, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) - Observations by the United Kingdom delegation.

[55] [1929] 1 KB 470.

[56] [1920] 2 KB 287.

[57] R. FENTIMAN, *Foreign Law in English Courts: Pleading, Proof, and Choice of Law*, Oxford University Press 1998, p. 109. See also F.A. MANN, Proper Law and Illegality in Private International Law, *British Yearbook of International Law (BYIL)* 1937, p. 107 *et seq.,* at 110-111 (highlighting that the case only concerned the English doctrine of impossibility and not any question of private international law); F.M.B. REYNOLDS, *Illegality by* Lex Loci Solutionis, *Law Quarterly Review (LQR)* 1992, p. 553 (stating that there is no need to take the case as deciding more than an issue under English domestic law).

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doctrine of implied terms, which two of the three judges have mentioned.[58] From a reading of their opinions, it appears that the judgment is grounded less in international solidarity but in accommodating the parties' worry of obstacles to performance.[59] One could argue that the Court of Appeal was not applying the Spanish decree as such, but rather took cognisance of it as a fact. In this sense, it allows and prescribes the consideration of foreign law if (1) the provision has been adopted by the State of contractual performance and (2) it renders the performance illegal.

There seems to be agreement that these peculiarities of the *Ralli Bros* case have informed the two restrictive conditions in Art. 9(3) Rome I Regulation.[60] In *Nikiforidis,* the ECJ however makes an attempt to escape these rigidities by allowing national courts to take into account foreign overriding mandatory rules "as matters of fact" where the conditions of Art. 9(3) Rome I Regulation have *not* been met.[61] It thereby implicitly admits that it views the conditions set out by the Regulation as overly strict. But its ruling directly contradicts the rationale of the decision in *Ralli Bros*, which is supposedly the basis of the provision, and excluded the national courts' ability to take into account foreign law other than that of the place of performance, which renders the fulfilment of the contractual obligation illegal. It will be shown below that this leniency of the ECJ risks undermining the uniformity of European private international law.[62]

Instead of permitting a new and unshackled application of foreign public policy provisions at the national level, it would be recommendable to introduce a proper rule in the Rome I Regulation that provides for international cooperation that is not restricted to invalidating rules at the place of performance. A source of inspiration could be the Swiss Private International Law Act, which authorises

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[58] See the opinions of WARRINGTON L.J. [1920] 2 KB, p. 287 *et seq.*, at 296 ("I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country") and SCRUTTON L.J., [1920] 2 KB, p. 287 *et seq.*, at 304 ("I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstance, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country").

[59] The only allusion to the policy of other countries is to be found in SCRUTTON L.J., [1920] 2 KB 287, 304 - "This country should not in my opinion assist or sanction the breach of the laws of other independent States." - but this statement follows right after he has grounded his decision in an implied term (see preceding footnote). No such term could exist, and no co-operation could be exercised if the parties specifically agreed to circumvent the law of another country.

[60] It is generally recognised that this case served as a model for Art. 9(3) Rome I Regulation, see *e.g.* A. BONOMI, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts, this *Yearbook* 2008, p. 285 *et seq.*, at 296; BONOMI 2017 (note 50), Art. 9 para. 129; S. FRANCQ, Lois de police étrangères, in *Répertoire Dalloz de droit international*, 2013 (actualisation 2016), para. 205; M. RENNER, in G.-P. CALLIES (ed.), *The Rome Regulations*, 2nd ed., Kluwer 2015, Art. 9 Rome I, para. 32.

[61] ECJ (note 1) para. 51 *et seq.*

[62] See *infra* part 6.

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Swiss judges to follow a foreign mandatory provision where legitimate and clearly preponderant interests so require and where the enacting State has a close connection to the case.[63] Another option would be to return to the pre-2008 approach by copying Art. 7(1) Rome Convention into the Rome I Regulation, of course without the possibility of making any reservations.

Either of these solutions would be better than the current state of the law.[64] This is well illustrated by the *Nikiforidis* case. The Swiss model would have allowed focussing on the question of whether there are clear and preponderant interests of the Greek State that require its provisions to be taken into account.[65] The Rome Convention's rule would have given centre-stage to the nature and purpose of Greece's austerity legislation and the consequence of its application and non-application.[66] Under both approaches, the labour court in Nuremberg could have considered the reliance of Mr Nikiforidis in the continued application of German law and weighed it against the necessities of the Greek government to reduce its expenses and treat all of its employees equally. In this discussion, the motives behind the Greek austerity legislation would have had to be balanced against interests that are at the heart of the Rome I Regulation such as certainty over the applicable law and the predictability of the outcome of litigation.[67] It is neither guaranteed nor excluded that the Greek law could have been applied in such a legal context.[68] Whatever the result, the Greek government would have at least had its day in court: it could have presented the reasons for its intervention in the German tribunal and justified the necessity to extend the pay cut to contracts governed by another law. The debate about the policy underlying the Greek law was, however, foreclosed by the mechanics of Art. 9(3) Rome I Regulation, which

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[63] Art. 19 Swiss Private International Law Act of December 20th 1987 (PILA). Note that the provision makes the assessment of the interests protected subject to the "Swiss conception of law".

[64] See also S. FRANCQ, Public Policy, Overriding Mandatory Rules and EU Conflict of Laws – On the Europeanness of Exceptions and Oddities, presentation at the conference "How European is European PIL?" in Berlin on March 3, 2018 (arguing that "the wording of Art. 9(3) Rome I Regulation is not the result of a true European spirit").

[65] See Art. 19(1) Swiss PILA.

[66] See the second sentence of Art. 7(1) Rome Convention. The criteria reappear in the second sentence of Art. 9(3) Rome I Regulation, yet they are subject to the conditions set out in the first sentence of the provision, namely that the overriding mandatory provisions are in force in the country of contractual performance and that they render the performance illegal.

[67] See Recital 6 Rome I Regulation.

[68] One author has argued that the application of the wage cutting provisions of the Greek law would be "self-serving" and therefore not be in the public interest: C. THOMALE, Griechische Spargesetze vor deutschen Arbeitsgerichten – Verwirrung um Art. 9 Abs. 3 Rom I-Verordnung, *Europäische Zeitschrift für Arbeitsrecht* (*EuZA*) 2016, p. 116 *et seq.*, at 118-120. However, according to the Greek government, the savings were necessary to balance the budget and to maintain essential State services. In this sense, austerity laws can be in the public interest and accordingly qualify as overriding mandatory provisions. In the same vein, see A. JUNKER, Schuldenkrise und Arbeitsvertragsstatut – Der Fall der griechischen Schule, *EuZA* 2016, p. 1 *et seq.*, at 2; F. MAULTZSCH (note 26), at 249.

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precludes the application of any foreign overriding mandatory provisions other than those in force at the place of contractual performance.

To resolve cases such as *Nikiforidis* in a manner that is consistent with both logic and the necessity for EU solidarity,[69] it is urgent to reform the Rome I Regulation. For certain, it is highly unlikely that the EU will return to the drawing board and revise Art. 9(3) Rome I Regulation. The Regulation has overall been such a success and has an almost sacrosanct status in Brussels. In the current political climate, nobody will want to re-open the debates about politically contentious issues such as the application of foreign mandatory rules. But perhaps the UK's departure from the Union will allow it to overcome a provision that is too restrictive to fulfil its function of permitting international co-operation. As the Brexiteers continue to emphasise, Brexit is full of opportunities. Why only for the UK, and not for the EU?

V. EU Solidarity and Conflict of Laws

Another problem raised by the referral was whether the principle of sincere cooperation, as enshrined in Art. 4(3) of the Treaty on European Union (TEU), would be relevant "for legal purposes" for the decision to apply the overriding mandatory provisions of another Member State directly or indirectly.[70] This innocuous looking question was of fundamental importance for the referral. Indeed, it formed the basis of a seeming contradiction and major embarrassment: on the one hand, the EU together with other creditors requires Greece to lower its expenditures. On the other hand, Art. 9(3) Rome I Regulation may not allow the courts of other Member States to apply a Greek public policy provision by cutting down the salary of its employees. Art. 4(3) TEU could have paved the way out of this conundrum. As a provision of primary law, it is supreme to the rules of secondary law, including the Rome I Regulation. But does it also entail an obligation to apply the public policy provisions of another Member State?

A number of German authors have answered this question in the affirmative.[71] Their argument runs as follows: the duty of sincere cooperation under

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[69] See, on this problem, the discussion under the next heading.

[70] Art. 4(3) TEU reads: "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

[71] See K. KREUZER, *Ausländisches Wirtschaftsrecht vor deutschen Gerichten – Zum Einfluss fremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte*, CF Müller 1986, p. 94 *et seq.*, at 100; E.J. MESTMÄCKER, Staatliche Souveränität und offene Märkte – Konflikte bei der extraterritorialen Rechtsanwendung von Wirtschaftsrecht, *RabelsZ* 52 (1988), p. 205, 236-237; W.-H. ROTH, Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht, *RabelsZ* 1991, p. 623 *et seq.*, at 662-663; W.-H. ROTH, Der Grundsatz der loyalen Zusammenarbeit in der Europäischen Union und das Internationale Privatrecht, in D. HEID/ R. STOTZ/ A. VERNY (eds), *Festschrift für Manfred A. Dauses zum 70. Geburtstag*, CH Beck 2014, p. 315 *et seq.*; M. KUCKEIN, *Die "Berücksichtigung" von Eingriffsnormen im deutschen und englischen Privatrecht*, Mohr

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Art. 4(3) TEU obliges national courts to respect the rules and public interests of other Member States. The effect can be clearly seen with regard to the country-of-origin principle, which forces the importing Member State to accept goods produced in accordance with the rules of the exporting Member State.[72] The proponents argue this duty would also apply with regard to private international law, which would be endowed in the federalist structure of the EU with the crucial function of coordinating the public interests of the Member States.[73] Art. 9(3) Rome I Regulation would not fulfil this coordinating function exhaustively, as it would for instance not address the application of public policy provisions *of the Union*.[74] It is also stressed that the fundamental freedoms require the recognition of certain legal situations created in other Member States independently of the conditions set by national or EU secondary law.[75]

Taking this idea further, it is argued that the principle of sincere cooperation would not be restricted to the relation between the Union and the Member States, but it also would cover the relation among the Member States *inter partes*. These States would have to act in the spirit of coordination and co-operation and be attentive to the impact of their decisions on the interests of other Member States and their citizens.[76] Since overriding mandatory rules are by definition crucial for the protection of political, social or economic interests of another Member State in the sense of Art. 9(1) Rome I Regulation, they could not be ignored by the courts. If Art. 9(3) Rome I Regulation was to exclude the application of such provisions by the national courts, it would violate the duty of sincere cooperation under primary law, from which Member States cannot be dispensed by secondary law.[77]

The ECJ however gave these arguments short shrift and answered with a simple "no". Its counterargument is embarrassingly simplistic: the principle of sincere cooperation in Art. 4(3) TEU would not authorise a Member State to circumvent the obligations that are imposed on it by EU law.[78] Yet this "argument" fails to address the question of *which* obligations EU law imposes. If the German

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Siebeck 2008; I. PÖTTING, *Die Beachtung forumsfremder Eingriffsnormen bei vertraglichen Schuldverhältnissen nach europäischem und Schweizer IPR*, Peter Lang 2012; A. KÖHLER (note 49). The Austrian Supreme Court (*Oberster Gerichtshof* OGH) has *obiter dictum* mentioned the duty of Member States to apply overriding mandatory provisions of another Member State provided that they are in conformity with EU law: see OGH, 8 March 2012 [2013] *Juristische Blätter* (JBl) p. 362 *et seq.*, at 364.

[72] See ECJ, Case 120/78, REWE-Zentral AG ("Cassis de Dijon"), [1979] ECR 649.

[73] W.-H. ROTH, Der Grundsatz (note 71), at 326-327 (citing A. MILLS, *The Confluence of Public and Private International Law*, Cambridge University Press 2009, p. 180 *et seq.*).

[74] W.-H. ROTH, Der Grundsatz (note 71), at 329.

[75] W.-H. ROTH, Der Grundsatz (note 71) at 330.

[76] W.-H. ROTH, Der Grundsatz (note 71), at 333 (citing the conclusions of Advocate General *Poiares Maduro* in Case C-343/04 – Land Oberösterreich v. CEZ I, 11.1.2006, [2006] ECR I-4459, para. 93, and in Case C-115/08 – Land Oberösterreich v. CEZ II, 22.4.2009, [2009] ECR I-10265, para. 1).

[77] W.-H. ROTH, Der Grundsatz (note 71), at 334.

[78] ECJ (note 1) para. 54.

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authors are right, then primary law would precisely require national courts to apply the public policy rules of another Member State. Equally unconvincing is the ECJ's reference to its earlier decision in *Manzi and Compagnia Naviera Orchestra*, where it had already stated that the principle of sincere cooperation in Art. 4(3) TEU would not authorise a Member State to circumvent the obligations imposed by EU law.[79] The *Manzi* case did not involve private international law; rather, it involved relations between the EU and the Member State, and was therefore rendered in a completely different legal context, with the result that the statement had a completely different meaning. The ECJ thus has not given a satisfactory answer as to the role of the principle of sincere cooperation for private international law.[80]

Though its response is overly simplistic, this does not suggest that the result achieved by the ECJ would be wrong. Indeed, one may entertain a number of doubts with regard to the effect of Art. 4(3) TEU in private international law. To start, the principle of sincere cooperation is characterised by its high level of abstraction and therefore hardly lends itself to the direct application to private law cases. For practical purposes, it must be rendered more concrete, which is done through the operation of secondary law. The interplay between primary and secondary law is well-known from other areas.[81] While it is certain that the validity of secondary law is subject to its compatibility with primary law, one must be wary of drawing too many unwritten conclusions from the abstract principles of the Treaties that supposedly contradict secondary law.

Particularly with regard to the role of foreign overriding mandatory provisions during the negotiations of the Rome I Regulation, it must not be forgotten that the Member States themselves were forging a consensus. They have decided that this rule shall be the same regardless of whether the provision in question is that of a Member State or of a Third State. In this sense, Art. 9(3) Rome I Regulation is *lex specialis* to the more general principle of sincere cooperation.

Certainly, in case of conflict, Art. 4(3) TEU would have the upper hand as it is primary law. However, the principle of sincere cooperation only covers the scope of the European Treaties (TEU and TFEU), and not areas that fall outside of them.[82] It thus does not mandate applying every public policy provision that has

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[79] ECJ, 23 January 2014, *Manzi and Compagnia Naviera Orchestra*, EU:C:2014:19, para. 40.

[80] In the same vein, see W.-H. ROTH, Drittstaatliche Eingriffsnormen und Rom I-Verordnung, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2018, p. 177 *et seq.*, at 185 (calling the rationale of the court "strangely formalistic and short").

[81] See *e.g.* the fundamental freedom to provide services under Art. 56 TFEU and the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, 27.12.2006).

[82] See W.-H. ROTH, Der Grundsatz (note 71), at 331, who nevertheless wants to extend this principle to the entire area of judicial cooperation in civil and commercial matters. Even though it is correct that judicial cooperation is part of the EU's agenda, one cannot deduce that a Member State court would have to follow the overriding mandatory provision of another Member State that do not fall within the Treaties' scope. Judicial co-

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been adopted by a Member State, at a national level. A mere look at the scope of Art. 4(3) TEU demonstrates that the principle does not require applying or taking into account the national law of other Member States.

Moreover, deducing such an obligation from Art. 4(3) TEU would mean ignoring the particular situation of private international law, in which public interests have to be balanced against private interests. Sincere cooperation does not demand the blind enforcement of other Member States' laws that interfere with private agreement. Even though these laws might protect important public interest, there are other values that have to be balanced against them, *e.g.* the principle of party autonomy and legal certainty, which also belong to the fundamental values of most national laws. The Member States placed a higher value on these principles than on the unconditional enforcement of restrictive policies. They therefore have opted for a stable and reliable framework for private relationships, which is in the common interest of all Member States for the sake of a functioning Single Market. They also voted for a universal private international law and against one that is different for intra-EU and extra-EU cases, which would be inevitable if Art. 4(3) TEU were interpreted to require the application of public policy provisions of other Member States, but not those of non-Member States. And by opting against a general obligation to enforce the public policy provisions of other States, the Member States avoided the need for national courts to resolve tricky questions such as a conflict between different public policy provisions of several States. These choices should be respected and not circumvented by an appeal to unspecific and abstract higher principles.

No different result is demanded by the supposed federalist structure of the EU. One may already have doubts as to whether the description of a federation fits the EU after the rejection of the EU constitution. But even if the EU were a federation and not merely a union, this would not *per se* lead to the applicability of the public policy rules of fellow Member States. Particularly enlightening is a look across the Atlantic. In the US, which is a federation, the laws of other federal states are applied, not as a matter of right, but only where they do not conflict with policies of the forum.[83] Moreover, conflict-of-laws theories are applied in the same manner to sister states as to foreign States. There is no split in US conflicts law for interstate and international affairs.[84] And federal obligations are not superimposed on conflict-of-laws.

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operation and co-operation in the enforcement of extraterritorial provisions are two different matters.

[83] See B. CURRIE, Notes on Methods and Objectives in the Conflict of Laws, *Duke Law Journal (Duke L.J.)* 1959, p. 171 *et seq*., at 178. Though numerous other approaches have been developed in the US, it is fair to say that Currie's thought "still controls the academic conflicts agenda." F.K. JUENGER, Conflict of Laws: A Critique of Interest Analysis, *American Journal of Comparative Law (Am. J. Comp. L.)* (1984), p. 1 *et seq*., at 4. See also D.E. CHILDRESS III, Comity as Conflict: Resituating International Comity as Conflict of Laws, *University of California Davis Law Review (UC Davis L. Rev.)* 2010,

p. 11 et seq., at 43, footnote 180.

[84] The proposal to treat interstate and international conflicts differently made by A.A. EHRENZWEIG, Interstate and International Conflicts Law: A Plea for Segregation, *Minnesota Law Review (Minn. L. Rev.)* 1957, p. 717 has not been retained. See

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After all, one might ask in what way the Greek State could have fulfilled the obligations imposed by the "Troika" under the existing framework of primary and secondary EU law. The answer must be: not by interfering with contracts that are to be performed abroad and are governed by foreign law. In particular, the current version of Art. 9(3) Rome I Regulation does not allow one party to unilaterally diminish its obligations to the detriment of the other party. For instance, the Greek State could not have introduced a legislative haircut to bonds to be paid in London and submitted to English law.[85] Under the current, restrictive approach of the Rome I Regulation, the Greek State also cannot interfere with an employment contract that is governed by German law. So the final answer is: the salary can be reduced only in conformity with German law as the governing law of contract.

If one finds fault with this result, the way to go is not to apply EU primary law directly. The principle of sincere cooperation between the Member States is too blunt an instrument to determine the law that applies to private relationships. Moreover, it is not at all clear why European States should only give effect to the laws of other EU Member States but not to those of other countries with whom they have friendly relations. The cooperation inside the EU is certainly special, but there is no reason not to lend a helping hand to governments of Third States. Therefore, one must reform European private international law, namely Art. 9(3) Rome I Regulation in the way that was suggested above.[86]

VI. Taking Foreign Overriding Mandatory Provisions into Account as Matters of Fact

The ECJ did not end its verdict on Art. 9 Rome I Regulation in *Nikiforidis* with the result that foreign overriding mandatory provisions could not be applied as legal rules, directly or indirectly. Rather, the Court went on to state – and this is the astonishing news – that the restrictions of Art. 9 Rome I Regulation do not prevent foreign overriding mandatory provisions from being "taken into account as a matter of fact".[87] Whether this is possible would solely depend on the substantive

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M. REIMANN, A New Restatement-For the International Age, *Indiana Law Journal (Ind. L.J.)* 2000, p. 575, at 578, footnote 20 (underlining that Ehrenzweig's work today is all but forgotten).

[85] This limitation has been implicitly recognised by Greece in the Bondholder Act 2012 through which it sought to restructure the country's debt and which only applied retroactively to debt governed by Greek law. New sovereign Greek bonds issued under English law contained a contractual provision (collective action clause CAC) that allows restructuring in the future. See M. XAFA, Sovereign Crisis Debt Management: Lessons from the 2012 Greek Debt Restructuring, *Centre for International Governance Innovation (CIGI)* 2014, CIGI paper No. 33, p. 9-10 <https://www.cigionline.org/sites/default/files/cigi_paper_33.pdf>.

[86] See *supra* 4.

[87] ECJ (note 1) para. 51.

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law that is applicable according to the Regulation. For the case of Mr Nikiforidis, this means that it was up to the German substantive law governing the employment contract to decide whether public policy provisions such as the Greek pay-cutting law could be factually taken into account.

It seems that the Court's reasoning allows circumventing of not only the Rome I Regulation, but also its own interpretation. First, the ECJ has ruled that the Regulation does not allow the *application* of foreign overriding mandatory provisions in situations other than those envisaged in Art. 9(3) Rome I Regulation. Now it adds that such provisions can nevertheless come into play by being "taken into account" as matters of fact. This raises a difficult question: what is the difference between "applying" and "factually taking into account" foreign provisions? Advocate General SZPUNAR, who had considered this issue in his conclusions in *Nikiforidis*, noted that "the practical difference between the *application* of, and *substantive regard* to, an overriding mandatory provision is almost imperceptible."[88] The distinction goes back to German case law and literature, which therefore have to be more closely examined.

A. German Jurisprudence and Precedents

The basis of the dichotomy between applying foreign law and taking it into account is rooted in the pioneering works of WENGLER[89] and ZWEIGERT[90] during the 1940s. Whilst WENGLER favoured the direct application of foreign public policy rules provided that the adopting State had a close connection to the situation and that they did not violate the public policy of the forum, ZWEIGERT on the contrary opined that they should be taken into account on the level of substantive law. The view of WENGLER had influenced Art. 7(1) Rome Convention, while ZWEIGERT's opinion is experiencing a renaissance through the ECJ judgment in *Nikiforidis*.

Many German scholars agree with ZWEIGERT in that it would be permissible to take account of factual results of foreign public policy on the level of substantive law.[91] Two lines of cases have been of particular importance for

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[88] Opinion of AG SZPUNAR (note 9) para. 101, emphasis as in the original.

[89] W WENGLER, Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht, *Zeitschrift für vergleichende Rechtswissenschaft* 1941, p. 168 *et seq.*, at 181 *et seq.*

[90] K. ZWEIGERT, Nichterfüllung auf Grund ausländischer Leistungsverbote, *RabelsZ* 1942, p. 283 *et seq.*

[91] See, *inter alia*, K. ANDEREGG, *Ausländische Eingriffsnormen im internationalen Vertragsrecht*, Mohr 1989, p. 101 *et seq.*; K. KREUZER (note 71); M. KUCKEIN (note 71), p. 72 *et seq.*; R. LEHMANN, *Zwingendes Recht dritter Staaten im internationalen Vertragsrecht*, Peter Lang 1986, p. 17 *et seq.* and p. 154 *et seq.*; F.A. MANN, Sonderanknüpfung und zwingendes Recht im internationalen Privatrecht, in O. SANDROCK (ed.), Festschrift für Günther Beitzke zum 70. Geburtstag am 26. April 1979, De Gruyter 1979, p. 608 *et seq.*; D. MARTINY, in H.J. SONNENBERGER *et al.* (eds), *Münchener Kommentar zum BGB*, vol. 10, 4th ed, CH Beck 2006, Art. 34 EGBGB para. 63; N.C. NEUMANN, *Internationale Handelsembargos und privatrechtliche Verträge*, Nomos 2001, p. 221

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factual consideration of foreign law within the German law as the governing contract law.[92] In the first line, it was ruled that public policy provisions of another State could render the contract *contra bonos mores* and therefore void under sec 138(1) of the German Civil Code (BGB).[93] Whilst German courts stated that foreign provisions could not be used to establish the illegality of a contract, their violation could amount to a breach of morality. The highest court of the German Empire, the *Reichsgericht*, already considered a transaction for drug smuggling to be *contra bonos mores*.[94] The case involved a sale of cocaine to be shipped to India, where such imports were legally prohibited to protect public health. The *Reichsgericht* based immorality not on the commercial policy of a single country, India, but instead on the violation of foreign public policy provisions common to all "cultured countries".[95] After WWII, the German Federal Court of Justice found a breach of morality in a case in which two German merchants had agreed to import borax from the US to Germany but could not produce a statement required

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et seq.; K.H. NEUMAYER, Autonomie de la volonté et dispositions impératives en droit international privé des obligations, *Rev. crit. dr. int. pr.* 1957, p. 579 *et seq.* and *Rev. crit. dr. int. pr.* 1958, p. 53 *et seq.*; M. SCHÄFER, Eingriffsnormen im deutschen IPR – eine neverending story?, in E.C. STIEFEL *et al.* (eds), *Iusto Iure*: Festgabe für Otto Sandrock zum 65. Geburtstag, Recht und Wirtschaft 1995, p. 37 *et seq.*, at 50 *et seq.*; A.K. SCHNYDER, *Wirtschaftskollisionsrecht*, Schulthess 1990, p. 243 *et seq.*; K. SIEHR, Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht, *RabelsZ* 1988, p. 41 *et seq.*, at 78 *et seq.*; H.J. SONNENBERGER, in H.J. SONNENBERGER *et al.* (eds), *Münchener Kommentar zum BGB*, vol. 10, 4th ed., CH Beck 2006, Einleitung paras 85 *et seq.*; F. VISCHER, Kollisionsrechtliche Parteiautonomie und dirigistische Wirtschaftsgesetzgebung, in *Festgabe zum siebzigsten Geburtstag von Max Gerwig*, Helbing & Lichtenhahn 1960, p. 167 *et seq.*, at 183 *et seq.*; F. VISCHER, *Recueil des Cours* 142 1974-II, p. 21 *et seq*; M. ZEPPENFELD, *Die allseitige Anknüpfung von Eingriffsnormen im Internationalen Wirtschaftsrecht*, Duncker & Humblot 2001, p. 36 *et seq*.

[92] Matters of intense academic discussion have moreover been the *Schuldstatuttheorie* versus the *Sonderanknüpfungstheorie* in Germany and beyond, which have recently been dealt with in English, for instance, by A. CHONG, The public policy and mandatory rules of third countries in international contracts, *Journal of Private International Law (JPIL)* 2006, p. 27 *et seq.*, at 40 *et seq.*; M. HELLNER, Third country overriding mandatory rules in the Rome I Regulation: old wine in new bottles?, *JPIL* 2009, p. 447 *et seq.*, at 448 *et seq.* Also see F. VISCHER in his General Course on Private International Law, published in *Recueil des Cours* 232 (1992-I), p. 21 *et seq.*, at 168 *et seq.* For a critical discussion, see K. SCHURIG, Zwingendes Recht, "Eingriffsnormen" und neues IPR, *RabelsZ* 1990, p. 217 *et seq.*, at 234 *et seq.*; C. ARMBRÜSTER, Geltung ausländischen zwingenden Rechts für deutschem Recht unterliegende Versicherungsverträge, *Versicherungsrecht (VersR)* 2006, p. 1 *et seq*.

[93] Sec. 138(1) of the German Civil Code (BGB): "A legal transaction which is contrary to morality is void."

[94] Cf. Reichsgericht, decision of 24 June 1927 (file No. II 519/26, published in Juristische Wochenschrift 1927, 2288).

[95] See already Reichsgericht, judgment of 3 October 1923 (file No. V 886/22, published in RGZ 108, 241, at 243–244); confirmed in the judgment of 17 June 1939 file No. II 19/39, published in RGZ 161, 296, at 299–300 with Nazi-tainted reference to the "German healthy public opinion").

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by US law that was designed to avoid a resale to the Eastern bloc.[96] The Court took account of the foreign law and held that the immoral contract would be null and void and that no damages could be claimed by either party.[97]

The best-known German precedent in this line of cases relates to an insurance claim for the loss of Nigerian masks during a shipment to Germany.[98] According to the law of Nigeria, the transaction over cultural goods required official permission, which had not been granted in this instance. The German Federal Court decided in 1972 that such a transaction would be *contra bonos mores* because it disregards established legal principles of the community of nations for the preservation of national cultural heritage.[99] The court reached this result by taking into account the outcome of Nigerian law as a matter of fact, which resembled the rules of the UNESCO Convention on Cultural Property.[100] Consequently, it was held that there was no insurable interest and the claim was rejected.

Yet there were cases decided to the contrary by the Federal Court during the time when Germany was divided. These cases involved contracts through which West Germans promised, for remuneration, to help East German citizens escape from the German Democratic Republic (GDR). The law of the GDR prohibited its citizens from escaping.[101] The (West German) Federal Court of Justice nevertheless held that the contracts were not immoral and consequently not void.[102] The Court argued that the GDR prohibition would contradict West German constitutional law and international conventions, which establish the right to leave one's country.[103] Therefore, it could not be given effect in West Germany.

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[96] German Federal Court of Justice, judgment of 21 December 1960 (file No. VIII ZR 1/60, published in BGHZ 34, 169, at 176–177).

[97] This kind of issue was exceptionally handled in a similar manner in the English case *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490 (CA), [1958] AC 301 (HL), where an Indian ban on exports to South Africa was taken into account, and the English sales contract was consequently disapproved. In the case *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171 (CA) a comparable issue arose but the judgment was based on different reasons.

[98] Federal Court of Justice, judgment of 22 June 1972 (file No. II ZR 113/70, published in BGHZ 59, 82 et seq.). Sometimes this case is in English referred to as "Kulturgüterfall", which simply means this was a case on cultural goods; it does not refer to the parties' names or any other aspects of the specific case.

[99] Federal Court of Justice (note 98) at 85-86.

[100] 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNTS No. 11806, vol. 823, p. 231).

[101] Sec. 213 of the Criminal Code of the German Democratic Republic made it punishable to "illegally cross the border".

[102] Federal Court of Justice, judgments of 29 September 1977 (file No. III ZR 164/75, published in BGHZ 69, 295, at 297–298; file No. III ZR 167/75, published in NJW 1977, 2358); file No. III ZR 118/76, publish in NJW 1977, 2359, at 2359–2360); judgment of 21 February 1980 (file No. III ZR 185/77, published in NJW 1980, 1574, at 1575).

[103] Art. 11 (freedom of movement) and 116 ("Germans" and citizenship) of the Constitution for the Federal Republic of Germany; Art. 2(2) Protocol No. 4 of 16 September

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The second line of cases involves foreign public policy rules that had been taken into account as grounds for the "impossibility" of performing the contractual obligations.[104] These decisions have ruled that a foreign rule effectively prohibiting contractual performance can be considered as making it impossible to fulfil the contract under German substantive law. They are directly in line with the teachings of ZWEIGERT.[105] Foreign law is taken into account as a type of "local data". Precedents date back to the WWI era when the English act on banning trade with the enemy[106] was considered by the *Reichsgericht* to render the contractual performance of an English company towards its German creditor impossible.[107] After WWII, the Federal Court held on the contrary that the assignment of a claim from an East German creditor to a West German was valid despite the missing exchange authorization required by East German law.[108] Again, the court reasoned that the East German provision could not be enforced in West Germany.[109]

As a general test, the Federal Court of Justice established that foreign overriding mandatory provisions serving economic and governmental purposes of the enacting State could only be taken into account under the governing law as facts insofar as the enacting State would be capable of enforcing them with regard to objects, rights, or actions on its territory.[110] This test was recently applied by the Federal Court and by the Frankfurt Higher Regional Court in a series of decisions dealing with payment claims based on Argentinian bonds. According to the courts, the payment obligations arising from the bonds were not affected by the debt moratorium imposed by Argentinian law because the Argentinian government was unable to enforce it unilaterally without the assistance of foreign courts.[111]

1963 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Art. 12(2) International Covenant on Civil and Political Rights.

[104] See sec. 275(1) of the German Civil Code (BGB), which provides: "A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person."

[105] K. ZWEIGERT (note 90).

[106] An Act to make provision with respect to penalties for Trading with the Enemy, and other purposes connected therewith, 4 & 5 Geo 5 (1914) ch. 87; An Act to amend the Trading with the Enemy Act, 1914, and for purposes connected therewith, 5 & 6 Geo 5 (1914) ch. 12.

[107] *Reichsgericht*, judgment of 28 June 1918 (file No. II 69/18, publish in RGZ 93, 182, at 183-184). A similar outcome was reached in an earlier case, see *Reichsgericht* judgment of 13 November 1917 (file No. II 167/17, published in RGZ 91, 260, at 262).

[108] Sec. 8 of the Act of 15 December 1950 for the Soviet Occupation Zone of Germany on the Regulation of Intra-German Payments (Gesetz zur Regelung des innerdeutschen Zahlungsverkehrs).

[109] Federal Court of Justice, judgment of 17 December 1959 (file No. VII ZR 198/58, published in BGHZ 31, 367, at 371 *et seq.*). Similar outcome in a later case underlying the Federal Court of Justice's judgment of 16 April 1975 (file No. I ZR 4/73, published in BGHZ 64, 183, at 189 *et seq.*).

[110] Federal Court of Justice, judgment of 17 November 1994 (file No. III ZR 70/93, published in BGHZ 128, 41, at 52).

[111] Federal Court of Justice, judgment of 24 February 2015 (file No. XI ZR 193/14, published in NJW 2015, 2328, at 2333 *et seq.*); Higher Regional Court (*Oberlandesgericht*)

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From the German jurisprudence and precedents discussed, it can be concluded that comprehensive provisions of substantive law may provide a basis for factually taking into account foreign overriding mandatory provisions. It is important to note that account is only taken of the result produced by foreign law. Clearly, foreign law is not, and cannot be, "applied within" substantive law. Contracts under German law can be null and void where the foreign law leads to a violation of *bonos mores* or to an impossibility of the performance of the contractual obligation. Impossibility is fairly easy to establish because it requires that the foreign law results in an almost physical obstacle for the fulfilment of the contract. By contrast, immorality due to foreign legal rules is a rather delicate issue. In order to avoid any biased evaluation of the foreign law in question, the assessment has at least to be based on established legal principles of the community of nations and international conventions. Even then the foreign law is not an undisputable fact that could be taken into account; the methodology comes rather close to an application of foreign or international law. Factual impossibility arises out of effective foreign prohibition, not out of moral debate. Hence, account can only be taken of a foreign law that effectively creates an obstacle to the performance of a contract, which then becomes a "matter of fact".

B. Consequences and Implications for European Law

The decision by the ECJ is very detrimental for the unity of European private international law. There are no established European principles for factually taking account of results of foreign public policy law within the applicable substantive law. In *Nikiforidis,* the ECJ pointed out that a seized court of a Member State has "the task to ascertain whether [foreign overriding mandatory provisions] are capable of being taken into account when assessing the facts of the case which are relevant in the light of the substantive law applicable to the […] contract at issue […]."[112] The implementation of this taking into account depends on the specifics of the *lex causae*, which determines whether and how it is acceptable to factually take into consideration an actually inapplicable law. In other words, the taking into account is contingent upon the autonomous characteristics of the domestic law governing the contract. Its substantive rules can open up the possibility of factually taking into account foreign public policy provisions, or not. Member States adopt different approaches when it comes to taking account of foreign public policy provisions as matters of fact: unlike the German courts, the French Court of Appeal in Paris refused to do so in a 2015 decision.[113] English courts have also

Frankfurt a.M. judgment of 12 June 2015 (file No. 8 U 93/12, ECLI:DE:OLGHE:2015:0612.8U93.12.0A, at paras 73–74); judgment of 11 December 2015 (file No. 8 U 279/12, ECLI:DE:OLGHE:2015:1211.8U279.12.0A, at paras 142–143); judgment of 26 August 2016 (file No. 8 U 83/14, ECLI:DE:OLGHE:2016:0826.8U83.14.0A, at paras 120–121).

[112] ECJ (note 1), para. 53.

[113] Cour d'appel de Paris, judgment of 25 February 2015 (file No. 12/23757, published in *Recueil Dalloz* 2015, p. 1260).

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taken a different view than the German courts:[114] Brexit might "remedy" this friction by a definite UK/EU separation, but this could clearly not serve as a viable model.

In the absence of Europe-wide standards about the taking into account of foreign public policy provisions, the outcome of comparable cases could be vastly different. The path taken by the ECJ could have worked inside a domestic law, such as that of Germany. It is not very suitable for the EU, a multilevel system of governance that as such must strive to solve conflicts of laws by uniform private international law rules. After *Nikiforidis*, EU conflict-of-laws faces the risk that the very same case can have very different outcomes depending on whether and how national substantive law permits the taking into account of foreign law by the law that is actually applicable. One might think that some risk could be reduced because the Rome I Regulation forces national courts to determine the governing substantive law in a uniform manner and that the accordingly applicable substantive law should be similarly applied, including the taking account of foreign law. But realistically, it has to be feared that the effects of this "taking into account" under one and the same substantive law will be implemented differently by national courts. In this process, dangerous divergences will surely arise. The ECJ would not have jurisdiction to ensure achieving unity across Member States because, as the ECJ ruled itself in *Nikiforidis*, the "taking into account" is an issue within domestic law, as opposed to European law, and therefore out of its control.

C. Objections to the ECJ's Decision

The ECJ's ruling that the Rome I Regulation does not preclude considering the substantive law of another State by "factually taking it into account" raises a number of objections. First and foremost, the submission to the vagaries of the applicable law clashes with the explicitly declared objectives of the Rome I Regulation, which are "predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments" for the sake of the proper functioning of the Internal Market.[115] The ECJ's interpretation permits Member States to potentially undermine the harmonised conflict-of-laws regime wherever their substantive law provides for "factually taking into account" another law. In this sense, a second "stealth" system of conflicts rules at the national level would be created beyond the reach of the EU legislator and judiciary. This is all the more damaging as the intellectual process of "factually taking into account" can hardly be distinguished from the "application" of another law.[116]

The reason given by the ECJ for allowing the taking into account of foreign overriding mandatory provisions is that the Rome I Regulation merely intends to

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[114] See *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678, [1939] 2 KB 394 (CA) (holding that a Hungarian company would not be unable to pay its England creditor according to their English contract even if restricted to do so under Hungarian law).

[115] Recital 6 Rome I Regulation.

[116] See *supra* part 6.

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harmonise conflict-of-laws of contracts and does not cover substantive contract law of the Member States.[117] Although the argument sounds logically correct at first, it does not withstand closer analysis. Undoubtedly, both Rome Regulations focus on solving conflict-of-laws issues. That does not mean, however, that they would be silent with regard to the permissibility of factually taking into account. Art. 17 of the Rome II Regulation explicitly addresses this topic by mandating that "account shall be taken, as a matter of fact and insofar as appropriate", of the rules in force at the place and time of the event giving rise to the liability. A similar statement is missing in the Rome I Regulation. This does not necessarily mean that the taking into account of another law would be prohibited with regard to contracts, but it demonstrates that European private international law is not limited to conflicts rules in the classic sense of the term. Rather, it regulates the national court's engagement with foreign law in a comprehensive manner. In particular, it may also have a bearing on which and to what extent foreign rules can be taken into account as a matter of fact.

It is undisputed that Member States maintain the right to determine their substantive law. But this does not warrant the conclusion that the Regulation would be unable to prevent the applicable substantive law of a Member State from providing for "factually taking into account" foreign law. It has been well established since the ECJ landmark judgment in *Costa v ENEL*[118] that a Member State's substantive law and legislative sovereignty is limited insofar as supranational EU law prevails. The latter is particularly the case where a directly effective Regulation such as Rome I applies. Since the Rome I Regulation harmonises and exhaustively governs conflict-of-laws issues in the area of contracts for all Member States, the State whose substantive law is applicable should refrain from modifying the decision on the applicable law by taking into account results of foreign law. Otherwise, the superior conflict-of-laws regime would be disregarded or circumvented, and this would counteract the joint efforts for the European area of freedom, security and justice.

Moreover, the broad "factual taking into account" of other countries' laws resembles the methodology of *renvoi*. It forwards the case under domestic law to be "factually" governed by another law than that determined according to the conflict-of-laws rules of the forum, be it the substantive law of another Member State or that of a Third State. *Renvoi* is explicitly banned by the Rome I Regulation.[119] This is a logical necessity for a harmonised conflict-of-laws regime that does not tolerate deviation. Insofar as the taking into account comes close to an application of foreign law, it must therefore be excluded.

Finally, there can be no justification for giving legislators of EU Member States (or Third States[120]) the power to modify an explicit choice of law by "factually taking into account" another law. Equally, where foreign law modifies substantive law, whose applicability is determined by objective connecting factors, it would threaten legal certainty and predictability for the contractual parties and

[117] ECJ (note 1) para. 52.

[118] ECJ, 15 July 1964, *Costa v ENEL*, ECLI:EU:C:1964:66, at 593–594.

[119] Art. 20 Rome I Regulation.

[120] Art. 2 Rome I Regulation.

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third parties relying on the applicable law. Ultimately, it must be borne in mind that private international law intends to create international decisional harmony (or "uniformity of decisions") across States, and this international harmony is endangered by modifications on the level of substantive law as much as by different rules of conflict of laws.[121]

D. In Favour of a Restricted Reading of *Nikiforidis*

It is undeniable that there are situations in which a judge can hardly avoid considering foreign law as a matter of fact. Take the example of a seller from State A that has contracted to ship certain goods to a buyer in State B. If State A adopts a prohibition for the export of these types of goods and enforces this prohibition via effective controls within its territory, it becomes – factually (!) – impossible for the seller to perform the obligations under the contract. Examples of such situations include the above-mentioned *Reichsgericht* case, in which it was held that a contractual performance of an English company towards its German creditor would be impossible due to the British ban on trading with the enemy,[122] or the situation in *Ralli Bros* of the Spanish debtors who were unable to pay the full freight rate in Spain (although not necessarily in Britain).[123] If the governing law provides for a general obligation of specific performance, like most civil law systems do,[124] then there is no point of 'sentencing' the seller to deliver the goods if he is unable to do so. Any other result would contradict the old adage *impossibilium nulla obligatio est*. The factual obstacle created by foreign law can become relevant within the applicable contract law under the doctrine of impossibility, *force majeure*, or a similar legal tool.[125]

In this very restricted sense, the taking into account of foreign law as a matter of fact is permissible and even unavoidable.[126] Indeed, it is a necessary feature of any reasonable substantive law. It is important to note the differences between this method and the direct *application* of foreign overriding mandatory provisions. The taking into account is only allowed where the prohibition is effectively enforced and factually hinders the debtor from performing its

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[121] This has already been considered by W. WENGLER (note 89), particularly at 188, and argued by A. BONOMI, Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment, this *Yearbook* 1999, p. 215 *et seq.*, at 239 *et seq*.

[122] *Reichsgericht*, judgment of 28 June 1918 (note 107).

[123] *Supra* note 56.

[124] The Draft Common Frame of Reference (DCFR), summarising the experience of both common law and civil law systems, provided for a "right to enforce performance" in Art. III.-3:302 DCFR. The United Nations Convention on Contracts for the International Sale of Goods, of April 11th 1980 (CISG), is more reserved and leaves the question to the *lex fori* of the deciding court: see Art. 28 CISG.

[125] The DCFR provides that specific performance cannot be enforced where "it would be unlawful or impossible", see III.-3:401 DCFR.

[126] See also W.-H. ROTH (note 80), p. 183-184.

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obligation. Only then does it create "a fact" that the judge cannot ignore.[127] Also, such a factual obstacle does not exclude that the debtor may be liable for breach of contract and may have to pay damages.[128]

The situation in *Nikiforidis* was very different. It was entirely possible for the Greek State to perform its obligations under the contract, given that it was the State itself that had created the obstacle. What the Hellenic Republic actually demanded was that the German courts enforce its austerity laws by giving them effect beyond the Greek territory and contracts governed by Greek law. This is not a taking into account in the restricted sense described above. Instead, it amounts to an application of Greek law, which has no control over the situation without the German court's support. Seeing the case from this perspective highlights the extraterritorial and far-reaching nature of the demand made by the Greek State. It also makes clear that the case falls squarely into the scope of Art. 9(3) Rome I Regulation. There was quite simply no space for the doctrine of factual taking into account in the circumstances of the case in which Greece demanded the enforcement of its austerity laws outside of its territory and outside of its courts. This notion being introduced into the *Nikiforidis* case is due to the particularly large conception of "taking into account" adopted by the first line of German precedents, which allowed the consideration of foreign rules to preserve "good morals".[129] This large conception is much too broad. To say that the contravention of a foreign law is violating the *bonos mores* under domestic law blurs the lines between taking foreign law into account as a matter of fact and the actual application of foreign law as to make them indistinguishable. That does not mean that legal prohibitions of another State do not play a role. But their enforcement abroad is submitted to the conditions imposed by private international law, namely Art. 9(3) Rome I Regulation.[130]

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[127] This is in line with the theory according to which a third country's law could only be applied when this State had the power to enforce its laws. This "power theory" (*Machttheorie*) had been developed for the determination of the applicable law: see G. KEGEL, Die Rolle des öffentlichen Rechts im Internationalen Privatrecht, in K.-H. BÖCKSTIEGEL *et al.* (eds), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht Festschrift für Ignaz Seidl-Hohenveldern*, C. Heymann 1988, p. 243, at 250. It seems, however, that it is much more adapted for the question as to whether foreign law has to be taken into account as a fact. See also the most recent German case law on impossibility, *supra* note 111.

[128] An exception from liability may apply where the debtor proves that the failure was due to an impediment beyond his control that he could not reasonably be expected to have considered at the time of the conclusion of the contract or have tried to avoid it: see Art. 79(1) CISG. See also Art. III.-3:104(1) DCFR, according to which non-performance is "excused" under very similar conditions. Liability for factual obstacles to performance depends on the distribution of risks under the agreement and the law applicable to it.

[129] See *supra* notes 94 *et seq*.

[130] For a similarly differentiated view, see W.-H. ROTH (note 80), p. 184, who speaks of a "blocking effect" (Sperrwirkung) of Art. 9(3) Rome I Regulation with regard to the application of foreign overriding mandatory rules under sec. 138 BGB.

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VII. The Aftermath before the German Courts

When the German Federal Labour Court took up the case after the ECJ ruling, it discovered that – contrary to its earlier suggestion – it had no possibility to take into account the Greek Act under German substantive law.[131] Specifically, it could not apply section 241(2) of the BGB, which requires both parties to a contract to show due consideration for each other's rights, assets and interests.[132] The Court had initially considered that this provision could serve as a basis for taking the Greek law into account,[133] but changed its view. It ruled that due consideration for the other party's interest does not entail an obligation of the employee to accept a permanent pay cut because of the financial woes of the employer.[134] Such a pay cut could only be implemented by a formal dismissal and the acceptance of a new contract by the employee.[135]

That late turn must be applauded. Otherwise, German contract law would have been stretched beyond any reasonable interpretation, allowing the taking into account of foreign public policy rules through almost any general clause. As a side note, however, this result could have been foreseen before the referral to the ECJ. A comparison between the Greek provisions and the lines of German case-law examined above demonstrates no basis for a unilateral pay cut because the case-law only allows for the invalidity of contract on grounds of immorality or impossibility of contractual performance.

Some authors have suggested that it would have been possible to give effect to the Greek law by (re-)interpreting the pay cut as a notice of dismissal combined with an offer of a new contract.[136] However, this would merely be a technical fix. It would neither have reflected the antagonistic laws in the present case, nor the limits that the private international law imposes on the application of foreign law. European private international law does not allow the application of foreign overriding mandatory provisions, except in cases set out in Artcile 9(3) Rome I Regulation. The Greek provisions do not meet the conditions of this provision as it currently stands. They do not intend to render the employment contract invalid and are not part of the law in force at the place of performance. Moreover, Greece cannot enforce its austerity legislation abroad since Mr Nikiforidis is not paid in Greece. As a result, the Rome I Regulation in its current form neither allows the application of the Greek provisions nor does German substantive law allow the taking account of such provisions.

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[131] Federal Labour Court, judgment of 26 April 2017 (file No. 5 AZR 962/13, ECLI:DE:BAG:2017:260417.U.5AZR962.13.0), para. 34-37.

[132] Sec. 241(1) BGB reads: "An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party."

[133] See Federal Labour Court (note 3).

[134] See already the Higher Labour Court Nuremberg (note 4), para 36.

[135] See already *supra* part 2.

[136] F. MAULTZSCH (note 26), at 252; K. SIEHR (note 23), at 211 *et seq*. This was also the solution of the Higher Labour Court Nuremberg (note 4), 74 and 118 *et seq*.

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VIII. Conclusions

Although the German courts ultimately ruled that they could not take the Greek legislative pay cut into account, the judgment in *Nikiforidis* does not amount to "Much Ado About Nothing". On the contrary, it is a seminal decision on the Rome I Regulation and on European private international law in general. It has brought some welcome clarifications with regard to the application of foreign public policy provisions. In particular, it is now beyond doubt that the list of circumstances under which foreign overriding mandatory rules can be given effect according to Artciel 9(3) Rome I Regulation is exhaustive and cannot be extended to situations not expressly covered.

The ECJ judgment has also pushed the question of sincere cooperation into the limelight of European discussion. This interaction between secondary EU law and Art. 4(3) TEU has not been sufficiently explored. While it is correct that primary law demands the cooperation between the Members of the Union, it would be going too far to impose a duty on national courts to apply or consider the public policy provisions of other Member States. This would ignore the particularities of private international law and the value it attaches to principles like party autonomy.

At the same time, the case illustrates a number of shortcomings of Art. 9(3) Rome I Regulation. The provision is too restricted to fulfil a function similar to that of Art. 7(1) Rome Convention or Art. 19 Swiss PILA. It is less of a tool for opening up the conflicts system to international cooperation than a response to the need to take factual impediments to contractual performance into account.

Against this background, it is no paradox that the ECJ allowed precisely this taking into account without respecting the limits imposed by Art. 9(3) Rome I Regulation. This ruling ignores the purpose behind the provision and risks undermining the unity of EU private international law. It gives the national courts broad permission to follow a foreign law that claims to govern the situation.

The adoption of a law by a foreign State is not enough to create a factual obstacle for performance. In addition, it is necessary that the adopting State has control over the situation and that it can and does effectively implement the law. Only under this condition are the courts of other countries not needed to support or be complicit in the foreign law's enforcement and may merely take account of a fact resulting from it. That was not the situation in *Nikiforidis*. Here, the Greek government required the assistance of the German courts in the enforcement of the law, which it could not achieve alone. The ECJ should therefore have rejected the possibility of applying the doctrine of factual taking account of a foreign law under the circumstances of this specific case.

In the future, one must hope that the limits of "taking into account" will be expounded in a more precise fashion. This, as a provisional solution, has to be done by the ECJ at the next occasion of a preliminary ruling request concerning the European autonomous interpretation of Art. 9 Rome I Regulation. Yet a sound solution requires legislative reform of the provision, which can only be done by the EU legislator and has to be proposed by the European Commission. The amended rule should allow national courts to apply overriding mandatory provisions of other

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States that have a close connection to the situation, provided that they serve a legitimate and clearly preponderant interest.

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RESOLVING THE DILEMMA OF JUDGMENT RECIPROCITY

FROM A SINO-JAPANESE MODEL TO A SINO-SINGAPOREAN MODEL

Qisheng HE* / Yahan WANG**

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I. Introduction

In international civil procedure, recognition and enforcement of foreign judgments is the last step to end litigation. Recognition and enforcement of foreign judgments is based on the principle of reciprocity, which aims at strengthening co-operation between sovereign States.[1] Historically, reciprocity was a principle of public

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[1] In reviewing a foreign judgment, common refusal grounds also include *lis alibi pendens*, inconsistent judgments, incompatibility with fundamental principles of procedure, lack of notice, and violation of the public policy of the State addressed. See HCCH, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission and Report by P. NYGH/ F. POCAR

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 83-107
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Printed in Germany

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international law and was introduced into private international law with the development of sovereignty. Reciprocity has since played a significant role in relations between sovereign States,[2] especially in the absence of a single and unique international authority to enforce agreements.[3]

In the field of private international law, reciprocity is not only an important part of international civil procedure,[4] it is also a vital basis for the recognition and enforcement of foreign judgments.[5] Reciprocity was developed on the basis of comity, a doctrine which was introduced by a group of Dutch scholars to deal with the application of foreign law within the sovereign's territory.[6] During the 17th century, a Dutch scholar, Ulrich HUBER, articulated three guiding principles to illustrate "the operation of foreign law within the territory of another sovereign".[7] HUBER's notion of comity was adopted by an influential English judge, Lord MANSFIELD,[8] and in the United States, Joseph STORY regarded comity as the basis for recognising foreign laws and judgments.[9] As a principle of recognition, comity can be regarded as deference to foreign law and foreign acts,[10] which addresses the mutual concerns of sovereign States.[11] In view of this, reciprocity is deemed to be a basis, as well as a more advanced form of comity.[12] Comity encourages national courts to give extraterritorial effect to the foreign judgments,[13] and this positive

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(hereinafter referred to "the NYGH/ POCAR Report"), Prel. Doc. No. 11 of August 2000 drawn up for the attention of the Nineteenth Session of June 2001. See the Proceedings of the Twentieth Session, Tome II, Judgments.

[2] See F. PARIS/ N. GHEI, The Role of Reciprocity in International Law, 36 *Cornell International Law Journal*, 2003, p. 94.

[3] *Ibid.,* 93 *et seq*.

[4] See H. SMIT, International Co-operation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity, 9 *Netherlands International Law Review*, 1962, p. 147.

[5] See A. LENHOFF, Reciprocity and the Law of Foreign Judgments: A Historical – Critical Analysis, 16 *Louisiana Law Review* 1955-1956, p. 466.

[6] See J.R. PAUL, Comity in International Law, 32 *Harvard International Law Journal* 1991, p. 14.

[7] *Ibid.,* 15. According to this article, the three principles are as follows: First, all States have the sovereign power within their territory but not beyond. Second, the State has sovereign power over any person within its territory. And third, when the court applies foreign law, the court acts on the basis of comity.

[8] See W.S. DODGE, International Comity in American Law, 115(8) *Columbia Law Review* 2015, p. 2085.

[9] *Ibid.*

[10] *Ibid.*, p. 2078.

[11] See F.K. JUENGER, The Recognition of Money Judgments in Civil and Commercial Matters, 36 *The American Journal of Comparative Law* (*Am. J. Com. L.*) 1988, p. 7.

[12] See S.L. STEVENS, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments, 26 *Hastings International & Comparative Law Review*, 2002, p. 120.

[13] F.K. JUENGER (note 11).

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function has been reciprocated to promote international relations.[14] However, when dealing with judgments from countries with overly restrictive practices with respect to the recognition of foreign judgments, courts and legislatures of other countries could use reciprocity as a basis for retaliation.[15] Therefore, as opposed to comity, reciprocity can have both favorable and unfavorable consequences.

The Civil Procedure Law of the People's Republic of China ("PRC")[16] establishes the framework for recognising and enforcing foreign judgments. In the Civil Procedure Law 2012,[17] the requirements of recognition and enforcement of foreign judgments are provided at Articles 280(1), 281 and 282.[18] According to Article 282 of the Civil Procedure Law, where an application for the recognition and enforcement of a legally effective foreign judgment is made, the People's Court shall examine the application or request in accordance with the international treaties to which the PRC is a Party, or based on the principle of reciprocity. Based on this provision, international treaties or reciprocity is required for a foreign judgment to be recognised and enforced in China.[19] Article 5 of the Enterprise Bankruptcy Law of the PRC,[20] which provides for the recognition and enforcement in China of foreign bankruptcy judgments, also contains the requirement for reciprocity.[21]

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[14] See D. MARTINY, Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 35 *Am. J. Comp. L.* 1987, p. 749.

[15] F.K. JUENGER (note 11), at 7 *et seq*.

[16] In 1982, the Chinese Civil Procedure Law was tentatively implemented. In 1991, the formal Civil Procedure Law of the PRC (中华人民共和国民事诉讼法) was promulgated by the National People's Congress of the PRC. The Civil Procedure Law was amended in 2007 and 2012 respectively. In the Civil Procedure Law, Part IV is entitled "Special Provisions for Foreign-related Civil Procedure", which includes the provisions for recognition and enforcement of foreign judgments.

[17] *Ibid*.

[18] Art. 282 of the Civil Procedure Law 2012 (previously Art. 268 of Civil Procedure Law 1991, Art. 266 of Civil Procedure Law 2007) provides that: [i]n the case of an application or request for recognition and enforcement of a legally effective judgment or ruling, the People's Court shall examine the application or request in accordance with the international treaties concluded or acceded to by the PRC or with the principle of reciprocity. If the application or request does not violate the fundamental principles of the laws of the PRC, or State sovereignty, security and social public interests of the PRC, the People's Court shall recognise and enforce the foreign judgment or ruling. And if the execution is required, the court should issue a writ to execute the judgment or ruling in accordance with the relevant provisions of this Law; if the application or request violate the fundamental principles of the law of the PRC or State sovereignty, security and social public interest of the PRC, the People's Court shall not recognise and execute the foreign judgment or ruling.

[19] See Art. 282 of the Civil Procedure Law 2012.

[20] The Enterprise Bankruptcy Law of the PRC (中华人民共和国企业破产法), which was adopted at the 23rd meeting of the Standing Committee of the 10th National People's Congress of the PRC on August 27, 2006.

[21] Article 5(2) of the Enterprise Bankruptcy Law of the PRC provides that where a legally effective judgment or ruling made by a foreign court involves any debtor's assets

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Although the reciprocity requirement has been an independent ground for recognising and enforcing foreign judgments since the Civil Procedure Law was enacted in 1991, it was difficult, before 2016, to obtain recognition in Chinese courts of a foreign judgment without a bilateral treaty in place between the foreign State and China.[22] In addition, the vague legislative criteria for reciprocity constituted an obstacle to the recognition of foreign judgments. Nevertheless, since 2016, important changes in the interpretation of "reciprocity" are promoting judicial cooperation between Chinese and foreign courts.

This article explores the evolution of judgment reciprocity in China. An introduction of China's restricted definition of reciprocity is followed by an analysis of the result of mutual retaliation between China and Japan, which represents a negative model of recognition and enforcement of foreign judgments. The successful model, between China and Singapore, of mutual recognition and enforcement of judgments is then discussed and the contributing factors to this success are analysed. Finally, the China's internal reform and external co-operation is explored, as well as the transformation of the interpretation of reciprocity in the recognition and enforcement of foreign judgments. We conclude that reciprocity will serve multiple and flexible functions in China's legal framework and judicial practice, which will enable China to join the establishment of a global and comprehensive network with respect to the recognition and enforcement of foreign judgments.

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within the territory of the PRC, and if the debtor applies for or requests the People's Court to recognise and enforce the judgment or ruling, the People's Court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon. If the judgment or ruling does not violate the fundamental principles of the laws of the PRC, does not damage the sovereignty, safety or social public interests of the State, and does not damage the legitimate rights and interests of the debtors within the territory of the PRC, then the People's Court should recognise and enforce the judgment or ruling.

[22] Many scholars hold the view that foreign judgments are difficult to recognise and enforce by the Chinese courts. *E.g.*, E. LESTRADE, European Union States and the Recognition and Enforcement of Foreign Judgments in China, 57 *European Newsletter* 2008, p. 2; M. MOEDRITZER/ K.C. WHITTAKER/ A. YE, Judgments "Made in China" But Enforcement in the United States?: Obtaining Recognition and Enforcement in the United States of Monetary Judgments Entered in China Against U.S. Companies Doing Business Abroad, 44 *The International Lawyer (Int'l Law.)* 2010, p. 832.

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II. The Sino-Japanese Model: Mutual Retaliation

A. Factual Reciprocity and Non-Recognition of Japanese Judgments

As a Japanese scholar has stated, reciprocity in China was very restrictive.[23] Due to their requirements for reciprocity and their conservative interpretations, China and Japan have never recognised and enforced each other's monetary judgments.[24] In fact, the mutual-retaliation model between China and Japan can be traced back to 1994, the *Gomi Akira* case,[25] in which China refused to recognise and enforce a civil judgment rendered by a Japanese court.

In the *Gomi Akira* case, the applicant, a Japanese citizen, applied to the Dalian Intermediate People's Court of Liaoning Province ("Dalian Court") for the recognition and enforcement of a Japanese civil judgment against another Japanese citizen.[26] In reviewing the case, the Dalian Court found that no bilateral treaties existed between China and Japan according to Article 268 of the Civil Procedure Law 1991 (now Article 282 of the Civil Procedure Law 2012). Regarding the issue as to whether reciprocity existed between China and Japan, the Dalian court made an inquiry to the Supreme People's Court ("SPC"). In 1995, the SPC issued its Reply on Whether the Japanese Judgment Concerning Credit and Debt Relationship Shall Be Recognised and Enforced by Chinese Courts ("SPC's Reply").[27] In

[23] See B. ELBALTI, Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but not Much Bite, 13 *Journal of Private International Law* (*JPIL*) 2017, p. 201.

[24] Except for B. ELBALTI, some Chinese scholars are also of the view that Chinese courts are conservative with respect to reciprocity. See W. ZHANG, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity", (2013) 12 *Chinese Journal of International Law*, p. 153.

[25] *Gomi Akira v Dalian Fari Seafood Co., Ltd.*, see Reply of the Supreme People's Court on Whether Japanese Judgment Concerning Credit and Debt Relationship Shall Be Recognized and Enforced by Chinese Courts [1995] *min ta zi* No. 17. (《最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函》，〔1995〕民他字第 17 号).

[26] In 1990, the applicant lent 140,000,000 yen to the respondent, Woshakunio, the legal representative of a Sino-Japanese joint venture. Since the respondent failed to pay the debt, the applicant filed suit, in the Kobara branch court of Hacohama local court in Japan, against the respondent and his company. In 1991, the Japanese court ordered the respondent to repay the loan with interest. Because the respondent had no property in Japan, the Japanese court issued an order to garnish the respondent's asset in a Chinese company (Fari Company) in which the respondent was an investor. The applicant requested the Dalian Court to recognise and enforce this judgment, as well as the Japanese court's garnishment order.

[27] Usually the SPC provides guidance through "Judicial Interpretations" (司法解释), in one of four different forms, *i.e.*, Interpretation (解释), Provision (规定), Reply (批复), and Decision (决定). These forms of judicial interpretation can provide guidance to lower courts in China and have legal binding force. See Art. 5 and 6 of the Regulation on Judicial

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this Reply, the SPC held that neither a bilateral treaty nor a reciprocal relationship existed between China and Japan.[28] Therefore, the Dalian Court made a decision to refuse recognition and enforcement of the Japanese judgment.

The Dalian Court's refusal may be based on historical reasons: at the time, China was at an early stage of reform and opening-up, and it was difficult for Chinese courts to take previous cases as a reference in determining reciprocity. Although the Chinese courts have decided a large number of cases involving foreign elements during this period,[29] the cases that related to the recognition and enforcement of foreign judgments were few. The *Gomi Akira* case in 1994 was the first case addressed to the Chinese court for recognition and enforcement. As a consequence, precedents with regard to reciprocity can hardly be found and followed by the Chinese courts. In addition, influenced by the traditional notion of international law and national sovereignty, China regarded the foreign adjudication as a country's exercise of judicial sovereignty. In the *Gomi Akira* case, since both parties were Japanese, recognising and enforcing the Japanese judgment mainly transferred money and interest between the two Japanese plaintiffs and defendants. The loans between the Japanese parties had no legal ties to the Chinese company that the Japanese court joined, without notice, as a third debtor in the Japanese court proceedings. The Chinese court could not only have held that the Japanese judgment lacked legal grounds, but it could also have found that the judgment involving a Chinese company infringed upon China's judicial sovereignty.[30] China aims to defend its judicial sovereignty by invoking reciprocity, which is considered as an act of the State, and thus, closely related to national sovereignty.

B. Cross-Retaliation by Japanese Courts

The decision in the *Gomi Akira* case and the SPC's Reply has since had a significant influence on judicial practice,[31] and has become a ground invoked by

Interpretation Work by the Supreme People's Court issued by the SPC, *fa fa* [2007] No. 12. (最高人民法院关于司法解释工作的规定)，法发〔2007〕12 号).

[28] See note 25.

[29] For example, from 1994 to 1998, there was a total of 17,368 foreign cases adjudicated at the first instance level by the Chinese courts, *i.e.* an average of 3,473 per year. See the SPC, the Working Report of the Supreme People's Court to the National People's Congress (最高人民法院工作报告) (1998), cited in M. ZHANG, International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System, 25 *Boston College International and Comparative Law Review* 2002, p. 62.

[30] See W. LI, Principle of Reciprocity as One of the Conditions in Recognition and Enforcement of Foreign Judgments, 2 *Tribune of Political Science and Law* 1999, p. 95 (李旺：外国法院判决的承认和执行条件中的互惠原则，政法论坛，1999 年第 2 期).

[31] In 2001, the No. 1 Shanghai Intermediate People's Court refused to recognise and enforce another civil judgment made by a Japanese court, and the reasoning was similar to the Dalian Court's decision in the *Gomi Akira* case. *Awabiya Co. Ltd.* case, the No.1 Shanghai Intermediate People's Court [2001] *hu yi zhong jing chu zi* No. 267 (unpublished), citing W. ZHANG (note 24), at 155.

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Japanese courts to refuse recognition of Chinese judgments. In Japan, according to Article 118(iv) of the Japanese Code of Civil Procedure, recognition can be granted when "reciprocity exists".[32] When the rendering country's requirements for recognition and enforcement of foreign judgments are almost the same as in Japan, or there is no substantial difference with the essential requirements for recognition and enforcement of foreign judgments under Japanese law, then reciprocity can be regarded as mutually guaranteed by the two countries, and no treaty or other form of international agreement is necessary.[33]

In 2003, based on Article 118 of the Japanese Code of Civil Procedure[34] and the *Gomi Akira* precedent, the Osaka High Court refused to recognise and enforce a civil judgment issued by a Chinese court.[35] In that case, the Osaka High Court firstly analysed the requirements for recognising and enforcing foreign judgments in China under the Civil Procedure Law in force at that time. Further, considering the different economic structures in Japan and China, the Japanese court held that it was unclear whether the Japanese judgments which involved commercial transactions would be recognised by the Chinese courts.[36] Secondly, the Osaka High Court maintained that a treaty with China on judicial assistance would be an essential condition for recognition and enforcement of foreign judgments in China. Like the Dalian Court in the *Gomi Akira* case and the SPC in its Reply issued in 1995, the Japanese court found that no reciprocal relationship had been established

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[32] See Osaka High Court, Judgment, April 9, 2003; H.J (1841) 111[2004], 48 *The Japanese Annual of International Law*, p. 173 (2005).

[33] *Ibid*.

[34] Art. 118 of Code of Civil Procedure:

A final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements: (i) the jurisdiction of the foreign court is recognised pursuant to laws and regulations, conventions, or treaties; (ii) the losing defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served; (iii) the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; (iv) a guarantee of reciprocity is in place.

[35] Osaka High Court (note 32), at 171.

In this case, the applicant established two Sino-Japanese joint ventures in China in 1991. After the applicant's son passed away in 1993, the respondent asserted that her husband (the applicant's son) was the actual investor of the joint companies, and the dividends from the joint ventures should be regarded as part of the deceased's estate. The dispute between the applicant and the respondent involved the deceased's estate. The applicant filed the suit in the Qingdao Intermediate People's Court of Shandong Province ("Qingdao Court") and obtained a favourable judgment. Subsequently, the applicant asked the Osaka District Court to determine the identity of the investor in the joint ventures. The Osaka District Court dismissed the applicant's claim. Then the applicant appealed to the Osaka High Court.

The English translation of this judgment, see 48 *The Japanese Annual of International Law* 2005, p. 171 *et seq*.

[36] *Ibid.*

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between the two countries.[37] Ultimately, the Osaka High Court dismissed the applicant's claim.

The Osaka High Court's decision might be considered retaliation in response to the Dalian Court's decision.[38] The applicant was Japanese and the respondent was Chinese. Meanwhile, the respondent's two sons were Japanese nationals. The applicant's request was to determine his identity as the investor in the Chinese joint ventures. If the Osaka High Court had recognised and enforced the Chinese judgment, the Japanese party's interests could have been fulfilled. However, since China had previously refused to recognise a Japanese judgment, for lack of reciprocity, the Japanese court retaliated by refusing, for the same reason, to recognise and enforce the Chinese court's judgment. As a result, the recognition and enforcement of judgments between China and Japan is based on a model of mutual retaliation. Since the Osaka High Court's decision of 2003, this trend between China and Japan has continued. As recently as 2015, the Tokyo High Court followed the reasoning of the Osaka High Court and refused, for lack of reciprocity, to recognise a judgment rendered by a Chinese court.[39]

C. The Reciprocity Dilemma under the Sino-Japanese Model

There is what we would consider a "Reciprocity Dilemma" between China and Japan as far as the recognition and enforcement of judgments is concerned. Both China and Japan deny the existence of reciprocity and refuse to recognise and enforce each other's judgments. This result may be attributed to their different criteria for reciprocity.

As mentioned above, international conventions and reciprocity are two independent legal bases for Chinese courts to recognise foreign judgments. During

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[37] Osaka High Court (note 32), at 174. The Osaka High Court found that a Chinese court had previously recognised and enforced a divorce judgment issued by a Japanese court, but it was a divorce judgment, and different from the case at hand. The divorce judgment that had been recognised and enforced by the Chinese court was the *Li Geng Case of Recognition of a Japanese Divorce Decree* (李庚、丁映秋申请承认日本国法院作出的离婚调解协议案), citing Q. HE, The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Sanlian v. Robinson*, 6 *Tsinghua China Law Review* 2013-14, p. 35.

[38] B. ELBALTI (note 23), at 206.

[39] Tokyo District Court, 20 March 2015, Westlaw Japan (Ref. No. 2015WLJPCA 03208001). In this case, the applicant, Shuqin Xia, was a survivor of the Nanjing Massacre. She accused a Japanese scholar and his publisher of questioning the Nanjing Massacre in his book. In 2006, the Xuanwu District Court of Nanjing Municipality supported the applicant's claim and ordered the Japanese defendants to pay eight million yuan as compensation to the applicant. Later, the applicant requested the Tokyo District Court to recognise and enforce this judgment. The main issue was whether a similar Japanese judgment would be recognised and enforced by the Chinese courts. Considering the Chinese law and practice, the Tokyo District Court concluded that reciprocity could not be established between Japan and China, and the Chinese judgment was rejected. The Tokyo High Court confirmed the decision of the Tokyo District Court in 2015: Tokyo High Court, November 25, 2015, citing B. ELBALTI (note 23), at 207.

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an extended period of time, the application of a bilateral treaty was the only basis upon which Chinese courts would recognise and enforce foreign judgments.[40] In 2003, the Foshan Intermediate People's Court of Guangzhou Province recognised an Italian judgment based on the relevant provisions in the Bilateral Judicial Assistance Treaty on Civil Matters between China and Italy.[41] This case was reported as the first foreign bankruptcy judgment that was recognised by the Chinese court since China joined the WTO.[42] Similarly, a French bankruptcy judgment was recognised by the Zhongshan Intermediate People's Court of Guangzhou Province based on the bilateral treaty with France in 2005.[43] In the *FRIGOOPOL* case of 2013,[44] the Ningbo Intermediate People's Court of Zhejiang Province recognised and enforced a commercial judgment delivered by a Polish court based

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[40] Usually, the bilateral treaty contains the provisions on service of judicial documents, the gathering of evidence, the recognition and enforcement of arbitral awards or judgments, and other related issues. *E.g.*, the Treaty between China and Brazil on Judicial Assistance in Civil and Commercial Matters (中华人民共和国和巴西联邦共和国关于民事和商事司法协助的条约). This treaty contains six chapters, which are general provisions, service of judicial legal documents, collection of evidence, recognition and enforcement of courts' decisions and arbitral awards, the other provisions and the final provisions respectively. The bilateral treaties with Algeria, Argentina, Bulgaria, France, Hungary, Italy, Morocco, Peru, Spain, and Tunisia are all similar in form. However, some bilateral treaties, such as China's bilateral treaties with Korea, Singapore and Thailand, only contain provisions for the recognition and enforcement of arbitral awards as opposed to judgments rendered by courts (*e.g.* the Treaty between China and Singapore on Judicial Assistance in Civil and Commercial Matters (中华人民共和国和新加坡共和国关于民事和商事司法协助的条约), Chapter IV is entitled Recognition and Enforcement of Arbitral Awards (仲裁裁决的承认与执行).) Art. 20 states that the contracting parties shall recognise and enforce each other's arbitral awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Art. 25 of the Treaty between China and Korea on Judicial Assistance in Civil and Commercial Matters and Art. 20 of the Treaty between China and Thailand on Judicial Assistance in Civil and Commercial Matters and Arbitration Cooperation have similar expressions.

[41] *The B&T Ceramic Group s.r.l. v E.N. Group. s.p.a* (意大利 B&T Ceramic Group s. r. l.有限公司申请承认和执行外国法院判决案), citing J. LIU, A Case on Application for Recognition and Enforcement of Italian Court Ruling on Bankruptcy, 3 *China Law* 2003, p. 95 *et seq*.

[42] W. ZHANG (note 24), at 161.

[43] *Antoine Montier v Pellis Corium "P.E.L.C.O.R."*, the Zhongshan Intermediate People's Court of Guangdong Province, [2005] *sui zhong fa min san chu zi* No. 146 (法国普瓦提艾商业法院对法国百高洋行破产案，广州市中级人民法院[2005]穗中法民三初字第 146 号民事裁定书).

[44] *Przedsiębiorstwu Przemyslu Chlodniczego "FRIGOOPOL" S.A.w Opolu v Yongchang Industry & Trade Company*, the Ningbo Intermediate People's Court of Zhejiang Province, [2013] *zhe yong min que zi* No. 1 (弗里古波尔股份有限公司与被申请人宁波市甬昌工贸实业公司国际货物买卖合同纠纷案，浙江省宁波市中级人民法院[2013]浙甬民确字第 1 号民事裁定书). This case was published by the SPC as one of the top eight representative cases of the People's Court which provides judicial services for the construction of the "Belt and Road Initiatives".

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on the bilateral treaty between Poland and China. Although the Civil Procedure Law provides for two methods of reviewing the foreign judgments, it seems that bilateral treaties were considered more important at that time. Due to the absence of a bilateral treaty between China and Japan, Japanese judgments are, therefore, hardly recognised or enforced by the Chinese courts.

In the absence of international conventions or bilateral treaties, reciprocity is a prerequisite for recognition of foreign judgments under the Civil Procedure Law of China.[45] However, the expression of reciprocity in the Civil Procedure Law is "so simple and abstract", and there is no actual standard for the application of reciprocity.[46] Based on the *Gomi Akira* case and the SPC's Reply, the main criteria for reciprocity is factual reciprocity, *i.e.* there should be a precedent proving that the courts of the country of origin have recognised a judgment rendered by the Chinese courts.[47]

The SPC's interpretation plays a significant role in judicial practice, and can provide legal guidance to lower courts.[48] The Dalian Court's decision in the *Gomi Akira* case had been published in the Gazette of the SPC.[49] Meanwhile, the SPC issued an official reply for this case, which can be regarded as a reference for lower courts to deal with similar cases.[50] That is perhaps the reason why Chinese courts have never recognised a Japanese monetary judgment.

On the other side of the seas, Japan uses reciprocity as a basis for enforcing foreign judgments. According to Article 118(iv) of the Code of Civil Procedure, for recognising and enforcing foreign judgments, reciprocity should be guaranteed.[51] However, the expression of Article 118(iv) of the Code of Civil Procedure is also vague, and one cannot find in it an explicit explanation of reci-

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[45] Art. 282 of the CPL 2012.

[46] See S. WATANABE, A Study of a Series of Cases Caused Non-Recognition of a Judicial Judgment between Japan and Mainland China – A Cross-border Garnishment Order of the Japanese Court Issued to a Chinese Company as a Third-Party Debtor, 57 *Japanese Yearbook of International Law* 2014, p. 292.

[47] See Q. HE, *International Civil Litigation in Comparative Perspective*, Higher Education Press 2015, p. 326 (何其生：《比较法视野下的国际民事诉讼》，高等教育出版社 2015 年版).

[48] See note 27. Art. 127 of the Constitution of PRC (中华人民共和国宪法), which reads as follows: "[t]he SPC supervises the administration of justice by the local people's courts at different levels and by the special people's courts."

[49] The cases published by the SPC in its Gazette were supposed to guide the judges in the Chinese courts. In fact, these cases may be regarded as precedent, and have "regulatory effects" on later judgments. See G. TU, *Private International Law in China*, Springer Singapore 2016, p. 6 *et seq.*; N. LIU, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 *Journal of Chinese Law* 1991, p. 118.

[50] See XI FENG, A Study on the Recognition and Enforcement of Chinese Judgments Concerning Property Law Matters by Japanese Courts, (2017) 3 *Wuhan University International Law Review*, p. 47 (冯茜：《日本法院对我国财产关系判决的承认执行问题研究》，《武大国际法评论》2017 年第 3 期).

[51] S. WATANABE (note 46), at 298.

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procity.[52] The Japanese Supreme Court confirmed the criteria for reciprocity in a landmark decision of 1983.[53] Before this case, the guarantee of reciprocity required that the rendering country's criteria for recognition were the same or more generous than the criteria under Japanese law:[54] the judges had to compare the Japanese and the rendering country's requirements for recognition and enforcement of foreign judgments.[55] However, it was not easy to compare these requirements, and the "same or more generous" criterion was also difficult to assess.[56] Since 1983, the Japanese Supreme Court has changed its position. The present criteria of "almost the same or have no difference on the significant points" replace the previous criteria and are regarded by Japanese scholars as more liberal.[57] However, after the *Gomi Akira* case in 1994, Japanese courts assumed that Japanese judgments could hardly be recognised and enforced by Chinese courts. As a result, the relationship between the two countries suffered in terms of reciprocity regarding recognition and enforcement of the other country's judgments.

III. The Sino-Singaporean Model: Mutual Recognition

A. From the *Giant Light* Case to the *Kolmar* Case

Two cases establish the foundation for the mutual recognition model between China and Singapore: *Giant Light Metal Technology (Kunshan) Co Ltd. v Aksa Far East Pte Ltd.* (hereinafter *Giant Light*),[58] which is the first Chinese monetary judgment that was recognised and enforced by a Singaporean court; and, *Kolmar Group AG Co. Ltd. v Jiangsu Textile Import and Export Co. Ltd.* (hereinafter *Kolmar*),[59] which is the first foreign monetary judgment that was recognised and enforced by a Chinese court in the absence of a treaty.[60] Contrary to the Sino-

[52] *Ibid.*, 298 *et seq.*

[53] B. ELBALTI (note 23), at 193.

[54] S. WATANABE (note 46), at 299.

[55] *Ibid.*

[56] *Ibid.*

[57] B. ELBALTI (note 23), at 193 *et seq.*

[58] *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.

[59] See *Kolmar Group AG Co. Ltd. v Jiangsu Textile Import and Export Co. Ltd.*, Nanjing Intermediate People's Court of Jiangsu Province [2016] *su 01 xie wai ren* No. 3. (高尔集团与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院判决、裁定案，江苏省南京市中级人民法院[2016]苏 01 协外认 3 号民事裁定书).

[60] The first case recognised by the Chinese courts was the *Sascha Rudolf Seehaus Case*, [2012] *e wu han zhong min shang wai chu zi* No. 00016 ([2012]鄂武汉中民商外初字第 00016 号). This case was decided by a German court and recognised by the Wuhan Intermediate People's Court based on the principle of reciprocity in 2013, but it has not

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Japanese model of mutual retaliation, the Sino-Singaporean model can be regarded as a sign that the Chinese criteria for reciprocal recognition and enforcement of foreign judgments are changing.

In the *Giant Light* case, a Chinese plaintiff (a company incorporated in China) applied to the Singapore High Court for the recognition and enforcement of a judgment rendered by the Suzhou Intermediate People's Court of Jiangsu Province ("Suzhou Court").[61] Quoting Professor Adrian BRIGGS, Andrew ANG J emphasised the distinction between recognition and enforcement: "…to be enforced, a foreign judgment must first be recognized".[62] Then, he noted that, under the Singaporean common law rules, international jurisdiction and the requirement for a defined sum of money (an enforceable foreign judgment must be a pure money judgment) were the two most important issues for recognition and enforcement of the Chinese judgment.[63] Based on the authoritative scholars' opinions and the cross-examination of Chinese legal experts, the High Court of Singapore concluded that the Suzhou Court's judgment satisfied the Singaporean requirements for recognition and enforcement of foreign judgments. Eventually, this Chinese court's judgment was successfully recognised and enforced by the High Court of Singapore.

In the *Kolmar Case,*[64] the applicant, Kolmar Group AG Co. Ltd. ("Kolmar Group"), a Swiss incorporated company, applied to the Nanjing Intermediate People's Court of Jiangsu Province ("Nanjing Court") for the recognition and enforcement of a civil judgment rendered by the High Court of Singapore on 22 October 2015.[65] Although China and Singapore signed a bilateral treaty on Judicial

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been published. Therefore, the *Kolmar Case* is reported by the public as the first foreign case recognised and enforced by the Chinese courts based on the principle of reciprocity.

[61] The defendant was a company incorporated in Singapore that engaged in the import and export of goods. The disputes between two parties involved a breach of contract. The parties entered into a contract for the purchase of two new generator sets, and the plaintiff paid the defendant USD 190,000. However, the generator sets delivered by the defendant were neither new nor useable. In 2005, the plaintiff successfully sued the defendant in the Suzhou Court. The Suzhou Court ordered the termination of the contract between the parties, the return of the two generator sets to the defendant, and the refund, to the plaintiff, of USD 190,000 along with compensation (RMB 7088). See *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16, para. 9. In 2014, the Chinese applicant applied to the High Court of Singapore for the recognition and enforcement of the Suzhou Court's judgment.

[62] *Giant Light* (note 58), para. 15.

[63] *Ibid*., para. 19.

[64] [2016] *su 01 xie wai ren* No. 3.

[65] In this case, the respondent, Jiangsu Textile Import and Export Co. Ltd. ("Jiangsu Company"), had a dispute with the applicant over a sales agreement. The parties reached a settlement agreement to resolve their dispute. However, the respondent failed to fulfill its obligations under the settlement agreement, so the applicant filed suit in the High Court of Singapore in accordance with the jurisdiction clause of the settlement agreement. The respondent failed to appear in court, and the High Court of Singapore handed down a default judgment No. O13. The judgment No. O13 ordered the respondent to pay 350,000 dollars to the Kolmar Group. The order was properly served, but was completely ignored by

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Assistance in Civil and Commercial Matters in 1997,[66] the scope of judicial assistance does not cover recognition and enforcement of judgments or orders. Therefore, on the basis of Article 282 of the Civil Procedure Law, the defendant, Jiangsu Company, argued that the court should reject Kolmar Group's application. After the review, the Nanjing Court found that, in January 2014, the High Court of Singapore had made a decision in the *Giant Light* case (No. [2014]SGHC16)[67] to recognise and enforce a judgment issued by the Suzhou Court. On this basis, the Nanjing Court applied the principle of reciprocity and held that the Chinese court could recognise and enforce the civil judgment issued by the High Court of Singapore.

To a certain extent, the Nanjing Court's decision in the *Kolmar Case* breaks through old shackles: previously, Chinese courts would insist on the existence of an international treaty. Although a bilateral treaty can increase the foreseeability and certainty in bilateral cooperation, the emphasis on the existence of the bilateral treaty left little space for the application of reciprocity.

The *Kolmar Case* has already had an impact on the practice in the following Chinese cases. On 30 June 2017, the Wuhan Intermediate People's Court ("Wuhan Court") recognised and enforced a civil judgment rendered by the Superior Court of California, County of Los Angeles, based on the principle of reciprocity[68] though China and the United States have no relevant treaty in place. In this case, based on the *Hubei Gezhouba Sanlian Indus. Co. v Robinson Helicopter Co.* case,[69] the Wuhan Court found that a relationship of reciprocity exists between U.S. and China.[70] The Wuhan Court's decision is the second published case where Chinese courts have recognised and enforced a foreign judgment based on the principle of reciprocity. Considering the current stagnation with respect to the negotiation of new bilateral treaties, as well as past judicial practice, the Sino-Singaporean model can be regarded as a new beginning for the judicial reform of recognition and enforcement of foreign judgments in China.

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the respondent. Because the respondent had property in China, Kolmar Group applied for recognition and enforcement of the judgment in the Nanjing Court in accordance with the Civil Procedure Law and the relevant judicial interpretation and regulations.

[66] China and Singapore signed the Treaty on Judicial Assistance in Civil and Commercial Matters on 28 April 2017; this treaty came into force on 27 June 1999.

[67] *Giant Light* (note 58).

[68] *Liu Li v Tao Li & Tong Wu*, the Intermediate People's Court of Wuhan Municipality of Hubei Province [2015] *e wu han zhong min shang wai chu zi* No. 00026 (申请人刘利与被申请人陶莉、童武申请承认和执行外国法院民事判决案，湖北省武汉市中级人民法院[2015]鄂武汉中民商外初字第 00026 号民事裁定书).

[69] *Hubei Gezhouba Sanlian Indus. Co. v Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, (C.D. Cal. 22 July 2009), aff'd, 425 F. App'x 580 (9th Cir. 2011). In this case, the Central District Court of California recognised a judgment rendered by the Chinese High People's Court of Hubei Province, and the decision of the Central District Court of California was affirmed by the United States Court of Appeals for the Ninth Circuit.

[70] See *Liu Li* (note 68).

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B. Contributing Factors to Mutual Recognition

Between China and Singapore, the mutual recognition and enforcement of judgments is of great importance for the development of reciprocity. The *Giant Light* case, the first case in which a Singaporean court recognised and enforced a Chinese court's monetary judgment, had a significant impact on the China's and Singapore's mutual recognition and enforcement of judgments. The Nanjing Court's decision in the *Kolmar* case has also been reported as being a "milestone decision" and "landmark development".[71] The contributing factors to this mutual recognition model are the transformation of the criteria for reciprocity in Chinese courts (1) and the promotion of the "Belt and Road Initiatives" (2).

1. Reciprocity Granted by the Chinese Court

Under the Sino-Singaporean model, a treaty is no longer the only criterion to establish reciprocity between the two countries. As mentioned above, China has bilateral treaties on judicial assistance in civil and commercial matters with 39 different countries.[72] From 2012 to 2018, there has been no considerable progress on the negotiation of additional relevant treaties. Because the negotiation of bilateral treaties has reached an impasse, the application of reciprocity is increasingly needed. As a matter of fact, the High Court of Singapore did not adopt the principle of reciprocity in the *Giant Light* case. Under the common law regime of Singapore, reciprocity is not a requirement for recognition and enforcement of foreign judgments.[73] The Suzhou Court's judgment satisfied the necessary conditions for Singapore to enforce a foreign judgment. Even though the *Giant Light* case was not enforced based on reciprocity, the Nanjing Court, in the *Kolmar* case,

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[71] See R. KEADY/ J. ZHUANG, Nanjing Court Enforces Singapore Judgment Based on the Principle of Reciprocity, Bird & Bird, 16 February 2017, available at <www.twobirds.com/en/news/articles/2017/singapore/nanjing-court-enforces-singapore-judgment-based-on-the-principle-of-reciprocity>; Asia Today Internationally, Chinese Court Recognizes Singapore Judgment Based on the Principle of Reciprocity, Asia Today Internationally, 1 February 2017, available at <asiatoday.com.au/content/chinese-court-recognises-singapore-judgment-based-principle-reciprocity>; Baker McKenzie, First Time PRC Court Recognizes a Foreign Judgment Based on Principle of Reciprocity Baker & McKenzie, January 2017, available at <f.datasrvr.com/fr1/317/73750/2017-042.pdf>. Many Chinese net news also reported this case and the Nanjing Court's decision. See L. CHEN/ Y. CHEN, First Time Nanjing Court Recognized and Enforced Singapore Court Judgment, (南京中院首次裁定承认执行新加坡法院判决) (Dispute Resolution, 28 January 2017), available at <sanwen8.cn/p/60bHmuV.html>; BIN ZHOU, First time Chinese Court Recognized and Enforced a Singapore Court Judgment (我国首次承认执行新加坡商事判决), (Legal Daily, 16 May 2017), available at <legal.people.com.cn/n1/2017/0516/c42510-29277953.html>.

[72] The latest bilateral treaty signed by China in 2014 was the Treaty between PRC and Ethiopia on Judicial Assistance in Civil and Commercial Matters, and this treaty came into force on 3rd January 2018.

[73] See K.C. LYE/ C.T. YEO, Singapore, in C. J.H. VAN LYNDEN & AKD Lawyers and Civil Law Notaries (eds), *Enforcement of Judgments, Awards & Deeds in Commercial Matters*, London 2013, p. 260 *et seq*.

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regarded the *Giant Light* case as the basis for the factual reciprocity between Singapore and China.

2. *Promotion of the "Belt and Road Initiative"*

The most important contributing factor to China's recognition and enforcement of the Singaporean judgment in the *Kolmar* case was China's promotion of its "Belt and Road Initiative".[74] This new Initiative responds to current economic development demands, and will thereby promote China's judicial reform and international cooperation. The promotion of this Initiative also reflects China's changes in three different areas.

Considering the requirements for building a new and more open economy system, the restrictive criteria for reciprocity, previously adopted by Chinese courts, are adverse to the protection of both Chinese and foreign parties' legitimate interests.[75] Before the *Giant Light* case, neither bilateral treaties nor reciprocal relationships existed between China and its major commercial partners, including the U.S., the United Kingdom, Canada, and Japan. This situation will impede China's progress in terms of economic co-operation in the long run; therefore, China must make changes in order to promote its "opening-up" reform.

From a judicial reform perspective, the Nanjing Court's decision in the *Kolmar* case follows the new judicial guidance of the SPC under the "Belt and Road Initiative". In 2015, the SPC published the "Suggestions to the People's Courts on Providing Judicial Service and Legal Guarantees to the Belt and Road Initiative" ("the SPC's Suggestions"),[76] which aim to provide instruction to lower courts and legal guarantees for the promotion of the "Belt and Road Initiative". Article 6 of the SPC's Suggestions emphasises that the People's Courts should strengthen international judicial cooperation with countries along the "Belt and Road", and protect the legitimate rights and interests of both Chinese and foreign parties. The Article further states that if a country along the "Belt and Road" has no bilateral treaty regarding judicial assistance with China, but is likely to have

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[74] The "Belt and Road" refers to the Silk Road Economic Belt and the 21st Century Maritime Silk Road, which is a systematic program. This project aims to promote the connectivity of Asia, European and African continents and their adjacent seas and to establish and strengthen mutually beneficial co-operation to a new high and in new forms: see The State Council of the PRC, "Full text: Action plan on the Belt and Road Initiative" 30 March 2015, available at <english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm>. More information about the "Belt and Road Initiative" can be found on this website.

[75] See Y. ZHANG, Speech at the National Forum of the Chief Judges from the Courts of Foreign-related Commercial and Maritime Trial, in E. WAN (ed.), *China Trail Guide on Foreign-related Commercial and Maritime Trial,* People's Court Press 2017, p. 18. (张勇健：《在全国涉外商事海事审判庭长座谈会上的讲话，载万鄂湘主编《涉外商事海事审判指导》, 2016 年第 1 辑（总第 32 辑，人民法院出版社 2017 版).

[76] The SPC's Suggestions to the People's Courts on Providing Judicial Service and Legal Guarantee to the "Belt and Road Initiative", *fa fa* [2015] No.9. (《最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见》， 法发[2015]9 号).

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more judicial cooperation with China in the future, or if the country promises reciprocity to China in the future, China can take the first step to grant reciprocity to this country, that is to say, China could recognise a decision from that country even in the absence of a precedent specifically recognising a Chinese court's decision in that country. Based on this Article, presumed reciprocity has been confirmed by the SPC, and China has adopted more generous criteria for reciprocity than before. By adopting this flexible standard, the Sino-Singaporean model of mutual recognition can be further improved and popularised.

The mutual recognition, between China and Singapore, of judicial decisions, is also attributed to policy coordination under the "Belt and Road Initiative". Improving policy coordination is of great significance for the implementation of this initiative, which requires China to strengthen intergovernmental co-operation and enhance mutual political trust.[77] Singapore is a country along the "Belt and Road"; therefore, establishing a reciprocal relationship between China and Singapore is a natural and reasonable result.

In conclusion, considering the abstract notion of reciprocity in China's legislation, the SPC's interpretation is necessary to guide judicial practice. From the SPC's Reply on the *Gomi Akira* case to the SPC's Suggestions under the promotion of the "Belt and Road Initiative", the SPC's attitude toward the application of reciprocity is increasingly flexible. For China's future development regarding the recognition and enforcement of foreign judgments, adopting flexible criteria for reciprocity and reinforcing international co-operation on judicial assistance is essential. This requires further internal reform and external co-operation.

IV. The Way Forward: Internal Reform and External Co-operation

With the rapid development of the world economy, international transactions between China and other countries are growing. China needs to correspondingly, reform its current international civil procedure to adapt to this change.[78] To enhance the criteria of reciprocity and protect the interests of private parties, the internal reform promoted by China is the first step. Meanwhile, co-operation at the international level should be guaranteed and strengthened.

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[77] See The State Council of the PRC (note 74).

[78] About the relationship of economic development and judicial reform, see Q. HE, The Idea of Justice in a Major Country and the Development of International Civil Procedure in China, 5 *Social Science in China* 2017, p. 123 *et seq*. (何其生：《大国司法理念与中国国际民事诉讼制度的发展》，《中国社会科学》2017 年第 5 期).

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A. Internal Reform: Abolishing Reciprocity or Transforming Reciprocity

Reforming the internal legal system is the foundation for improving judicial cooperation in the recognition and enforcement of judgments. Many European countries, such as Belgium,[79] Bulgaria,[80] Lithuania,[81] Macedonia,[82] Poland,[83] and Switzerland,[84] have abolished the requirement for reciprocity in the recognition and enforcement of foreign judgments. The trend of abolishing reciprocity can also be found in some Latin American countries, such as Brazil[85] and Venezuela.[86] The criteria for reciprocity adopted by the Chinese courts have also been criticised by many Chinese scholars.[87] However, considering the present situation, the abandonment of the requirement for reciprocity in the legislation is not feasible.[88] Since China is a Civil Law country, abolishing the requirement for reciprocity means amending the current provisions in the Civil Procedure Law, which requires legislative action on the part of the National People's Congress of China, which may be time-consuming. Also, although reciprocity may benefit private parties by creating incentives for a foreign country to enforce judgments rendered by domestic courts,[89] recognition and enforcement of foreign judgments is an issue that involves a country's judicial sovereignty. As a doctrine born in the wake of the

[79] See K. MUL, Belgium (updated 2017), in L. GARB/ L. JULIAN (eds), *Enforcement of Foreign Judgments*, Kluwer Law International, p. 5.

[80] See R. VOUTCHEVA *et al.*, Republic of Bulgaria (updated 2015), in L. GARB/ L. JULIAN (note 79), p. 5.

[81] B. ELBALTI (note 23), at 187.

[82] See A.D. HUG, Republic of Macedonia (updated 2016), in L. GARB/ L. JULIAN (note 79), p. 6.

[83] See M. GRUCA, Poland (updated 2017), in L. GARB/ L. JULIAN (note 79), p. 5.

[84] See M. REITER/ L. NAEF, Switzerland (updated 2016), in L. GARB/ L. JULIAN (note 79), p. 13.

[85] See A. CAMARGO RODRIGUES, Brazil (updated 2017), in L. GARB/ L. JULIAN (note 79), p. 3 *et seq*.

[86] See A.G. VISO, Venezuela (updated 2015), in L. GARB/ L. JULIAN (note 79), p. 6.

[87] The criticism against reciprocity can be found in some Chinese scholars' articles. See W. ZHANG (note 24), at 155; J. WANG, Defects of the Reciprocal Principle in Recognition and Enforcement of Judgments, 3 *Journal of Yunnan University* (Law Edition) 2008, p. 170. (王吉文：《互惠原则在判决承认与执行上的缺陷》，《云南大学学报法学版》2008 年第 3 期).

[88] See T. DU, The Principle of Reciprocity and Recognition and Enforcement of Foreign Judgments, 1 *Global Law Review* 2007, p. 118 (杜涛：《互惠原则与外国法院判决的承认与执行》，《环球法律评论》2007 年第 1 期); Y. LIU, Rethinking the Role of the Principle of Reciprocity in the Course of the Recognition and Enforcement of Foreign Judgments with the Berlin Higher Court to Recognize the Judgment of Wuxi Intermediate Court of the PRC as A Case Study, 3 People's Judicature 2009, 99. (刘懿彤：《互惠原则在承认和执行外国法院判决中作用的再认识——以德国柏林高等法院承认中国无锡中院判决为案例》，《人民司法》2009 年第 3 期).

[89] See J.F. COYLE, Rethinking Judgments Reciprocity, 92 *North Carolina Law Review* 2014, p. 1112.

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emergence of the idea of sovereignty, reciprocity can be an appropriate way to produce cooperation among sovereign countries.[90] The legislature of China attaches importance to the notion of sovereignty in international relations,[91] so abolishing reciprocity in legislation is impractical. Therefore, transforming the criteria of reciprocity and reinforcing the operability of reciprocity could be a practical solution.

The proper way to achieve this solution is for the SPC to promulgate a judicial interpretation on recognition and enforcement of foreign judgments in civil and commercial matters, and to fix the criteria of the presumed reciprocity in this new document on judicial interpretation. Such a document issued by the SPC would improve legal certainty and foreseeability and provide sufficient and detailed guidance to Chinese courts. As for the future application of presumed reciprocity, there are two issues need to be considered.

First, a system of internal co-operation of courts, specifically a case-reporting regime, is necessary. If any courts become aware that judgments rendered by Chinese courts have been recognised and enforced by foreign countries' courts, these courts should report the information to the higher level courts. When the SPC is informed of the precedents, it should circulate a notice to all national courts.[92] This reporting system will benefit the parties and increase judicial efficiency.

Second, under presumed reciprocity, both applicant and respondent can extricate themselves from the burden of proof. In the legislation of many countries, if the requested country's judgments are likely to be recognised and enforced by the courts of the rendering country, reciprocity can be established between the two nations.[93] In other countries, contrary to factual reciprocity, presumed reciprocity represents a reversed way to presume the existence of reciprocity. If there is no evidence to prove that the rendering country has refused to recognise and enforce, for lack of reciprocity, the judgments delivered by Chinese courts, then reciprocity is presumed to exist.[94] In fact, the above SPC's Suggestions include a presumed way to promote judicial cooperation with countries that have no bilateral treaties with China. By adopting presumed reciprocity, the parties' rights and interests can better be protected, and it would be easier to build up bilateral co-operation on recognition and enforcement of foreign judgments. With the safeguard of presumed reciprocity, the Sino-Singaporean model will have a bright prospect. However, internal reform is still not enough; it is merely a unilateral action to facilitate free movement of civil and commercial judgments in the global area. Further advancement required increased international cooperation.

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[90] See R.O. KEOHANE, Reciprocity in International Relations, *40 International Organization* 1986, p. 1 *et seq*.

[91] T. DU (note 88), at 118.

[92] Y. ZHANG (note 75).

[93] B. ELBALTI (note 23), at 191.

[94] See Q. HE, The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Sanlian v. Robinson*, 6 *Tsinghua China Law Review* 2013-14, p. 38.

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B. External Co-operation: Providing More Certainty

External co-operation includes three-level action, *i.e.*, bilateral, regional and multilateral cooperation.

First, bilateral treaties on judicial assistance are efficient to promote mutual recognition and enforcement of judgments. The bilateral treaty does not only operate as a legal instrument for courts in the two countries to mutually enforce judgments, but can also unify the conditions for recognition and enforcement of judgments between two countries.[95] As noted above, China has bilateral treaties with 39 countries in the area of judicial assistance.[96] Some of those bilateral treaties provide explicit provisions for recognising and enforcing judgments between China and the other contracting State. However, since the number of bilateral treaties is limited, the application of international treaties will be correspondingly limited. The process of concluding and ratifying bilateral treaties takes time and energy, and the contracting States are limited in number.[97] Furthermore, as mentioned above, China's negotiation of bilateral treaties is stagnating. Therefore, adopting alternative methods of improving bilateral cooperation is essential to China.

Under Article 6 of the SPC's Suggestions, the precondition for unilaterally providing reciprocity is the rendering country's promise or intention. This expression is quite general and abstract. In order to know the rendering countries' intention, China can strengthen its diplomatic and judicial cooperation at the bilateral level. Through cooperation, by informing the rendering country about China's intention to provide reciprocity and by asking the rendering country's intention regarding reciprocity, if the rendering country has the intention to give reciprocity to China, China can take the first step to establish reciprocity.[98] Diplomatic or judicial cooperation allow China and the rendering country to learn each other's intentions of establishing reciprocity, which could encourage the two countries to achieve mutual guarantees and accelerate the establishment of a reciprocal relationship.

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[95] *Ibid.*

[96] Those countries are Algeria, Argentina, Belarus, Brazil, Bosnia and Herzegovina, Bulgaria, Cuba, Cyprus, Egypt, France, Greece, Hungary, Italy, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Laos, Lithuania, Mongolia, Morocco, North Korea, Peru, Poland, Romania, Russia, Singapore, Spain, Tajikistan, Thailand, Tunisia, Turkey, Ukraine, the United Arab Emirates, Uzbekistan, Vietnam, Ethiopia, Iran (not come into force), and Belgium (not come into force). Among those 39 bilateral treaties, there are 19 bilateral treaties on judicial assistance in civil and criminal matters and 20 bilateral treaties on judicial assistance in civil and commercial matters. See the website of the Ministry of Foreign Affairs of the PRC (中华人民共和国外交部), available at <www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml>.

[97] See J. WANG, Analysis of the Necessity for China to Ratify the Hague Convention on Choice of Court Agreements, 16 *Anhui University Law Review* 2009, p. 162 *et seq*. (王吉文：《我国批准海牙<选择法院协议公约>的必要性分析》，《安徽大学法律评论》2009 年第 1 辑).

[98] Y. ZHANG (note 75).

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Second, even though recognition and enforcement of foreign judgments is vital to transnational commerce and trade, very few instruments regulate this issue in the global sphere. Nonetheless, the regional cooperation has achieved significant success. The mutual recognition and enforcement of cross-border judgments in the European Union (EU) is a representative and fruitful model of regional cooperation.[99] After the new Brussels I Regulation ("Brussels I-*bis*")[100] was adopted on 12 December 2012 and came into force on 10 January 2015, this new "Brussels I-*bis* Regime" began facilitating the cross-border circulation of judgments in civil and commercial matters among the EU Member States.[101] The free movement of judgments within the EU has been achieved.

Similarly, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, signed in 1979 (the "Montevideo Convention"), aims to ensure the extraterritorial validity of judgments and arbitral awards in Latin American countries.[102] As a development and complement to the Montevideo Convention, the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (the "La Paz Convention") was signed in 1984.[103] The Montevideo Convention and the La Paz Convention promote the mutual recognition and enforcement of judgments among the Latin American countries.[104] Among the Arabian Gulf countries, there are two regional conventions regarding the recognition and enforcement of

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[99] In 1968, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention") was signed by the six Member States of the European Economic Community. The Brussels Convention established an organised system for the recognition and enforcement of foreign judgments in civil and commercial matters. Since the Treaty of Amsterdam came into force in 1999, judicial co-operation in civil matters has become a specific EU policy area in its First Pillar. E. STORKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered*, Oxford University Press 2008, p. 4. Following this change, the 1968 Brussels Convention was replaced by the 2001 Brussels I Regulation. See Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Brussels I Regulation") [2001] OJ L012/1, 16.1.2001.

[100] 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 [2012] OJ L351/1, 20.12.2012.

[101] See Ph. HOVAGUIMIAN, The Enforcement of Foreign Judgments under Brussels I bis: False Alarms and Real Concerns, 11 *JPIL* 2015, p. 212.

[102] Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (adopted 8 May 1979, in force 14 June 1980), available at <www.oas.org/juridico/english/treaties/b-41.html>. This convention was ratified by nine countries: Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

[103] Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (adopted 24 May 1984, in force 24 December 2004), available at <www.oas.org/juridico/english/treaties/b-50.html>.

[104] See J.D. AMADO, Recognition and Enforcement of Foreign Judgments in Latin American Countries: An Overview and Update, 31 *Virginia Journal of International Law* 1990-91, p. 108.

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judgments. The first one is the Gulf Cooperation Council Convention in 1996 (the "GCC Convention"); the second is the 1983 Riyadh Arab Agreement for Judicial Cooperation (the "Riyadh Convention").[105] Article 1 of the GCC Convention mandates reciprocal recognition of foreign judgments among the GCC countries.[106] The Riyadh Convention also contains provisions for recognition and enforcement of foreign judgments,[107] and Article 32(1) of this convention establishes a specific *exequatur* procedure to promote the recognition and enforcement of foreign judgments among the Contracting States.[108]

The achievement of those regional conventions can be attributed to the endeavour of intergovernmental co-operation, and the free movement of judgments in the regional area becomes a trend in the present international community. This trend will have an impact on the recognition and enforcement of Chinese judgments abroad. For instance, under the Brussels I-*bis* Regime, a German court rendered a commercial judgment against a Chinese company. If this German judgment satisfies the related requirements of the Brussels I-*bis*, this judgment could be recognised and enforced in all EU Member States. On the contrary, a judgment rendered by a Chinese court against a party of an EU Member State cannot enjoy the same kind of treatment. Enhancing intergovernmental co-operation among China and regional economic integration organisations is one way to accelerate judicial cooperation with the regions of these organisations.

Recently, a new event has facilitated the cooperation in recognition and enforcement of judgments among China and ASEAN (the Association of Southeast Asian Nations) countries. On 8 June 2017, the Second China-ASEAN Justice Forum published the "Nanning Statement".[109] The Nanning Statement is a multilateral consensus on "justice and regional judicial cooperation" in the Internet era.[110] One purpose of this Statement is to improve the cross-border dispute resolution mechanism and to promote mutual recognition and enforcement of civil and commercial judgments. The consensus of the Nanning Statement contains eight sections, and Section seven of the Nanning Statement states that:

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[105] See S. KANTARIA, The Enforcement of Foreign Judgments in the UAE and DIFC Courts, 28 *Arab Law Quarterly* 2014, p. 195.

[106] The Gulf Cooperation Council Convention, Art. 1, citing N. BREMER, Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries, 3 *McGill Journal of Dispute Resolution* 2016-17, p. 40.

[107] The Riyadh Arab Agreement for Judicial Cooperation (entered into force 6 April 1983), Art. 25, available at <www.refworld.org/docid/3ae6b38d8.html>.

[108] N. BREMER (note 106).

[109] The Chief Justices, Supreme Court Presidents and Judges from China, ASEAN and other South Asian Countries attended this forum. The forum was held in Nanning, China. See Xingguang Jiang, Nanning Declaration Approved at Justice Forum, (The Supreme People's Court of the PRC, 9 June 2017), available at <english.court.gov.cn/2017-06/09/content_29686326.htm>.

[110] The English translation of the Nanning Statement, see Nanning declaration of the second China ASEAN forum on justice, available at <www.48hnews.com/2017/06/08/nanning-declaration-of-the-second-china-asean-forum-on-justice/>.

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> Regional cross-border transactions and investments require a judicial safeguard based on appropriate mutual recognition and enforcement of judicial judgments among countries in the region. Subject to their domestic laws, Supreme courts of participating countries will keep good faith in interpreting domestic laws, try to avoid unnecessary parallel proceedings, and consider facilitating the appropriate mutual recognition and enforcement of civil or commercial judgments among different jurisdictions. If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, presume the existence of their reciprocal relationship, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity.[111]

China is one of the participating members of this consensus, so presumed reciprocity in the Nanning Statement applies to recognition and enforcement of civil and commercial judgments between China and other participating countries. This regional statement increases judicial trust between China and the ASEAN countries, which can be deemed as a basis for the further regional co-operation on mutual recognition and enforcement of foreign judgments. However, the Nanning Statement is not an intergovernmental document, and has no binding force on its participating countries. Even in Asia, there is no regional convention on judicial co-operation. As such, the intergovernmental cooperation with the ASEAN countries should be further facilitated and strengthened. If the Nanning Statement can become a Nanning Convention, it will greatly promote mutual recognition and enforcement of judgments in civil and commercial matters in the future.

Third, a universal convention on recognition and enforcement of foreign judgments would be a great achievement for the global economy. If there is an international treaty that could bind most countries in the field of recognition and enforcement of foreign judgments, reciprocity would exist among all the Member States. However, contrary to achievements in regional cooperation, international cooperation on recognition and enforcement of foreign judgments has experienced more complications and challenges.

The Judgments Project[112] undertaken by the Hague Conference since 1992 is of great importance to promote the elaboration of an international instrument on recognition and enforcement of foreign judgments. However, the initial plan to develop a double convention or mixed convention ultimately failed in 2001.[113] A

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[111] "Nanning Statement of the Second China-ASEAN Justice Forum (第二届中国-东盟大法官论坛南宁声明)" (The Supreme People's Court of the PRC, 9 June 2017), available at <www.court.gov.cn/zixun-xiangqing-47372.html>.

[112] HCCH, The Judgment Project of the Hague Conference, available at <www.hcch.net/en/projects/legislative-projects/judgments>.

[113] See P. Beaumont, The Revived Judgments Project in The Hague, 4 *Nederlands Internationaal Privaatrecht* 2014, p. 532.

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"double" or "mixed" convention combines the issue of jurisdiction with the issue of recognition and enforcement of foreign judgments, and mixing the two questions in one international instrument is doomed to failure.[114] The double convention model regulates both direct and indirect jurisdiction, and requires a high degree of consensus.[115] Considering the differences in these countries' legal systems, economy, politics and cultures, in the present stage, this consensus is hard to achieve. The mixed convention model follows the pattern of the double convention but is not as exhaustive, and allows the courts of Contracting States to invoke jurisdiction based on national law within certain limits.[116]

In order to remedy the previous failure, the Hague Convention on Choice of Court Agreements was adopted on 30 June 2005, and can be regarded as the first fruit of the Judgments Project.[117]

Since China aims to promote commercial co-operation with more countries, and constructing a global legal framework for the recognition and enforcement of foreign judgments in civil and commercial matters would be in the interests not only of Chinese private parties doing business abroad, but also foreign private parties doing business in China. On 12 September 2017, China signed the 2005 Hague Choice of Court Convention, which means that China recognises that the text of the Convention is in line with Chinese law. China should consider ratifying the 2005 Hague Convention and use this opportunity to promote the free movement of judgments. The purpose of the 2005 Hague Convention is to establish uniform rules on international cases with exclusive choice of court agreements reached in civil or commercial matters.[118] Ratifying the Convention is both an opportunity and a challenge for China. On the one hand, its ratification means that Chinese courts have to recognise and enforce more foreign judgments in the near future. The Convention gives appropriate weight to party autonomy, which may encourage Chinese parties to choose foreign courts.[119] On the other hand, ratifying the Convention may stimulate China to establish an open foreign-related trial

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[114] See Y. OESTREICHER, The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments, 6 *Washington University Global Studies Law Review* 2007, p. 341.

[115] HCCH, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission and Reported by P. NYGH and F. POCAR, adopted on August 2000, available at <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf>, visited on 17 August 2017.

[116] HCCH, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission and Reported by P. NYGH and F. POCAR, adopted on August 2000, available at <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf>, visited on 17 August 2017.

[117] P. BEAUMONT (note 113), at 533. See also Y. OESTREICHER, "We're on a Road to Nowhere" – Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments, 42 *Int'l Law* 2008, p. 77 *et seq*. In another Prof. Y. OESTERICHER's article, he suggested that a "single" convention could be adopted. With this "simple" convention model, a "presumption of enforceability" rule with extensive exceptions will be promoted. See Y. OESTREICHER (note 114), at 339.

[118] Convention on Choice of Court Agreements, Art. 1(1).

[119] Q. HE (note 78), at 143 *et seq*.

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mechanism and enhance the enforceability of Chinese courts' judgments in the global sphere.

Furthermore, participating in the elaboration of an international instrument, especially in the framework of the Hague Judgments Project, is an effective way for China to promote recognition and enforcement of judgments. Since 2011, the Hague Conference on Private International Law has revived the Judgments Project, and the Council on General Affairs and Policy established a Working Group to prepare proposals on the recognition and enforcement of foreign judgments in civil and commercial matters.[120] Strengthening intergovernmental co-operation at the multilateral level is conducive to reaching the necessary consensus to establish a global network on the recognition and enforcement of foreign judgments. As compared to reciprocity, a global convention might promote the free movement of judgments and provide more certainty in their recognition and enforcement.

V. Conclusion

The mutual retaliation between China and Japan in terms of the recognition and enforcement of judgments from the two countries results from their different criteria for reciprocity and the restrictive Chinese view that reciprocity must be factual. At present, since it is not possible to abolish reciprocity in the legislation, it is necessary for China to enhance the operability and flexibility of reciprocity and to engage in international co-operation.

The *Kolmar Case* between China and Singapore can be regarded as a landmark development in China's reform on recognition and enforcement of foreign judgments. This development can be attributed to the new guidance provided by the SPC. Moreover, with the promotion of the "Belt and Road Initiative" and the consensus reached by the Nanning Statement, China's restrictive criteria for reciprocity may evolve into a more flexible approach. Factual reciprocity is no longer the sole criterion used to determine whether a reciprocal relationship exists between China and the rendering country. The rendering countries' intention or promise to provide reciprocity may also be a criterion based

[120] HCCH, The Judgment Project of the Hague Conference, available at <www.hcch.net/en/projects/legislative-projects/judgments>. The early stage (1992-2001) failure of the Judgments Project may be attributed to the mistrust and suspicion existing between different jurisdictions, and the attempt to produce a convention on a "double" or "mixed" convention model, which combines the issue of jurisdiction with the issue of recognition and enforcement of foreign judgments. According to the provisions of the double convention, the Contracting States need to modify their national law relating to international jurisdiction. The Brussels Convention and Lugano Convention are examples of double convention format, and their success can be attributed to the fact that the Contracting States share substantially similar interests. In light of past failures and experiences, the Judgments Project seeks to establish a robust, single convention on recognition and enforcement of foreign judgments. Regarding the discussion of the Hague Judgments Project, please see Y. OESTREICHER (note 114), at 342 *et seq*.; Y. OESTREICHER (note 117), at 77 *et seq*.; P. BEAUMONT (note 109), at 532.

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on which China may base its unilateral decision to recognise and enforce the rendering country's decision. In addition, as long as the court of rendering country has not yet refused, for lack of reciprocity, judgments made by the Chinese courts Chinese courts can presume the existence of reciprocity between China and the rendering country. If, for example, the rendering country has refused to recognise and enforce a Chinese judgment for reasons of due process or based on other grounds, this cannot justify the Chinese court's refusal to recognise and enforce the rendering country's judgment for want of reciprocity

From the Sino-Japanese model to the Sino-Singaporean model, China's regime of recognition and enforcement of foreign judgments has entered into a new stage, and the reform on reciprocity is a typical instance in this new stage. However, unilateral reform is not sufficient. In order to establish a global and comprehensive network for the recognition and enforcement of foreign judgments, China should reinforce diplomatic cooperation and adopt presumed reciprocity to improve bilateral reciprocal relationships. At the regional level, China should strengthen intergovernmental co-operation and reach a multilateral consensus with the ASEAN countries. At the international level, ratifying the 2005 Hague Choice of Court Convention is an opportunity for China. It will facilitate China's participation in establishing uniform rules on recognition and enforcement of foreign judgments. Meanwhile, the Judgments Project has achieved good progress on a draft Convention. Establishing uniform rules on the free movement of judgments in the global sphere is a general trend. Internal reform and external co-operation are essential methods through which China may conform to this developing trend.

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UNIFORM JURISDICTION RULES UNDER THE HAGUE CHOICE OF COURT CONVENTION

Johannes LANDBRECHT[*]

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 109-143
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I. Coordinating Diversity *versus* Harmonising Jurisdiction Rules

The Hague "Convention of 30 June 2005 on Choice of Court Agreements"[1] (the "Convention") establishes "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters",[2] aiming at "an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements".[3]

It is submitted that, in order to attain these objectives of certainty and effectiveness, the Convention's jurisdiction provisions, Art. 5, Art. 6, Art. 8, and Art. 9(a)-(b),[4] must be interpreted primarily as conflict rules, with as little substantive content as possible.[5] These provisions harmonise, at treaty level, the determination of the applicable law, *i.e.* they coordinate diversity. But they do not harmonise the substance of jurisdiction rules. The outcome of this approach is not a uniform regulatory framework in the abstract, *i.e.* not all choice of court agreements within the Convention's scope will be governed by identical rules. However, uniformity is achieved from the perspective of individual agreements, all competent courts and authorities applying (for the most part) the same rules.

The Convention has a formal concept of chosen court (below II.). From a systematic point of view, most substantive issues of effectiveness of choice of court agreements – insofar as the Convention remains silent – may therefore be relegated to domestic law (below III.). This interpretation maximises the extent to which the objectives of the Convention are achieved (below IV.).

II. Formal Concept of "Chosen Court"

Whether a court is chosen, for the purposes of the Convention, is a formal rather than a substantive matter. The Convention is largely agnostic as to substantive issues concerning the effectiveness of choice of court agreements.

First, Art. 3(a) defines the notion of an "exclusive choice of court agreement" by reference to formalities in Art. 3(c) and the fact that the agreement

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[1] 44 I.L.M. 1294 (2005); entry into force for the EU and Mexico on 1 October 2015, for Singapore on 1 October 2016. A Hague "Convention of 25 November 1965 on the Choice of Court" was signed only by Israel and has no Contracting States. Prominent among the materials is T.C. HARTLEY/ M. DOGAUCHI, *Explanatory Report. Convention of 30 June 2005 on Choice of Court Agreements*, Text adopted by the Twentieth Session.

[2] Convention, Preamble, para. 3.

[3] Convention, Preamble, para. 4.

[4] Articles without specification are those of the Convention.

[5] A substantive rule (*Sachnorm*) (domestic or treaty level) directly regulates a certain issue, *e.g.* formal requirements. A conflict rule (*Kollisionsnorm*) merely designates a legal regime to regulate such issue. See *e.g.* C. VON BAR/ P. MANKOWSKI, *Internationales Privatrecht*, vol. I, 2nd ed., C.H. Beck, 2003, § 4, no. 1-2.

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"designates" a specific court or courts. Mere designation being enough, an exclusive choice of court agreement does not require a legally valid choice on the substantive level – the choice and the chosen court being formal concepts.

Second, according to Art. 5(1), Art. 6(a), and Art. 9(a), the Convention determines the law applicable to issues of an "agreement's" validity even if the "agreement" (as defined in Art. 3(a)) is null and void.

Third, a judgment rendered by a chosen court must be enforced by other Contracting States irrespective of whether the chosen court relied on the choice of court agreement.[6] The only conditions are (a) the existence of an exclusive choice of court agreement falling under the Convention and (b) that the court designated therein renders a judgment within such agreement's scope. Whether the court took account of the choice of court agreement and the Convention, *i.e.* acted as the chosen court under the Convention in a substantive sense (rather than a court assuming jurisdiction according to its own law), is immaterial. For the purposes of the Convention, the (formal) designation of a court suffices.

III. Jurisdiction Provisions as Substantive or Conflict Rules

The Convention regulates both direct jurisdiction (*compétence directe*), *i.e.* whether a forum is competent to render a decision (Art. 5, Art. 6), and indirect jurisdiction (*compétence indirecte*),[7] *i.e.* the competent forum from the perspective of a court requested to recognise or enforce such decision (Art. 8, Art. 9(a)-(b)).[8]

With regard to *direct jurisdiction*, choice of court agreements have two distinct effects. On the one hand, a choice of court agreement usually seeks to *prorogate* at least one forum, *i.e.* it designates a forum to have jurisdiction that otherwise may not have it.[9] The prorogated forum then needs to determine whether to accept jurisdiction, within the Convention's scope, in accordance with its Art. 5 (below A.). On the other hand, a choice of court agreement may *derogate* one forum or several fora, *i.e.* seek to oust certain fora of jurisdiction that would

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[6] Below Section III.C.1.

[7] For the terminology see *e.g.* N. COIPEL-CORDONNIER, *Les conventions d'arbitrage et d'élection de for en droit international privé*, LGDJ, 1999, no. 77; G. KEGEL/ K. SCHURIG, *Internationales Privatrecht*, 9th ed., C.H. Beck, 2004, p. 1062.

[8] These provisions contain the Convention's "Three Basic Rules", see R.A. BRAND/ P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, Cambridge University Press, 2008, Part I, 2 II.A-C.

[9] See *e.g.* H. SCHACK, *Internationales Zivilverfahrensrecht*, 7th ed., C.H. Beck, 2017, § 9.II.1. The prorogative effect of choice of court agreements (*l'effet prorogatoire de juridiction*) is also called their "positive", "jurisdiction-granting" aspect, see T.C. HARTLEY, *Choice-of-court agreements under the European and international instruments: The revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford University Press, 2013, § 1.08.

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otherwise have it.[10] The question is then whether a derogated forum respects such agreement, *i.e.* refrains from exercising jurisdiction. The Convention coordinates the Contracting States' approach to this exercise in Art. 6 (below B.).

Indirect jurisdiction is addressed in Art. 8 and Art. 9 (below C.).

A. Prorogation: Jurisdiction of the Chosen Court (Art. 5)

While the basic principles of jurisdiction in Art. 5 are substantive rules (below 1.), the exception in Art. 5(1) ("the agreement is null and void") operates as a conflict rule (below 2.). Art. 5 prohibits any modification of the *burden* of proof or lowering of the *standard* of proof (below 3.).

1. Substantive Rules

The Convention autonomously defines the prorogative effect with three exceptions (below a) as well as the admissibility of choice of court agreements (below b).

a) Prorogative Effect and Reservations (Art. 5(2) and (3))

The court (or courts) of a Contracting State designated in a choice of court agreement falling under the Convention has (or have) jurisdiction (Art. 5(1)). The chosen court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State" (Art. 5(2)). Those are substantive rules at treaty level.

It seems uncontroversial[11] that Art. 5(2) prohibits *forum non conveniens* considerations or the application of other discretion-based doctrines of determining

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[10] See *e.g.* H. SCHACK (note 9), § 9.II.2. The derogative effect of choice of court agreements (*l'effet dérogatoire de juridiction*) is also called their "negative", "jurisdiction-depriving" aspect, see T. C. HARTLEY (note 9), § 1.08.

[11] See *e.g.* R. AMIN, International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for The Hague Convention on Choice of Court Agreements?, *Australian International Law Journal* 2010, p. 113 (123); R.A. BRAND/ P. HERRUP (note 8), p. 83; R.A. BRAND/ S. R. JABLONSKI, *Forum Non Conveniens. History, Global Practice, and the Future Under the Hague Convention of Choice of Court Agreements*, Oxford University Press, 2007, p. 208; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 3; D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, 2nd ed., Sweet & Maxwell, 2010, no. 10.42; A. SCHULZ, The Hague Convention of 30 June 2005 on Choice of Court Agreements, *Journal of Private International Law* (*JPIL)* 2005, p. 1 (9); L.E. TEITZ, The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, *American Journal of Comparative Law* 53 2005, p. 543 (551); L. USUNIER, La Convention de La Haye du 30 juin 2005 sur les accords d'élection de for. Beaucoup de bruit pour rien ?, *Rev. crit. dr. int. pr.* 2010, p. 37 (67); M. WELLER, Haager Übereinkommen vom 30. Juni 2005 über Gerichtsstands-vereinbarungen, in T. RAUSCHER (ed.), *EuZPR/EuIPR: Kommentar*, vol. II, 4th ed., Otto Schmidt, 2015-2016, no. 23.

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or refusing to exercise jurisdiction. The Convention autonomously determines the appropriate forum by deferring to the parties' choices. Art. 5(2) is also said to exclude reliance on *lis alibi pendens*.[12] The chosen court may not decline jurisdiction because another court has been seised first.

The Convention adds three reservations relating to domestic jurisdiction rules regarding (i) subject matter and (ii) the value of the claim (both Art. 5(3)(a)) as well as (iii) the local allocation of jurisdiction (Art. 5(3)(b)). The corresponding domestic rules remain in principle unaffected, but, in the context of internal allocation, "due consideration should be given" to the parties' choice "where the chosen court has discretion as to whether to transfer a case" (Art. 5(3)(b) *in fine*). These reservations do not jeopardise uniformity as the competent Contracting State and the "law of that State" (Art. 5(1)) remain the same.

b) Admissibility and the Convention's Scope

The overall admissibility of choice of court agreements is also governed by substantive rules at treaty level.

In a domestic system, the admissibility (or enforceability in a narrow sense)[13] of choice of court agreements defines whether courts shall accept such agreements in principle with regard to their prorogative or derogative effect,[14] *i.e.* the concept of admissibility relates to the conditions of the jurisdictional effects of choice of court agreements in the abstract.[15] Whether the courts apply a *specific* choice of court agreement then depends on its effectiveness.

The Convention does not seem to specifically address the admissibility of choice of court agreements,[16] but the provisions on the Convention's scope perform the same function.[17] All choice of court agreements within the Convention's scope

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[12] M. BLÄSI, *Das Haager Übereinkommen über Gerichtsstandsvereinbarungen – Unter besonderer Berücksichtigung seiner zu erwartenden Auswirkungen auf den deutsch-amerikanischen Rechtsverkehr*, P. Lang, 2010, p. 168-169; R.A. BRAND/ P. HERRUP (note 8), pp. 82-83; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 3, 132-134.

[13] See W. W. HEISER, The Hague Convention on Choice of Court Agreements: the Impact on *Forum Non Conveniens*, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts, *University of Pennsylvania Journal of International Law* 2010, p. 1013 (1013). In a wider sense, "enforceability" determines whether a choice of court agreement is considered effective in a specific case; see *e.g.* W.W. HEISER, *ibidem*, p. 1014; N. SIEVI, Enforceability of International Choice of Court Agreements: Impact of the Hague Convention on the US and EU Legal System, *Hague Yearbook of international Law.* 2011, p. 95 *et seq*.

[14] *Cf.* for the terminology of "admissibility" (*Zulässigkeit*) of choice of court agreements, *e.g.* H. SCHACK (note 9), no. 500 (prorogation), no. 512 (derogation).

[15] N. COIPEL-CORDONNIER (note 7), no. 55.

[16] T.C. HARTLEY/ M. DOGAUCHI (note 1), do not mention "admissibility", and neither does most of the literature dealing with the Convention.

[17] Discussing "scope" with "admissibility" R. WAGNER/ J.M. SCHÜNGELER, Das Haager Übereinkommen vom 30.6.2005 über Gerichtsstandsvereinbarungen und die

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are admissible[18] – or otherwise the Convention's purpose would be defeated. By defining its scope, the Convention thus indirectly determines the admissibility of choice of court agreements in all Contracting States.[19] The provisions defining the Convention's scope must be interpreted autonomously and due "regard shall be had to [the Convention's] international character and to the need to promote uniformity in its application" (Art. 23). The Contracting States may restrict the admissibility of choice of court agreements only in accordance with the Convention.[20]

One commentary, referring to "admissibility" as "validity",[21] argues that such "validity" is governed by the law of the chosen court referred to in Art. 5(1).[22] However, whether Contracting States are required to recognise choice of court agreements in principle, *i.e.* whether they have to accept them as *potentially* "valid" (admissible), must be governed by the provisions defining the Convention's scope – otherwise Contracting States, when ratifying the Convention, would not undertake any obligation and the Convention would have no unifying effect whatsoever. Using the term "validity" in this specific context is also likely to cause confusion and should be avoided. Under the Convention, the notion of "validity", as reflected in Art. 3(d), is broad, relating to effectiveness, and not limited to admissibility.

As for its scope, the Convention applies to "exclusive" choice of court agreements (Art. 3),[23] whereby a choice of court agreement is "deemed to be exclusive unless the parties have expressly provided otherwise" (Art. 3(b)).[24]

Parallelvorschriften in der Brüssel I-Verordnung, *Zeitschrift für Vergleichende Rechtswissenschaft* (*ZVglRWiss*) 108 (2009), p. 399 (405).

[18] M. WELLER (note 11), no. 22.

[19] A choice of court agreement outside the Convention's scope is not necessarily inadmissible in a certain domestic court although not protected by the Convention.

[20] A Contracting State that has made a reservation when signing the Convention or at any time thereafter (Art. 32 (1)) need not accept jurisdiction if a dispute's only connection to that State is the location of the chosen court (Art. 19). It need not enforce judgments of the chosen court if the parties were resident in that State and all connections (of parties and dispute) were to that State but for the location of the court (Art. 20). It may refuse to apply the Convention to specific subject matters (Art. 21).

[21] See R.A. BRAND/ P. HERRUP (note 8), p. 20: "Validity … deals with state interests and limitations on the ability of private parties to enter into agreements that will be recognized by the state."

[22] R.A. BRAND/ P. HERRUP (note 8), p. 20: "the Convention includes an autonomous choice of law rule on the question of validity"; similar apparently A. BUCHER, La Convention de La Haye sur les accords d'élection de for, *Schweizerische Zeitschrift für internationales und europäisches Recht* 2006, p. 29 (40).

[23] Unilateral jurisdiction clauses for the benefit of only one party are outside the Convention's scope, as the jurisdiction agreement must be "exclusive" no matter who the plaintiff will be; see *e.g.* A. BUCHER (note 22), p. 36.

[24] From a comparative perspective, this is an important clarification. In the US, the presumption seems to be that choice of court agreements are non-exclusive, see R.A. BRAND/ P. HERRUP (note 8), p. 190; L.E. TEITZ, Choice of Court Clauses and Third Countries From a US Perspective: Challenges to Predictability, in A. NUYTS/ N. WATTÉ

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Although choice of court agreements need not combine prorogation and derogation,[25] the Convention only applies to agreements that both prorogate "the courts of one Contracting State or one or more specific courts of one Contracting State" (Art. 3(a)) and derogate all other fora ("to the exclusion of the jurisdiction of any other courts", Art. 3(a)). The Convention applies to "international cases" relating to "civil and commercial matters" (Art. 1(1)).[26] The residence of the parties is immaterial as long as the court(s) of a Contracting State are designated.[27] Agreements involving certain parties that are considered weak (consumers and employees, Art. 2(1)) or involving certain subject matters (Art. 2(2)) are excluded.

In Art. 3(c), the Convention seems to establish formal requirements for choice of court agreements. Indeed, most observers consider that this provision leaves no room for applying domestic law with regard to formalities.[28] However, it is submitted that the better view is to interpret Art. 3(c) as a provision determining the Convention's scope.[29]

In the interest of casting a wide net,[30] Art. 3(c) aims to cover as many choice of court agreements as possible. If a choice of court agreement is "in writing" (Art. 3(c)(i)) or is concluded or documented "by any other means of

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(eds.), *International Civil Litigation in Europe and Relations with Third States*, Bruylant, 2005, p. 285 (288); W.W. HEISER (note 13), pp. 1015-1016. Under Singapore and English common law, there is no presumption either way, the issue being one of construction; see SINGAPORE ACADEMY OF LAW, *Law Reform Committee, Report of The Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005,* March 2013, para. 4; A. BRIGGS, *Private International Law in English Courts*, Oxford University Press, 2014, no. 4.423. Under EU law, jurisdiction conferred in a choice of court agreement "shall be exclusive unless the parties have agreed otherwise" (Art. 25(1)(2) Brussels Ia Regulation), a solution apparently adopted also *e.g.* in Australia, see R. GARNETT, The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?, *JPIL* 2009, p. 161 (164).

[25] H. SCHACK (note 9), no. 496.

[26] In detail T.C. HARTLEY, The International Scope of Choice-of-Court Agreements under the Brussels I Regulation, the Lugano Convention and the Hague Convention, in *Liber Amicorum Lando*, DJØF Publishing, 2012, p. 197 *et seq*.

[27] P. HUBER, Die Haager Konvention über Gerichtsstandsvereinbarungen und das (amerikanische) Ermessen, in *Festschrift für Peter Gottwald zum 70. Geburtstag* (*FS Gottwald*), C. H. Beck, 2014, p. 283 (284), II.1.(c).

[28] See below note 60.

[29] Also T. KRUGER, The 20th Session of the Hague Conference: a New Choice of Court Convention and the Issue of EC Membership, *I.C.L.Q.* 2006, p. 447 (449), mentions Art. 3(c) primarily in the context of describing the Convention's scope; similar G.S. LIPE/ T.J. TYLER, The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases, *Houston Journal of International Law* 33 (2010), p. 1 (13); S. LUGINBÜHL/ H. WOLLGAST, Das neue Haager Übereinkommen über Gerichtsstands-vereinbarungen: Aussichten für das geistige Eigentum, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (*GRUR Int*) 2006, p. 208 (210); G. RÜHL, Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt?, *IPRax* 2005, p. 410 (412-413) (although these authors do not provide much detail and may ultimately not agree with the interpretation proposed).

[30] R.A. BRAND/ P. HERRUP (note 8), p. 46.

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communication which renders information accessible so as to be usable for subsequent reference" (Art. 3(c)(ii)), it is a choice of court agreement for the purposes of the Convention,[31] falls under its scope,[32] and is admissible in principle. However, a specific agreement's effectiveness is then to be determined according to the law(s) designated by the law of the chosen court.[33]

2. *Conflict Rule*

While the admissibility of choice of court agreements and their prorogative effect are regulated by substantive rules at treaty level,[34] the exception[35] in Art. 5(1), if the agreement is "null and void", is a conflict rule.

The term "null and void" in Art. 5(1) should be interpreted as "ineffective" (below a). The reference to the "law of the chosen court"[36] to determine (in)effectiveness includes a reference to its conflict of laws rules (below b). (In)effectiveness encompasses formal validity (below c), substantive validity (below d), and issues of interpretation (below e).

a) Interpreting "Null and Void" (Art. 5(1)) as "Ineffective"

Art. 5(1) provides:[37]

> "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."

It is clear from the wording of this provision that the issue of whether a choice of court agreement is "null and void" is governed by the law of the chosen court (Art. 5(1) *in fine*). It is a matter of controversy, however, what issues are

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[31] The interpretation proposed follows the same logic as the English Arbitration Act 1996 according to which arbitration agreements not complying with its formal requirements fall outside its scope but may remain valid under common law, see s. 81(1)(b).

[32] R. WAGNER, Das Haager Übereinkommen vom 30.6.2005 über Gerichtsstandsvereinbarungen, *RabelsZ* 73 (2009), p. 100 (118).

[33] See the subsequent Section III.A.2.

[34] See the preceding Section III.A.1.

[35] The reference to the agreement being "null and void" in Art. 5(1) stipulates "the only generally applicable exception to the rule that the chosen court must hear the case", T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 125.

[36] The term "law of the chosen court" is shorthand for the "law of that State" in Art. 5(1) and the "law of the State of the chosen court" in Art. 6(a) and Art. 9(a).

[37] The French, equally authentic version (see Convention, last paragraph) reads: "*Le tribunal ou les tribunaux d'un Etat contractant désignés dans un accord exclusif d'élection de for sont compétents pour connaître d'un litige auquel l'accord s'applique, sauf si celui-ci est nul selon le droit de cet Etat.*"

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encompassed by this reference, or, in other words, how to interpret "null and void".[38] It is submitted that the end of Art. 5(1) should be read as

> "unless the agreement is [*ineffective*][39] under the law of that State [*as to prorogating the chosen court*]".

Thus, the law of the chosen court governs all issues of effectiveness.[40]

The wording of Art. 5(1) supports the reading proposed. On the one hand, under a general usage of the term, a "void" contract is a contract that has no legal effect.[41] Such result can have many reasons. On the other hand, the terms "null and void" and "*nul*" are used, in their "natural habitat" of English or French law, in a way that is not inconsistent with the suggested interpretation (although categories of English or French law would of course not finally determine the interpretation of a term under the Convention). English law distinguishes void and voidable contracts, but the two terms do not seem to be clearly distinguished,[42] with the effect that "void" has no technical meaning. Under the corresponding French law concept (*nullité du contrat*), "*nul*" refers to retroactive annulment of a contract that was entered into in an irregular manner,[43] whereby reasons of annulment include issues of capacity, consent, lack of power to represent, formal requirements etc.

An alternative interpretation of "null and void" as encompassing "some subset of grounds under national law for declining to give legal effect to a meeting of the minds which has occurred"[44] has no basis in the wording or structure of the Convention. Resorting to domestic law concepts when interpreting concepts under the Convention would sooner create problems than solve them.

b) *The "Law of the Chosen Court" Includes Conflict Rules*

The reference to the law of the chosen court in Art. 5(1) *in fine* thereby includes the conflict of laws rules of such State, such reading being seemingly uncontested.[45]

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[38] For references see the following discussion.

[39] Referring to "effectiveness" when determining the scope of the conflict rule in Art. 5(1) also P. BEAUMONT, Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status, *JPIL* 2009, p. 125 (139).

[40] This includes its conflict of laws rules, see below Section III.A.2.(b).

[41] *Garner's Dictionary of Legal Usage*, 3rd ed., Oxford University Press, 2011, p. 932, entry "void contract".

[42] See *Garner's Dictionary of Legal Usage* (note 41), p. 932, entry "void; voidable", with references.

[43] See *e.g.* A. BÉNABENT, *Droit civil. Les obligations*, 11th ed., Montchrestien, 2007, no. 201, 207.

[44] R.A. BRAND/ P. HERRUP (note 8), p. 80.

[45] See *e.g.* A. BUCHER (note 22), p. 38; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 125; R.A. BRAND/ P. HERRUP (note 8), p. 20, 80; P. HUBER, Das Haager Übereinkommen über Gerichtsstandsvereinbarungen, *IPRax* 2016, p. 197 (200); M. WELLER (note 11), no. 22; all with references.

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For EU Member States, even in cases where the Convention prevails over the Brussels Ia Regulation,[46] the law(s) designated by the law of the chosen court might include EU law provisions replacing the Member States' domestic law (unless the issue is governed by the Convention). According to Art. 26(6)(a), the Convention "shall not affect the application of" (*inter alia*) the Brussels Ia Regulation if "none of the parties is resident in a Contracting State that is not a Member State of [the EU]".[47] Yet, even in cases where the Convention has priority, the Convention determines an issue only insofar as it contains rules governing it. Therefore, the Brussels Ia Regulation is not necessarily replaced in its entirety.[48]

If one follows the majority view that Art. 3(c) exclusively governs formal requirements,[49] then Art. 25 Brussels Ia Regulation would be replaced by Art. 3(c). Yet, Art. 25 Brussels Ia Regulation also covers form-related issues of consent and fairness not addressed in Art. 3(c).[50] Such issues of substantive validity are, according to Art. 5(1), governed by the law(s) designated by the law of the chosen court, which, in the case of an EU court, can (partially) lead to an application of Art. 25 Brussels Ia Regulation.

In any event, the more convincing view is[51] that Art. 3(c) only concerns the scope of the Convention and does not establish formal requirements, in which case Art. 25 Brussels Ia Regulation would apply more broadly. Although the practical impact of this interpretation would need to be assessed in detail, considering that it has been said that the requirements for formal and substantive effectiveness under the Brussels Ia Regulation "essentially mirror those of the Convention",[52] it is likely that there was no need to further "reserve" the application of the Brussels Ia Regulation[53] – it can be considered part of the "domestic law" of the EU Member States and applies accordingly, to the extent the Convention refers to it.

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[46] 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).

[47] See *e.g.* J. ANTOMO, Aufwind für internationale Gerichtsstandsvereinbarungen – Inkrafttreten des Haager Übereinkommens, *Neue Juristische Wochenschrift* 2015, p. 2919 (2920); P. HUBER (note 27), p. 285; P. MANKOWSKI, in T. RAUSCHER (ed.), *EuZPR/EuIPR: Kommentar*, vol. I, 4th ed., Otto Schmidt, 2015-2016, Art. 25 Brüssel Ia-VO, no. 272-277; E. PEIFFER, *Schutz gegen Klagen im forum derogatum*, Mohr Siebeck, 2013, p. 103 *et seq*.

[48] Similar P. MANKOWSKI (note 47), No. 279; F. EICHEL, Das Haager Übereinkommen über Gerichtsstandsvereinbarungen auf dem Weg zur Ratifikation und zum Inkrafttreten, *Zeitschrift für das Privatrecht der Europäischen Union* (*GPR*) 3/2014, p. 159 (162): the Convention (or, *vice versa*, the Brussels Ia Regulation) only prevail insofar as the two instruments contain conflicting rules.

[49] See below note 60.

[50] See below Section III.A.2.(c), note 104, and note 105.

[51] See below Section III.A.2.(c) and above Section III.A.1.b).

[52] E. DUBOSE, The Implementation of the 2005 Hague Convention on Choice of Court Agreements in the European Union: An Analysis of its Relationship with the Brussels I-bis Regulation, *Zeitschrift für Europarecht Studien* 2015, p. 441 (463).

[53] Less optimistic L. USUNIER (note 11), p. 58.

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Example 1: A Mexican and an Austrian party designate Munich as forum in a choice of court agreement regarding matters covered by the Convention (Art. 2).

The case is international (Art. 1(2)) as the two parties are not resident in the same Contracting State. The parties have designated the court of a Contracting State (Germany as part of the EU) (Art. 3(a)). The requirements of Art. 26(6)(a) are not fulfilled and therefore the Convention prevails over the Brussels Ia Regulation.

The law governing the effectiveness of this choice of court agreement must be designated, pursuant to Art. 5(1), by German law. German law, in this context, would seem to include relevant provisions of EU law. In this scenario, Art. 25 Brussels Ia Regulation prevails over German domestic law[54] because the "parties, regardless of their domicile, have agreed that a court or the courts of a [EU] Member State [*i.e.* Germany] are to have jurisdiction" (Art. 25(1)(1) Brussels Ia Regulation). Art. 25 autonomously regulates formalities and related issues of consent.[55] For remaining issues, the German court applies its domestic rules on choice of court agreements (s. 38, 40 German Code of Civil Procedure)[56] and further determines the law applicable to residual issues of consent and vitiating elements.

c) *Formal Validity*

The first issue potentially rendering a choice of court agreement ineffective ("null and void") is non-compliance with formal requirements. It is submitted that the Convention's reference to the law of the chosen court includes a reference to potential formal requirements, as regards the effectiveness of a choice of court agreement, of the law(s) designated by the law of the chosen court.[57]

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[54] Art. 6(1) and Art. 25 Brussels Ia Regulation. See H. SCHACK (note 9), no. 527: with regard to choice of court agreements, domestic German law applies only (i) in purely domestic cases, (ii) if the parties have designated the court of a non-EU Member State (*e.g.* the Mexican courts), or (iii) if the choice of court agreement does not fall within the subject-matter scope of the Brussels Ia Regulation.

[55] See *Estasis Salotti v. RÜWA*, C-24/76, ECLI:EU:C:1976:177, para. 7; *MSG v. Les Gravières Rhénanes SARL*, C-106/95, ECLI:EU:C:1997:70, para. 15; recently confirmed in *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH*, C-322/14, ECLI:EU:C:2015:334, para. 29; Q. FORNER DELAYGUA, Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast, *JPIL* 2015, p. 379 (394); H. SCHACK (note 9), No. 536 (with references).

[56] H. SCHACK (note 9), No. 500, 533.

[57] Apparently agreeing R. WAGNER (note 32), p. 118. Also agreeing L. USUNIER (note 11), p. 45, although ultimately accepting the opposite view following T.C. HARTLEY/ M. DOGAUCHI (note 1) (*ibidem*, p. 46). Yet, the document reflecting the Contracting States' consensus is the Convention, not T.C. HARTLEY/ M. DOGAUCHI (note 1); see R.A. BRAND/ P. HERRUP (note 8), p. 29-30.

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This interpretation is in line with the wording of the Convention[58] and the context in which Art. 3(c) appears, the provision being part of Chapter I on the Convention's "Scope and Definitions". It also tallies with the fact that previous drafts of the Convention had contained further detail on formal requirements but such detail was ultimately dropped[59] – which would signal that not all issues of effectiveness in view of formal requirements that were considered relevant at some point during the drafting process are now dealt with in the Convention. Yet, the proposed interpretation will be highly controversial.

According to most commentators, the Contracting States must not establish stricter formal requirements than Art. 3(c).[60] This may also have been the subjective intention of some of the drafters,[61] although others highlight that the Convention's formal requirements were meant as rules of evidence rather than requirements of effectiveness.[62] Yet, the majority's view ignores both the wording and the context of the provision. It also downplays the problems that could be caused by the details that are relevant in the context of formal requirements.[63] The majority's view leads to diverse outcomes, *i.e.* it jeopardises the Convention's goal of uniformity.

Issues framed as formalities in some systems may relate to consent in others.[64] Having different regimes govern those issues would be a recipe for disaster. But as long as the substantive rules of form and consent are determined by

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[58] "Null and void" in Art. 5(1) is not limited to issues of substantive validity, contrary to Art. 25(1)(1) Brussels Ia Regulation, according to which the chosen court has jurisdiction "unless the agreement is null and void *as to its substantive validity* under the law of that Member State" (emphasis added).

[59] See S. VRELLIS, The Validity of a Choice of Court Agreement under the Hague Convention of 2005, in *Convergence and Divergence in Private International Law – Liber Amicorum Siehr*, Schulthess, 2010, p. 763 (768).

[60] See *e.g.* P. BEAUMONT (note 39), p. 138-139; R.A. BRAND/ P. HERRUP (note 8), p. 45; D. COESTER-WALTJEN, Parteiautonomie in der internationalen Zuständigkeit, in *Festschrift für Andreas Heldrich zum 70. Geburtstag*, C.H. Beck, 2005, p. 549 (555); F. EICHEL (note 48), p. 164; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 126; T.C. HARTLEY, The Modern Approach to Private International Law. International Litigation and Transactions from a Common-Law Perspective, *Recueil des Cours* 2006, vol. 319, p. 139; P. A. NIELSEN, The Hague Judgments Convention, *Nordic Journal of International Law* 2011, p. 95 (106); E. PEIFFER (note 47), p. 162; S. VRELLIS (note 59), p. 768; M. WELLER (note 11), no. 14.

[61] As reflected in T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 126.

[62] See C. KESSEDJIAN, La Convention de La Haye du 30 juin 2005 sur l'élection de for, *Clunet* 2006, p. 813 (825), no. 22; B. LINDENMAYR, *Vereinbarung über die internationale Zuständigkeit und das darauf anwendbare Recht*, Duncker & Humblot, 2002, p. 248. According to S. VRELLIS (note 59), p. 767, this perspective evolved during the drafting of the Convention.

[63] For a comprehensive comparative analysis of formal requirements see H. HEISS, Die Form internationaler Gerichtsstandsvereinbarungen, *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 2000, p. 202.

[64] See *e.g.* Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, Routledge, 2014, p. 21.

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the same conflict rules, diverging requirements between different Contracting States pose no practical problem. If the governing law is known, the parties can research requirements and comply with or otherwise react to them (if only by selecting a court in another Contracting State). Parties are not particular.

Treating form and consent at *treaty level* is thereby impossible, as the Convention does not contain sufficiently detailed rules:

> *Example 2:* P uses standard terms and publishes them on its website (clearly visible and easy to find). This approach is a usage widely known and regularly observed in P's trade. P contracts with C in a transaction relating to this trade. The standard terms contain an exclusive choice of court clause designating French courts. Can P rely on this clause with success? Is this an issue of consent or formalities?[65] Does it matter whether C was aware of the usage?
>
> From the perspective of the Convention, "formal requirements" are probably complied with as the choice of court agreement is in writing[66] or documented "by any other means of communication which renders information accessible so as to be usable for subsequent reference" (Art. 3(c)(ii)). The Convention thus applies to the purported choice of court agreement in P and C's contract.
>
> Yet, to solve the other questions, the Convention's rules are not detailed enough, not covering, for instance, issues of knowledge, notice, or agreement by reference. The Convention would be a rather blunt instrument to deal with them,[67] for instance by creatively interpreting "communication", "agreement", or "accessible" in Art. 3(c). In contrast, Art. 25(1)(3)(c) Brussels Ia Regulation demonstrates the level of sophistication required.

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[65] According to some, choice of court agreements in standard contract terms (*Allgemeine Geschäftsbedingungen*) are covered by Art. 3(c); see *e.g.* F. EICHEL, Das Haager Übereinkommen über Gerichtsstandsvereinbarungen vom 30.6.2005. Eine Bestandsaufnahme nach der Unterzeichnung durch die USA, *Recht der internationalen Wirtschaft* 2009, p. 289 (294).

[66] Although it is unclear what "in writing" means. According to some, signatures by hand are not required, see *e.g.* D. CZERNICH, Neue Aspekte im österreichisch-amerikanischen Rechtsverkehr durch das Haager Gerichtsstandsübereinkommen, *Wirtschaftsrechtliche Blätter* 2012, p. 309 (312). While certainly plausible, this is merely an opinion and the Convention provides no certainty on the subject – a further argument for leaving the determination of such detail to the law(s) designated by the law of the chosen court.

[67] See *e.g.* B. AUDIT, Observations sur la Convention de La Haye du 30 juin 2005 relative aux accords d'élection de for, *Liber Amicorum Gaudemet-Tallon Vers de nouveaux équilibres entre ordres juridiques*, Dalloz, 2008, p. 171 (180-181); B. HESS, The Draft Hague Convention on Choice of Court Agreements, External Competencies of the European Union and Recent Case Law of the European Court of Justice, in A. NUYTS/ N. WATTÉ (eds.), *International Civil Litigation in Europe and Relations with Third States*, Bruylant, 2005, p. 263 (280).

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Reasons of practicality then dictate that formal requirements be uniformly governed *by the law(s) designated by the law of the chosen court*, not by the law of the forum. All courts potentially involved in dealing with a choice of court agreement within the Convention's scope would hereby determine the law applicable to formalities, and ultimately whether formal requirements have been complied with, according to the same law.[68]

Potential "divergence" from Art. 3(c) is immaterial.

First, if the law(s) designated by the law of the chosen court establish "stricter" formal requirements than Art. 3(c) (be that as formal requirements proper or under the guise of rules relating to consent), they would not take up the Convention on the "offer" of enforcing the parties' choice of court agreement in all Contracting States. But it can be left, in this context, to the Contracting States to decide whether they want choice of court agreements designating their courts to be enforced – the result would still be certain and predictable and the parties have it in their hands to comply with these requirements (unlike in the case of admissibility issues or discretion-related restrictions). Second, it is unlikely that a Contracting State would be unduly restrictive as it has decided, by ratifying the Convention, to accept choice of court agreements in principle. Third, if the applicable law is more lenient,[69] the choice of court agreement would fall outside the scope of the Convention[70] and other courts would not have to recognise it, but they remain free to do so under domestic law.[71]

In effect, if the interpretation proposed is adopted, Art. 3(c) establishes *minimum formal requirements* with regard to the effectiveness of choice of court agreements for the purposes of the Convention, but it does not achieve their full harmonisation. Whether an aspect relates to formal requirements or consent, which differ across legal systems,[72] is then immaterial. At the very least, compliance with Art. 3(c) does not automatically require the law(s) designated by the law of the chosen court to also accept the agreement as valid with regard to consent.[73]

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[68] The court chosen, Art. 5(1); any court not chosen, Art. 6(a); and enforcement authorities, Art. 9(a).

[69] D. JOSEPH (note 11), no. 3.89, draws a parallel to a salvage contract concluded orally by reference to the Lloyd's Open Form, which is an established trade usage. Although the actual Lloyd's Open Form contains an arbitration clause, such usage would make also a choice of court agreement valid under Art. 25(1)(3)(c) Brussels Ia Regulation. JOSEPH doubts whether the requirements of Art. 3(c) would be met, but one could argue that the agreement is still documented in a way that "renders information accessible so as to be usable for subsequent reference" (Art. 3(c)(ii)) (like the Lloyd's Open Form that is available online). Whether the choice of court agreement is otherwise effective would then have to be determined according to the law(s) designated by the law of the chosen court (Art. 5(1)).

[70] F. EICHEL (note 60), p. 164, fn. 76; L. USUNIER (note 11), p. 45. Similar R.A. BRAND/ P. HERRUP (note 8), p. 45.

[71] M. WELLER, Internationale Gerichtsstandsvereinbarungen: Haager Übereinkommen – Brüssel I-Reform, in *Ars aequi et boni in mundo Festschrift zum 80. Geburtstag von Rolf A. Schütze*, C.H. Beck, 2015, p. 705 (710).

[72] See above note 64.

[73] B. AUDIT (note 67), p. 182. Agreeing with this result A. BUCHER (note 22), p. 37; C. KESSEDJIAN (note 62), p. 826, no. 23; M. WELLER, "Die verbesserte Wirksamkeit" der

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d) *Substantive Validity*

All issues related to the substantive validity of a choice of court agreement are governed by the law(s) designated by the law of the chosen court.[74]

The conditions discussed in this Section all relate to the effectiveness of choice of court agreements. The list is not exhaustive. Since domestic systems have different approaches to validity, not all of these conditions are relevant under each domestic law. However, the range of conditions considered relevant by commentators is presented here in order to highlight potential pitfalls in a uniform regulatory framework if these issues (and the law applicable to them) were to be left to the different domestic laws to determine – which speaks in favour of leaving them all to be decided by the law(s) designated by the law of the chosen court.

(1) Whether the parties duly *consented* to the choice of court agreement, *i.e.* whether there indeed exists an *agreement*, is an issue of its effectiveness (*i.e.* whether it is "null and void").

Whether there is "consent" and whether there is an "agreement" are the same issue.[75] The term "agreement" in the Convention's jurisdiction provisions does not create a free-standing concept but merely refers to the Convention's scope (Art. 3)[76] – all issues of effectiveness relating to such agreement being determined by the law(s) designated by the law of the chosen court. This is the majority opinion.[77] One commentary argues[78] that the existence of an agreement needs to be determined separately. However, its concept of "agreement", and what is meant by "existence", remains unclear. This view also faces the problem that, as is admitted,[79] the Convention does not specify the law applicable to the issue of whether an agreement "exists", if that were considered an issue separate from "null and void". This speaks in favour of dropping any separate concept of "existence of an agreement": it is not necessary under the Convention and only unduly complicates matters. The majority view is to be preferred.

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europäischen Gerichtsstandsvereinbarung nach der Reform der Brüssel I-VO, *Zeitschrift für Zivilprozeß International* 2014, p. 251 (261). M. WELLER (note 11), no. 14, states expressly that the requirement of a particular contract language, although it could be seen as a formal requirement, might vitiate the agreement for lack of consent under a law designated by the law of the chosen court.

[74] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 126. *Contra* R.A. BRAND/ P. HERRUP (note 8), p. 80, who concede that "null and void" may refer to "any ground of invalidity which is not purely formal" but state that this "is a less compelling reading" as it would "bring the existence *vel non* of a meeting of the minds within the ambit of 'null and void'". Yet, the proposed interpretation conforms with the Convention's wording, structure, and objectives.

[75] P. BEAUMONT (note 39), p. 138.

[76] See *e.g.* T.C. HARTLEY, The Hague Choice-of-Court Convention, *European Law Review* 2006, p. 414 (417).

[77] Except regarding formal requirements, above note 60; see *e.g.* P. HUBER (note 45), p. 201, with references in fn. 49; M. WELLER (note 73), p. 261-262.

[78] R.A. BRAND/ P. HERRUP (note 8), p. 40-41, 79, 88.

[79] R.A. BRAND/ P. HERRUP (note 8), p. 79.

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Under many legal systems, lack of consent entails nullity of the agreement.[80] "Null and void" should thus be interpreted as covering consent in line with a natural reading of Art. 5(1). Since this provision refers to the law of the chosen court, all aspects of consent are governed by the law(s) designated by this law.[81] This includes, for instance, whether consent may be explicit, implied, or presumed (whatever that means under the law(s) designated by the law of the chosen court).[82]

Possible alternatives are unsatisfactory:

First, no substantive rules regarding "consent" are available at treaty level.[83] While such rules are available to a certain extent under the Brussels Ia Regulation,[84] these rules are primarily based on the case law of the Court of Justice of the European Union (CJEU),[85] which highlights that the approach under EU law should not be transferred to the Convention – as there is no judicial body comparable to the CJEU available under the Convention.[86]

Second, T.C. HARTLEY and M. DOGAUCHI propose that most consent issues should be governed by the law(s) designated by the law of the chosen court. Yet, if a domestic law contains what BEAUMONT has dubbed "very silly rules on consent",[87] the issue should be treated as one of fact, *i.e.* at treaty level.[88] However, there are no questions of pure fact or "basic factual requirements",[89] only questions of law relating to facts[90] – and a law governing these questions must be found. As discussed above,[91] it is more important to provide certainty than to protect the parties from external criteria (which is something the Convention cannot achieve in any event as it does not prohibit a chosen court's recourse to its own law when accepting jurisdiction beyond the Convention's requirements). In order to deal

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[80] See *e.g.* B. AUDIT (note 67), p. 183.

[81] A. BUCHER (note 22), p. 40; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 94; A. SCHULZ, The Hague Convention of 30 June 2005 on Choice of Court Agreements, *JPIL* 2006, p. 243 (253).

[82] Some read into Art. 3 the requirement of consent being explicit (*explizite Einigung*), see M. FRICKE, Das Haager Übereinkommen über Gerichtsstandsvereinbarungen unter besonderer Berücksichtigung seiner Bedeutung für die Versicherungswirtschaft, *Versicherungsrecht* 2006, p. 476 (479). However, this view not only mixes requirements of the Convention's scope (Art. 3), formal requirements, as well as substantive requirements (consent), it also has no support in the text of the Convention – leaving aside that it remains unclear what "explicit" is supposed to mean.

[83] A. SCHULZ (note 81), p. 252.

[84] A. SCHULZ (note 81), p. 253. See above Section III.A.2.(c).

[85] See above note 55.

[86] See also below Section IV.B.

[87] See P. BEAUMONT (note 39), p. 139, who criticises this proposal with reference to the negotiations of the Convention.

[88] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 95-96.

[89] T.C. HARTLEY/ M. DOGAUCHI, *Ibidem*, para. 95.

[90] M. WELLER (note 11), no. 13.

[91] See above Section III.A.2.(c).

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with extreme cases from the perspective of other Contracting States,[92] Art. 6 and Art. 9 provide safety valves.[93]

Third, leaving the determination of the law(s) applicable to consent to the law of the forum[94] would potentially lead to conflicting outcomes,[95] leaving aside that there is no support for such interpretation in the wording of Art. 5(1). Whether the parties consented is not a matter of "state interests"[96] and the issue of consent is not distinct from but one aspect of the validity of an agreement under a specific domestic law (validity understood as effectiveness, not admissibility[97]).[98]

Fourth, it has been proposed *de lege ferenda* to apply the UNIDROIT Principles of International Commercial Contracts 2010[99] to the validity of choice of court agreements under the Convention.[100] However, this solution has the same weakness as a substantive rule at treaty level and must be rejected: there is no judicial body that could ensure a uniform application of such text. Yet, it "is in the sphere of application that uniformity is created, not in that of drafting".[101]

(2) General *issues of fairness* in the context of determining whether there was consent, or when determining the content of a choice of court agreement, also relate to the agreement's effectiveness (or whether it is "null and void"). Issues such as whether choice of court agreements may be incorporated by reference,[102] or whether they are abusive if contained in general contract terms, are thus governed by the law(s) designated by the law of the chosen court.[103]

Again, possible alternatives are unsatisfactory. The Convention contains no substantive provisions on the matter. Leaving the determination of the applicable

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[92] According to T.C. HARTLEY (note 9), no. 7.12, such extreme cases were the reason to include the reference to the "fact of consent" in T.C. HARTLEY/ M. DOGAUCHI (note 1) (see above note 88).

[93] M. WELLER (note 11), no. 11.

[94] R.A. BRAND/ P. HERRUP (note 8), p. 19-20.

[95] P. BEAUMONT (note 39), p. 138.

[96] *Contra* R.A. BRAND/ P. HERRUP (note 8), p. 19-20.

[97] On this terminology see above note 21.

[98] *Contra* R.A. BRAND/ P. HERRUP (note 8), p. 79.

[99] <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>.

[100] M. WELLER, Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes, *JPIL* 2017, p. 91 (99); M. WELLER, Validity and interpretation of international choice of court agreements: the case for an extended use of transnational non-state contract law, in *Eppur si muove: the age of uniform law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, vol. 1, UNIDROIT, 2016, p. 393 (397).

[101] C.B. ANDERSEN, Defining Uniformity in Law, *Uniform Law Review* 2007, p. 5 (41).

[102] See *e.g.* HALSBURY'S LAWS OF SINGAPORE, vol. 6(2) Conflict of Laws, LexisNexis, 2013 Reissue, para. [75.112].

[103] M. BLÄSI (note 12), p. 165-167; F. EICHEL, *AGB-Gerichtsstandsklauseln im deutsch-amerikanischen Handelsverkehr*, Jenaer Wissenschaftliche Verlagsgesellschaft, 2007, p. 260-261; M. WELLER (note 73), p. 263.

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law(s) to different domestic laws (the law of the chosen court or the law of the forum) would risk diverging outcomes.

On the other hand, leaving the designation of the applicable law(s) to the law of the chosen court establishes a uniform regulatory framework and reduces difficulties with characterisation. For instance, whether it is fair to include a choice of court agreement in pre-formulated, non-negotiated standard contract terms (*Allgemeine Geschäftsbedingungen*) could be characterised as a matter of consent[104] or as a formal requirement.[105] If the conflict rule at treaty level refers to the same law (the law of the chosen court) to designate the law(s) applicable to both issues, no characterisation difficulties arise at treaty level, and potentially diverging approaches to characterisation at domestic law level across Contracting States play no role.

(3) The law of the chosen court should also designate the law(s) governing *certainty*,[106] referring here to the English law concept:[107] for instance, whether the agreement has become binding upon the parties, whether they have reserved issues for negotiation,[108] or whether the content of the agreement is clear.

Dealing with certainty at treaty level is impossible as it lacks sufficiently detailed rules, Art. 3(a) ("disputes which have arisen or may arise in connection with a particular legal relationship") potentially dealing with only some of the relevant aspects. Leaving it to different domestic laws to determine the applicable law would result in diverging and unpredictable outcomes.

(4) Whether the choice of court agreement is ineffective ("null and void") due to *public policy* reasons must also be determined by the law(s) designated by the law of the chosen court (unless the issue is regulated by the Convention itself). It has been said that "the Convention does not authorise the chosen court to refuse to enforce a choice of court agreement where enforcement would be contrary to the public policy of the State of the chosen court".[109] Yet, unless this interpretation is limited to the admissibility of choice of court agreements as per the Convention's scope, it is not supported by the wording of Art. 5 and inconsistent with other provisions of the Convention.

First, a violation of the public policy of the law(s) designated by the law of the chosen court may render the choice of court agreement null and void under the law ultimately designated in accordance with Art. 5(1). An explicit public policy reservation is not required. Second, the public policy reservations in Art. 6(c) or Art. 9(e) provide *additional* grounds for "ignoring" the choice of court agreement, but the nullity of the choice of court agreement under the law(s) designated by the

[104] This is the position in German domestic law, H. SCHACK (note 9), No. 509.

[105] This is the position in EU law, H. SCHACK (note 9), No. 536.

[106] At common law, choice of court agreements are private law agreements (A. BRIGGS (note 24), No. 4.429) and subject to the general requirements of certainty.

[107] This concerns "the practical limits of contractual adjudication over disputes concerning the breakdown of consensus", N. ANDREWS, *Contract Law,* 2nd ed., Cambridge University Press, 2015, No. 4.02.

[108] N. ANDREWS (note 107), no. 4.06.

[109] W.W. HEISER (note 13), p. 1035.

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law of the chosen court, including for public policy reasons, is a ground in itself to do so (Art. 6(a) or Art. 9(a)).

The Contracting States must avoid counteracting the Convention by imposing extreme public policy requirements, and public policy requirements may not relate to the admissibility of choice of court agreements falling within the Convention's scope.[110] However, from the perspective of the Convention's objectives, *i.e.* enhancing legal certainty and the effectiveness of choice of court agreements through a uniform regulatory framework, even extreme public policy requirements would be a secondary concern – it suffices to clearly designate the law governing the issue. If parties worry that a forum will not accept their choice, they can select a different forum.

(5) The doctrines of *variation*, *waiver*, or *estoppel* also relate to the effectiveness of choice of court agreements.[111] In order to avoid difficulties of characterisation, and in order to ensure uniformity of outcome, the issue of whether such doctrines apply to a specific choice of court agreement, and whether they render it ineffective ("null and void"), are also governed by the law(s) designated by the law of the chosen court. The same applies to reasons of *nullity arising after the conclusion* of the (initially valid) choice of court agreement.[112]

The Convention does not contain sufficiently detailed provisions to deal with these issues itself, and leaving the determination of the applicable law to the law of the forum (the Art. 6 courts or Art. 9 enforcement authorities) would potentially result in diverging and unpredictable outcomes.

(6) The reference to "null and void" finally includes *capacity* issues.[113]

The Convention does not contain substantive rules on capacity; this seems to be uncontroversial. However, it contains, in Art. 5(1), a conflict rule referring, for capacity issues, to the law(s) designated by the law of the chosen court. Art. 6(b) and Art. 9(b), also dealing with capacity, in addition refer to the law(s) designated by the law of the respective forum. As a result, in courts not chosen and in front of enforcement authorities, the parties to a choice of court agreement require capacity under the law(s) designated by the law of the chosen court as well as under the law(s) designated by the law of the forum.[114]

This is confirmed by the following considerations. There may be cases where the choice of court agreement is "null and void" under the law(s) designated by the law of the chosen court (Art. 5(1)) because a party lacked capacity, but no capacity problems arise under the law(s) designated by the law of a court not chosen (Art. 6(b)), there is no manifest injustice or violation of the public policy of the law of the court not chosen (Art. (6(c)), and no "exceptional reasons beyond

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[110] On the Convention's scope see above Section III.A.1.(b).

[111] See *e.g.* HALSBURY'S LAWS OF SINGAPORE (note 102), para. [75.114].

[112] P. HUBER (note 45), p. 200, fn. 29; C. MOEBUS, *Das Haager Übereinkommen von 2005. Die Derogationswirkung des Art. 6 HÜ unter besonderer Berücksichtigung des NYÜ*, Springer, 2016, p. 187 *et seq*.

[113] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 126; P. HUBER (note 45), p. 200.

[114] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 126, fn. 159; P. HUBER (note 45), p. 201 ("*kumulative Anknüpfung").*

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the control of the parties" exist (Art. 6(d)).[115] If the reference to the law of the chosen court in Art. 5(1) and in Art. 6(a) did not include capacity issues, the court not chosen could not rely on Art. 6(a) to ignore the jurisdiction agreement. It would have to wait for the chosen court to decline to hear the case and then rely on Art. 6(e). This is inefficient and must be avoided by interpreting "null and void", in Art. 5(1) and in Art. 6(a), as referring to capacity issues as well.

e) Interpretation of a Choice of Court Agreement

Contractual interpretation also relates to the effectiveness of choice of court agreements (or whether they are "null and void"). It is often difficult to distinguish issues of validity (most importantly consent) from issues of interpretation (most importantly an agreement's scope, personal or regarding subject-matter).

To ensure a consistent outcome, the same law should be used to designate the law(s) applicable to issues of interpretation and substantive validity. Under the Convention, this is achieved by referring the determination of the applicable law to the law of the chosen court, *i.e.* by interpreting "null and void" in Art. 5(1) as encompassing contractual interpretation.[116]

(1) The *personal scope* of a choice of court agreement determines who is bound by it. When the choice of court agreement is initially concluded, the issue of "who is bound" is one of *consent*. But "consent" may also come at a later stage, for instance in case of assignment or succession. The issue can then be framed as one of interpreting the personal scope of the agreement. This makes it clear why the same law should designate the law(s) governing issues of consent and interpreting the personal scope – ultimately one might be dealing with the same question.

For instance, in case of assignment, the agreement remains a choice of court agreement (Art. 3(a)). However, whether a "third party" (non-signatory) is bound will depend on other rules – often the law applicable to the assigned contract or obligation.[117] Since a large number of laws can potentially apply, it is crucial to coordinate this diversity. Having the issue decided by all courts that operate under the Convention (Art. 5(1), Art. 6(a), and Art. 9(a) authority) on the basis of the same law(s) designated by the law of the chosen court ensures uniformity of outcome with regard to individual choice of court agreements.

Leaving aside uniformity of outcome, one might object that the reference to the law of the chosen court is not necessary for the court not chosen considering that, pursuant to Art. 6(e), this court would be allowed to take the case once the chosen court has decided not to hear it. However, the Art. 6 court should not need to wait for such decision of the chosen court, which could be a waste of time and money for the parties.

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[115] On these provisions see below Section III.B.

[116] Agreeing with the result M. WELLER (note 73), p. 263, but applying the conflict rule in Art. 5(1) *by analogy*.

[117] The *Forderungsstatut*, see H. SCHACK (note 9), no. 510 (with comparative references). See also T.C. HARTLEY (note 9), § 8.10 ("a matter of applying the relevant system of contract law").

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The reference to the law of the chosen court for determining the law(s) applicable to the personal scope of a choice of court agreement is also helpful for enforcement authorities. If the chosen court accepts jurisdiction by determining that the choice of court agreement is effective, the enforcement authority is bound by this decision (Art. 9(a) *in fine*). The question then arises how far this binding effect reaches. If it encompasses issues of the personal scope of a choice of court agreement, as determined by interpretation of the choice of court agreement, the enforcement authority is bound by the chosen court's decision and no diverging outcomes can arise. If, however, the issue of determining the law(s) applicable to the personal scope of a choice of court agreement were left to the law(s) designated by the law of the forum, *i.e.* the enforcement authority's law in this context, the decision of the chosen court would not be binding in that regard and the enforcement authority could, potentially, refuse enforcement. Such diverging outcomes are to be avoided, in particular given the close connection of the issues of consent and personal scope of a choice of court agreement.

(2) The law(s) designated by the law of the chosen court also determine the *subject-matter scope* of a choice of court agreement, for instance whether congruent tort claims (*konkurrierende Deliktsansprüche*) are covered. The reason why Art. 5(1) also refers to the law(s) designated by the law of the chosen court for such issues of interpretation is that it has to be determined whether the choice of court agreement is effective (or "null and void") with regard to the particular claim. If the agreement is ineffective in that regard, the chosen court may decline jurisdiction.

Interpreting the subject-matter scope of choice of court agreements at treaty level or according to the law(s) designated by the law of the forum would risk creating legal uncertainty and conflicting outcomes, as demonstrated in the previous Section with regard to the personal scope of a choice of court agreement. A solution that may make sense in the context of the Brussels Ia Regulation,[118] with the CJEU as the guarantor of uniform interpretation, is unsuitable for the treaty context, where such guarantor is missing.[119]

The words "to which the agreement applies" in Art. 5(1) therefore do not contain any substantive rule at treaty level. They merely refer to an effective choice of court agreement (within the scope of the Convention, Art. 3), issues of effectiveness and the agreement's subject-matter scope to be determined in accordance with the law(s) designated by the law of the chosen court.

(3) All remaining issues of interpretation concerning effectiveness that are not regulated by the Convention should also be included in the "null and void" concept and be governed by the law(s) designated by the law of the chosen court. The reason is again the uniformity of outcome (and primarily the uniform

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[118] See *e.g.* A. SCHULZ (note 81), p. 253, highlighting the "European context of a more and more closely integrated common judicial area".

[119] *Contra* T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 101 (attempt an autonomous interpretation of the "disputes covered" under the Convention); T.C. HARTLEY (note 9), § 8.09 (for a parallel interpretation of "disputes covered" in the Convention, the Brussels Ia Regulation, and the Lugano Convention).

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designation of a law governing the respective issues). An example could be the question of whether a choice of court agreement has expired.

However, it should not be forgotten that there are some issues which, although characterised as issues of interpretation under some legal systems, are regulated by the Convention directly (outside its jurisdiction provisions and, arguably, more relating to its scope[120]). For instance, (i) whether the choice of court agreement is exclusive, which is often treated as an issue of interpretation,[121] is determined by Art. 3(b);[122] (ii) where a choice of court agreement is part of an overall contract and it is alleged that the overall contract is null and void, Art. 3(d) clarifies that in itself this has no impact on the validity of the choice of court agreement.

3. *Burden and Standard of Proof*

Finally, in practice, issues of the burden and the standard of proof play a fundamental role that justifies some additional observations.

The *burden of proof* with regard to a choice of court agreement appears straightforward: it lies with the party relying on such agreement[123] in whichever forum the issue arises. The reason is that such party does so in order to invoke an exception to the general jurisdiction rules in such forum.

The issue of the *standard of proof* is more difficult. In some systems, a good arguable case[124] suffices to establish jurisdiction on the basis of a choice of court agreement. This would be, in these systems, less than the normal balance of probabilities standard applicable in civil law cases.[125]

It would seem that the Convention should be less concerned about the standard applied by the chosen court where that court *accepts* jurisdiction. However, if other courts are supposed to be bound by its decision at the enforcement stage, the Convention requires the chosen court to have "determined that the agreement is valid" (Art. 9(a) *in fine*), most likely, at some point during the proceedings, according to the chosen court's regular standard of proof. In any event, discretionary considerations may not play any role due to Art. 5(2). This

[120] These provisions are part of Chapter I on "Scope and Definitions".

[121] See *e.g.* H. SCHACK (note 9), no. 521 (in the context of discussing the interpretation of choice of court agreements under *German domestic* law; the position is different if German courts apply EU law); see the comparative account above note 24.

[122] The Convention does not apply to non-exclusive choice of court agreements. However, according to Art. 22, Contracting State may provide additional protection.

[123] HALSBURY'S LAWS OF SINGAPORE (note 102), para. [75.112]; D. JOSEPH (note 11), no. 10.43.

[124] See *e.g.* HALSBURY'S LAWS OF SINGAPORE (note 102), para. [75.112].

[125] For the relevant standards under, for instance, English common law, see I. BERGSON, The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union, *JPIL* 2015, p. 1 (10-11): balance of probabilities, good arguable case, serious issue to be tried.

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should mean in turn that the chosen court may not *decline* jurisdiction under Art. 5(1) merely on the basis of a good arguable case that the choice of court agreement is null and void.[126]

B. Derogation: Obligations of a Court Not Chosen (Art. 6)

The derogative effect of choice of court agreements is addressed in Art. 6.

Art. 6 concerns "proceedings to which an exclusive choice of court agreement applies", which has to be determined by interpreting the choice of court agreement, although it is unclear under which law.[127] It is submitted that the notion of "exclusive choice of court agreement" in Art. 6 refers to the Convention's scope – to be determined at treaty level.[128] Whether such choice of court agreement then "applies" (Art. 6) to specific proceedings is a sub-issue of whether such agreement applies to a certain (overall) "dispute" under Art. 5(1). It is therefore determined by the law(s) designated by the law of the chosen court.[129]

Any court (of a Contracting State) outside the State of the chosen court[130] must decline jurisdiction unless one of the exceptions in Art. 6(a)-(e) applies. These exceptions are exhaustive ("unless") – this being an autonomous rule at treaty level. They do not create Convention-based jurisdiction rules. Rather, the court not chosen must determine its jurisdiction according to its own rules. The effect of Art. 6 is only that the Convention will not stand in the way of a court not chosen accepting jurisdiction.[131]

Except in Art. 6(d) (below 1.), Art. 6 contains only conflict rules (below 2.). The provision prohibits a lowering of the standard of proof if a court not chosen wishes to rely on the exceptions in Art. 6 (below 3.).

1. Substantive Rule: Whether the Agreement Can Reasonably Be Performed (Art. 6(d))

Under Art. 6(d), a court not chosen may ignore a choice of court agreement if "for exceptional reasons beyond the control of the parties, the agreement cannot

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[126] Too broad-brush D. JOSEPH (note 11), no. 10.43, stating that English courts would always apply the good arguable case standard.

[127] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 144, raise the issue that an interpretation of the choice of court agreement is required but do not discuss according to which law.

[128] On which see above Section III.A.1.(b).

[129] See above Section III.A.2.(e)(2) *in fine* (subject-matter scope).

[130] According to its wording, Art. 6 does not apply to courts not chosen in the Contracting State of the chosen court. As can be seen also from Art. 5(3), on which see above Section III.A.1.(a), the Convention does not aim at finally determining the internal allocation of jurisdiction within a Contracting State.

[131] See T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 146; R.A. BRAND/ P. HERRUP (note 8), p. 88.

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reasonably be performed". The scope of this provision, as with the other exceptions in Art. 6, must be limited.[132]

It has been suggested that issues of "frustration" would fall under Art. 6(d),[133] but this does not appear to be a relevant example. Under English law, for instance, frustration "brings the contract to an end forthwith, without more and automatically",[134] *i.e.* frustration renders a choice of court agreement "null and void". Such scenario falls under Art. 6(a) insofar as frustration is applied under a law designated by the law of the chosen court – as it should be, considering that this is an issue of effectiveness of the choice of court agreement. There would thus be no need to rely, in addition, on Art. 6(d). More generally, Art. 6(d) cannot refer to issues of (in)effectiveness of the choice of court agreement under any law(s) designated by the law of the chosen court[135] since they are covered by Art. 6(a). If, on the other hand, one applies frustration under the law of the forum, this could be framed as a public policy exception covered by Art. 6(c). Art. 6(d) in addition would again be superfluous.

The explanation may be that Art. 6(d) reserves the possibility of residual jurisdiction in exceptional cases[136] where the choice of court agreement remains valid (*forum necessitatis*, "*Notzuständigkeit*"[137]). In line with its wording, considering that it does not designate an applicable law, Art. 6(d) is a substantive rule,[138] to be interpreted in accordance with the principles of the Convention itself, *i.e.*, most importantly, in view of the obligation of uniform interpretation (Art. 23).

> *Example 3:* Art. 6(d) could provide a solution in a scenario[139] such as the one underlying the English case of *Carvalho v. Hull Blyth*

[132] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 148.

[133] T C. HARTLEY/ M. DOGAUCHI (note 1), para. 154.

[134] *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497 (P.C.) 505 (LORD SUMNER).

[135] T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 154, fn. 193, also refer to the German concept of *Wegfall der Geschäftsgrundlage* (now codified as *Störung der Geschäftsgrundlage* in s. 313 German Civil Code). The relevance of this example is also doubtful considering that, under this concept, a party may request the modification of an agreement or can ultimately terminate it, *i.e.* the agreement is no longer effective, at least not in its original form – a scenario covered by Art. 6(a).

[136] Maybe similar to cases where service outside the jurisdiction under English common law would be permitted on the basis that England is the proper place because possibly the only realistic place to have a judicial hearing, see A. BRIGGS (note 24), no. 4.438.

[137] A *forum necessitatis* is considered *e.g.* in cases where all possible fora, for one reason or another, decline jurisdiction, see H. SCHACK (note 9), No. 457. T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 154, mention war in the State of the chosen court.

[138] This is not discussed in T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 154, but the authors' reference to the doctrine of frustration could be understood as invoking a substantive law concept that would need to be developed at treaty level. *Contra* R.A. BRAND/ P. HERRUP (note 8), p. 94, advocating an application of the *lex fori*.

[139] Similar scenario contemplated by T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 154.

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(Angola) Ltd.[140] The case involved decolonisation in Angola. The English Court of Appeal accepted that the court designated in the parties' choice of court agreement (the District Court of Luanda in Angola) had undergone some fundamental change (after Angola's independence from Portugal), holding that the court chosen by the parties had in fact disappeared. Although a "District Court of Luanda" still existed in name, this court was not the one chosen.

It should be noted that in this case there were no capacity concerns and the choice of court agreement, under the law(s) designated by the law of the chosen court, remained valid. Art. 6(a), (b), and (e) would thus provide no solution. Furthermore, it may seem far-fetched to argue that enforcing the parties' choice would cause "manifest injustice or would be manifestly contrary to the public policy of the State of the court seised" (Art. 6(c)), and such argument would require a negative or even derogatory verdict about a foreign court, which a State court might want to avoid. However, the court not chosen might rely on Art. 6(d) in order to justify ignoring the choice of court agreement – invoking "exceptional reasons beyond the control of the parties" that resulted in the fact that "the agreement cannot reasonably be performed" (Art. 6(d)), at least not in the way the parties originally envisaged (considering that the "old" District Court of Luanda had disappeared). This would involve no value-judgement relating to the designated court and would simply give effect, as best as possible, to the parties' original choice at the time of entering into the agreement.[141]

2. *Conflict Rules*

The remaining four exceptions in Art. 6 are, according to their wording, conflict rules, although some of their elements may have to be interpreted autonomously at treaty level.

(1) Under Art. 6(a), a court not chosen may refuse to respect a choice of court agreement, irrespective of a decision of the chosen court, if the choice of court agreement "is null and void under the law of the State of the chosen court". While this gives priority to the *law* of the chosen court, the wording of Art. 6(a) also makes it clear that the Convention does not grant the chosen court exclusivity for determining the effectiveness of the choice of court agreement, *i.e.* binding for

[140] [1979] 1 W.L.R. 1228; [1979] 3 All E.R. 280; [1980] 1 Lloyd's Rep. 172 (C.A.).

[141] A similar issue might arise in the context of Brexit. While there is no reason to suspect that the quality of the English judiciary will in any way deteriorate due to the UK leaving the EU, the parties to a choice of court agreement may nevertheless have expectations as to how certain subject-matters are being adjudicated in the English courts – and the way of adjudication may change, *e.g.* insofar as EU law is concerned. Or the parties may have certain expectations as to the enforceability of an English court judgment in the EU that are then impossible to meet. It cannot be excluded that, from the parties' perspective, the English courts might fundamentally change their "nature".

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all courts not chosen.[142] Any court seised, be that the court chosen or a court not chosen, determines the effectiveness of a choice of court agreement itself.[143]

The question then arises how the term "null and void" in Art. 6(a) must be interpreted, and which issues are encompassed by the reference to the law of the chosen court. In order to achieve a uniform regulatory framework to the largest extent possible, it is submitted that "null and void", and the reference to the law of the chosen court in Art. 6(a), must be interpreted in exactly the same way[144] as under Art. 5(1)[145] for the following reasons.

First, the wording of Art. 5(1) and Art. 6(a) is virtually identical as far as this is relevant in the present context. Identical wording in one legal instrument should be interpreted in the same way, unless there are strong reasons to apply diverging interpretations. In the present case, there are no such reasons. Second, Art. 5(1), Art. 6(a), and Art. 9(a) attest to the Convention's policy choice to give the law of the chosen court priority to determine the law(s) applicable to the effectiveness of choice of court agreements. A court applying Art. 6(a) acts under the Convention and must respect this policy decision.[146] Third, interpreting "null and void" in Art. 5(1), Art. 6(a), and Art. 9(a) in an identical manner reduces the risk of contradictory decisions. Otherwise, there is a risk that the court chosen and all courts not chosen decline (violation of the right to access to justice) or accept (problem of parallel proceedings) jurisdiction.[147]

(2) A court not chosen need not respect a choice of court agreement if "a party lacked the capacity to conclude the agreement" "under the law of the State of the court seised" (Art. 6(b)).[148] What "capacity" is in this context needs to be determined at treaty level, as the Convention itself must determine the scope of the safety valve in Art. 6(b) – or otherwise domestic law could circumvent the Convention. In the interest of uniformisation of the applicable jurisdiction rules,

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[142] This is different at the enforcement stage (Art. 9(a)), see below Section III.C.1.

[143] M. BLÄSI (note 12), p. 182-183; R.A. BRAND/ P. HERRUP (note 8), p. 88; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 145-146, 149. Unclear B. HESS, *Europäisches Zivilprozessrecht,* C.F. Müller, 2010, § 5, no. 45: court not chosen must suspend the proceedings until the chosen court has decided on its jurisdiction; but also § 6, no. 131: no prerogative of the prorogated court to decide on its jurisdiction.

[144] The majority of commentators seems to agree with this, see *e.g.* R.A. BRAND/ P. HERRUP (note 8), p. 90; T.C. HARTLEY (note 60), p. 139; M. WELLER (note 11), no. 22.

[145] On this interpretation see above Section III.A.2. On the reasons why this interpretation is warranted as such see below Section IV.

[146] See R.A. BRAND/ P. HERRUP (note 8), p. 88: a court not chosen "should not exercise its jurisdiction in a manner inconsistent with the fundamental object and purpose of the Convention".

[147] See A. SCHULZ (note 81), p. 256.

[148] According to one author, Art. 6(b) is contained in Art. 6(a), see C. THIELE, The Hague Convention on Choice-of-Court Agreements: Was It Worth the Effort?, in E. GOTTSCHALK/ R. MICHAELS/ G. RÜHL/ J. VON HEIN, *Conflict of Laws in a Globalized World,* Cambridge University Press, 2007, p. 63 (76). However, the laws designated in these two provisions to determine the law(s) applicable to the issue of capacity, *i.e.* the law of the forum (Art. 6(b)) and the law of the chosen court (Art. 6(a)), are different.

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the scope of application of this exception must be as limited as possible. In a given case, the notion of "capacity" in the context of Art. 5(1), as determined by the law(s) designated by the law of the chosen court, may therefore differ from the "capacity" concept in Art. 6(b), as determined by the Convention.

(3) A court not chosen also need not respect a choice of court agreement if "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised" (Art. 6(c)). The potential scope of the notions of "manifest injustice" and "public policy" must also be interpreted at treaty level[149] and restrictively,[150] for the same reasons as those mentioned in the previous paragraph with regard to the concept of "capacity" in Art. 6(b). Only within the scope of these notions, as defined by the Convention, may a court not chosen rely on its own law.[151] For instance, it is prohibited to invoke "public policy" to counteract the Convention's rules on the admissibility of choice of court agreements (as defined by the Convention's scope).

(4) Pursuant to Art. 6(e), the court not chosen may ignore a choice of court agreement if "the chosen court has decided not to hear the case", regardless of the chosen court's reason.[152] Although it does not explicitly read like a conflict rule, the issue of whether a chosen court has decided not to hear the case must be determined according to the designated court's rules.

3. Standard of Proof

The question remains whether, in the interest of ensuring the envisaged priority of the (law of the) chosen court, Art. 6 has any impact on the standard of proof (regarding the choice of court agreement and whether it may be null and void, as well as regarding the other grounds in Art. 6) required in the court not chosen. The answer depends on the way the court not chosen wishes to proceed.

If a court not chosen *gives priority to the chosen court*, there seems to be no reason why Art. 6 should have any impact on the standard of proof (regarding the choice of court agreement) before the court not chosen. From the perspective of the Convention, a court not chosen should be free to refrain from exercising jurisdiction on the basis of a *prima facie* assessment of its jurisdiction and in particular of the effectiveness of the choice of court agreement.[153]

However, if the court not chosen *wishes to assume jurisdiction*, invoking one of the exceptions in Art. 6 that authorise it to ignore the choice of court agreement, the objectives of the Convention require that the court not chosen make

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[149] R.A. BRAND/ P. HERRUP (note 8), p. 92.

[150] R.A. BRAND/ P. HERRUP (note 8), p. 92; T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 148.

[151] Imprecise T.C. HARTLEY (note 60), p. 140, mentioning only the court's "own concepts of justice and public policy". But domestic law may not define what *e.g.* "public policy" is for the purposes of the Convention.

[152] R.A. BRAND/ P. HERRUP (note 8), p. 95.

[153] M. WELLER (note 100), p. 112.

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a full assessment of the grounds in Art. 6.[154] The court not chosen may not assume jurisdiction purely on the basis of *forum non conveniens* considerations or a good arguable case that the choice of court agreement may be invalid. This is independent of whether proceedings have been commenced in the chosen court, or indeed whether such proceedings will ever be commenced.

C. Rules of Indirect Jurisdiction

The Convention furthermore aims at establishing, through two conflict rules, a uniform regulatory framework for determining indirect jurisdiction.

According to Art. 8(1)(1), a "judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter". Art. 9 enumerates, exhaustively,[155] exceptions to this rule. The first two of these exceptions concern the concept of indirect jurisdiction by referring to the agreement's effectiveness under the law(s) designated by the law of the chosen court (below 1.) and capacity issues under the law of the State requested to enforce (below 2.).

1. Choice of Court Agreement Null and Void (Art. 9(a))

The authority requested to enforce a judgment rendered by a chosen court falling under the scope of the Convention may in principle itself review whether such agreement is null and void under the law(s) designated by the law of the chosen court (Art. 9(a)). Yet, Art. 9(a) *in fine* also provides that the requested authority must accept the validity of the choice of court agreement, without reviewing it, if "the chosen court has determined that the agreement is valid". In an enforcement context, therefore, the chosen court's decision on the effectiveness of the choice of court agreement is binding on all other courts.

As a consequence, the requested authority only determines the agreement's validity independently under Art. 9(a) where there may be a valid choice of court agreement but the chosen court left the issue open, accepting jurisdiction on the basis of some other ground.[156]

If the requested authority determines that the choice of court agreement is valid and the dispute (and thus ultimately the chosen court's judgment) covered thereby, it must enforce the decision under Art. 8(1). It would be overly formalistic to request the chosen court to expressly state that it bases its jurisdiction on the choice of court agreement, or to determine the validity of the choice of court agreement in the proceedings in the chosen court if jurisdiction can be established more efficiently on the basis of some other ground.

[154] See M. WELLER, *Ibidem*, p. 111-113.

[155] See Art. 8(1)(2): "Recognition or enforcement may be refused *only* on the grounds specified in this Convention." (emphasis added)

[156] See T.C. HARTLEY/ M. DOGAUCHI (note 1), para. 183, fn. 220.

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If the chosen court has not decided upon the issue and the requested authority determines that the choice of court agreement is null and void, it may refuse enforcement. Enforcement may in particular be refused if the judgment concerns an issue that is not covered by the subject-matter scope of the choice of court agreement, even though the choice of court agreement may *per se* be valid. The choice of court agreement shall thereby be considered ineffective (null and void) with regard to such subject-matter.[157] Otherwise any decision of a chosen court, and between the parties that have designated this court to decide upon certain (other) disputes,[158] would potentially "travel" under the Convention, even though the parties may have carefully restricted the subject-matter scope of their choice of court agreement, *i.e.* even though there is in fact no choice of court agreement with regard to the particular dispute.[159]

2. Issues of Capacity (Art. 9(b))

Finally, Art. 9(b) is the equivalent of Art. 6(b)[160] and allows an authority to refuse enforcement if a judgment was rendered on the basis of a choice of court agreement that would not be considered binding for one of the parties under the law of the requested State. With regard to capacity issues, the Convention does not establish a uniform regulatory framework since the chosen court (Art. 5(1)), any court not chosen (Art. 6(b)), and authorities requested to enforce (Art. 9(b)) may all decide the issue differently.[161] However, the concept of "capacity" in Art. 6(b) and Art. 9(b) must be interpreted at treaty level and restrictively, whereas the "capacity" relevant in the context of Art. 5(1)[162] is a concept of the designated domestic law (and its precise definition is ultimately irrelevant for the purpose of applying the Convention).

[157] On the interpretation of "null and void" with regard to the subject-matter scope of the choice of court agreement see above Section III.A.2.(e). See also below note 159.

[158] The chosen court's jurisdiction under the Convention only extends to disputes "to which the [choice of court] agreement applies" (Art. 5(1)).

[159] The outer limit would be the Convention's scope (Art. 2(2)). A decision on any claim within this scope (even if not covered by the choice of court agreement) would have to be enforced in principle under Art. 8(1) if "null and void" in Art. 9(a) did not refer to the subject-matter scope of the choice of court agreement as determined by the law(s) designated by the law of the chosen court. This result must be rejected.

[160] On which see above Section III.B.2.

[161] See above note 114.

[162] See above Section III.A.2.(d)(6).

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IV. Achieving the Objectives of Legal Certainty and Effectiveness

Although the proposed approach of merely coordinating diversity may be seen to have potential downsides (below A.), the Convention's structure allows for no viable alternatives (below B.). The approach has four key advantages (below C.).

A. Potential Downsides of the Proposed Approach

There may be, with regard to conflict as well as substantive rules, some uncertainty involved as to the correct legal solution in a given case. This is due to the fact that not all details may be settled under the law of the chosen court and the substantive law(s) designated thereby. However, such uncertainty is at least predictable as the state of the respective law can be researched – and the courts of the respective domestic legal system can ultimately clarify the issue. This is better than importing such uncertainty into the Convention.

Furthermore, analysing whether the choice of court agreement is null and void under the law(s) designated by the law of the chosen court may be more complicated for other courts and authorities than for the chosen court, both with regard to conflict and substantive rules.[163] However, this arises under any conflict of laws scenario. Other courts and authorities should, to the extent possible, let the chosen court decide first and subsequently defer to its decision.[164] A party initiating proceedings in a court that is not the designated court should not have it easy to convince the court to take the case.

The courts operating on the basis of Art. 6(a) and Art. 9(a) may also err when applying foreign law. On the other hand, the occasional mistake when applying foreign law should be preferable to having no way to predict, and thus prepare for, the applicable rules.

Finally, the proposal does not solve issues of characterisation at domestic law level or problems of interpreting and applying conflict of laws and substantive jurisdiction rules. However, solving such problems is not the objective of the proposed interpretation (and, one might add, of the Convention). Rather, the goal is to designate an authority (the chosen court, including courts of appeal in the respective jurisdiction) and a legal regime (the law of the chosen court including its conflict of laws rules) to deal with these problems and finally settle them – in a particular case for the parties and overall through case law for the future. *Mutatis mutandis*, the same applies to the courts and regimes designated by the conflict rules of the law of the chosen court. What the proposal does solve, therefore, or at least reduce, are issues of characterisation and interpretation at treaty level – by minimising the need for autonomous interpretation at treaty level and by otherwise referring these issues to a domestic law and its courts.

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[163] R.A. BRAND/ P. HERRUP (note 8), p. 81.

[164] See Art. 6(e) and Art. 9(a) *in fine*.

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B. The Structure of the Convention Dictates the Proposed Approach

Some might argue that the proposed approach ultimately means that an exception to the jurisdiction rules in the Convention, *i.e.* the concept of a choice of court agreement being "null and void" (Art. 5(1)),[165] is interpreted broadly, whereas exceptions should in general be interpreted restrictively. However, while that may be a valid starting point, there is no rule that exceptions must at all cost be interpreted in one way or another, the Convention's wording, structure, and objectives also being important elements for the interpretative exercise. The latter elements dictate the proposed approach.

A uniform regulatory framework cannot be achieved by determining more of the potential substantive issues at treaty level, or by allowing the applicable law(s) to be determined by the law of the forum. Even though Art. 23 enshrines the principle of uniform interpretation, there is no judicial body that would ultimately ensure uniformity at treaty level:[166] "Any promulgated text of law is just words until it is applied as law. And any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law."[167]

The situation is very different under the Brussels Ia Regulation as the CJEU watches over the application of EU law and thus also authoritatively interprets the Brussels Ia Regulation.[168] In the context of this Regulation, and in order to achieve uniformity, it may indeed be preferable to autonomously interpret Brussels Ia Regulation provisions in a much more detailed manner, *i.e.* to leave the Member States as little interpretative leeway as possible.[169] The CJEU ensures uniformity.

In the context of the Convention, however, considering that there is no CJEU or other ultimate decision maker available,[170] it is preferable to approach the interpretation of Convention provisions differently. A uniform regulatory framework on the basis of the Convention can best be achieved by reducing the need for autonomous interpretation at treaty level according to the following considerations.

On the one hand, this can be done by interpreting its provisions as closely to the natural meaning of their wording as possible, *i.e.* by not reading too much into them. What is proposed here is an exercise of autonomous interpretation at treaty level. However, the interpretation follows closely the wording, structure, and objectives of the Convention, avoiding undue creativity, and it is hoped that domestic courts could agree with it.

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[165] See above note 35.

[166] M. WELLER (note 73), p. 262.

[167] C.B. ANDERSEN (note 101), p. 41.

[168] T.C. HARTLEY, *Civil jurisdiction and judgments in Europe: the Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, Oxford University Press, 2017, no. 1.17-1.36.

[169] See *e.g.* on formal requirements indicating consent above note 55.

[170] T.C. HARTLEY (note 168), no. 1.02, points out that the CJEU has also the final say about the interpretation of the Convention within the EU Member States. This is correct and ensures a uniform application of the Convention within the EU. But the scope of such uniformisation is limited to the jurisdiction of the CJEU that does not extend to other Contracting States of the Convention.

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On the other hand, the need for autonomous interpretation is reduced by using the Convention provisions as conflict rules as far as possible, *i.e.* by leaving it to the law(s) designated thereby to ensure uniformity. Conflicting outcomes cannot be avoided to the extent the Convention permits them,[171] but the risk of unwanted conflicting outcomes in specific cases is minimised.

Any perceived "deference" to the law of the chosen court could be seen as a *quid pro quo* amongst Contracting States. Arguably, however, this is the wrong perspective to begin with. The Contracting States only recognise and enforce the *parties'* autonomous choice; they do not defer to or put trust in the law of other States or their courts or otherwise protect parties on the basis of their residence and potential legal expectations – the Convention being applicable purely on the basis that the court(s) of a Contracting State are chosen.[172] Whether the Convention is indeed based on a "qualified" or "partial" mutual trust[173] can be left open in this context.

In any event, interests of States other than the one in which the chosen court is located are not jeopardised, as the Convention provides – in view of applicable jurisdiction rules – safety valves for courts not chosen (Art. 6(b)-(c)) and authorities requested to enforce (Art. 9(b)).[174]

Contracting States finally have the possibility to make declarations (reservations) when ratifying the Convention.[175] If a Contracting State has not made such reservation, it must be taken to have accepted the overall structure of the Convention. In the interest of promoting the purpose of the Convention, this includes an acceptance to the greatest extent possible of any interpretation that leads to a uniform regulatory framework.

C. Four Key Advantages of the Proposed Approach

The key advantages of the proposed interpretation are, in a nutshell:

First, the solution is simple and straightforward. Leaving it entirely to the law of the chosen court to determine which rules are applicable means, for instance, that it is immaterial whether a domestic rule is considered procedural or substantive,[176] or whether it applies only to domestic or also to international

[171] See above Sections III.B. and C.

[172] P. HUBER (note 27), p. 284, II.1.(c).

[173] M. AHMED / P. BEAUMONT, Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit, *JPIL* 2017, p. 386 (388); M. AHMED, *The nature and enforcement of Choice of Court Agreements: a comparative study*, Hart, 2017, p. 237.

[174] See above Sections III.B.2. and III.C.2. Art. 9(c)-(g) contain further safety valves at the enforcement stage that go beyond issues of (indirect) jurisdiction.

[175] See above note 20.

[176] See *e.g.* P. GOTTWALD, Internationale Gerichtsstandsvereinbarungen: Verträge zwischen Prozeßrecht und materiellem Recht, in *Festschrift für Wolfram Henckel zum 70. Geburtstag am 21. April 1995,* de Gruyter, 1995, p. 295; G. WAGNER, *Prozeßverträge,* Mohr Siebeck, 1999, p. 556-563.

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cases.[177] From the parties' point of view, simplicity of jurisdiction rules is key. All disputes regarding procedural issues (such as jurisdiction) only add to the parties' dispute without bringing them closer to a solution of the underlying "real" problem.

Second, the solution provides legal certainty. When choosing a court, the parties only need to research one perspective fully with regard to the effectiveness of their choice. Concerning other regimes (potentially relevant under Art. 6 or Art. 9), the need for legal advice is reduced to complex or borderline cases.

Third, the solution is nuanced rather than broad-brush. The reference to the law of the chosen court includes a reference to its conflict of laws rules.[178] In the context of applying the law of the chosen court, there is therefore plenty of room for taking into account any circumstances, interests, or policy considerations that one might like to have taken into account (subject only to the substantive rules at treaty level).[179] Having one single starting point in the conflict rules of the law of the chosen court ensures legal certainty and avoids mixing legal cultures and the dangers that come with it.

Fourth, the uniformisation effect is considerable. Such effect was important to the Convention drafters as the negotiation history confirms.[180] With regard to conflict rules, the Convention achieves uniformisation to a very large degree – directing the various courts, through autonomous provisions,[181] to the law upon which the applicable law is to be determined.[182] With regard to substantive rules, considerable *uniformisation is achieved in each specific case*, as the determination of the applicable law by the law of the chosen court (subject only to the safety valves) aligns the substantive rules applied by all courts operating on the basis of Art. 5(1), Art. 6(a), or Art. 9(a).[183]

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[177] This distinction is drawn *e.g.* in French law, see B. AUDIT (note 67), p. 184.

[178] See above Section III.A.2.(b).

[179] This may or may not lead to the substantive rules of some other legal system. Whether a domestic system accepts *renvoi* may play some role in the context of finding a differentiated outcome. However, any potential disadvantage in this context is outweighed by the predictability of the result.

[180] Even R.A. BRAND/ P. HERRUP (note 8), p. 81, although otherwise unnecessarily complicating the Convention's interpretation, concede that the "best articulated justification" of the conflict rules solution in Art. 5(1) "was that there should be uniform results whether the determination is made under Article 5 by the chosen court, under Article 6 by a court not chosen, or under Article 9 by a court asked to recognize and enforce a resulting judgment".

[181] Art. 5(1), Art. 6(a) and (e), and Art. 9(a) refer to the law of the chosen court. Art. 6(b) and (c) refer to the *lex fori*. Art. 9(b) refers to the law of the requested State.

[182] This would lead to harmonisation by rules "fitting together"; see for this interpretation of "harmonisation" L. ENRIQUES, A Harmonized European Company Law: Are We There Already?, *I.C.L.Q.* 2017, p. 763 (773).

[183] In addition, Art. 6(d) establishes an autonomous exception at treaty level.

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There is no overall harmonisation of jurisdiction rules in the abstract, *i.e.* independent of a given case,[184] but the parties to exclusive choice of court agreements, *i.e.* those that should ultimately benefit from this new instrument, do not need such harmonisation in the abstract. They can research the various (diverging) systems and choose the one they like best.

V. Conclusion

The Convention deals with State court jurisdiction that has as its *raison d'être* an act of party autonomy[185] – a choice of court *agreement*. It is not a "judgments convention" under which State interests play a decisive role and parties are subjected to jurisdiction they have not chosen and might be surprised about, *i.e.* may need to be protected against. By ratifying the Convention, Contracting States grant party autonomy. Once the scope of this autonomy is defined, and as long as the parties do not cross its boundaries, State interests must take a back seat.[186] The parties can protect themselves: the silliest rule is not dangerous if the parties are in a position to avoid it (if only by designating a different forum).

The spectre of a chosen court enforcing a choice of court agreement that was concluded "under undue influence, fraud or duress"[187] – a possibility that allegedly warrants additional protection by deviating from the strict adherence to the conflict rule referring to the law of the chosen court in Art. 5(1) – is a fabrication and can be ignored. First, no commentator seems to have identified such law.[188] Second, it is not the Convention's aim to protect against choice of court agreements concluded under questionable circumstances – all it does is to coordinate the extent to which choice of court agreements are effective across Contracting States. While the chosen court will always remain free to enforce questionable choice of court agreements (there is nothing in the Convention that would stop it), other courts and authorities may invoke the safety valves in Art. 6 and Art. 9.[189] Third, and in any event, the risk of *fora* being imposed on parties with less bargaining power may be exaggerated: a "stronger" party is able to ensure litigation in its preferred forum, but this comes at a price at the enforcement stage. Yet, effective enforcement is ultimately what is even more important than a

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[184] Harmonisation of the rule content is what EU lawyers are used to and often expect, see L. ENRIQUES (note 182), p. 765, fn. 9.

[185] On party autonomy and jurisdiction rules see *e.g.* D. COESTER-WALTJEN (note 60), p. 549-550; M. STÜRNER, Gerichtsstands- und Erfüllungsortvereinbarungen im europäischen Zivilprozessrecht, *GPR* 6/2013, p. 305 (305-306).

[186] M. KEYES, Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice, *JPIL* 2009, p. 181 (182-184).

[187] R.A. BRAND/ P. HERRUP (note 8), p. 81; Z. S. TANG (note 64), p. 26.

[188] R.A. BRAND/ P. HERRUP (note 8), p. 81, fn. 1, only provide a "deliberately exaggerated example".

[189] S. LUGINBÜHL/ H. WOLLGAST (note 29), p. 210.

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convenient forum. The "stronger" party will weigh these objectives and the outcome might, in practice, be more balanced than most commentators imagine.

When interpreting and applying the Convention, the objective must therefore be to help the parties and to render their choice effective. Yet, there is no need to make the choice for them or to protect them against "bad" choices. If businesses fail to invest the time and effort required to research the one jurisdiction they wish to choose, nevertheless participating in international commerce and deviating from the regular jurisdiction rules that States establish in order to protect parties in default scenarios, such businesses are not worthy of protection:[190] *caveat emptor*. Unequal bargaining power has been taken into account by limiting the Convention's scope (Art. 2(1));[191] additional protection, if any, must be left to the law(s) designated by the law of the chosen court.

In summary, the general jurisdictional effects and the admissibility of choice of court agreements are governed by substantive rules at treaty level, whereas formal and substantive effectiveness, as well as the interpretation of choice of court agreements falling under the Convention, must be determined according to the law(s) designated by the law of the chosen court. This approach is not "under-ambitious" but realistic.[192] It ensures a uniform regulatory framework for individual choice of court agreements and thus legal certainty and their effectiveness in a transnational environment.

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[190] B. HESS (note 67), p. 278.

[191] T.C. HARTLEY (note 60), p. 138.

[192] For a similar assessment of the Convention's conflict rules approach (although not including formal requirements therein) see L. USUNIER (note 11), p. 61.

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MATRIMONIAL PROPERTY REGIMES IN EUROPEAN PRIVATE INTERNATIONAL LAW

BEYOND HUSBAND AND WIFE – NEW COUPLE REGIMES AND THE EUROPEAN PROPERTY REGULATIONS

Anatol DUTTA[*]

I. The Legal Framework
   A. Definition of Registered Partnership
   B. Definition of Marriage
II. Same-Sex Marriages
III. Side Glance: Polygamous Marriages
IV. Formalised Partnerships without Mandatory Registration
V. *De facto* Partnerships
VI. Conclusion

Traditional marriage between husband and wife is not the only regime which regulates the relationship of a couple, be it during the relationship or – in particular – when the relationship has come to an end due to separation or death. In many jurisdictions, alongside traditional marriage, new couple regimes have entered the scene to ensure that the relationship-related advantages and disadvantages of the partners are fairly distributed. First, marriage was opened to same-sex couples. In addition, optional couple regimes such as registered partnerships were introduced as a substitute or alternative to marriage. And default regimes for de facto partners were created, which trigger legal consequences, also regarding the property of the unmarried or unregistered partners, by securing a participation in the wealth acquired during the relationship.

This growing variety of couple regimes can also be observed in many family laws within the European Union. It is, therefore, rather surprising that the

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 145-158
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Printed in Germany

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recently adopted Property Regulations for spouses[1] and registered partners[2] cover only some of the couple regimes. The European legislature missed, partly due to political reasons (below section II), the opportunity to develop a comprehensive system.

This outcome is already regrettable because the Regulations endanger their goal: to enhance the legal security for all couples in cross-border cases, notably, by establishing a European harmony of decision as to the property consequences of their relationships. It is also a pity that European private international law regarding matrimonial property, does not perform its role as an avant-garde of European private law. For reasons of legislative competence, the European legislator expresses itself in the core area of private law mainly on the level of private international law. Hence, the European private international law instruments can shape, beyond their actual ambit, the common structures of a future European private law, at least, with respect to the fundamental concepts on which European comparative research and future harmonisation could build.

I. The Legal Framework

Crucial for answering the question as to which couple regimes are covered by the Property Regulations for spouses and registered partners, is the meaning of marriage and registered partnership. However, those who expect clear-cut definitions in the new instruments will be disappointed. The Regulations define one of the concepts only.

A. Definition of Registered Partnership

It is only the Regulation for registered partners which provides at Article 3(1)(a) an autonomous[3] definition of registered partnerships. This term shall, for the purposes

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[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2016) OJ L 183/1, 8.7.2016.

[2] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (2016) OJ L 183/30, 8.7.2016.

[3] Cf. also the slightly enigmatic third sentence of Recital 17 in the Regulation for registered partners, stating that the "actual substance of the concept should remain defined in the national laws of the Member States". Nevertheless, the term "registered partnership" in the Regulation is an autonomous concept defined at Article 3(1)(a). Probably, the European legislator only tries to express in Recital 17 that the material to be characterised when applying the legal definition provided in Article 3(1)(a), *i.e.* the substantive provisions on registered partnerships, are subject to national law – which should be a matter of course. This interpretation corresponds also with the fourth sentence of Recital 17, clarifying that

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of the Regulation, denote a "regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation."

This legal definition contains, on the one hand, some elements regarding the nature of the relationship covered by the Regulation. The registered partnership is limited to couples; polygamous relationships are excluded from the scope of the Regulation for registered partners.[4] The gender or sex of the partners is, however, irrelevant. Furthermore, Article 3(1)(a) makes no high demands on the mutual commitment of the partners. The Regulation only speaks of the partners' "shared life". By this element, mere partnerships of convenience (such as flat sharing, companies and partnerships, joint ownership, *etc.*) are probably excluded, although the exact delimitation to partnerships without "shared lives" can be difficult to ascertain.[5] In any case, couple regimes, such as the *cohabitation légale* under Belgian law, which can be established by relatives[6] and opens the regime beyond the classic couple relationships, are sufficient for a "shared life" within the meaning of Article 3(1)(a). Finally, the intensity of the property consequences has no relevance within the legal definition of registered partnerships: the Regulation covers partnerships which entail the same property consequences as marriage, but also partnerships with autonomous regimes even if they are, from a matrimonial property perspective, considerably less equipped than marriage,[7] like in Belgium, France and Luxembourg.[8] The Belgian delegation in the Council had reflected on the question as to whether the Regulation for registered partners should apply to "marriage light" registered partnerships only, and whether "marriage-like" partnerships should be governed by the Regulation for spouses.[9] However, this idea was not adopted in the final version of the Regulations.

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the Regulation does not oblige the Member States to introduce registered partnerships in their national laws, cf. also Council Document No. 15888/14, p. 3.

[4] M. COESTER, Besonderheiten der Verordnung für das Güterrecht eingetragener Partner, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 111 *et seq.*

[5] M. COESTER (note 4), at 112.

[6] Article 1475 Code civil *a contrario*.

[7] J. KOHLER/ W. PINTENS, Entwicklungen im europäischen Personen- und Familienrecht 2015–2016, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2016, p. 1509 *et seq.*, at 1512; C. RUDOLF, Vereinheitlichtes Güterkollisionsrecht für Ehegatten und eingetragene Partner, *Zeitschrift für Rechtsvergleichung (ZfRV)* 2017, p. 171 *et seq.*, at 174. Whether the partners, based on Article 22(1) of the Regulation for registered partners, can choose a law with weak or no matrimonial property consequences for the partners is a different question: does such a law attach "property consequences to the institution of the registered partnership", as required by Article 22(1)? *Pro e.g.* A. DUTTA, Das neue internationale Güterrecht der Europäischen Union – ein Abriss der europäischen Güterrechtsverordnungen, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2016, p. 1973 *et seq.*, at 1981; *contra e.g.* M. COESTER (note 4), at 116 *et seq.*

[8] Cf. Article 1478(1) Code civil (Belgium); Article 515–5 Code civil (France); Article 10(1) Loi relative aux effets légaux de certains partenariats (Luxembourg).

[9] See Council Document No. 13698/11 ADD 16, p. 2.

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On the other hand, the definition at Article 3(1)(a) also establishes formal requirements for registered partnerships. The couple regime must provide for a "mandatory" registration of the partnership. This registration element can only be understood as a compulsory requirement, although the German version of the definition ("*deren Eintragung nach den betreffenden rechtlichen Vorschriften verbindlich ist*") is rather vague in this respect, unlike the English and other versions ("*dont l'enregistrement est obligatoire*", "*la cui registrazione è obbligatoria*"). The nature of the register – civil status register, population register, *etc.* – is, however, of no relevance.

Finally, two general aspects of the legal definition for registered partnerships attract attention: first, one has to infer from the systematic connection of both Regulations that marriage within the meaning of the Regulation for spouses (see below section I.B) does not fall within the definition of registered partnerships. At least the wording of the definition at Article 3(1)(a) of the Regulation for registered partners would cover also traditional marriages. This conceptual overlap fulfils a function, as explained below (section II), when it comes to same-sex marriages. There is also a second general aspect which is worth mentioning: within the existing private international law instruments of the European Union, the term "registered partnership" has been defined in the Regulation for registered partners for the first time quite concretely and narrowly as opposed to the approach followed in the Succession Regulation[10] for example. Article 23(2)(b) of this Regulation rather broadly clarifies that the law governing the succession upon death also determines "the succession rights of the surviving spouse or partner" without establishing, for example, a registration requirement.

B. Definition of Marriage

The Property Regulations for spouses and registered partners, however, duck out of defining marriage, at least on the European level. The Regulation for spouses limits its scope in Article 1(1)(1) to "matrimonial property regimes" – a term which is defined at Article 3(1)(a) only in terms of "property regime" not, however, in terms of its quality as "matrimonial". A definition of marriage is missing in the Regulation; instead, the Regulation for spouses, according to its Recital 17, leaves the marriage concept to "the national laws of the Member States". Hence, the European legislator deliberately avoids an autonomous definition of marriage, and shifts the responsibility, regarding its scope, to national law. Therefore, one can, at least for the moment, only hold that the Regulation *for sure* encompasses marriages which fall under the common core of the marriage definition in all jurisdictions – and that is, for the time being, only opposite-sex and monogamous marriages, which are recognised universally.

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[10] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (2012) OJ L 201/107, 27.7.2012.

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II. Same-Sex Marriages

Against this background, it is rather unclear which of both instruments covers marriages outside the universal definition of marriage. This question concerns, of course, apart from polygamous marriages (see below section III), same-sex marriages which are not offered as optional couple regimes in all Member States participating in the Property Regulations for spouses and registered partners.

Localising same-sex marriages within the Regulations requires a closer inspection of the Regulation for spouses and its reference in Recital 17 to the national law of the Member States (cf. above section I.B). Unfortunately, the Recital leaves open the significant question as to which national law shall determine the definition of marriage. A rather strong opinion, within the literature published so far on the Regulations, interprets Recital 17 as a reference to the *lex fori*,[11] hence the definition of marriage in the private international law or substantive law of the Member State whose courts have been seized in a matrimonial property matter. In particular, Member States that do not allow same-sex marriages should not be obliged to apply the Matrimonial Property Regulation for spouses to such couples. Those Member States have, however, according to the "*lex fori*" theory, to subject same-sex marriages at least to the Regulation for registered partners.[12] The legal definition for registered partnerships in this Regulation also encompasses, as already mentioned (above section I.A), marriages, at least if they have to be registered, and are limited to two spouses; the definition for registered partnerships only excludes, for systematic reasons, marriages which are covered by the Regulation for spouses, hence, at least according to the majority view in the literature, couple regimes which qualify for a marriage under the *lex fori*.[13]

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[11] See *e.g.* A. BONOMI, Fragen des Allgemeinen Teils: Qualifikation, Vorfrage, Renvoi, ordre public, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 123, 130 *et seq*.; D. COESTER-WALTJEN, Die objektive Anknüpfung des Ehegüterstatuts, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 47 *et seq*., at 49; N. JOUBERT, La dernière pierre (provisoire ?) à l'édifice du droit international privé européen en matière familiale – Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés, *Rev. crit. dr. int. pr.* 2017, p. 1 *et seq*., at 7; J. KOHLER/ W. PINTENS (note 7), at 1510; D.-A. SIMOTTA, Die internationale Zuständigkeit nach den neuen Europäischen Güterrechtsverordnungen, *Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss)* 116, 2017, p. 44 *et seq*., at 47; J. WEBER, Die Europäischen Güterrechtsverordnungen: Eine erste Annäherung, *Deutsche Notar-Zeitschrift (DNotZ)* 2016, p. 659 *et seq*., at 669; see also E.J. MEISE, Rechtswahl in vorsorgenden Eheverträgen und Scheidungsfolgenvereinbarungen, *Rheinische Notar-Zeitschrift (RNotZ)* 2016, p. 485 *et seq*., at 491.

[12] Cf. also D. MARTINY, Die Anknüpfung güterrechtlicher Angelegenheiten nach den Europäischen Güterrechtsverordnungen, *Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW)* 2017, p. 1 *et seq.*

[13] Cf. A. BONOMI (note 11), at 131 and 133 *et seq.*

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Such a "*lex fori*" approach, however, thwarts the main goal of any uniform conflict rule within the European Union;[14] it creates a potential disharmony of decisions in an area harmonised by directly applicable Regulations: following the "*lex fori*" approach, one and the same marriage concluded between spouses of the same sex can fall, depending on the forum, under the Regulation for spouses (if the *lex fori* recognises same-sex marriages) or the Regulation for registered partnerships (if the *lex fori* does not recognise same-sex marriages). As a consequence, in different Member States, different harmonised (!) conflict rules might define the applicable matrimonial property law. However, also in the area of jurisdiction, conflicts might arise giving incentives to forum shop – notwithstanding harmonised (!) jurisdictional rules, which, of course, differ in both Regulations. It is already dubious whether the *lis pendens* rules of the Regulations apply if the courts are seized with respect to one and the same marriage, in one Member State on the basis of the Regulation for spouses, and in the other Member State on the basis of the Regulation for registered partners. Can such proceedings involve "the same cause of action" (cf. Article 17(1) of both Regulations) if the marriage is, in one Member State, subject to the rules of the Regulation for spouses, and, in the other, to those of the Regulation for registered partners? Andrea BONOMI correctly asserts: "*Für eine EU-Verordnung ist ein solches Ergebnis unüblich und frustrierend.*"[15]

A satisfactory solution creating a harmony of decisions among the participating Member States, as to which of the Regulations shall apply to same-sex marriages, is by far not impossible. Such a solution simply requires an interpretation of the rather unspecified reference in Recital 17 to national law which safeguards that, from the perspective of all participating Member States, the same national law is decisive for the characterisation of a couple regime as a marriage. One could, for example, in order to achieve harmonious decisions among participating Member States – one of the main goals of both Regulations – interpret the reference in Recital 17 as a conflict rule referring, for the characterisation of a couple regime as a marriage (not for the incidental question as to whether the marriage is existent and valid), to the law under which the couple regime was created or first registered.[16] If the law of this "State of origin" labels the couple regime as a marriage, then this marriage is also regarded as a marriage for purposes of the Property Regulations for spouses and registered partners. The delimitation between both Regulations would, as a consequence, be drawn uniformly for all participating Member States. Admittedly, such a "State of origin"

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[14] This is criticised also by D. MARTINY (note 12), at 7; C. RUDOLF (note 7), at 174; J. WEBER, Einführung, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 1 *et seq*., at 4.

[15] A. BONOMI (note 11), at 131.

[16] A. DUTTA (note 7), at 1976; see also C. RUDOLF (note 7), at 174; already regarding the first Commission Proposal for the Regulations, see A. DUTTA/ F. WEDEMANN, Die Europäisierung des internationalen Zuständigkeitsrechts in Gütersachen – Notizen zu den Verordnungsvorschlägen der Europäischen Kommission zum Ehegüterrecht sowie zum Güterrecht eingetragener Partnerschaften, in R. GEIMER/ R. SCHÜTZE (eds), *Recht ohne Grenzen – Festschrift für Athanassios Kaissis zum 65. Geburtstag*, München, 2012, p. 133, 143 *et seq.*

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approach is much less compatible with the wording of Recital 17 than the "*lex fori*" approach. Especially, according to this *Qualifikationsverweisung*, *i.e.* conflict rule for the purposes of characterisation,[17] "the national laws of the *Member* States" are not necessarily applicable, as the relevant marriage could also have been created or firstly registered in a third State or a Member State not participating in the Regulations. However, a potential "*contra legem*" accusation against the "State of origin" approach might perhaps be balanced by the fact that the definition of marriage is "only" dealt with on the level of the Recitals (and there even in a subclause). Furthermore, the "State of origin" approach as a conflict rule for the purposes of characterisation in effect corresponds to the conflict rule for the property consequences of registered partnerships contained in Article 26(1) of the Regulation for registered partners; hence, it is not a totally new concept within the Regulations. At the most, it appears that one can argue against the "State of origin" approach historically. The background for the reservation of the European legislature in defining marriage is sufficiently known. Some Member States wanted, at any cost, to avoid that the Regulations would force their courts to recognise same-sex marriages.[18] However, those Member States did not ultimately participate in the enhanced cooperation, which led to the adoption of the Property Regulations for spouses and registered partners only for some Member States. Furthermore, the Regulation for spouses with its option to decline jurisdiction (Article 9) and the public policy exception (Article 31) is equipped with sufficient mechanisms to allow courts with a restrictive *lex fori* to exit the Matrimonial Property Regulation for spouses if confronted with a same-sex marriage.

There is a further aspect which militates against the "*lex fori*" approach of the majority opinion in the literature. Applying the law of the courts seized in a matrimonial property matter to the question of whether a same-sex marriage is a marriage entails rather complicated follow-up questions, in particular: how does the relevant forum Member State characterise same-sex marriages? Of course, according to the "*lex fori*" approach, the Member States could, for example, in their implementing legislation, clarify whether same-sex marriages fall within the ambit of the Matrimonial Property Regulation for spouses. The question, however, is how same-sex marriages are characterised if the legislator of the forum Member State remains silent. In such a scenario the characterisation issue is left to legal practice and doctrine in the Member State concerned. For example, the German *Bundesgerichtshof*, the highest court for, *inter alia*, family law matters, characterised – prior to the opening of marriage to same-sex couples in German law – same-sex marriages established abroad as registered partnerships rather than marriages.[19] Such a characterisation, for the purposes of national law, has probably, according to the "*lex fori*" theory, to be extended to the marriage concept of the Matrimonial

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[17] D. MARTINY (note 12), at 7.

[18] *Serdynska*, Die Entstehung der Güterrechtsverordnungen – ein Überblick, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 7 *et seq*.

[19] BGH, BGHZ 210, 59 = FamRZ 2016, 1251 = NJW 2016, 2322, para. 34 *et seq*.; BGH, FamRZ 2016, 1761 = NJW 2016, 2953, para. 14 *et seq*.

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Property Regulation for spouses.[20] However, and here the difficulties start, at least for German law, with the introduction of the so-called "*Ehe für alle*" in Germany,[21] allowing also same-sex marriages, the question is open again. At first sight, the opening of marriage to same-sex couples in German substantive law (see the new § 1353(1)1 of the *Bürgerliche Gesetzbuch*, the German Civil Code) advocates for that such marriages – if one follows the "*lex fori*" approach – are to be characterised before the German courts as marriages within the meaning of the Matrimonial Property Regulation for spouses.[22] At closer inspection, however, one may doubt whether such a characterisation is really correct because German law does not treat same-sex marriages as traditional marriages for the purposes of private international law. Rather a new Article 17b(4) of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, the Introductory Act to the Civil Code, which contains the national private international law rules, provides that same-sex marriages shall be handled in the conflict of laws as registered partnerships (in order to avoid the nationality principle which still governs the preconditions to marry under German private international law and could deprive foreign same-sex couples of their right to marry in Germany). The "*lex fori*" theory, hence, has to decide which definition is relevant according to Recital 17 for the scope of the Matrimonial Property Regulation for spouses in the national law of the forum Member State: the definition in substantive law or the definition in private international law. There are even more possibilities within the *lex fori*: one could also rely, for the characterisation of a certain couple regime as a marriage for the purposes of the Regulation for spouses, on the *lex causae* applicable under the conflict rules of the *lex fori*.[23] Or one could require the forum Member State to characterise a same-sex marriage even as a marriage for the purposes of the Regulation for spouses if the conflict rules of the forum recognise this marriage in whichever form, and be it only as a registered partnership.[24] In a nutshell, the possibilities under the "*lex fori*" theory are manifold. If one follows the "*lex fori*" approach, in my view, one should adhere to the definition of marriage in the private international law of the forum Member State. Indeed, the definition of marriage determines which private international law of the two Regulations is relevant, and, hence, involves a classic

[20] Cf. *e.g.* J. WEBER (note 11), at 669.

[21] See the *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* of 20 July 2017, the Act for the introduction of the right to marry for persons of the same sex, *Bundesgesetzblatt*, 2017 I p. 2787.

[22] M. COESTER (note 4), at 113.

[23] See *e.g.* D.-A. SIMOTTA (note 11), at 47, who relies on Article 9 of the Matrimonial Property Regulation for spouses, which only allows the courts to decline jurisdiction if under the private international law of the forum Member State the marriage in question is not recognised for purposes of matrimonial property. However, contrary to the question of *characterisation* whether a certain couple regime qualifies as a marriage within the Regulations, Article 9 builds on the *existence* and *validity* of a marriage, which can only be checked according to a certain substantive law. Hence, the reference to the *lex causae* in Article 9(1)1 makes sense but says little on the national law applicable to the characterisation issue.

[24] See *e.g.* A. BONOMI (note 11), at 133.

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characterisation issue,[25] which should be located in the area of law determining that question in the *lex fori*: its private international law.[26]

And, finally, there is a further aspect which speaks for the "State of origin" approach: the whole discussion on the law applicable to the definition of marriage within the Matrimonial Property Regulations avoids the discussion as to which of both Regulations fits better for same-sex marriages – a question, which was also not discussed in detail during the legislative process, or at least not documented in the accessible *travaux préparatoires.*[27] *Prima facie*, it appears that the choice of law solutions in the Regulation for registered partners – the property consequences of registered partnerships are subject to the law of the State under whose law the registered partnership was created, cf. Article 26(1) – is quite sensible for same-sex marriages too. As long as not all jurisdictions have opened marriage to same-sex couples, the reference to the law, under which the couple regime is established, ensures that a law applies which recognises same-sex marriages. This consideration might be well-founded for the preconditions of marriage, but it has less force when it comes to the matrimonial property consequences of marriage, which are, in most legal systems, gender neutral: one can indeed apply the matrimonial property law of a State with only traditional marriages to a same-sex marriage without difficulty.[28] The situation is rather different regarding registered partnerships. Not all jurisdictions which offer this regime shape their registered partnerships as marriage-like; as already mentioned, some jurisdictions define the property consequences of registered partnerships independently from, and, in most cases, as even weaker than marriage. Here it is sensible that the law which creates the regime should also define its consequences. Therefore, even from a private international law policy perspective, the better arguments speak for a location of same-sex marriages within the Matrimonial Property Regulation for spouses: this Regulation tries to find – in the *Savigny* sense – the seat of the relationship, by referring to the law of their habitual residence, their nationality or the closest connection (cf. Article 26(1) of that Regulation), much more than the Regulation for registered partners with its rather arbitrary conflict rule pointing to the law under which the couple regime was established.

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[25] A. DUTTA (note 7), at 1975 *et seq*.; see also D. MARTINY (note 12), at 7.

[26] Cf. also A. BONOMI (note 11), at 132 *et seq*.; for a different perspective, see D. COESTER-WALTJEN (note 11), at 49: substantive law of the *lex fori* based on Article 9 of the Regulation for spouses *e contrario*, which refers to the *lex causae* (cf. already note 23); this *argumentum e contrario* is, in my view, not entirely compelling; it would also be possible to interpret Article 9 differently to the effect that the characterisation concepts of the forum's private international law are decisive; probably also in favour of the substantive law of the *lex fori* M. COESTER (note 4), at 113.

[27] Cf. at the most, the considerations of the Belgian delegation mentioned above in section I.A.

[28] See, however, the Italian delegation in Council Document No. 13698/11 ADD 5, p. 2, for a different approach.

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III. Side Glance: Polygamous Marriages

The assumption in the already mentioned Recital 17 of the Regulation for spouses that this Regulation does not define marriage could be challenged, at least regarding polygamous marriages. Those marriages are, of course, not new couple regimes; nevertheless, they shall be addressed briefly here. The Regulation for spouses appears to limit the definition of marriage to monogamous marriages. The text of the Regulation often speaks of "both spouses", for example, in the English version of Article 10, Article 23(1)1 & (2), Article 25(1)1 & (2)1, Article 26(3)1(b), Article 27(a) & (d) and Article 28(1). Moreover, the definition of registered partnership (see above section I.A) limits this concept to monogamous couples. If one, however, takes Recital 17 of the Matrimonial Property Regulation for spouses seriously those indications are erroneous because the definition of marriage shall be subject to national law only,[29] hence, according to the position taken in this paper (above section II) to the law of the State under whose law the marriage was established or first registered. According to the law of that State, polygamous marriages can be admissible. Such a polygamous marriage has then to be treated as a marriage for the purposes of applying the Regulation for spouses. Of course, also here, the preconditions for declining jurisdiction (Article 9 of the Regulation for spouses) or for the public policy exception (Article 31) can be fulfilled. Those who subject the definition of marriage within Recital 17 to the *lex fori* have to check whether the polygamous marriage is a marriage from the perspective of the forum Member State. The question of which concept of marriage – that of substantive law, that of private international law or that of the *lex causae* – is decisive (above section II) has to be answered in this context as well.

IV. Formalised Partnerships without Mandatory Registration

Not only the concept of marriage, but also the legal definition of registered partnerships in the Property Regulations for spouses and registered partners (above section I.A) contains surprising gaps. Some new couple regimes beyond marriage are not covered by the Regulation for registered partners. Excluded are, for example, partnerships which require a formal partnership agreement but not necessarily a registration.[30] The same applies for hybrid systems in which the registration is – for example, besides a factual living together for a certain period of time – only one possibility to trigger property consequences between the

[29] See also A. BONOMI (note 11), at 131.

[30] See *e.g.* in Alberta, Article 3(1)(b) of the Adult Interdependent Relationships Act or in Catalonia, Article 234–1 Codi civil.

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partners.[31] Both kinds of formalised partnerships do not presuppose – other than as provided by the legal definition in Article 3(1)(a) of the Regulation for registered partners – a mandatory registration.[32] The issue must have been known to the European legislature when drafting the Property Regulations for spouses and registered partners. The Hungarian delegation alluded, in one of its papers in the Council discussions, to partnerships with solely optional registration.[33]

A justification for the mandatory registration requirement is not easy to find, more so since the Regulation for registered partners does not primarily use the register as the pertinent connecting factor, but rather generally the law under which the partnership is established (see Article 26(1)). It would have been much more convincing to include all formalised couple regimes which exist alongside marriage. In order to avoid problems of delimitation and in order to exclude pure *de facto* partnerships, the Regulation for registered partners could have, for example, required a registration or a formal conclusion of the agreement with the participation of a public authority.

V. *De facto* Partnerships

The Property Regulations for spouses and registered partners do not apply to mere *de facto* partnerships which do not require a mandatory registration, even if they create matrimonial property consequences. The Recitals of the Regulation for registered partners justify this reluctance as follows: "[w]hile some Member States do make provision for such de facto unions, they should be considered separately from registered partnerships, which have an official character that makes it possible to take account of their specific features and lay down rules on the subject in Union legislation" (Recital 16). It can, of course, be doubted whether a suitable solution for *de facto* partnerships is really impossible on the European Union level. At least in the Green Paper, the European Commission had considered a broader scope of the instruments planned[34] and also some delegations of the Member States

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[31] See *e.g.* in Manitoba the definition of "common-law partner" in Section 1 Family Property Act; cf. also Article 1(36) & (37) Legge delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze (Italy).

[32] For a more generous perspective, however, see A. BONOMI (note 11), at 135.

[33] See Council Document No. 13698/11, p. 2.

[34] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final of 17 July 2006, p. 3: "To ensure that all property aspects of family law are examined, the Green Paper addresses issues touching both on matrimonial property regimes and on the property consequences of other forms of union. In all the Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Mutual Recognition Programme states that the question of the property consequences of the separation of unmarried couples must also be addressed. The area of justice must meet the citizen's practical needs".

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in the Council had advocated in favour of a more comprehensive approach.[35] Furthermore, the private international law codifications of the Member States show that conflict rules for *de facto* couples are not beyond imagination. For example, already the Yugoslav Private International Law Act of 1982, as today the Slovenian Private International Law Act of 1999 at its Article 41, provided that the property consequences of *de facto* unions shall be governed by the law of the common nationality of the partners or in the absence of such a nationality by the law of the common residence.[36]

An exception should, however, be made if a default regime for *de facto* partnerships treats non-married and non-registered partners as married couples,[37] as is the case in some jurisdictions.[38] Such couple regimes should be handled, for the purposes of the Property Regulations for spouses and registered partners, as marriages.[39] To such marriage-like default regimes, in principle, the same applies as to same-sex and polygamous marriages: Which couple regimes are regarded as matrimonial property regimes and are to be characterised as marriages, for the purposes of matrimonial property law, is a question for national law,[40] hence, according to the "State of origin" approach, the law under which the couple regime was established (above section II). However, the "State of origin" approach (and the "*lex fori*" theory too), reaches its limits when it comes to default regimes for *de facto* partners. The legal consequences of such regimes are not based on a legal act, as the celebration of a marriage or the registration of a partnership, which can be easily attributed to a certain legal system. The law on *de facto* partnerships normally, unlike in the area of marriage or registered partnership, does not distinguish between status and status effects. The law applicable to the status effects – apart from matrimonial property, especially, the law applicable to maintenance and succession – refers, if the *de facto* union triggers legal consequence, not to an existing status relationship – created with effect in all areas of law – but rather defines the preconditions for the relevant *de facto* union autonomously. Therefore, it should suffice for the application of the Matrimonial

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[35] See the position of the Slovak delegation in Council Document No. 13698/11 ADD 18, p. 2.

[36] See also in general P. ŠARČEVIĆ, Private international law aspects of legally regulated forms of non-marital cohabitation and registered partnerships, in this *Yearbook,* 1999, p. 37.

[37] Differently as to the first Commission Proposal for the Regulations A. DUTTA/ F. WEDEMANN (note 16), at 139.

[38] *E.g.* in Argentina (Articles 524 *et seq*. Código Civil y Comercial), Australia (Sections 90RA *et seq*. Family Law Act), Brazil (Article 1726 Código civil), Croatia (§ 258 Obiteljski zakon), Ireland (Sections 173 et seq. Civil Partnership and Certain Rights and Obligations of Cohabitants Act, cf. for spouses Sections 13 et seq. Family Law [Divorce] Act), Serbia (Art. 4(2) Porodični zakon), Slovenia (Article 12(1) Zakon o zakonski zvezi in družinskih razmerjih) and Ukraine (Article 74 Semejnyj kodeks), to mention just a few jurisdictions.

[39] A. DUTTA (note 7), at 1976 *et seq*.; cf. also, at least, from a policy perspective M. COESTER (note 4), at 113.

[40] See for informal marriages ("*informell begründete Ehen*") A. BONOMI (note 11), at 131.

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Property Regulation for spouses that the applicable matrimonial property regime treats a – however defined – *de facto* union as a marriage for the purpose of matrimonial property.[41] In contrast to marriage and registered partnership, the law applicable to matrimonial property as the law applicable to one of the status consequences, encompasses also the preconditions for the couple regime.[42]

VI. Conclusion

The fact that the Property Regulations for spouses and registered partners are unclear in the border areas of marriage and registered partnerships can only partially be attributed to shortcomings of the European legislature. It were mainly the sensitivities of some Member States, which in the end did not participate in the Regulations, and precisely their refusal to accept same-sex relationships, which prevented the legislator from touching the marriage concept of the Member States. The lesson to be learned from the Property Regulations for spouses and registered partners is that within the enhanced cooperation, the needs of the not participating Member States should in the future be disregarded.[43] In a perfect world, once a legislative project has failed for all Member States, the negotiations on the enhanced cooperation should start afresh and should not – as it happened in the context of the Property Regulations for spouses and registered partners – uncritically adopt the state of proposals discussed when the breakaway Member States were still on board.

From a technical perspective, one can only criticise the *lacunae* within the legal definition of registered partnerships. Here, in particular, the representatives of the Member States in the Council have to ask themselves why they did not insist that the Regulation for registered partners covers all the formalised partnerships provided for by the Member States laws (see above section IV). However, even this weakness should let us not forget that the Property Regulations for spouses and registered partners, at least for the majority of couples which still live in a traditional marriage, create legal certainty by harmonising the conflict and jurisdictional rules for a considerable number of Member States. The problems might however be solved on a different level. The question of whether status acquired in a Member State has to be recognised in other Member States could not only concern the name of a person[44] but also the matrimonial property

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[41] Cf. also my earlier – slightly imprecise – position in A. DUTTA (note 7), at 1977.

[42] Cf. for the law applicable to succession, DUTTA, in *Münchener Kommentar zum BGB*, 7th ed., 2018, Article 1 of the Succession Regulation para. 15.

[43] A. DUTTA, Schlusswort, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München, 2017, p. 183 *et seq*., at 186.

[44] ECJ, 2 October 2003, Case C-148/02*, Carlos Garcia Avello v Belgian State*, ECLI:EU:C:2003:539; ECJ, 14 October 2008, Case C-353/0*6, Stefan Grunkin and Dorothee Regina Paul*, ECLI:EU:C:2008:559; ECJ, 22 December 2010, Case C-208/09*, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECLI:EU:C:2010:806; ECJ, 2 June 2016, Case C-438/14*, Nabiel Peter Bogendorff von Wolffersdorff v Standesamt*

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consequences of the person's couple relationship.[45] If that is the case[46], the *Qualifikationsverweisung* to the law of the State of origin (see above section II) would have a basis in European Union law, at least for intra-European cases.

der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, ECLI:EU:C:2016:401; ECJ, 8 June 2017, Case C-541/15*, Mircea Florian Freitag,* ECLI:EU:C:2017:432.

[45] Cf. also A. BONOMI (note 11), at 133, mentioning the possibility of applying the case law of the Court of Justice on names to same-sex marriages as such.

[46] See, as to same-sex marriages, the recent decision of the ECJ, 5 June 2018, C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept* v *Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliu Național pentru Combaterea Discriminării*, ECLI:EU:C:2018:385.

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JURISDICTION IN MATTERS RELATING TO PROPERTY REGIMES UNDER EU PRIVATE INTERNATIONAL LAW

Pietro FRANZINA[*]

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 159-194
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. Introduction

Regulations (EU) No. 2016/1103[1] and 2016/1104[2] of 24 June 2016 set forth a comprehensive body of rules of private international law regarding, respectively, matters of matrimonial property regimes and the property consequences of registered partnerships. The outcome of enhanced cooperation under Article 20 of the Treaty on European Union (TEU),[3] the two Regulations bind, so far, eighteen Member States.[4] Their rules apply to legal proceedings instituted on or after 29 January 2019.[5]

The Regulations (hereinafter, the Property Regimes Regulations) bring together rules on jurisdiction, the conflict of laws and the recognition and enforcement of judgments, following the one-stop-shop approach underlying other measures in the field of judicial cooperation in civil matters under Article 81 of the Treaty on the Functioning of the European Union (TFEU), such as Regulation (EC) No. 4/2009 on maintenance obligations (the Maintenance Regulation)[6] and

[1] Council Regulation (EU) No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016.

[2] Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016.

[3] Authorised under Council Decision (EU) No. 2016/954, OJ L 159, 16.06.2016.

[4] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden.

[5] See Article 69 of the two texts for further details.

[6] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009.

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Regulation (EU) No. 650/2012 on succession upon death (the Succession Regulation).[7]

The two Property Regimes Regulations feature a common layout. Their provisions, apart from obvious adaptations and save for some exceptions, bear almost the same wording and feature the same numbering.

Jurisdiction is dealt with in Chapter II. The provisions in that Chapter may be grouped into four sets, based on their object and function.

Articles 4 to 12 set out the grounds on which the courts of a Member State participating in the enhanced cooperation are entitled to hear a case within the scope of the Regulations and decide it as to its substance.[8] Articles 13 to 16 address questions regarding the exercise of the jurisdiction conferred under the previous provisions (*e.g.*, whether a court may refrain from using part of its jurisdiction in particular circumstances), and the way in which the issue of jurisdiction is to be dealt with in proceedings within the purview of the Regulations (*e.g.*, whether the seised court may declare that it has no jurisdiction of its own motion, rather than on a formal challenge by the defendant). Articles 17 and 18 relate to the coordination of "parallel" proceedings pending simultaneously in two or more Member States, under the usual formulas of *lis pendens* and related actions. Finally, Article 19 refers to the power of courts, other than those with jurisdiction over the substance of the matter, to grant provisional, including protective, measures.

This paper is concerned with the provisions in the first group, that is, the rules that confer jurisdiction over the substance of a matter. Other provisions in the Chapter will be considered only insofar as relevant to the understanding of such rules.

A. "Court" and "Jurisdiction" Defined

None of the measures enacted so far by the EU to deal with judicial cooperation in civil matters comes with an explicit definition of "jurisdiction". The Property Regimes Regulations are no exception.

Rather, the Regulations clarify in Article 3(2) that the term "court" does not refer solely to judicial authorities, but extends to such "other authorities and legal professionals" with competence under the law of their respective States on matters of property regimes, insofar as they "exercise judicial functions or act by delegation of power by a judicial authority or under its control". Those other authorities and professionals can only be assimilated to courts where they "offer guarantees with regard to impartiality and the right of all parties to be heard", and the

[7] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012.

[8] The Regulations refer generally to "Member States". However, since they apply only to participating Member States, the provisions that govern jurisdiction must be understood to refer to Member States participating, at the material time, in the enhanced co-operation.

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decisions they render "may be made the subject of an appeal to or review by a judicial authority" and "have a similar force and effect" as a judicial decision.[9]

In light of the above, the word "jurisdiction" may be understood to refer to the issue of whether the "courts" of a Member State, as defined above, may discharge the functions with which they are entrusted under the law of that State, where they are seised of a matter within the scope of the Regulations.[10] This means that the rules on jurisdiction in the two Regulations are not only applicable where a partner seeks to enforce, against the other, a claim arising from their property relationships, but also, for example, with respect to the liquidation of the spouses' common property, where the liquidation process, pursuant to the relevant national rules, is to take place under the authority of a notary acting as a delegate for a judicial authority (as it occurs, for instance, under Article 255, point 10, of the French Civil Code).[11]

B. Jurisdiction Distinguished from Venue

The jurisdiction-conferring provisions of the Regulations, with the exception of Article 8 on voluntary submission and Article 12 on counterclaims, provide for a general reference to the courts of a given Member State, taken together. It is for the law of the latter State to determine which particular authority within its jurisdiction (*i.e.*, what kind of authority, and the authority of which place) should entertain the case in the circumstances.[12] This conforms to the approach followed by most (but not all) EU measures dealing with jurisdiction,[13] and reflects the principle enshrined in Article 2, whereby the Regulations do not affect the freedom of the Member States to regulate the competence of their authorities in matters of property regimes.

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[9] The formula in the Property Regimes Regulation reproduces the one in Article 3(2) of the Succession Regulation. See further, with reference to the latter provision, M. WELLER, Article 3 - Definitions, in A.-L. CALVO CARAVACA/ A. DAVÌ/ H.-P. MANSEL (eds), *The EU Succession Regulation – A Commentary*, Cambridge 2016, p. 122 *et seq*.

[10] Although the Regulations fail to state this explicitly, the rules therein only apply – in light of their legal basis, Article 81 TFEU – to matters "with cross-border implications".

[11] L. PERREAU-SAUSSINE, Le nouveau Règlement européen "Régimes matrimoniaux", *La Semaine Juridique - Edition Générale* 2016, p. 1932.

[12] A. DUTTA, Das neue internationale Güterrecht der Europäischen Union, *Zeitschrift für das gesamte Familienrecht* 2016, p. 1978.

[13] The same approach is followed, *inter alia*, by the Succession Regulations. The opposite approach is illustrated by some provisions in 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 (Brussels I *bis*), OJ L 351, 20.12.2012, which refer, specifically, to the courts of a particular "place" (*e.g.*, pursuant to Article 7(2), "the courts for the place where the harmful event occurred").

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II. General Features of the Jurisdiction-Conferring Rules

A. The Overall Layout

The Property Regimes Regulations include several provisions that aim to determine whether, and subject to which conditions, the courts of a participating Member State may entertain a cross-border case and decide it on the merits.

The layout of the above provisions, taken as a whole, may be sketched as follows. Articles 4 to 8 identify the Member State whose courts are entitled, as a rule, to entertain a matter within the purview of the Regulations. They set out the "basic" grounds on which jurisdiction can be asserted in accordance with the Regulations. Article 9 allows for an exception to those rules by enabling the courts designated thereunder to decline their jurisdiction in particular circumstances. The same Article 9 identifies the Member State whose authorities should have jurisdiction as a result of the case being dismissed by the former. Articles 10 and 11 supplement the basic grounds mentioned above by setting out the extra grounds on which jurisdiction may be asserted where no court of a Member State has jurisdiction to rule on the matter under the previous rules. Finally, Article 12 provides that where jurisdiction is based on any of the above grounds – basic, alternative or subsidiary – the seised court can also decide a counterclaim.

This rather complex picture, as the analysis of the individual provisions will demonstrate in more detail, underlies two main policies. One such policy consists in ensuring that litigation over property regimes matters is channelled towards a limited number of easily identifiable courts, if not indeed the courts of one Member State alone. The other policy consists in giving the courts of Member States the opportunity to deal with a broad range of matters within the scope of the Regulations, including matters featuring relatively weak ties with the territory or the social or economic environment of the Member States themselves.[14]

B. A Self-Contained Regime

The jurisdiction-conferring rules of the Regulations integrate a self-contained regime. This means that domestic provisions are barred from interfering with the operation of the Regulations, and that the Regulations lay down an exhaustive regime, leaving no room for concurrent, namely national, sources.

[14] I. Barrière-Brousse, Le patrimoine des couples internationaux dans l'espace judiciaire européen – Les règlements européens du 24 juin 2016 relatifs aux régimes matrimoniaux et aux effets patrimoniaux des partenariats enregistrés, *Clunet* 2017, p. 505 *et seq*.

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1. A Uniform Regime, Suffering No Interference from Domestic Rules

By conferring jurisdiction on the courts of a given Member State, the Regulations do not merely enable the designated courts to decide the matters specified thereunder. They also require those courts to entertain such cases and decide them on the merits.

The language and structure of the Regulations suggest, in fact, that the courts of a participating Member State can neither assert their jurisdiction on grounds other than those set out in the Regulations (with Articles 10 and 11 providing the only permissible grounds for extension), nor decline jurisdiction for reasons other than those provided for in the Regulations themselves, for instance, because they consider that the courts of another country would be better placed to decide the case (the only grounds on which a court may refrain from entertaining a claim for which it has jurisdiction under the Regulation are those provided for at Article 9).

2. An Exhaustive Regime, with No Room for Other Sources

Regarding matters within their scope, the Regulations replace in their entirety the domestic rules on jurisdiction of the participating Member States.[15]

There are actually no gaps, in the Regulations, which national rules might in principle be called upon to fill. This reflects the fact that the applicability of the two texts is not affected by the nationality, the habitual residence or other personal qualification of the spouses or partners, nor by the localisation of their assets. Regarding the latter point, it should be noted that, consistent with the posture taken by the Succession Regulation towards the estate of the deceased, the Property Regimes Regulations treat the property relationships of the couple as a unity, and accordingly fail to distinguish between moveable and immoveable property, and – with the exception of Article 10, on subsidiary jurisdiction, and Article 13, on limitation of jurisdiction – between assets located on the territory of a participating Member State (or indeed the Member State of the forum, in the case of Article 10) and assets located elsewhere.

Domestic rules are further prevented, under the Regulations, to serve the residual or subsidiary function with which they are entrusted under other EU texts, such as Regulation (EC) No. 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II *bis*),[16] in accordance with Article 7 therein, or

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[15] D.-A. SIMOTTA, Die internationale Zuständigkeit nach den neuen Europäischen Güterrechtsverordnungen, *Zeitschrift für Vergleichende Rechtswissenschaft* 2017, p. 46. Rather, as stated in Article 62, the Regulations do not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of the Regulations themselves.

[16] 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, 23.12.2003.

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Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I *bis*), under Article 6. Where no court of a Member State has jurisdiction pursuant to the "basic" rules in the Property Regimes Regulations, the only grounds on which jurisdiction can be asserted are, in fact, the uniform grounds listed at Articles 10 and 11.[17]

III. Property Matters Connected with a Succession Case

Article 4 provides that, where a court of a Member State is seised pursuant to the Succession Regulation of a matter relating to the succession of a spouse or a partner, the courts of that State also have jurisdiction to decide such property regimes matters as arise "in connection with that succession case".

A. The Place of Article 4 in the Jurisdictional System of the Regulation

The Property Regimes Regulations do not include a rule of "general" jurisdiction, that is, a rule applicable in principle to any proceedings within their scope. The two texts depart in this respect from a well-established pattern, the paradigm of which is the *actor sequitur forum rei* rule originally laid down in the Brussels Convention of 27 September 1968 on jurisdiction and the recognition of judgments in civil and commercial matters,[18] and now enshrined in Article 4(1) of the Brussels I *bis* Regulation.

Articles 4 and 5 of the Property Regimes Regulations are rules of special jurisdiction, as they apply to no more than a subset of cases within the reach of the Regulations. Article 6, while not presenting itself as special, works in fact as a residual, rather than as a general rule. Actually, jurisdiction conferred under Article 6 is not concurrent with, but rather a complement to, jurisdiction under the previous rules.

B. Purpose and Operation

Article 4 extends the scope of the jurisdiction conferred under the Succession Regulation so as to enable the courts of the Member State designated under the latter instrument to decide, as well, any related claim concerning the property relationships between the *de cujus* and the surviving spouse or partner.

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[17] See Recital 40 of Regulation (EU) No. 2016/1103 and Recital 39 of Regulation (EU) No. 2016/1104.

[18] OJ L 299, 31.12.1972.

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1. Conditions Precedents

For Article 4 to apply, a court in a participating Member State must be seised of a matter in respect of succession in accordance with the Succession Regulation.

In order to determine, for these purposes, whether at the material time the court in question was in fact seised of such a matter, regard should be had to Article 14 of the latter Regulation. If a property regimes matter arises after the succession case is over (namely, because the proceedings have resulted in a final ruling), jurisdiction under Article 4 of the Property Regimes Regulations will no longer be available, from that moment onwards, to initiate fresh proceedings over any connected property matter. By contrast, a court seised of proceedings relating to a matter of property regimes at a time when the succession case was pending, will retain jurisdiction under Article 4 after the latter case is over, according to the principle of *perpetuatio jurisdictionis*.[19]

Jurisdiction over the succession case may be based, for the purposes of the Property Regimes Regulation, on any of the grounds in the Succession Regulation, as they result from Article 4 to 11 therein.[20] According to those rules, jurisdiction lies in general with the courts of the Member State where the deceased habitually resided at the time of death (Article 4). The parties to litigation, however, may, by agreement, confer jurisdiction on a court or the courts of the Member State whose law was chosen by the deceased under a *professio juris* (Article 5). Where the deceased did not habitually reside in a Member State at the time of death, the courts of a Member State in which assets of the estate are located may nevertheless assert their jurisdiction, provided that further conditions are met, such as that the deceased was a national of the Member State in question; but where no court in a Member State has jurisdiction pursuant to the latter provision, the courts of the Member State in which assets of the estate are located has authority to rule on those assets (Article 10). Finally, where no court of a Member State has jurisdiction pursuant to the previous provisions, the courts of a Member State may exceptionally rule on the succession on grounds of necessity, that is, where it is established that "proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected."[21]

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[19] See B. HEIDERHOFF, Die EU-Güterrechtsverordnungen, *IPRax* 2018, p. 9 *et seq*., also for further developments.

[20] See generally, on the jurisdiction-conferring provisions in the Succession Regulation, H. GAUDEMET-TALLON, Les règles de compétence judiciaire dans le règlement européen sur les successions, in G. KHAIRALLAH/ M. REVILLARD (eds), *Droit européen des successions internationales: le règlement du 4 juillet 2012*, Paris 2013, p. 127 *et seq*., and M. ÁLVAREZ TORNÉ, *La autoridad competente en materia de sucesiones internacionales: el nuevo reglamento de la UE*, Madrid 2013. The decision of the drafters to derive jurisdiction over property regimes matters from any ground in the Succession Regulation has been criticised by some authors. See, in particular, the remarks made by A. BONOMI, The Interaction Among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions, this *Yearbook* 2011, p. 223, regarding jurisdiction over a succession matter, based on a choice of court of the parties concerned.

[21] It is unclear whether jurisdiction over a property regimes matter could further be founded, according to Article 4 of the Property Regimes Regulations, on Article 13 of the Succession Regulation, on jurisdiction to receive a declaration of acceptance or waiver of

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The unrestricted reference of Article 4 of the Property Regimes Regulations to the jurisdictional grounds in the Succession Regulation has been the object of criticism, since the "extended" operation of those grounds may fail to meet, in some circumstances, the requirements of proximity and predictability, or prove otherwise unfair to the surviving spouse or partner.[22] This may occur, for instance, where, on account of a *professio juris* made by the *de cujus* according to Article 22 of the Succession Regulation, the courts of the Member State of nationality of the deceased are seised of a succession matter. Article 5 of the Succession Regulation provides that the latter courts have jurisdiction to decide that matter provided, *inter alia*, that the "parties concerned" have so agreed. Apparently, the expression "parties concerned" refers, as such, to those taking part in the proceedings that have the succession matter as their object. Now, the surviving spouse or partner is not necessarily a party to the latter proceedings. This would seem to imply that, under the combined operation of Article 5 of the Succession Regulation and Article 4 of the Property Regimes Regulations, any property regimes claim connected with the succession will have to be brought in the Member State where the deceased was a national, regardless of the agreement, of the surviving spouse or partner, to the jurisdiction of the courts of that State. The outcome, it is contended, would hardly be acceptable. To avoid this shortcoming one should rather interpret Article 5 of the Succession Regulation as requiring in any case, for the purposes of the "attraction" of a property regimes matter, the agreement of the surviving spouse or partner.[23]

The articulation of jurisdiction over a succession and a property regimes matter may prove problematic in other respects. Jurisdiction under Article 4 of the Property Regimes Regulations exists, as noted, when a court in a participating Member State is "seised" ("*saisie*", "*angerufen*") of a matter in respect of succession. The question then arises as to whether the courts so seised, once seised as well of a property regimes matter, should retain their jurisdiction to rule on the property regimes matter in the event that they subsequently decline the jurisdiction under the Succession Regulation with respect to the succession case, as it might occur, *inter alia*, pursuant to Article 6 of the Succession Regulation. The latter provision has it that, where the law chosen by the deceased to govern his succession is the law of a Member State, the seised court may decline its jurisdiction in two situations: where it "considers that the courts of the Member State of the chosen law are better placed to rule on the succession", and where the parties

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the succession, a legacy or a reserved share. Article 4, with its broad language, does not appear to make any distinction among the various grounds in the Succession Regulation, and has been interpreted by some as referring, in fact, to Article 13, as well (D.-A. SIMOTTA (note 15), p. 49 *et seq*.). That said, Article 13, given its narrow scope and the limited powers it grants to the authorities designated thereunder (the mere acceptance of the above declarations), may hardly be seen as a suitable basis for asserting jurisdiction over a property matter.

[22] A. BONOMI, Compétence accessoire versus proximité et prévisibilité du for: quelques réflexions sur ces objectifs antagonistes à l'aune des Règlements sur les régimes et les partenariats, in *Le droit à l'épreuve des siècles et des frontières – Mélanges en l'honneur du Professeur Bertrand Ancel*, forthcoming.

[23] *Ibid*.

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"have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law".

As it will be seen in the following sub-section of this paper, Article 4 of the Property Regimes Regulation, aims to concentrate litigation on related succession and property matters before the courts of one Member State. The Regulations fail to specify whether, in the above scenario, jurisdiction based on Article 4 of the Regulations should cease to exist as a result of jurisdiction over the connected succession case being declined. Logically, this ought to be the case, since the aim of Article 4 is to have the two matters – the succession matter and the property regimes matter – decided in one Member State. Jurisdiction over the property regimes claim should accordingly evolve in parallel with jurisdiction over the succession case.

A parallelism between the succession case and the property regimes matter may occur in another situation, namely where the estate of the deceased comprises assets located in a country other than those bound by the Succession Regulation and the Property Regimes Regulations, respectively. According to Article 12 of the Succession Regulation, the court seised of the succession case may decide "not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State". Article 13 of the Property Regimes Regulations allows the court seised of a property regimes matter to limit the scope of its ruling in a similar fashion where the estate of the deceased "whose succession falls under Regulation (EU) No. 650/2012 comprises assets located in a third state". The two provisions are in fact likely to apply in respect of the same assets, thereby aligning the jurisdiction of a Member State's courts over the succession with the jurisdiction of the courts of that Member State over the property regimes matter.

2. *The Aim Pursued*

The Matrimonial Property Regimes Regulations, according to Article 1(2)(d), do not apply, as such, to the succession or the estate of a deceased spouse or partner. That issue is left entirely to the Succession Regulation.[24] In practice, however, as noted in the Explanatory Memoranda that accompany the proposals for the two Regulations, proceedings in connection with property regimes often arise from the liquidation of the couple's property when the matrimonial ties, or the partnership, cease to exist, either as a result of the death of one of the spouses, or partners, or as

[24] Regarding the delimitation of the scope of the Matrimonial Property Regulations *vis-à-vis* the Succession Regulation, see generally B. HEIDERHOFF (note 19), p. 2 *et seq*., and P. MANKOWSKI, Das Verhältnis zwischen der EuErbVO und den neuen Verordnungen zum Internationalen Güterrecht, *Zeitschrift für Erbrecht und Vermögensnachfolge* 2016, p. 479 *et seq*., and, with reference to the proposals of the above Regulations, A. BONOMI (note 20), p. 219 *et seq*. See also A. BONOMI, Article 1er - Champ d'application, in A. BONOMI/ P. WAUTELET, *Le droit européen des successions. Commentaire du Règlement (UE) no 650/2012 du 4 juillet 2012*, 2nd ed., Bruxelles 2016, p. 87 *et seq*. In the case law of the Court of Justice, see now, on this topic, ECJ, 1 March 2018, *Doris Margret Lisette Mahnkopf*, Case C-558/16, ECLI:EU:C:2018:138.

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a result of the dissolution of those ties.[25] The Regulations accordingly seek to concentrate, before the courts of one Member State, the different aspects of the dispute.[26]

Overall, the aim is to simplify litigation. Bringing the various facets of the case before the courts of one State should in fact make the case easier to manage (the same evidence, for example, might be relevant to deciding both the succession and the property regimes matter), and should enable the seised court(s) to get a comprehensive understanding of the various issues at stake, regardless of their characterisation.

On a general note, concentration is meant to minimise the shortcomings of the fragmentation and specialisation of EU private international law legislation. The measures enacted so far in this area are almost invariably concerned with just one sector of private law, and often limited to one set of related issues. In addition, some areas of private law still await harmonisation, or have only been partially harmonised. Fragmentation, absent appropriate corrections, may thus ultimately conceal the ties that bind together the various questions raised by a case, and prevent the court(s) dealing with the matter from rendering a sensible decision, based on a global assessment of such questions.

It is worth noting that the concentration pursued by the Regulations is not always or necessarily set to result in the case being decided in all of its aspects by one and the same court. As far as jurisdiction is concerned, the Property Regimes Regulations, like the Succession Regulation, simply determine, as observed above, whether the courts of a Member State, globally considered, are entitled to hear a case. All other issues, including venue, are left to the law of the Member State in question. The relevant domestic provisions may accordingly be such that the various aspects of litigation are handled by different authorities within that State. The language of Article 4 reflects this understanding. Where "a court", in the singular, is seised of a matter of succession, "the courts", in the plural, of that State have jurisdiction over any connected matter of property regimes.

In the end, concentration, as ensured under Article 4, may happen to be "partial", meaning that proceedings over the two sets of matters may occur before two courts in one Member State, rather than a single court. Partial concentration, while not necessarily devoid of benefits, may prevent the Regulations from expressing their potential in full, if they do not occasionally undermine the effectiveness of those instruments. It is for the Member State concerned, acting in accordance with the duty of sincere co-operation in Article 4(3) TEU, to address and correct this state of affairs, by reforming, as the case may be, its rules of civil procedure (for example, with a view to facilitating the consolidation of proceedings, where necessary).

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[25] COM/2016/106 and COM/2016/107, point 5.2.

[26] Recital 32 of the two Regulations. See further on the concentration policy underlying both Article 4 and Article 5 of the Regulations, P. MANKOWSKI, Internationale Zuständigkeit nach EuGüVO und EuPartVO, in A. DUTTA/ J. WEBER (eds), *Die Europäischen Güterrechtsverordnungen*, München 2017, p. 13 *et seq*.

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3. The Technique Employed

To achieve concentration, the Regulations make jurisdiction over property matters an accessory to jurisdiction over succession. In practice, the succession matter, which serves as the centre of gravity of the case, or the principal element thereof, is given the power to attract any connected property matter, which accordingly presents itself as an accessory to the latter.

The approach is not new in itself. The idea that jurisdiction may exist on a "derivative" rather than a self-standing ground was already well-known under the 1968 Brussels Convention, both as a concept underlying codified rules (such as, for example, Article 6(2), on jurisdiction over actions on a warranty or guarantee, corresponding to Article 8(2) of the Brussels I *bis* Regulation), and as a tool for interpreting – and correcting, where necessary – rules reflecting a different pattern.

The Court of Justice acknowledged in *Shenavai*, a ruling given in 1987,[27] the potential of derivative jurisdiction to manage complex litigation. The issue concerned the provision in the Brussels Convention stating that jurisdiction in matters relating to a contract lies with the court for the place of performance of the particular obligation in dispute. The Court held that in the case of a dispute concerned with a number of obligations arising under the same contract, and due to be performed in different countries, the court should be "guided by the maxim *accessorium sequitur principale*", meaning that "it will be the principal obligation which will determine its jurisdiction" over the matter taken as a whole.[28]

The EU legislature itself has since resorted on various occasions to schemes based on the attraction that a "principal" element exerts on its "accessories". It did so, in particular, to manage the specialisation and fragmentation of the regional sources of private international law. Article 3(c) of the Maintenance Regulation, for example, provides that jurisdiction over a maintenance claim lies, *inter alia*, with the court having jurisdiction to entertain "proceedings concerning the status of a person" whenever the maintenance claim "is ancillary to those proceedings". Similarly, pursuant to Article 12(1) of the Brussels II *bis* Regulation, the courts of a Member State exercising jurisdiction on an application for divorce, legal separation or marriage annulment under Article 3 of that Regulation, may hear "any matter relating to parental responsibility connected with that application", albeit subject to certain conditions, including the acceptance of the jurisdiction of those courts to rule on the parental responsibility claim by the spouses and by the holders of parental responsibility.

Article 4 of the Property Regimes Regulations, in reality, differs from the latter precedents in one respect. Concentration is not regarded by Article 4 as a mere option. Rather, it represents the normal approach to jurisdiction whenever a property regimes matter arises "in connection with a succession case". The courts of a participating Member State can only rule over a matter with the described characteristics if jurisdiction over the connected succession case lies with the courts of that State. Actually, where jurisdiction under Article 4 lies with the courts

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[27] ECJ, 15 January 1987, *Hassan Shenavai* v *Klaus Kreischer*, Case 266/85, ECLI:EU:C:1987:11.

[28] *Ibid.*, para. 19.

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of a Member State, no other courts can rule on the matter: a choice-of-court agreement under Article 7 cannot be reached in cases other than those covered by Article 6, and voluntary submission pursuant to Article 8 does not operate, as indicated therein, where jurisdiction is conferred under Article 4 to the courts of a Member State.

4. The Connection Requirement

The Regulations fail to clarify when exactly a property regimes matter may be considered to arise "in connection with" ("*en relation avec*"; "*in Verbindung mit*") the succession case.

The notion, it is contended, should be given an autonomous meaning and applied in such a way as to produce results consistent with the purpose of the provision. Arguably, for the requirement to be met, a broad and indirect link between the two matters should suffice, as this would facilitate the concentration that the Regulations seek to promote.[29]

Specifically, it is contended that a property regimes claim should be deemed connected with a succession case not only where the decision on the former is likely to have an impact on the outcome of the latter, but also – for reasons of procedural efficiency – where the assessment of the succession case involves investigation measures or, generally, inquiries, common to those relevant to the assessment of the property regimes claim.

IV. Property Matters Connected with Divorce and Similar Proceedings

Most of the general remarks that have been put forward in the previous section with respect to Article 4 apply, with the necessary adaptations, to Article 5 of the Property Regimes Regulations. Article 5 provides, in short, that where a matter in respect of property regimes arises in connection with the dissolution or the annulment of either a marriage or a registered partnership, jurisdiction over the property matter lies with the courts of the Member State where proceedings concerning the said dissolution or annulment are pending.[30]

Here, again, the Regulations aim at concentrating litigation before the courts of one State, given the ties between the various elements of the case. As with Article 4, the technique employed consists in treating one aspect as

[29] Cf. I. BARRIÈRE-BROUSSE (note 14), p. 506, noting that the provision refers to a "*lien de connexité exprimé de façon large*", involving a broad margin of appreciation on the part of the court seised.

[30] Arguably, the "dissolution" of a partnership occurs, for the purposes of Article 5 of Regulation (EU) No. 2016/1104, both where the ties between the partners are dissolved as a result of a breakdown of their relationship, and where the partnership, if possible according to the applicable rules, is transformed with the intervention of an authority.

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"principal" and the other as an "accessory" thereto for the purposes of jurisdiction. The wording of Article 5 suggests that concentration occurs regardless of whether the property claim is being brought by the same party who initiated the underlying "principal" proceedings. In other words, nothing prevents partner A from relying on Article 5 to assert, with respect to a property regimes matter, the jurisdiction of the court seised by partner B in respect of the underlying dissolution or annulment case.

Apart from the general features above, Article 5 in Regulation (EU) No. 2016/1103 differs in various respects from Article 5 in Regulation (EU) No. 2016/1104. The two provisions call, accordingly, for a separate analysis.

A. Matrimonial Matters

Pursuant to Article 5(1) of Regulation (EU) No. 2016/1103, where a court of a Member State is seised "pursuant to Regulation (EC) No. 2201/2003", *i.e.*, the Brussels II *bis* Regulation, of an application for divorce, legal separation or marriage annulment, "the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application".[31]

Where divorce or legal separation occur under rules that do not make such divorce or legal separation the outcome of a decision by an authority of a Member State,[32] the applicability of Article 5 is excluded.

1. "Strong" and "Weak" Grounds of Matrimonial Jurisdiction

Concentration under Article 4 operates unconditionally, that is, on the mere basis that a court in a participating Member State has jurisdiction over a matter of succession, and a property regimes matter is connected. By contrast, jurisdiction under Article 5 exists, in some instances, only subject to an additional element, namely the agreement of the spouses as to the extension of the jurisdiction of the court seised of the "principal" matter, to the "accessory" one.

Article 5(2) makes the agreement of the spouses a pre-requisite for jurisdiction in the following cases where the court seised of the matrimonial matter: has jurisdiction based on the habitual residence of the applicant, in accordance with the fifth or the sixth indent of Article 3(1)(a) of the Brussels II *bis* Regulation; or has jurisdiction pursuant to Article 5 of the Brussels II *bis* Regulation for converting a judgment on the legal separation of the spouses, which the same court has previously rendered, into a divorce; or has jurisdiction based on such domestic rules of jurisdiction as apply, residually, in accordance with Article 7 of the

[31] The standards against which one should determine whether, and when, a court has been seised of an application relating to a matrimonial matter are set out at Article 16 of the Brussels II *bis* Regulation.

[32] On the non-applicability of the Brussels II *bis* and the Rome III Regulations in this scenario, see ECJ, 20 December 2017, *Soha Sahyouni* v *Raja Mamisch*, Case C-372/16, ECLI:EU:C:2017:988, para. 48.

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Brussels II *bis* Regulation, where no court of a Member State has jurisdiction pursuant to the uniform rules in that Regulation and proceedings are brought against a spouse who is neither habitually resident in, nor a national of, a Member State.[33]

By contrast, it follows from Article 5(2) of Regulation (EU) No. 2016/1103, read in conjunction with Article 3(1)(a) of the Brussels II *bis* Regulation, that the agreement of the spouses is not required where the court seised of the matrimonial matter is a court of the Member State where the spouses are habitually resident (Article 3(1)(a), first indent); or, a court of the Member State where they were last habitually resident, insofar as one of them still resides there (second indent); or, a court of the Member State where the respondent is habitually resident (third indent); or, in the event of a joint application, the Member State where either of the spouses is habitually resident (fourth indent). Similarly, the agreement of the spouses is not necessary under the combined operation of Article 5(2) of Regulation (EU) No. 2016/1103 and Article 3(1)(b) of the Brussels II *bis* Regulation, where the court seised of the property regimes matter is a court of the Member State of the nationality of both spouses.

In practice, Article 5 of Regulation (EU) No. 2016/1103 makes a distinction, among the grounds set out in the Brussels II *bis* Regulation for jurisdiction over matrimonial disputes, between "strong" and "weak" grounds.[34] The former are sufficient to establish the "extended" jurisdiction of the courts of the Member State designated thereunder, meaning that those courts are automatically entitled to decide any property regimes matter in connection with the dispute. By contrast, weak grounds only bring about such an extension where they are reinforced, or confirmed, by the agreement of the spouses.[35]

2. The Rationale of the Distinction

The Regulation fails to state the reasons justifying the above distinction. Recital 34 laconically observes that the extension should not be allowed without the spouses' agreement where jurisdiction on the matrimonial matter is "based on specific

[33] Regarding these provisions, see generally the contributions by A. BORRÁS, Art. 3-9, in U. MAGNUS/ P. MANKOWSKI (eds), *Brussels II bis Regulation*, Munich 2012, p. 86 *et seq*., and those by R. HAUSMANN and by M. FALLON, in S. CORNELOUP (ed.), *Droit européen du divorce / European Divorce Law*, Paris 2013, p. 235 *et seq.* and p. 261 *et seq.*

[34] The idea that, with accessory jurisdiction, a distinction might need to be made between eligible and non-eligible "principal" grounds is not new in itself. Article 3(b) and (c) of the Maintenance Regulation, for instance, provide that a court with jurisdiction to entertain proceedings in matters relating to status or parental responsibility may also hear a connected maintenance claim, provided, however, that such jurisdiction is not "based solely on the nationality of one of the parties".

[35] The spouses' agreement, according to P. MANKOWSKI (note 26), p. 18, addresses the "deficit of legitimacy" of some of the grounds of jurisdiction in the Brussels II *bis* Regulation.

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grounds". However, the precise reason why those particular grounds, rather than others, should require the agreement of the spouses remains unclear.[36]

The lack of stated reasons for the distinction is all the more disappointing if one considers that Article 5 of Regulation (EU) No. 2016/1103 creates a rank among the grounds in question where the Brussels II *bis* Regulation itself sees none.[37] The grounds in Article 3(1) of the latter text, as the Court of Justice noted in *Hadadi*, are part of a system which "is not intended to preclude the courts of several States from having jurisdiction", and rather postulates "the coexistence of several courts having jurisdiction […] without any hierarchy being established between them".[38]

Truly enough, various authors have since opined that the structure of Article 3 of the Brussels II *bis* Regulation ought to be reconsidered, arguing specifically that the grounds in that provision should no longer bear the same strength and the same standing.[39] As a matter of fact, while all of the objective grounds in Article 3 are based on a general idea of reasonable proximity, the actual degree of proximity expressed by each of those grounds is not the same, and the balance between the different policies underlying Article 3 (ease of access to justice for the claimant, reasonable opportunity for the defendant to present his or her case, predictability, *etc.*) is not struck by those grounds in the same way. The fact is that, while Article 5 of the Regulation (EU) No. 2016/1103 succeeded in challenging that scheme, the EU institutions have (regrettably) refused, for their part, to include the topic in the agenda of the still on-going recast of the Brussels II *bis* Regulation, launched in 2016.[40] Otherwise stated, while the grounds for jurisdiction in Brussels II *bis* are, and are set to remain, of equal order if considered in and of themselves, Regulation (EU) No. 2016/1103 indicates that their weight should vary as soon as they operate as a basis for jurisdiction over matters of matrimonial property regimes.

One practical implication of this rather erratic approach is that spouses are required to pay extra attention (and should consequently receive extra advice from counsel) when choosing the Member States where matrimonial proceedings should be brought in circumstances where Article 3 of the Brussels II *bis* Regulation indeed allows for two or more options in that respect. Some options might in fact

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[36] See on the whole topic, with reference to the similar approach underlying the initial Commission's proposals of 2011, B. CAMPUZANO DÍAZ, The Coordination of the EU Regulations on Divorce and Legal Separation With the Proposal on Matrimonial Property Regimes, this *Yearbook* 2011, p. 238 *et seq*.

[37] One can actually speak of a hierarchical ordering within the Brussels II *bis* Regulation only with respect to the relationship between the "ordinary" heads of jurisdiction in Article 3 (as complemented by Article 4 and 5), on the one hand, and the subsidiary heads that Article 7 makes available by referring to the domestic rules of the forum.

[38] ECJ, 16 July 2009, *Laszlo Hadadi (Hadady)* v *Csilla Marta Mesko, épouse Hadadi (Hadady)*, Case C-168/08, ECLI:EU:C:2009:474, para. 49.

[39] See generally on this debate A. BONOMI, La compétence internationale en matière de divorce - Quelques suggestions pour une (improbable) révision du règlement Bruxelles II bis, *Rev. crit. dr. int. pr.* 2017, p. 511 *et seq*.

[40] COM/2016/411, final.

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turn out to be more efficient than others whenever litigation includes, or is likely to involve, a connected claim within the scope of Regulation (EU) No. 2016/1103.

3. *The Agreement of the Spouses*

According to Article 5(2) of Regulation (EU) No. 2016/1103, the courts in the Member State where matrimonial proceedings are pending can, in the above situations, assert their jurisdiction "subject to the spouses' agreement".

The latter agreement cannot be plainly equated with a prorogation of jurisdiction, at least if the expression is understood within the meaning resulting from Article 25 of the Brussels I *bis* Regulation, Article 4 of the Maintenance Regulation or Article 7 of the Property Regimes Regulations themselves, on choice-of-court agreements. Those provisions, in fact, treat the agreement of the parties as a basis for jurisdiction, whereas, under Article 5(2) of Regulation (EU) No. 2016/1103, the spouses' agreement is rather meant to fix, so to say, the perceived deficiency of the relevant grounds in the Brussels II *bis* Regulation. Jurisdiction under Article 5(2) does not appear to lie as such on the will of the spouses: it still reflects an objective link between the forum and the (matrimonial) matter, as supplemented by the acceptance of the parties. Actually, the agreement of the spouses pursuant to Article 5(2) of Regulation (EU) No. 2016/1103 comes closer to the "acceptance" required under Article 12 of the Brussels II *bis* Regulation from the spouses or the holders of parental responsibility for the purpose of conferring, on the court seised of matrimonial proceedings, jurisdiction over a connected matter of parental responsibility.

By referring to the "spouses' agreement" ("*l'accord des époux*", "[*die*] *Vereinbarung der Ehegatten*"), Article 5(2) requires that both spouses accept that the courts of the State of the matrimonial proceedings extend their jurisdiction so as to cover the connected property regimes matter. Thus, if one spouse brings proceedings in a State whose courts have jurisdiction over the matrimonial case based on "weak" grounds, and the other spouse seeks to enforce a property claim against the former, the seised court will not be able to rule on the claim as long as the plaintiff does not agree on the extension.[41] Occasionally, this might encourage a rush to the courthouse or otherwise inspire abusive tactics.[42]

As to the form of the agreement, the Regulation states that Article 7(2) must be complied with whenever the agreement "is concluded before the court is seised to rule on matters of matrimonial property regimes". Article 7(2) applies to choice-of-court agreements in cases covered by Article 6, and requires those agreements to be "expressed in writing and dated and signed by the parties". Curiously, since

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[41] Things, of course, would be different if the property claim were brought by the spouse who petitions for divorce or legal separation, or seeks the annulment of the marriage. The agreement of that spouse would in fact result from the petition itself.

[42] Cf. the comments of the UK on an early version of Article 5, suggesting that the "application of this provision should not depend on whether both spouses agree, otherwise one spouse could hold the other to ransom by dividing up the litigation between different Member States and driving up costs": doc. 8307/12 of 28 March 2012, p. 2, in the Public Register of Council Documents, available at <http://register.consilium.europa.eu>.

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the Brussels II *bis* Regulation does not make room for a choice-of-court agreement in matrimonial matters, an "early" agreement pursuant to Article 5(2) of Regulation (EU) No. 2016/1103 runs the risk of providing the parties with limited benefits in terms of predictability. The agreement may well state that the courts in country X are to have jurisdiction over such matters of matrimonial property as may arise in connection with an application for divorce or legal separation, but none of the parties will be able to secure, in the first place, by way of agreement, the jurisdiction of the courts of country X to rule on such an application.

Doubts remain as to the formal requirements with which this kind of agreement should comply if concluded after the court is seised. One possibility would be to refer, for this purpose, to the relevant (procedural) rules in force in the forum, provided that their application does not jeopardise the *effet utile* of Article 5. A more convincing alternative consists in applying, by analogy, the standards that the Brussels II *bis* Regulation sets out for the purpose of prorogation under Article 12. Thus, the seised court should consider that the spouses have reached an agreement pursuant to Article 5(2) whenever its jurisdiction "has been accepted expressly or otherwise in an unequivocal manner" by the spouses themselves.

B. Matters Relating to the Dissolution or Annulment of a Partnership

Article 5 of Regulation (EU) No. 2016/1104 governs jurisdiction "in cases of dissolution or annulment" of a registered partnership. These cases fall outside the scope of the Brussels II *bis* Regulation and of any other EU measures in the field of judicial co-operation in civil matters. Actually, jurisdiction over the dissolution or annulment of registered partnerships does not form the object of any international instrument setting out harmonised rules. This state of affairs excludes, at the outset, the possibility of a reference, as in Regulation (EU) No. 2016/1103, to commonly accepted grounds of jurisdiction to decide the "principal" matter.

In light of this, the Regulation provides that the courts of the Member State, where the dissolution or the annulment of a partnership is at issue, have jurisdiction to decide a connected matter regarding the property consequences of that partnership only "where the partners so agree", regardless of the nature of the grounds for jurisdiction over the "principal" case.

For the rest, the findings of the previous sub-section of this paper, including as regards the form of the agreement, apply *mutatis mutandis* to Article 5 of Regulation (EU) No. 2016/1104.

V. Jurisdiction "In Other Cases"

Articles 4 and 5, although conceived to address the majority of cases within the purview of the Matrimonial Property Regulations, fail to cover the field in its entirety. Basically, the task of Article 6 consists in filling that gap.

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A. The Two Functions of Article 6

Article 6 performs two functions. First, it sets forth the grounds on which the courts of a participating Member State can claim jurisdiction "in cases other than those provided for" in Articles 4 or 5. These include cases where a dispute arises between the partners as to whether a certain item of property forms part of the couple's common property or rather belongs to one partner alone, or – in a non-contentious scenario – where, under the applicable substantive rules, the spouses need to seek court approval in order to modify their regime after the marriage.[43] Secondly, Article 6 works as a general rule of residual jurisdiction: it provides that, regardless of any connection with a succession case or a case on the dissolution or annulment of a marriage or partnership, jurisdiction may be asserted, on the same grounds as above, "[w]here no court of a Member State has jurisdiction pursuant to Article 4 or 5".

The former scenario ("in cases other than those provided for" in Articles 4 or 5) might arise where there is a matrimonial property matter in connection with a case within the material scope of Article 4 or Article 5, but the conditions stipulated therein are not met. This may happen, for example, where a property matter arises in connection with proceedings concerning divorce, legal separation or marriage annulment, and the spouses are unable to reach a necessary agreement pursuant to Article 5(2) of Regulation (EU) No. 2016/1103.

B. A "Ladder" of Jurisdictional Grounds in Article 6

Where Article 6 applies, no matter which of the above functions are served in the circumstances, jurisdiction to rule on a property regimes matter lies, in the first place, with the courts of the Member State in whose territory the spouses or partners are habitually resident. If the habitual residence of the spouses or partners is not located in one participating Member State, jurisdiction lies with the courts of the State where the spouses were last habitually resident, "insofar as one of them still resides there at the time the court is seised". Where that condition also fails, the case will have to be brought before in the participating Member State of the habitual residence of the respondent, and, failing that as well, with the courts of the participating Member State of the spouses' or partners' common nationality. Article 6 of Regulation (EU) No. 2016/1104 provides, in addition to the above grounds, that jurisdiction – as a last resort – lies with the courts of the Member State "under whose law the registered partnership was created".[44]

For the purposes of Article 6 of the Property Regimes Regulations, the habitual residence of the spouses or partners and their nationality must be assessed

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[43] I. VIARENGO, The EU Proposal on Matrimonial Property Regimes - Some General Remarks, this *Yearbook* 2011, p. 208.

[44] The latter provision is intended to make sure that the non-universal recognition of registered partnership does not hinder the partners' right of access to a court, at least where their partnership was created under the law of a participating Member State: P. LAGARDE, Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés, *Riv. dir. int. priv. proc.* 2016, p. 680.

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with reference to "the time the court is seised". This implies, in turn, a reference to Article 14, whose purpose is to specify when "a court shall be deemed to be seised" for the purposes of the provisions in Chapter II.

Article 6 lays down a "ladder" of grounds of jurisdiction. The steps of the ladder can be taken in no other order than the order resulting from Article 6 itself. Put otherwise, a court in a participating Member State cannot jump to any grounds for jurisdiction down the line. Rather, in order to assert its authority to decide a matter based on such grounds, it must first satisfy itself that the previous grounds, seen in the prescribed sequence, are not the basis for the jurisdiction of the courts of another participating Member State.

In terms of structure and language, Article 6 resembles Article 8 of Regulation (EU) No. 1259/2010 on the law applicable to divorce and legal separation (Rome III).[45] The latter provision – a conflict-of-law rule, not a rule on jurisdiction – lays down a sequence of connecting factors, identifying the law governing divorce or legal separation absent a choice of law by the spouses. The idea behind both rules, roughly stated, is that different connections may, in respect of a given relationship or dispute, satisfy the goal of proximity (and/or other jurisdiction-influencing policies), but not with the same intensity. The connections that correspond more fully to the relevant goals should work as "first options", and the others should only be resorted to where such first options are unavailable.

The expression "habitual residence", for the purposes of the Matrimonial Property Regimes Regulation, should be understood to have, in principle, the same meaning as under the Rome III Regulation and the other measures in the field of judicial cooperation in civil matters which employ that notion. A spouse or a partner, to use the words of the Court of Justice in *Magdalena Fernández*, should be deemed to be habitually resident where he or she has "established, with the intention that it should be of a lasting character, the permanent or habitual centre of [his or her] interests".[46] It is common ground that, in determining the habitual residence of a person, regard should be had to the duration, regularity, conditions and reasons for the stay of that person on the territory of a particular State, in light of the whole range of the concerned individual's interests (family interests, professional interests, *etc.*).[47]

Regarding nationality, the preamble of the two Regulations (Recital 50 of Regulation (EU) No. 2016/1103 and Recital 49 of Regulation (EU) No. 2016/1104) clarify that where the Regulations refer to nationality as a connecting factor (or ground for jurisdiction), "the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of [the Regulations] and should be left to national law, including, where

[45] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010.

[46] ECJ, 15 September 1994, *Pedro Magdalena Fernández* v *Commission of the European Communities*, ECLI:EU:C:1994:332, para. 29.

[47] See, in general, on the notion of habitual residence, M.-P. WELLER/ B. RENTSCH, "Habitual Residence": a Plea for Settled Intention, in S. LEIBLE (ed.), *General Principles of European Private International Law*, Alphen aan den Rijn 2016, p. 171 *et seq*.

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applicable, international Conventions, in full observance of the general principles of the Union", such as the principle, enshrined in Article 18 TFEU, which protects EU citizens from discrimination on grounds of nationality.[48]

C. Choice of Court under Article 7

According to Article 7 of the Property Regimes Regulations the parties may agree that the courts of a participating Member State, chosen among those selected under in Article 7, are to have jurisdiction on matters regarding their property regime.

The jurisdiction thus conferred is exclusive in nature. This means that a valid choice pursuant to Article 7 brings about both a prorogation and a derogation effect. In other words, the choice gives the designated courts authority to rule on the matter, and, at the same time, prevents the courts of any other participating Member State from asserting their jurisdiction over the case, even though they would otherwise have jurisdiction in accordance with the Regulations.

A choice under Article 7 may be made, absent any provision to the contrary in the Regulations, at any time,[49] including before the celebration of the marriage or the establishment of the partnership. Arguably, it is for the procedural law of the forum to determine, in the event of an agreement reached after the seising of a court, at which stage of the proceedings, at the latest, such an agreement may be made.

1. The Scope of Article 7 and of the Agreements Thereunder

Article 7 only applies in "cases covered by Article 6". In practice, no choice is possible where a property regimes matter arises in connection with a succession case or with a case relating to the dissolution or annulment of a marriage or registered partnership in circumstances where jurisdiction lies with a court of a participating Member State pursuant to Articles 4 or 5.

Through a choice of court under Article 7, the spouses, or the partners, are permitted to designate "the courts" ("*les juridictions*", "*die Gerichte*") of any eligible participating Member State. This language differs from the language used by the EU legislator to deal with choice-of-court agreements under other texts, where reference is made, as in Article 25 of the Brussels I *bis* Regulation, to "a court or the courts of a Member State" ("*une juridiction ou* [*les*] *juridictions d'un État membre*", "*ein Gericht oder die Gerichte*").[50] This appears to indicate that a choice of court is understood by Article 7 of the Property Regimes Regulations to

[48] See further, on nationality in EU private international law, S. BARIATTI, Multiple Nationalities and EU Private International Law: Many Questions and Some Tentative Answers, this *Yearbook* 2011, p. 1 *et seq*.

[49] P. MANKOWSKI (note 26), p. 26.

[50] See, in the same vein, Article 4 of the Maintenance Regulation, speaking of the agreement of the parties "that the … court or courts of a Member State shall have jurisdiction to settle any disputes" *etc*.

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confer jurisdiction to the courts of the chosen State taken as a whole, as opposed to the courts of a particular place.[51]

The reasons for this limitation are not clear. One might guess that such a unitary selection reflects the fact that, as discussed in the following sub-section, the parties can choose, in general, the courts of the State whose law governs the matter in question, with the implication that, since one law governs the property relationships in dispute, the courts of the selected country, considered as one, should have jurisdiction under Article 7. However, this would hardly be a convincing explanation. Article 5(1) of the Succession Regulation, for example, demonstrates that a choice of court may be based on a choice of law, and still result in the designation of one particular court, rather than the courts of the State whose law applies to the matter considered together: "[w]here the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that *a court* or *the courts* of that Member State are to have exclusive jurisdiction to rule on any succession matter."

Arguably, if the parties agree to confer jurisdiction on a specific court in a participating Member State, their agreement should not be regarded as altogether inadmissible. Rather, the issue will have to be answered based on the appropriate canons of contractual interpretation as to whether the parties intended to have the matter decided by the selected court alone, or – as permitted by the Regulations – by any other court of that Member State as well.

On a different note, the Regulations fail to specify whether a choice of court should invariably refer to any property regimes matter as may arise between the parties within the scope of Article 6, or may refer selectively – if the parties so agree – to one or more particular claims in that framework. The latter reading, it is argued, ought to be preferred. The Regulations acknowledge the value of party autonomy, and should accordingly be interpreted as allowing the parties to shape the scope of their agreement as they deem fit. Of course, an exercise of "selective" party autonomy may result in an agreement lacking the desired degree of clarity, and ultimately feed litigation instead of facilitating its management, as a choice is supposed to do. Appropriate advice would, in these circumstances, prove to be of particular need.

Choice-of-court agreements are likely to integrate instruments with a broader scope, notably matrimonial (or partnership) property agreements. Where this occurs, the choice will normally refer to such disputes as may arise between the parties in the future. Nothing in the Regulations, however, seems to prevent the parties from choosing a court under Article 7 in connection with a dispute that has already arisen (including after the proceedings in respect thereof have been initiated, if the procedural law of the forum so provides).

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[51] See, however, P. MANKOWSKI (note 26), p. 24 *et seq*., advocating an extensive interpretation of the provision.

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2. The Available Options

Under Article 7(1), the parties wishing to enter into a choice-of-court agreement are given a limited range of options.

The first option is common to cases, within Article 6, regarding matrimonial property regimes and property consequences of registered partnerships. Pursuant to Article 7(1), the spouses, or the partners, may agree to confer jurisdiction on the courts of the Member State whose law they have chosen as the law governing their property relations pursuant to Article 22.

The other available options vary according to whether the matter involves a couple of married spouses rather than a couple of registered partners. In the former scenario, pursuant to the combined operation of Article 7(1) and Article 26(1)(a) and (b) of Regulation (EU) No. 2016/1103, jurisdiction may be assigned to the courts of any of the following participating Member States: the State of the first common habitual residence of the spouses after the conclusion of the marriage; the State of their common nationality at the time of the conclusion of the marriage; the State where the marriage itself was concluded. In the case of a registered partnership, Article 7(1) of Regulation (EU) No. 2016/1104 in combination with Article 26(1), merely enables the partners to choose the courts of the State under whose law the partnership itself was created.

3. Rationale

The private international law of the EU, including in the field of family law, makes considerable room for party autonomy.[52] Article 7 of the Property Regimes Regulations reflects and further corroborates this trend.

As observed in the preamble of the two texts (Recital 36 of Regulation (EU) No. 2016/1103, and Recital 37 of Regulation (EU) No. 2016/1104), the goal is basically to "increase legal certainty and predictability". A choice of court, though confined within the narrow ambit of the "cases covered by Article 6", has the advantage of avoiding at the outset any uncertainty as could arise in respect of the habitual residence of each of the spouses, or partners.

Additionally, where a choice of court builds on a choice of law, in the sense that it confers jurisdiction, under the options above, on the courts of the country whose law applies to the substance of the matter, the parties have an opportunity to benefit from the typical advantages of the parallelism of *forum* and *jus*. The seised court will be spared the inconvenience and costs of dealing with a foreign law, and the parties will have in principle no reasons to worry about the risk of interference with or disregard for the chosen law, respectively due to relevant overriding

[52] See recently, on the topic, M.-L. REVILLARD, L'autonomie de la volonté dans les relations de famille internationales: regards sur les récents instruments internationaux, in *A commitment to private international law - Essays in honour of Hans van Loon*, Cambridge 2013, p. 487 *et seq.*, and O. FERACI, Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters, this *Yearbook* 2014-2015, p. 105 *et seq.*

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mandatory provision of the forum, or the public policy of the forum, pursuant to Article 30 or 31 of the Property Regimes Regulations.

4. Formal Validity and Other Requirements

Article 7(2) prescribes that choice-of-court agreements "be expressed in writing and dated and signed by the parties". Any communication by electronic means which provides a durable record of the agreement will be deemed to satisfy the requirement of the written form.

The Regulation is silent as to the other requirements that the choice might have to meet. It is believed that, as far as the substantive validity of the agreement is concerned, regard should be had to the law of the participating Member State whose courts have been chosen. This reading is based on the analogy between the issue under examination and the issue addressed in Article 25(1) of the Brussels I *bis* Regulation and decided under the stated solution.[53] According to the latter provision, where the parties "have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship", those courts have jurisdiction "unless the agreement is null and void as to its substantive validity under the law of that Member State".

VI. Jurisdiction Based on the Appearance of the Defendant

Some of the measures enacted by the EU to deal with jurisdiction over cross-border cases in civil and commercial matters include a provision according to which, a court acquires jurisdiction where the defendant enters an appearance without contesting the jurisdiction of the seised court. The uncontested appearance is then considered to be a "tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction".[54] The seised court will accordingly be able to conclude, based on that simple finding, that it has jurisdiction decide the matter.

Article 8 of the Property Regimes Regulations follows roughly the above pattern, though it departs from its most immediate models – Article 26 of the Brussels I *bis* Regulation and Article 5 of the Maintenance Regulation – in some significant respects.

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[53] On the limited coherence of the EU measures relating to judicial cooperation which make provision for a choice of court and/or a choice of law, and the ways to enhance such coherence, see generally F. MAULTZSCH, Party autonomy in European Private International Law: Uniform Principle or Context-dependent Instrument?, *Journal of Private International Law* 2016, p. 466 *et seq*.

[54] ECJ, 20 May 2010, *Česká podnikatelská pojišťovna as, Vienna Insurance Group* v *Michal Bilas*, Case C-111/09, ECLI:EU:C:2010:290, para. 21.

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A. The "Selective" Jurisdictional Effects of Voluntary Submission

Contrary to the provisions on tacit prorogation in the Brussels I *bis* Regulation and in the Maintenance Regulations, which confer jurisdiction on any court as may be seised of a matter within the scope of those instruments, save for stated exceptions, Article 8 of the Property Regimes Regulation clarifies that a court may assert its jurisdiction based on the defendant's appearance if it is a court of one of the Member States selected for this purpose under Article 8 itself.

This is the State whose law was chosen by the parties to govern their property relationships, and the State whose law applies objectively to the property regime in question, pursuant to some of the connecting factors contemplated in the applicable Regulation. Specifically, with respect to the property relations between spouses, the State in question may be either the State of the spouses' first common habitual residence on the date of the marriage, or the State of the spouses' common nationality at the time of the marriage, whereas, regarding the property relations between partners, the only selected State for the purposes of Article 8 is the State under whose law the registered partnership was created.

Further limitations restrict the scope of Article 8. No jurisdictional effects can be drawn from the appearance of the defendant "in cases covered by Article 4", that is, where the property matter arises in connection with a succession case in circumstances where Article 4 confers jurisdiction on the courts of the Member State seised of that case. Voluntary submission is likewise devoid of effect in cases covered by Article 5(1) of Regulation (EU) No. 2016/1103, that is, in matters relating to divorce, legal separation and marriage annulment, where the court seised of the matrimonial matter has jurisdiction on a "strong" ground, within the meaning illustrated above.

B. Conditions Precedent

The seised court can only rely on Article 8 where the defendant on appearance failed to contest the court's jurisdiction. Article 8, similarly to the corresponding provisions in other Regulations, is also inapplicable "where appearance was entered to contest the jurisdiction".

Before assuming jurisdiction based on the defendant's appearance, the seised court must ensure, according to Article 8(2), "that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance". The provision mirrors, with the necessary adaptations, Article 26(2) of the Brussels I *bis* Regulation.

Nothing is said in the Property Regimes Regulation, as in the Brussels I *bis* Regulation itself, regarding the manner in which the seised court should assess that the latter condition has been met. The court should accordingly refer, for this, to the procedural law of the forum.

The European Judicial Network in civil and commercial matters established a non-mandatory standard containing the information against which the court could assess whether the defendant has been provided with the information

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required pursuant to Article 26(2) of the Brussels I *bis* Regulation.[55] Subject to the necessary adaptations, the form appears to also represent a suitable basis for the assessment prescribed under Article 8(2) of the Property Regimes Regulations.

C. Relationship with Article 15

Pursuant to Article 15, where a court of a Member State is seised of a property regimes matter over which it has no jurisdiction under the Regulations, it must "declare of its own motion that it has no jurisdiction".

The provision does not interfere with the operation of Article 8, or *vice versa*. Actually, the two rules perform different functions. The purpose of Article 8 is to confer jurisdiction, whereas Article 15 is concerned with the assessment, by the seised court, of the issue whether it has jurisdiction, or not, to hear the case. Article 15 requires the seised court to rule on the latter issue irrespective of whether a request to that effect has been made by the parties, or by one of them.

Accordingly, the fact that the defendant has entered an appearance without objecting to the court's jurisdiction does not exempt the latter court from the duty of examining its jurisdiction *ex officio*, in particular to assess whether the conditions in Article 8 have been met under the circumstances.[56]

VII. Alternative Jurisdiction

Pursuant to Article 9(1) of the Property Regimes Regulations, a court with jurisdiction to rule on a property regimes matter, regardless of the grounds for its authority under the circumstances, is permitted to decline its jurisdiction if it finds that the marriage or the registered partnership in question cannot produce legal effects in the legal order of the forum.

Should this happen, with the courts indicated in Article 9(2) will come to have jurisdiction. The jurisdiction of the latter courts is "alternative", according to the language of the Regulations ("*compétence de substitution*", "*alternative Zuständigkeit*"), in the sense that it fills a gap resulting from the dismissal of the case on the part of the otherwise competent courts.

A. The Purpose of the Provision

Article 9 purports to accommodate two conflicting concerns. On the one hand, it provides the courts of a participating Member State with the possibility not to rule

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[55] The form is available in the Brussels I *bis* Regulation section of the European Judicial Atlas, at <https://e-justice.europa.eu>.

[56] S. CORNELOUP, Article 8, in S. CORNELOUP/ V. ÉGÉA/ E. GALLANT/ F. JAULT (eds), *Le droit européen des régimes patrimoniaux des couples – Commentaire des règlements 2016/1103 et 2016/1104*, forthcoming.

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on particular matters within the scope of the Regulations whenever the matter in question refers to a substantive situation that simply cannot fit into the standards of the forum, as in the case of a property regimes matter arising from a same-sex marriage, brought before the courts of a participating Member State that only admit marriage between opposite-sex spouses. On the other hand, Article 9, by providing for an alternative to the jurisdiction of the above courts, averts the risk that the spouses, or the partners, are victims of a denial of justice.

The first concern reflects the divergent attitudes of Member States towards the institution of marriage, and builds on the idea that the EU – which is not competent to adopt measures dealing with substantive aspects of family law – should, as required by Article 67(1) TFEU, ensure "respect for […] the different legal systems and traditions of the Member States", and do so, in particular, where politically sensitive issues are at stake, as in this case.

A similar concern had already surfaced in EU legislation in the field of judicial cooperation in civil matters, although not regarding jurisdiction, but rather the conflict of laws. It is clarified in Article 13 of the Rome III Regulation on the law applicable to divorce and legal separation that nothing in that Regulation obliges "the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce" by virtue of the Regulation itself.[57]

Like Article 13 of the Rome III Regulation, Article 9 of the Property Regimes Regulation represents an attempt to encourage broad participation in the enhanced co-operation from which the Regulations have resulted. Member States should in theory be less reluctant towards joining the enhanced co-operation, knowing that their courts will not be forced, out of respect for the Regulations, to acknowledge, endorse or otherwise deal with a kind of legal relationship to which they are hostile in their legislation.[58]

On a different note, the existence of a rule like Article 9 suggests that – in spite of the statement in Recital 17 of Regulation (EU) No. 2016/1103, according to which the Regulation "does not define «marriage», which is defined by the national laws of the Member States" – the Regulation, it is contended, presupposes a broad and autonomous notion of marriage, which plausibly includes same-sex marriages.[59] As a matter of fact, if individual participating Member States were

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[57] See on this provision, among others, N. JOUBERT, Article 13 - Différences dans le droit national, in S. CORNELOUP (ed.), *Droit européen du divorce / European Divorce Law*, Paris 2013, p. 623 *et seq*.

[58] Clearly, this has not been sufficient to convince all the Member States whose non-participation in the enhanced cooperation is based on the hostile posture described above. See, for instance, on the position of Poland towards the Regulations, P. TWARDOCH, Le Règlement européen en matière de régimes matrimoniaux de la perspective du droit polonais, *Rev. crit. dr. int. pr.* 2016, p. 465 *et seq*.

[59] Recital 17 is meant to reassure Member States that they remain in control of a sensitive notion, such as marriage, including in situations where the notion in question is employed by EU legislation for its own purposes, in measures that do not (and could not, in any case) adversely affect the freedom of those States to shape as they wish the substantive aspects of family law. The statement, however, appears to serve an essentially political purpose, rather than a legal one. The resulting ambiguity is probably the price to pay for

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free to decide that a marriage can be characterised as such for the purposes of Regulation (EU) No. 2016/1103 only if it conforms with the local understanding of that concept, then Article 9 would be largely devoid of practical effect. In courts of a participating Member State under whose law only opposite-sex marriage qualifies as marriage, the situation considered in Article 9 would simply never arise, since those courts would fail to regard a same-sex marriage as a marriage for the purposes of Regulation (EU) No. 2016/1103 and accordingly refrain from applying its provisions, including Article 9 itself.

B. Conditions for the Dismissal

The prerequisites for dismissing jurisdiction on the basis of Article 9(1) of the Property Regimes Regulations are not the same in the two texts. To decline its jurisdiction, the seised court must establish, pursuant to Regulation (EU) No. 2016/1103, that, "under its private international law", the marriage concerned "is not recognised for the purposes of matrimonial property regime proceedings". Under Regulation (EU) No. 2016/1104, instead, dismissal simply depends on the fact that the law of the forum "does not provide for the institution of registered partnership".

The different approach taken by the two Regulations appears to reflect the fact that the legal systems of all Member States include rules of private international law relating to marriage, while the same finding does not necessarily hold true for registered partnerships. The States whose legislation does not make room for the creation of registered partnerships do not normally enact rules to deal with the law applicable to such partnerships.

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touching on a topic that, due to Member States' idiosyncrasies, regional legislation can hardly approach, at this stage of its historical development, in an avowedly autonomous fashion. For a similar definitional difficulty, see ECJ, 5 June 2018, *Relu Adrian Coman and Others* v *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, ECLI:EU:C:2018:385. The case concerned the interpretation of EU primary and secondary rules which govern the right of citizens to move and reside freely within the territory of the Union. The Court, having clarified that the term "spouse" within the meaning of Directive 2004/38 on freedom of movement "is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned" (para. 35), held that, under Article 21(1) TFEU, the authorities of a Member State cannot refuse to grant the same-sex spouse of the Union citizen in question, a third-country national, the right to reside in the territory of that State on the ground that the law of the latter State does not recognise marriage between persons of the same sex (para. 51). Admittedly, the relevance of the judgment to the interpretation of EU rules of private international law is only indirect, at best. What matters, however, is that in the Court's view, the freedom that Member States enjoy in deciding whether or not to make provision for same-sex marriage (ECJ, 24 November 2016, *David L. Parris* v *Trinity College Dublin and Others*, C-443/15, EU:C:2016:897, para. 59), does not prevent the Union from enacting legislation under which the word "marriage" is to be understood as an independent EU notion, namely one encompassing both homosexual and heterosexual couples.

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The rules of private international law that the seised court must consider for the purposes of Article 9(1) of Regulation (EU) No. 2016/1103 are the rules that would normally be applied in the forum to assess the "recognition", *i.e.*, the effectiveness, of the marriage in question, taking into account its cross-border character. The relevant rules may result, depending on the Member State and the circumstances, from domestic legislation, the practice of courts or any pertinent international convention. The relevant standards, pursuant to those rules, may have to be found – according to the circumstances – in the law of the forum or in the law of a foreign country.

The inquiry may extend to such foreign or local judgment, or public document, as may concern the recognition of the marriage. In any case, pursuant to Article 9(3), jurisdiction cannot be declined "when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognised in the Member State of the forum".

A marriage will be deemed to qualify for recognition for the purposes of Article 9(1) of Regulation (EU) No. 2016/1103 if the relevant rules – including any relevant exception to the applicable general rules, as may be raised on grounds of public policy or otherwise – lead to the conclusion that the marriage in question has legal force as such in the forum. Arguably, Article 9(1) allows for jurisdiction to be declined where, under the private international law rules of the forum, the marriage is "converted" into a registered partnership, that is, where the legal system of the forum objects to considering the marriage in question as a marriage, but rather characterises it as a registered partnership and subjects it to the (local) rules concerning the latter institution.[60]

Where a court of a participating Member State is seised of proceedings regarding the property consequences of a registered partnership, a dismissal under Article 9(1) of Regulation (EU) No. 2016/1104 merely presupposes, as observed, that the law of the forum fails to provide for the institution of registered partnership. However, as provided in Article 9(3) of the latter Regulation, jurisdiction cannot be declined "when the parties have obtained a dissolution or annulment of a registered partnership which is capable of being recognised in the Member State of the forum."

Under both Regulation (EU) No. 2016/1103 and Regulation (EU) No. 2016/1104, Article 9(1) enables a court in a participating Member State to dismiss a case ("it may decline jurisdiction") whenever the described conditions are met. That outcome is not prescribed as such by the Regulations. It follows that a court intending to avail itself of the possibility contemplated in Article 9 should not be entitled do so simply on the basis of Article 9 itself, but rather on the basis of Article 9 in conjunction with such relevant internal provisions as require or permit that the court in question takes advantage of that possibility and actually dismisses the case. The reasons stated by the court in the decision whereby it declines jurisdiction should accordingly refer, in principle, to both bases.

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[60] This occurs, for instance, pursuant to Article 32 *bis* of the Italian Statute on Private International Law (Law No. 218 of 31 May 1995, as amended), in the case of a same-sex marriage between Italian nationals.

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As acknowledged in Recital 38 of Regulation (EU) No. 2016/1103 and in Recital 36 of Regulation (EU) No. 2016/1104, any court seised after jurisdiction has been declined elsewhere, "may also exceptionally need to decline jurisdiction under the same conditions".[61]

C. The Grounds on which Alternative Jurisdiction May Be Asserted

Article 9(2) deals with the consequences of a dismissal pursuant to Article 9(1). Its aim is to ensure that the claimant has an opportunity to pursue his or her claim in another forum.

The content of the provision is not the same in the two Property Regimes Regulations.

Regulation (EU) No. 2016/1103 considers two scenarios. The first one arises where the dismissal comes from a court with jurisdiction under Article 4, on property matters arising in connection with a succession case, or under Article 6, on jurisdiction "in other cases". In this scenario, if the parties have agreed to confer jurisdiction on the courts of any other Member State "in accordance with Article 7", jurisdiction over the property matter lies with the courts of that Member State.

The second scenario occurs where no agreement has been concluded between the spouses in the cases considered above, or in the cases covered by Article 5. Here, alternative jurisdiction lies with the courts of such other Member State as is determined, in the circumstances, pursuant to Article 6 or Article 8, on voluntary submission, or with "the courts of the Member State of the conclusion of the marriage". The reference to the grounds in Articles 6 and 8 represent, again, a way to restate what the Regulation would already normally provide. Instead, the provision is "original" where it refers to the courts of the State where the marriage was contracted, as these courts would normally be barred, as such, if it was not for a dismissal under Article 9(1), from claiming jurisdiction under a matter of matrimonial property.[62] They are entrusted with alternative jurisdiction on the assumption that in no case will they decline their jurisdiction in accordance with

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[61] Recital 38 of Regulation (EU) No. 2016/1103 adds, however, that "[t]he combination of the various jurisdiction rules should, however, ensure that parties have all possibilities to seise the courts of a Member State which will accept jurisdiction for the purposes of giving effect to their matrimonial property regime".

[62] Recital 38 of Regulation (EU) No. 2016/1103 specifies, with reference to Article 9(2), that where jurisdiction is declined under Article 9(1), "the party concerned should have the possibility to submit the case in any other Member State that has a connecting factor granting jurisdiction, *irrespective of the order of the jurisdiction grounds*, while at the same time respecting the parties' autonomy" (emphasis added). The meaning of the emphasised passage is not entirely clear. Plausibly, it serves as a clarification that, in the second scenario considered above, the claimant can seise "directly" the courts of the Member State where the marriage was celebrated, without having to try, first, to seise the courts specified in Article 6.

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Article 9(1), since the marriage in question is one contracted in accordance with the law of the State in question.[63]

The picture is simpler under Article 9(2) of Regulation (EU) No. 2016/1104. This provides that, where the case is dismissed pursuant to Article 9(1) of the latter Regulation, and the parties agree on a choice of court in accordance with Article 7, jurisdiction lies with the courts so chosen. Otherwise, Articles 6 and 8 apply.

D. Procedural Aspects

Little is said in Article 9 of the Property Regimes Regulation regarding the procedural treatment of the dismissal contemplated thereunder, the only prescription (or probably recommendation, given the absence of further details or sanctions) being that, "[i]f the court decides to decline jurisdiction, it shall do so without undue delay".

One question, in this respect, is whether the seised court should be entitled to decline its jurisdiction only once it has carried out a complete inquiry, resulting in a final finding that it has jurisdiction, but nevertheless intends to decline it under Article 9(1). The question should plausibly be answered in the affirmative. Article 9 applies, as such, on the assumption that the seised court would normally be able (and required) to rule on the matter. Rather, to address the concern for the unhindered access to justice by the claimant, the seised court, as soon as it perceives that the proceedings are likely to result in a dismissal in accordance with Article 9(1), should ensure, in accordance with the procedural law of the forum, a fast track for jurisdiction to be declined. If the court were to do otherwise, it would hardly comply the above mentioned duty to dismiss the case "without undue delay".

Another issue is whether, and subject to which conditions, the parties should be entitled to rely on measures taken, or legal effects arising, in the first proceedings (those concluded by a decision to decline jurisdiction) for the purposes of the second proceedings (those subsequently brought before the courts with alternative jurisdiction). For instance, the claimant may be interested in asserting, before the second court, that the seising of the first court had the effect of interrupting a period of prescription which would otherwise prevent the enforceability of his claim, or may want to produce, before the second court, evidence obtained under measures ordered by the first court before it decided to dismiss the case. Absent any indication in the Regulations, it is believed that these questions cannot be answered otherwise than in accordance with the law of the court which is seised of the matter in the second place.

[63] L. PERREAU-SAUSSINE (note 11), p. 1932.

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VIII. Residual Grounds of Jurisdiction

As noted above, the Property Regimes Regulations leave no room for domestic jurisdiction-conferring rules. A court in a participating Member State, seised of a matter within the scope of the Regulations, will thus have no option but to dismiss the claim for want of jurisdiction if it finds that none of the grounds provided for by the Regulations arises in the circumstances. This is meant to simplify the legal landscape in the field and enhance certainty.

The risk exists, however, that under the uniform jurisdiction-conferring provisions examined so far, the courts of a participating Member State occasionally find themselves prevented from hearing a case that they would instead consider sensible and convenient to adjudicate. The Regulations deal with matters that are socially and politically sensitive, and States may in particular circumstances be willing to enable their courts to hear one such matter, regardless of its remoteness to the forum.

Articles 10 and 11 address this concern by providing the courts of participating Member States with a last-resort opportunity to retain a case that any such court should normally be barred from entertaining.

A. Subsidiary Jurisdiction Based on the Situation of Immoveable Property

Article 10 applies in two scenarios, namely where no court of a Member State "has jurisdiction pursuant to Article 4, 5, 6, 7 or 8", and where the jurisdiction of all otherwise competent courts has been declined pursuant to Article 9, with no alternative court having alternative jurisdiction under that provision.

Where this occurs, the courts of a Member State have jurisdiction "in so far as immoveable property of one or both [spouses or partners] are located in the territory of that Member State", with the clarification that, in this event, the court seised has jurisdiction "to rule only in respect of the immoveable property in question".

1. The Purpose of the Provision

The immediate model for Article 10 is Article 10(2) of the Succession Regulation, which confers (residual) jurisdiction on the courts of the Member State where assets of the estate are located "to rule on those assets". The two provisions represent an exception to the principle enshrined in the Matrimonial Property Regimes and the Succession Regulation whereby, respectively, the property of the couple and the estate of the deceased are to be dealt with as a unity, regardless of the nature and location of the individual items that compose such property or estate.

The exception is justified on the ground that the State of the *locus rei sitae* have arguably a practical interest in handling cases regarding the assets concerned, and such an interest deserves to be taken into account where no other court of a participating Member State can claim jurisdiction over the case.

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2. *The Lack of Uniform Rules on Coordination with Third Countries*

The exercise of jurisdiction in the described scenario is likely to result in positive conflicts of jurisdiction. This may occur, in particular, where litigation is brought at the same time in the participating Member State of the situs and in another country (either a non-participating Member State or a third country), and the latter courts claim, in accordance with their rules, jurisdiction over the whole of the couple's property, including the assets for which jurisdiction exists in the said participating Member State pursuant to Article 10.

The Property Regimes Regulations, like the Succession Regulation, the Maintenance Regulation and the Brussels II *bis* Regulation, fail to set out general rules on the coordination of proceedings brought in a State bound by such Regulations with proceedings involving the same cause of action and between the same parties, or otherwise connected with the former, as may be pending simultaneously in another country. Articles 17 and 18, on *lis pendens* and related actions, only apply in fact where the different proceedings in question are brought before the courts of different participating Member States.

It is argued that absent any further uniform rules on parallel litigation with States other than participating Member States, the courts in the latter States should be able to resort to their own domestic rules, if any, on international *lis pendens* and related actions, and stay or decline their jurisdiction thereunder as a means to manage positive conflicts of jurisdiction. Admittedly, the application of those rules may undermine the effectiveness of the Matrimonial Property Regulations, and should accordingly be excluded under the rule of interpretation adopted by the Court of Justice in *Owusu*.[64] Yet, the authority of *Owusu* outside the scope of the Brussels I regime, for which it was developed, remains the object of debate,[65] and arguments may be put forward to show that, at least where EU legislation deliberately expands its reach so as to include "remote" cases, as under Article 10 of the Property Regimes Regulation, the resulting positive conflicts of jurisdiction deserve appropriate consideration. Where EU texts themselves fail to address that concern, those conflicts should thus be dealt with, in principle, in the forms provided under the law of the forum. The seised courts, in the end, should be careful in striking a fair balance between the concern for coordination with third countries, one the one hand, and the concern for the uniform and effective operation of EU law, on the other.

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[64] ECJ, 1 March 2005, *Andrew Owusu* v *N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*, Case C-281/02, ECLI:EU:C:2005:120, para. 46, where the Court ruled that the Brussels Convention of 1968 "precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that Convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State".

[65] See recently on this topic K. TRIMMINGS, Matrimonial Matters under the Brussels IIa Regulation, in P. R. BEAUMONT/ M. DANOV/ K. TRIMMINGS/ B. YÜKSEL (eds), *Cross-border Litigation in Europe*, Oxford 2017, p. 813 *et seq*.

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B. Forum of Necessity

Article 11 makes provisions, alongside the Maintenance Regulation (Article 7) and the Succession Regulation (Article 11), for a residual *forum necessitatis*. Basically, as with the provisions that served as a model for Article 11, the idea is that the courts of the participating Member State should be able to avoid the risk of a denial of justice by exceptionally asserting their jurisdiction over a property regimes matter for which they would normally lack jurisdiction, "if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected". For jurisdiction to be claimed on this basis, however, "a sufficient connection" must exist between the case and the Member State of the court seised.[66]

Jurisdiction under Article 11 is residual in the sense that it only exists "[w]here no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10". It is thus "more residual", if one may say so, than jurisdiction based on Article 10.

As stated in the preamble of the Regulations (Recital 41 of Regulation (EU) No. 2016/1103 and Recital 40 of Regulation (EU) No. 2016/1104, respectively), asserting jurisdiction may be regarded as "necessary" for the purposes of Article 11 where it is established that the claimant is prevented from initiating or pursuing proceedings in the relevant third country, for instance, "because of civil war".[67]

A "sufficient connection" should be deemed to exist, for example, where the claimant is a national of the participating Member State whose courts are seised based on Article 11.

Positive conflicts of jurisdiction may arise where Article 11 serves as a basis for jurisdiction, since other courts, within or outside the EU, may claim authority to decide the matter, including for the same reason underlying Article 11, that is, averting the risk of a denial of justice. The issues, here, are similar to those examined above in connection with Article 10. The provisions of the Regulations on *lis pendens* and related actions will only be available in cases involving courts sitting in different participating Member States. For the rest, the seised court, it is contended, should engage in a balanced and sensible use of domestic rules on parallel litigation.

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[66] On necessity as a ground of jurisdiction, see recently, also for references to other works, M. FALLON, Le rattachement de nécessité des situations juridiques internationales en matière civile et commerciale, in A. NUYTS/ R. JAFFERALI/ V. MARQUETTE (eds), *Liber Amicorum Nadine Watté*, Bruxelles 2017, p. 175 *et seq*.

[67] See further, on the situations where a "necessity" to assert jurisdiction has been found to exist, namely under the rule on *forum necessitatis* in Article 7 of the Maintenance Regulation, P. FRANZINA, Forum necessitatis, in I. VIARENGO/ F.C. VILLATA (eds), *Planning the Future of Cross Border Families: A Path Through Coordination*, forthcoming.

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IX. Counterclaims

Article 12 of the Regulations governs jurisdiction over a counterclaim, that is, a claim brought by the defendant against the claimant, not as a pure defence, but with the aim of obtaining a separate judgment.[68] The provision has it that the court with jurisdiction based on any of the grounds examined so far, including Article 9(2), "shall also have jurisdiction to rule on a counterclaim", provided that the counterclaim, too, falls within the scope of the Regulations.

The solution reflects an established pattern, inaugurated under Article 6(3) of the 1968 Brussels Convention (now Article 8(3) of the Brussels I *bis* Regulation), and since adopted in other EU legislative texts, such as the Brussels II *bis* Regulation (Article 4). Consistent with those precedents, Article 12 should be interpreted as requiring the counterclaim to be somehow connected with the main action.[69]

Arguably, the scope of the jurisdiction conferred under Article 12 does not exceed, given its derivative nature, the scope of the jurisdiction conferred to the seised court over the main action. Thus, a court with jurisdiction based on Article 10 may assert its jurisdiction decide a counterclaim under Article 12, only insofar as the counterclaim in question relates to the immoveable property in respect of which that court has asserted its jurisdiction pursuant to Article 10 in the first place.[70]

X. Concluding Remarks

The provisions set out in the Property Regimes Regulations to deal with jurisdiction feature a remarkable degree of complexity.

The goals that those provisions seek to attain are, as such, commendable: minimising the risk of inconsistent decisions, while providing the courts of the participating Member States with ample opportunity to entertain cross-border claims in this field, including, under appropriate circumstances, where the matter is significantly connected with a State other than a participating Member State. The rules whereby these goals are pursued, however, are rather elaborate in their overall layout and may, in some instances, give rise to hesitation and practical difficulty.

Truly enough, the new provisions largely build on solutions that have already been used in other EU texts. Nonetheless, some of those solutions, too, operate here with new variations or are submitted to new exceptions.

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[68] See already, ECJ, 13 July 1995, *Danværn Production A/S* v *Schuhfabriken Otterbeck GmbH & Co.*, Case C-341/93, ECLI:EU:C:1995:239, para. 18.

[69] P. MANKOWSKI (note 26), p. 43.

[70] Cf. the concerns raised by the French and the Belgian delegations with reference to an early version of Article 12: doc. 13698/11 - ADD 15 of 26 September 2011, p. 6, and doc. 13698/11 - ADD 16 of 30 September 2011, p. 5, both in the Public Register of Council documents, note 41.

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All in all, the Property Regimes Regulations set out rules of jurisdiction that, by their technical refinement, speak of the degree of maturity reached by EU private international law. On a practical note, the time required by magistrates and other authorities to familiarise themselves with the niceties of the two instruments is unlikely to be short, demonstrating that the adoption of a legislative measure is just one stage of a long and demanding process, involving legal education and training, as well as a continuous dialogue between academia and practice and among practitioners.

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CONNECTING FACTORS TO DETERMINE THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES

Dagmar COESTER-WALTJEN[*]

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The following remarks will concentrate on the determination of the applicable law on matrimonial property regimes according to Council Regulation (EU) No 2016/1103 of June 24, 2016 "implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes."[1] However, they will be limited to conflict-of-law rules absent any choice of law by the spouses. Thus, the main focus will be on the reference to the applicable law determined by (objective) connecting factors.

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[1] OJ L 183, 8.7.2016.

Yearbook of Private International Law, Volume 19 (2017/2018), pp.195-211
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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I. The Scope of the Regulation

A. Entry into Force and Applicability

Council Regulation (EU) 2016/1103 entered into force on 29 July 2016, but the conflict-of-law rules will apply only as of January 29, 2019. They will be applicable to matrimonial property regimes of all marriages concluded after 28 January 2019.[2] In addition, the Regulation will apply to choice of law agreements on matrimonial property regimes entered into after that date irrespective of the marriage date. Thus, marital property regimes of spouses already married now will – now and in future – be governed by the law determined by the conflict rules of the relevant national legal order for the time being. Therefore, there will be parallel conflict-of-law regimes on matrimonial property, possibly for many decades. Retroactive changes in determining the applicable law are avoided as well as an automatic change in the marital property regime.

However, those couples already married before 29 January 2019 will have the opportunity to choose the applicable law according to the rules of the Regulation. This possibility will exist as of 29 January 2019, and no earlier. Due to the precise wording, the Regulation will not apply to choice of law agreements entered into earlier, even if the parties agreed to give effect to this choice of law only after the named date.[3]

B. Territorial Scope of the Regulation

The Regulation does not apply to all Member States of the European Union; it only applies to those who agreed on an enhanced cooperation authorised by Council Decision (EU) No 2016/954 of June 9, 2016.[4] This means that – as things stand –

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[2] R. MAGNUS, Einige Überlegungen zu den Zuständigkeits- und Kollisionsnormen der EuGüVO, in K. HILBIG-LUGANI/ P.M. HUBER (eds), *Moderne Familienformen, Symposium zum 75. Geburtstag von Michael Coester*, Berlin-Boston 2018, p. 186. The original version of Art. 69 was misleading; this has been clarified in the meantime, see *Corrigendum* to Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 113, 29.4.2017.

[3] K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen zur Ausbildung allgemeiner Strukturen des Europäischen Internationalen Privatrechts, in K. HILBIG-LUGANI/ P. M. HUBER (eds), *Moderne Familienformen. Symposium zum 75. Geburtstag von Michael Coester,* Berlin/ Boston 2018, p. 174; K. HILBIG-LUGANI, Parteiautonomie im Zusammenspiel des neueren Europäischen Kollisionsrechts, *DNotZ (Deutsche Notar-Zeitschrift)* 2017, p. 752 (with critical remarks on this limitation); for a different view, see J. RIECK, Ehe- und Partnerschaftsverträge in Anwendung der EU-Verordnungen, *NJW (Neue Juristische Wochenschrift)* 2016, p. 3757.

[4] Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ L 159,

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the Regulation will be applied in 18 Member States, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain, and Sweden. It will not be applicable in the following States: the so-called Schengen States (Denmark, Ireland, UK), the Baltic States (Estonia,[5] Lithuania, Latvia), Poland, Hungary, Romania, and Slovakia. According to Article 328 (1) TFEU enhanced cooperation still remains open to all other Member States subject to compliance with the conditions of participation set out in the authorising decision and with the acts which might have been adopted within that framework in the meantime (Recital 13).

The expression "Member State" in the Regulation and in the following text is limited to the Member States of the enhanced cooperation concerning this Regulation but does not include the Member States of the EU altogether.[6] Unfortunately, the Member States bound by this Regulation are not the same as those bound by the EU Succession Regulation and by the Rome III Regulation.[7] Thus, if a marital property regime comes to an end by divorce or death, the applicable law will not necessarily be determined for all relevant questions by the respective European regulations, but partly by the conflict rules of a Member State. This might cause problems if, for example, the demarcation between marital property and inheritance is at issue. There is no overall EU regime on conflict-of-law issues within the Member States interested in enhanced cooperation.

The application of the Regulation does not depend on any specific personal requirement concerning the spouses, however, existing conventions to which one or more Member States are a party remain effective. Thus, the German-Iranian Convention of 1929[8] which obliges the partners to the Convention in Article 8(3) to apply the national law of the persons concerned in family matters takes priority (Art. 62).

C. Material Scope of the Regulation

In a nutshell the material scope of the Regulation with respect to the determination of the applicable law may be described as including all rules concerning civil-law aspects of matrimonial property regimes, both daily management of the matrimo-

16.6.2016; for the long process of drafting, discussing, looking for consented versions, and finally agreeing on the Regulation: J. SERDYNSKA, Die Entstehung der Güterrechtsverordnungen – Ein Überblick, in A. DUTTA/ J. WEBER (eds), *Die europäischen Güterrechtsverordnungen*, München 2017, p. 7; for the different territorial scope of the enhanced cooperation in family law regulations, see K. HILBIG-LUGANI, Parteiautonomie (note 3), p. 741 and 766.

[5] Estonia seems to have declared some interest, but has not joined in the enhanced co-operation so far.

[6] J. WEBER, Die europäischen Güterrechtsverordnungen: Eine erste Annäherung, *DNotZ* 2016, p. 662.

[7] B. HEIDERHOFF, Die EU-Güterrechtsverordnungen, *IPRax* 2018, p. 4.

[8] *Reichsgesetzblatt* 1930 I 1006.

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nial property and the liquidation of the regime, in particular at the separation of the couple or at the death of one of the spouses (Recital 18). The definition of marital property is very broad (Art. 3(1)(a), Art. 27) and should be interpreted autonomously (Recital 18). It also includes property relations of the spouses with third persons and their protection as well as default and optional rules of the respective regimes.[9] The Regulation also covers matters which according to the conflict rules of the national legal systems might be outside the "normal" private international law qualification of marital property regimes. For example, the Regulation applies to matters that are subject to specific conflict rules in German private international law (such as Art. 14, 16, 17a Introductory Act to the Civil Code – EGBGB) and it is unclear whether it might apply also to issues which involve the "*régime primaire*" in French law – as it is currently under discussion.

The Regulation does not define the term "marriage" and leaves the interpretation of what is a marital relationship to the national law of the Member States (Recital 17). This should be understood as referring to the laws of the respective court (*lex fori*), but not the *lex causae* (law applicable to the marital property regime) because the *lex causae* could be also the law of a non-Member State.[10] The reference to the *lex fori* does not include the conflict rules of that law.[11] This results from the different wording in Recital 17 on the one hand and Recital 21 and Article 9 on the other. Recital 17 deals with the question of whether the respective relationship can even be called a marriage; thus, the only issue of Recital 17 concerns the applicability of the Regulation.[12] Recital 21 and Article 9 in contrast refer to the determination of the law which governs the validity of the marriage (including preliminary questions).[13] The different wording makes sense because different issues are concerned. Nevertheless an autonomous definition of marriage would have avoided many problems and would have secured a uniform application of the Regulation. However, agreement on this topic was out of reach.

[9] B. HEIDERHOFF (note 7), p. 2; there have been critical comments on the different language versions of this definition by D. HENRICH, Zur EU-Güterrechtsverordnung: Handlungsbedarf für die nationalen Gesetzgeber, *ZfRV (Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung)* 2016, p. 172.

[10] A. DUTTA/ F. WEDEMANN want to apply the definition of the place of registration in order to avoid different results in different Member States, but again this does not comply with the wording of Recital 17; A. DUTTA/ F. WEDEMANN, Die Europäisierung des internationalen Zuständigkeitsrechts in Gütersachen, in R. GEIMER/ R. A. SCHÜTZE (eds), *Recht ohne Grenzen - Festschrift für Athanassios Kaissis zum 65. Geburtstag*, München 2012, p. 139.

[11] For such inclusion: A. BONOMI, Fragen des allgemeinen Teils: Qualifikation, Vorfrage, *renvoi* und *ordre public*, in A. DUTTA/ J. WEBER (eds), *Die europäischen Güterrechtsverordnungen*, München 2017, p. 131 *et seq.* (No. 45 *et seq.*).

[12] Except for Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Italy, and Slovenia, all other Member States of this enhanced co-operation have introduced same-sex marriage by now, thus a special problem of how to treat a same-sex marriage has lost its importance considerably.

[13] K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 166.

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II. Principles and Exceptions

A. Universal Applicability

The conflict rules of the Regulation are universally applicable (Art. 20, Recital 44). They apply regardless of whether the law referred to is that of a Member State. It could be also the law of another Member State of the EU not participating in the enhanced cooperation or that of a "normal" third State. Since the Regulation does not take precedence over existing bi- and multi-lateral conventions to which the Member States might be parties, this principle gives way to obligations resulting from these conventions.

B. Immutability

Secondly the determination of the applicable law by objective connecting factors is immutable – at least in principle. Thus, absent a choice of law by the spouses, the law governing the marital property regime is determined according to the connecting factors existing at the marriage date.[14] Such a "frozen concept" allows stability, predictability and reliability with regard to the applicable law – for the spouses as well as for third persons. However, this was one of the most disputed issues during the preparatory sessions.[15] Whereas German law has adhered to this principle for a long time, there are other legal systems which prefer more flexibility, especially in a mobile society. Also, the Hague Convention of March 1978 on the Law applicable to Matrimonial Property Regimes (the "Hague Convention") provides for changes to the applicable law (Art. 7). Because of the advantages and disadvantages to both approaches, the Regulation provides for a compromise by a so-called escape clause (Art. 26 (3)), which will be discussed below (see *infra* IV.)

C. The Monistic Approach

Despite the long and controversial discussion – already during the preparatory works of Regulation (EU) No 650/2012 on Matters of Succession[16] – the Regulation takes a monistic approach, determining the applicable law for all issues

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[14] For the complications resulting from a retroactive choice of law, see L. RADEMACHER, Changing the Past: Retroactive Choice of Law and the Protection of Third Parties in the European Regulations on Patrimonial Consequences of Marriages and Registered Partnerships, *CDT (Cuadernos de Derecho Transnacional)* 2018, p. 7.

[15] For the relevant arguments, see K. DENGLER, *Die europäische Vereinheitlichung des internationalen Ehegüterrechts und des internationalen Güterrechts für eingetragene Partnerschaften,* Tübingen 2014, p. 238 *et seq*.

[16] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012.

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alike. The widely favored *dépeçage* for immovables was rejected. A separate choice of law for immovables is also not available.[17] There are, however, some exceptions where public policy (Art. 31), overriding mandatory provisions (Art. 30),[18] the protection of third parties (Art. 28), or formal requirements for matrimonial property agreements (Art. 25) are at stake. Article 13(1) will have the same effect if assets of a deceased spouse are located in a third State and the rules of this third State would not recognise or enforce the decision of the courts of a Member State seized to rule on the matrimonial property regime.[19] Thus, there may be cases in which matrimonial property issues, concerning the State of a deceased spouse, will be governed by different legal systems.

D. No *renvoi*

The conflict rules of the Regulation refer exclusively to the substantive law of the respective legal system (not including the private international rules of that law: Art. 32).[20] Thus, there will be no *renvoi*.[21] This is also the approach of the Rome III Regulation (Art. 11), whereas under the Regulation on Matters of Succession, a *renvoi* from the law of a third State will be followed.[22]

Under German private international law, for the time being, references to a legal system nearly always include the conflict rules of that system (Art. 4(1) EGBGB). Therefore quite often one might be referred back to German law. Now, the principle, pursuant to the Regulation, of direct reference to the substantive law to be followed, will lead more often to situations in which the judge will have to apply foreign law. A *renvoi* would have allowed for the return to the law of the forum if, like Swiss law (Art. 54 (1) Swiss Private International Law)[23], the law to

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[17] J. WEBER (note 6), p. 676; K. KROLL-LUDWIGS, EU-EheGüterVO-E, in T. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Brüssel IIa*, vol. 4, Köln 2015, p. 1081 *et seq*.

[18] For examples in German law, see K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 172.

[19] For the last point, see D. COESTER-WALTJEN, Die objektive Anknüpfung des Ehegüterstatuts, in A. DUTTA/ J. WEBER (eds), *Die europäischen Güterrechtsverordnungen*, München 2017, p. 60; for the other issues, see A. BONOMI (note 11), p. 141-142; R. SÜSS, Sonderanknüpfungen von Eheverträgen und der Schutz Dritter, in A. DUTTA/ J. WEBER (eds), *Die europäischen Güterrechtsverordnungen*, München 2017, p. 92 and 102; K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 168.

[20] D. HENRICH, Auf dem Weg zu einem europäischen internationalen Ehegüterrecht, in I. GÖTZ *et al.* (eds), *Familie – Recht – Ethik: Festschrift für Gerd Brudermüller zum 65. Geburtstag,* München 2014, p. 318.

[21] Crit. B. HEIDERHOFF (note 7), p. 4; K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 180.

[22] A. DUTTA, Art. 34 EuErbVO, in F. J. SÄCKER *et al.* (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB Band 11: Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*, 7th ed., München 2018, p. 1951 *et seq*.

[23] D. HENRICH (note 20), p. 318.

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which reference was made was not immutable – or referred back to the *lex fori.* The so-called hidden *renvoi* of common law systems has always been welcomed by German judges.[24]

Despite the rejection of *renvoi,* private international rules of third States may remain important for counselling. In order to avoid irreconcilable judgments, the spouses should have in mind whether the courts (of the third State) will apply the same law on the subject matter as the courts of the relevant Member State or whether these (third States') courts according to their conflict rules will apply another law. If the Regulation refers to the application of the substantive legal system X – such as, for example, the law of the common habitual residence at the marriage date – the courts of State X might nevertheless apply the law of State Y because of the common nationality of the parties or because the spouses have another common habitual residence now, or they might apply the *lex rei sitae* to immovables.[25] These problems can be avoided if after taking into account the conflict rules of the legal system referred to by the Regulation, the parties make a choice of law that will be respected in all relevant legal systems. This will bring about harmony of court decisions, predictability and security of the applicable law.[26]

References to the legal systems of the Member States will not cause these problems because all Member States will understand the reference to their laws as a reference to their substantive rules on marital property. These issues stress the importance of counselling regarding the advantages of tailoring agreements.

III. Applicable Law in the Absence of Choice of Law Agreements

A. The General Approach

In the absence of a choice of law agreement by the spouses, the applicable law has to be determined on the basis of objective criteria. The Regulation provides for a list of connecting factors in a certain ranking. This ranking has been a hotly debated issue as it concerns the conflict between the protagonists of the nationality approach and the advocates of habitual residence as the most important factor. German law still ranks nationality as the most important criterion for determining the applicable law in many family law matters (habitual residence being only a subsidiary criterion). But habitual residence has trumped all other criteria, especially on the international scale. The Hague Convention also regards the common

[24] A. DUTTA, Das neue internationale Güterrecht der Europäischen Union – ein Abriss der europäischen Güterrechtsverordnungen, *FamRZ (Zeitschrift für das gesamte Familienrecht)* 2016, p. 1983.

[25] Thus, party expectations might be destroyed and court decisions might be irreconcilable.

[26] J. WEBER (note 6), p. 663 and 688.

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habitual residence of the spouses as the primary connecting factor. According to the Regulation, common nationality of the spouses determines the applicable law only if there has been no common habitual residence at the marriage date. As a kind of default rule, the law of the State with which the spouses have the closest link should govern if neither of the foregoing connecting factors apply.

B. The First Common Habitual Residence

The first common habitual residence of the spouses after the marriage determines the law applicable to the marital property regime (Art. 26(1)(a)), if there is no choice of law agreement. There is no definition of habitual residence in the Regulation. It is generally agreed that the term should be interpreted autonomously.[27] However, there are many variations of interpreting this term under discussion.[28] There seems to be a strong preference to define the term habitual residence according to the relevant subject matter.[29] Nevertheless, at least for the purposes of this Regulation, it seems to be agreed that the factual center of the spouses' life, the place where both of them are socially integrated, should be regarded as their common habitual residence.[30] There should be a "genuine connecting factor".[31] The intention of the spouses with regard to their future marital life may also play a role.[32] But it must be kept in mind that the ECJ[33] recently decided – although in another context – that intent alone without physical presence is not enough to establish habitual residence.[34]

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[27] D. MARTINY, Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften, *IPRax* 2011, p. 446; T. HELMS, Neues europäisches Familienkollisionsrecht, in A.-L. VERBECKE *et al.* (eds), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens,* Cambridge 2012, p. 687.

[28] B. RENTSCH, *Der gewöhnliche Aufenthalt im System des europäischen Kollisionsrechts*, Tübingen 2017.

[29] K. HILBIG-LUGANI, Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, *GPR (Zeitschrift für Gemeinschaftsprivatrecht)* 2014, p. 14; T. HELMS (note 27), p. 689; compare also ECJ, 22 December 2010, *Barbara Mercredi v Richard Chaffe*, ECLI:EU:C:2010:829, No. 46.

[30] T. HELMS (note 27), p. 687; J. WEBER (note 6), p. 670; K. KROLL-LUDWIGS (note 17), No. 19.

[31] K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 167 referring to Recital 35 s. 2 (which, however, deals expressly with jurisdiction).

[32] B. HEIDERHOFF (note 7), p. 5 (especially with regard to the acceptable period after the marriage ceremony until a common habitual residence is established).

[33] ECJ, 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, *FamRZ* 2017, p. 1506 (note B. RENTSCH, p. 1510). The issue involved the habitual residence of a newborn for questions of child abduction.

[34] Intent may also be relevant if the spouses enter into a choice of law agreement before marriage and want to elect the law of their intended future common habitual residence; see also K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3),

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A common habitual residence need not necessarily be established in the same dwelling or in the same town. It is sufficient if both spouses have their center of life within the same legal system.[35] Thus, if one spouse lives and works in Hamburg and the other in Munich, they have their common habitual residence in Germany. But if one spouse lives in Paris and the other in Munich, they have no common habitual residence, because there is no connection to only one legal system. Based on Article 33(2)(a), the latter applies also if the spouses are living in a State which has two or more systems of law and no internal conflict-of-laws rules, such as the United States. In such cases the criteria next in the ranking will determine the applicable law. If, however, the State where both spouses live has several systems of law, but a unified law on marital property – like Switzerland, for example – this federal law can govern the marital property regime. Thus, the spouses will be regarded as having a common habitual residence even though one spouse lives in (the Canton of) Zurich and the other in (the Canton of) Basel.

The decisive point of time for determining the common habitual residence is more difficult to ascertain. In principle, the common habitual residence should exist at the marriage date. However, as couples might not always establish their common daily life at the very beginning of their marriage, the Regulation concedes some period of time: it is sufficient that the common habitual residence will be established "shortly after marriage" (Recital 49). The law of the then established common habitual residence will govern the marital property regime retroactively as of the marriage date.[36] Thus, the principle of immutability is respected and at the same time there is some flexibility. But there is some uncertainty about the length of this period. "Shortly" is a very open term.[37] Should it be a fortnight only or may it be a longer time? It is suggested that a period of up to three months would be acceptable.[38] But also a period of six to eight months, depending on the circumstances of the given case, is proposed.[39]

According to the principle of immutability later changes or abandonment of the common habitual residence will not influence the application of the marital property regime determined according to Article 26(1)(a) – except where the spouses later agree on a choice of law or where the escape clause applies (see *infra* IV).

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p. 176; J. WEBER (note 6), p. 677. K. HILBIG-LUGANI suggests that this should be possible at least if the chosen law accepts such an escrow.

[35] B. HEIDERHOFF (note 7), p. 5; D. MARTINY, Die Anknüpfung güterrechtlicher Angelegenheiten nach den Europäischen Güterrechtsverordnungen, *ZfPW (Zeitschrift für die gesamte Privatrechtswissenschaft*) 2017, p. 22; J. WEBER (note 6), p. 671.

[36] B. HEIDERHOFF (note 7), p. 5; J. WEBER (note 6), p. 671; A. DUTTA (note 24), p. 1982; D. MARTINY (note 27), p. 450.

[37] B. HEIDERHOFF (note 7), p. 5; K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 176.

[38] J. WEBER (note 6), p. 671.

[39] B. HEIDERHOFF (note 7), p. 5.

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C. Common Nationality of the Spouses

If no common habitual residence was established at the marriage date or shortly thereafter, the law of the common nationality of the spouses, if any, will govern the marital property regime (Art. 26(1)(b)). The nationalities of the spouses at the time are decisive. Again, according to the principle of immutability, the application of this law will not be affected by a later change of nationality or by establishing a common habitual residence at a later time. Even the escape clause will not apply (Art. 26 (3)). Only a choice of law agreement of the spouses may cause a change in the applicable law.

In most cases, nationality is a criterion which can be determined easily and very fast. This is the reason why nationality as a connecting factor is preferred in several jurisdictions and still has many advocates. In the Regulation, the special role of nationality is stressed insofar as the escape clause (Art. 26(3)) does not apply. The law of the common nationality of the spouses, as at the marriage date, continues according to Article 26(1)(b), to be the governing law.

However, even the criterion of common nationality might cause a problem if one or both spouses have more than one nationality. According to Recital 50, the question of how to consider a person's nationality is left to the national law of the Member States. Member States have to observe the applicable international conventions, as well as the general principles of the European Union. This means that, for German law, Article 5 EGBGB is in principle applicable which, in case of multiple nationalities, prefers the effective nationality. The preference for German nationality, provided for at Article 5(1)(2) EGBGB, however, must give way to the European principle of non-discrimination (Art. 18 TFEU).[40] Thus, a person with German and Swiss citizenship will be considered German for the purposes of the Regulation when German nationality is the effective nationality, *i.e.* the person has more intensive links to Germany than to Switzerland. The same applies even if one or both spouses have citizenship in two Member States. Although the ECJ[41] has rejected the limitation to the effective nationality for jurisdictional purposes, Recital 50 allows for the inference that, for this Regulation, the European legislator leaves the decision on this issue to the national laws including their possible preference of the effective nationality as long as this is not

[40] J. WEBER (note 6), p. 672; T. HELMS (note 27), p. 695; the same is proposed by K. HILBIG-LUGANI for the application of Art. 8 Rome III Regulation, K. HILBIG-LUGANI, Art. 8 Rome III-VO, in R. HÜSSTEGE/ H.-P. MANSEL/ P. A. BRAND (eds), *Nomos-Kommentar zum Bürgerlichen Gesetzbuch: Rom-Verordnungen/ EuErbVO/ HUP,* Vol. 6, 2nd ed., Baden Baden 2015, No. 19a, b; K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 168; K. HILBIG-LUGANI, Parteiautonomie (note 3), p. 745; A. DUTTA takes a different view as long as a choice of law is possible; A. DUTTA (note 24), p. 1981, No. 57.

[41] ECJ, 16 July 2009, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, ECLI:EU:C:2009:474, *IPRax* 2010, p. 66 – concerning jurisdiction in divorce matters under Sec. 3 (b) Regulation 2201/2003; 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, 23.12.2003.

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discriminatory.[42] The choice between two national laws of two Member States is not discriminatory if the intensity of the link of the concerned person, to one or the other Member State is the decisive factor. In addition, it makes a difference whether dual nationality leads to the alternative jurisdiction of several fora – as was the case in the decision of the ECJ – or to the application of several national property regimes which cannot help in determining the applicable law. Therefore, the cited decision of the ECJ will not influence whether the Regulation will prevent a national law from applying a concept of effective nationality, as the decisive criterion conforms to the provisions of the Regulation.

If, however, both spouses have more than one common nationality at the marriage date, according to Article 26(2) common nationality will not function as a connecting factor. This applies even if there is only one common effective nationality of both spouses. In a case, for example, of two spouses both with Brazilian and American citizenship, where US citizenship is the effective one,[43] Article 26(1)(b) will not apply. The applicable law will have to be determined according to Article 26(1)(c). At first glance, it seems regrettable that the Regulation excludes the application of Article 26(1)(b) in this special constellation. But, since the concept of effective nationality is, for now, one of national law as opposed to European law, this appears to be plausible. In addition, the common links of the spouses to a legal system will nevertheless play a role under the following criterion, the closest connection.

D. Closest Connection

If at the marriage date, there is neither a common habitual residence nor a common nationality, the marital property regime shall be governed by the law to which both spouses have the closest connection. The term "closest connection" must be interpreted autonomously in order to provide the same results in all Member States. When, at this third stage of analysis, the closest connection of both spouses is to be identified, nationality might play an important role again (if it cannot be considered under Art. 26(1)(b) due to Art. 26 (2)).[44] Thus, spouses with multiple common

[42] See also B. HEIDERHOFF (note 7), p. 16 (having some doubts because of Art. 26 (2) and criticising the unclear and misleading approach to this issue by the Regulation); K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 169; K. HILBIG-LUGANI, Parteiautonomie (note 3), p. 745.

[43] In this example, their habitual residence must be in different states of the US, otherwise (as in the case of a German effective nationality) already Art. 26(1)(a) would apply, referring to the law of the common habitual residence: see above at note 29).

[44] For the important role of nationality in determining habitual residence, see ECJ, 22 December 2010, *Barbara Mercredi v Richard Chaffe*, ECLI:EU:C:2010:829, No. 47; the same applies if, under Art. 11 Regulation (EU) No 2201/2003, the closest connection of a child plays a role. With regard to the importance of nationality in defining the closest connection, one might wonder whether it wouldn't have been better to abstain from nationality as a connecting factor altogether (see D. COESTER-WALTJEN, Fernwirkungen der Europäischen Verordnungen auf die international-familienrechtlichen Regelungen des EGBGB, *FamRZ* 2013, p. 174), but this might have been too radical for the proponents of the nationality concept.

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nationalities might be treated as having the closest link to the State of effective nationality for both of them.

Besides nationality, origin, religion, language, culture, and social relations will play a role. The intention of the spouses regarding their future life might be important too.[45] Therefore, the plan to establish a common habitual residence must be taken into account under this heading if the establishment will take place sometime after the marriage but too late to be considered under the heading of a common habitual residence at the marriage date (Art. 26(1)(a)).[46] In the original draft of the Regulation, the place of the marriage, expressly mentioned at Article 17(1)(c), will have some significance although minor.

There is no fallback rule calling for the application of the *lex fori* where both spouses hardly have a close connection to the same legal system. The application of the *lex fori* would have been problematic in two respects: the relevant law would have to be applied retroactively as of the marriage date,[47] and such a rule would invite forum shopping in case of parallel jurisdictions (see especially Art. 5 referring to Art. 3 Regulation 2201/2003).[48] Therefore, in such (rare) cases, the law to which both spouses have at least some connection must be applied.

IV. The Escape Clause

A. Scope of the Application

The escape clause of Article 26(3) is the result of the compromise between the supporters of immutability and those favoring mutability of the reference to a legal system. Under certain circumstances, this clause allows the court (on request of at least one spouse) to apply a law other than that determined under Article 26(1)(a) for the marital property regime. Since this deviation from the normal conflict rules takes into account changes of circumstances after the relevant time for the determination of the applicable law, this concept is a matter of principle and not only an adjustment of the connecting factors, like the escape clauses of Article 4 (3) Rome I Regulation and Article 4 (3) Rome II Regulation.

The Hague Convention might have served as a model (Art. 7), but the provision of the Regulation is less complicated, although it has the same limited scope of application. First, it only applies if the spouses have not designated the

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[45] J. WEBER (note 6), p. 673; K. KROLL-LUDWIGS (note 17), No. 77; C. KOHLER/ W. PINTENS, Entwicklungen im europäischen Personen- und Familienrecht 2015-2016, *FamRZ* 2016, p. 1512.

[46] J. WEBER (note 6), p. 673.

[47] K. KROLL-LUDWIGS (note 17), No. 76 *in fine*.

[48] K. HILBIG-LUGANI, Art. 8 Rome III-VO (note 40), No. 22; J. BASEDOW, European Divorce Law - Comments on the Rome III Regulation, in A.-L. VERBECKE *et al.* (eds), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens,* Cambridge 2012, p. 144; critical also with regard to the application of the *lex fori* for the dissolution of marriage according to the Rome III Regulation.

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applicable law by agreement, thus only if the applicable law is determined on the basis of objective criteria.[49] Second, it only applies if the common habitual residence at the marriage date (or shortly thereafter) has been the decisive factor. If the spouses did not establish a common habitual residence at the beginning of their marriage, the common nationality will play the dominant role for determination of the applicable law. Then even fundamental changes in the spouses' life concerning their relationship with a legal system, and a later change of nationality by both spouses will have no influence on the former reference to that legal system.[50] This limited scope of the escape clause might be a tribute to those who are convinced that nationality as a connecting factor is superior. But still it seems very problematic.

Of course, spouses may agree on a choice of law even at that later stage of marriage. They may then choose the law of the present habitual residence or the law of the State of the (new) nationality of one or both spouses. But if the spouses recognise the importance of the law applicable to their matrimonial property regime only after court proceedings have commenced, then it might be difficult (if not impossible) to come to an agreement. The same problem exists if one of the spouses has died before such an agreement could be reached.

The non-application of the escape clause in cases where the applicable law is to be determined by Article 26(1)(c) (closest connection) is even less persuasive.[51] Absent a common habitual residence and a common nationality, the closest connection to a legal system at the marriage date might have been very random and unsubstantial, whereas one could see a strong link to a legal system, for example, as of the first or second year of the marriage. Again a choice of law agreement might not be a realistic alternative.

B. Requirements for a Deviation from Art. 26 (1) (a)

First of all, a law other than that referred to by Article 26(1)(a) may only be applied if at least one of the spouses asks for this. Thus, there must be a request by one of the spouses to the judicial authority. The court must not deviate from the conflict rule on its own initiative. The application may be made by the spouse irrespective of his or her role in the relevant judicial proceedings (plaintiff or defendant) as long as he or she is a party to these proceedings. It is also possible that both spouses make such an application. However, where both spouses consent on the application of another law, a choice of law agreement between them would be a sensible alternative. But it might be easier and cheaper to apply to the judicial authority already acting in that matter. This is especially true if the law of the Member State in which both spouses have their habitual residence provides for additional formal requirements for choice of law agreements (Art. 23(2)). There are no special formal requirements of the Regulation for the application to the

[49] D. HENRICH (note 20), p. 316.

[50] See the critical remarks and the persuasive examples at B. HEIDERHOFF (note 7), p. 6.

[51] *Ibidem*.

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judicial authority under Article 26 (3). These matters are governed by the procedural law of the respective judicial authority. This law will decide – for example – whether the spouse may apply in person or needs to be represented by a lawyer.

Second, there must not be a marriage property agreement[52] contracted before the last habitual residence was established (Art. 26(3)(4)). This seems to be plausible because when entering a marital property agreement, spouses have – or at least should have – in mind that they act within the framework of a certain legal system.[53] Thus, there should be no room for a unilateral deviation from this common understanding. But of course, the spouses may overrule the marital property agreement by the mutual choice of a new law governing their marital property issues. Therefore, counsel should explain to spouses entering a marital property agreement that they thereby freeze the law applicable to their marital property issues, unless they will agree on a (new) choice of law.

Third, the law substituted for the law referred to in Article 26(1)(a) can only be the law of the last common habitual residence. The spouses must have had this last habitual residence for a "significantly longer period of time than their first common habitual residence." And both spouses must have relied on the law of that legal system in arranging or planning their property relations (Art. 26(3) (SS1) (a) (b)).

Obviously, these requirements invite discussion and controversy if the spouses have different views about the past. There might be a controversy on how long the first common habitual residence lasted and when the last habitual residence was established.[54] There might be arguments with regard to the reliance on the regime of the last common habitual residence. The Regulation is silent with regard to criteria which should indicate reliance.

But even aside from these possible sources of conflict between the spouses, uncertainties are inherent to the rule. In particular, the relevant relationship between the duration of the first and the last common habitual residence might be assessed differently. If the spouses had their first common habitual residence for three years after marriage in State A and then moved to State X, where they have been living for twenty years, the answer is easy. But what is the answer if, after the first three years in State A, the couple moved to State B for five years, then to State C for the same duration, and finally they end up in State X as their last common habitual residence, where they have now lived for ten years? Will this be enough for the application of the escape clause? Or, if the question arises already after they have stayed in State B for five years? Is five years significantly longer than three years? Many will deny this. But five years is certainly significantly longer than three months.

Aside from the problematic relationship between the duration of the last common habitual residence and the first one, the last common habitual residence must be long enough to justify any reliance in planning or arranging property relations. This might depend very much on the economic and financial situation of

[52] R. SÜSS (note 19), p. 98.

[53] J. WEBER (note 6), p. 675 (he wants to apply this principle even if the marital property agreement is invalid because of a lack of form according to Art. 25).

[54] K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 176.

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each couple. In many marriages, property arrangements (buying a family home, starting a business) probably might take place during the first decade of the marriage, after the couple has settled, or – again – after retirement when new arrangements regarding the economic situation seem appropriate.

Besides these practical problems in the application of the escape rule, the provision fails to take account of similar situations in which its application would make sense. The limited application of the rule only to cases in which the law of the first common habitual residence governs has already been criticised (see *supra* A). But even within its limited application, the escape clause does not take account of nearly identical situations. On the one hand, it is generally agreed that spouses might have different habitual residences at the time of the decision of the judicial authority. For example, they might have split up already, one moving back to State A, the other staying in State X or moving to State B. If, however, on the other hand the spouses changed their long-lasting common habitual residence in State X and moved together to State Y, where after a short while one spouse died or the marriage broke up, the escape clause does not apply. The law of State Y cannot be applied because the duration of the spouses' habitual residence was too short. The marital property law of State X cannot be considered either, because State X is neither the place of their common habitual residence at the marriage date, nor their last common habitual residence. Thus, the law of State A will be applicable despite the fact that the spouses might have lived there just for a very short time (for example for the first five months) after the date of their marriage and even though they relied on the application of the law of State X (where they might have lived for twenty years thereafter until they both moved to State Y). Again, by a choice of law agreement, these problems would be avoided, but when the issue becomes known, it might be too late for that alternative solution. It is regrettable that the escape clause does not take care of these situations.[55]

All this might be an important point of counselling when questions of arranging property relations are at issue.

C. Consequences

By application of (at least) one spouse and proof that all requirements are fulfilled, the judicial authority will decide on the applicable law. However, it is not at the discretion of the judge to "choose" the law of the State of the last habitual residence.[56] The wording of Article 26(3) "by way of exception" only stresses the exceptional character of the deviation from the normally applicable conflict rule. But if the requirements are fulfilled (even though this might be the case only in exceptional circumstances) a judge has to issue the decision that the law of the last common habitual residence governs all marital property issues.

As already indicated, the scope for interpretation of the relevant requirements is rather broad. Thus, one judicial authority might hold that the duration of the common habitual residence of five years is significantly longer than three

[55] B. HEIDERHOFF (note 7), p. 6.

[56] J. WEBER (note 6), p. 676.

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years, while another judge might not. As in other issues of interpretation, judicial authorities might arrive at different results.[57] The possible constellations are so many and depend so much on the circumstances of each case, that one can hardly expect rules of precedence in the near future.

These uncertainties are especially problematic where different courts are dealing with these matters. If, for example, one spouse dies during the proceedings, according to Article 4 and 5, courts of different Member States may have jurisdiction on matters of marital property (if the applicable procedural law provides a *perpetuatio fori*) and the different courts may arrive at different results.[58]

The application of the law of the last common habitual residence is limited in two respects: with regard to established rights of third persons and with regard to the retroactive effect.

The protection of the rights of third parties – a concern of the Regulation in general – is dealt with at Article 26(3) (ss 3). The application of the "new law" should[59] not affect rights of third parties adversely. But only those rights that the third party would derive from the application of the law of the first common habitual residence as at the marriage date, are relevant. It seems to be a sound policy that the change of the applicable law must not have negative effects on established rights of third parties. The question of whether the third party relied on the application of the law of the common habitual residence at the marriage date is not at issue here – in contrast to the rule at Article 28.[60] The protection of third parties applies even if the third party did not take any notice of the applicable law from which the right derived. Thus, problems of proof concerning knowledge and reliance are avoided. Nevertheless, the third party has to plead that he or she has acquired certain rights and that these would be adversely affected by the application of another law.

In principle the determination of the applicable law by the judicial authority has effect as of the marriage date. Thus, this law applies as of the beginning of the marriage and there is no need to dissolve the marital property according to the regime of the first common habitual residence. However, one or both spouses may object to this retroactive application. The objection may be raised by the applicant spouse as well as by the other. The Regulation does not deal with the formalities of such objections. It might be supposed that the objection of the spouse(s) like all party statements during proceedings should be subject to the applicable procedural law of the forum.

In case at least one of the spouses disagrees, the "new law" can be applied only as of the establishment of the last common habitual residence. This means

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[57] D. HENRICH (note 20), p. 315.

[58] For the problems of concurrent jurisdiction, see P. MANKOWSKI, Das Verhältnis zwischen der EuErbVO und den neuen Verordnungen zum Internationalen Güterrecht, *ZEV (Zeitschrift für Erbrecht und Vermögensnachfolge)* 2016, p. 484 *et seq*.; P. MANKOWSKI, Internationale Zuständigkeit nach EuGüVO und EuPartVO, in A. DUTTA/ J. WEBER (eds), *Die europäischen Güterrechtsverordnungen*, München 2017, p. 14 and 17.

[59] The German version of this rule says "must not" (*darf nicht*).

[60] For the protection of third persons under Art 28, see: R. MAGNUS (note 2), p. 197.

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that the former matrimonial property regime has to be dissolved retroactively at that date as well. This might cause some difficulties. In addition there might be a dispute between the spouses about the exact point of time when the last habitual residence has been established.[61] The disagreeing spouse(s) should be aware of this complication.

Despite these critical remarks, the escape clause as a possible correction of the conflict rules is welcome in principle, because it allows some flexibility.[62] A former version proposed by the Commission[63] might have been preferable. An acceptable alternative could have been formulated on the basis of Article 15 Swiss Private International Law.[64]

V. Conclusion

In case there is no choice of law agreement between the spouses the Regulation offers relatively clear and precise rules on how to determine the law applicable to the matrimonial property regime. This is very important because, in most cases, there will be no choice of law agreement. However, some provisions invite discussion (such as Art. 9, Recital 17, 21 and 50), some rules do not provide the necessary certainty (such as Art. 26(1)(a) and Recital 49), and some clauses do not allow enough flexibility (such as Art. 26(3)). Nevertheless, the Regulation has to be considered as a step forward toward the unification of European rules on conflict-of-laws.[65]

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[61] K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 176 (especially for the retroactive determination).

[62] D. HENRICH (note 20), p. 316-317 (for a sensitive approach of escape clauses).

[63] See 18045/12 JUSTCIV 377: "[b]y way of exception, where it is clear from all circumstances of the case that a state other than the state whose law is applicable under paragraph 1 has a longer and manifestly closer connection with the spouses (such as recent common habitual residence of long duration), and the spouses relied on the law of that other state, the court may apply the law of that other state."

[64] Art. 15 Swiss Private International Law: "*Das Recht, auf das dieses Gesetz verweist, ist ausnahmsweise nicht anwendbar, wenn nach den gesamten Umständen offensichtlich ist, dass der Sachverhalt mit diesem Recht in nur geringem, mit einem anderen Recht jedoch in viel engerem Zusammenhang steht. Diese Bestimmung ist nicht anwendbar, wenn eine Rechtswahl vorliegt.*"

[65] B. HEIDERHOFF (note 7), p. 11; R. MAGNUS (note 2), p. 199; K. HILBIG-LUGANI, Beiträge der Güterrechtsverordnungen (note 3), p. 183.

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WHAT'S WRONG WITH ARTICLE 22? THE UNSOLVED MYSTERIES OF CHOICE OF LAW FOR MATRIMONIAL PROPERTY

Patrick WAUTELET*

I. Party Autonomy in Matrimonial Matters: Coordination with Succession Issues
II. Is an Implied Choice of Law Compatible with the Regulations?
III. The Regulations and "Old" Choices of Law
IV. Choice of Law and the Protection of Spouses & Partners
V. Conclusion

The twin EU Regulations on Matrimonial Property[1] will become fully effective on 29 January 2019. These new EU instruments confirm that party autonomy is one of the main principles of EU private international law. If some hesitation existed in the Proposals put forward by the Commission, in particular in relation to the possibility for partners to choose the law applicable to their relations, the Regulations have taken a firm position. The choice of law is the first provision in the chapter on applicable law. Article 22 of one regulation almost mirrors Article 22 of the other regulation. The provisions make it possible respectively for spouses and partners to choose the law applicable to their relations.

It is true that, as is the case in succession matters, the law chosen has less impact than the law which would be applicable in the absence of a choice. A choice of law will indeed in most cases only come in support of the regime chosen by spouses or partners. Nevertheless, for practitioners, and notaries in particular, the existence of common choice-of-law rules and, more importantly the confirmation that the relationships between spouses or partners is governed by the law they have chosen, brings about a welcome certainty. A French notary advising a Greek-French couple, for instance, will no longer need to make an express reservation as to the effects of a choice of law made under the 1978 Convention[2] in case proceedings were instituted in Greece after the spouses split up.

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[1] Council Regulation (EU) No. 2016/1103 of 24 June 2016 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; Council Regulation (EU) 2016/1103 of 24 June 2016 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.

[2] Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 213-231
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Printed in Germany

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It may therefore be expected that the coming into force of the two Regulations will lead to an increase in the use of choice of law. While no precise data exists, anecdotal evidence shows that many marriage agreements are concluded without an express choice of law.[3] The existence of a firm legal basis on a European level for choice of law may lead to a more frequent use of choice-of-law provisions. This will have to be studied closely in order to find out whether this possibility is effectively used by parties.[4]

The confirmation of party autonomy only binds the 18 Member States which have participated in the enhanced co-operation. This is regrettable; it means that the question as to whether a choice of law is binding remains subject to national private international law principles in those Member States not bound by the Regulations. In some cases, this should not prove insurmountable. Polish private international law for example recognises the possibility for spouses to choose the law applicable to their assets.[5] In other cases, the fate of a choice of law included in a matrimonial agreement remains uncertain.[6] However, some of the "renegade" Member States may in fact join the Regulations in the coming years.

It is also true that the adoption of common rule by 18 Member States offers limited comfort if one considers the more than 200 jurisdictions in the world. Looking at the world at large, the choice of law may meet with skepticism or even aversion in some countries. In Russia, for example, a choice of law in a prenuptial agreement is only possible if the spouses are of different nationalities or if they do not have a common habitual residence.[7] If this is not the case, the agreement will be considered under the law of their last common habitual residence. Australian authorities also seem to grant limited weight to a choice of law made by spouses. A choice of law made by parties will be decisive in order to determine the existing property rights of the spouses. It will have less value, if any, to determine the spouses' entitlement to an adjustment of these rights or entitlement to maintenance.[8] Similarly, it appears that under English law, a choice of law included in a prenuptial agreement has limited significance. It can support the conclusion that

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[3] On this issue, see below, at section 2.

[4] Spouses and partners do not enjoy an unlimited choice. Since the choice granted to spouses and partners is limited, there does not seem to be a need for research on whether there is a "market" for law, as has been done for contracts, see G. CUNIBERTI, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Law & Business (Northwestern J. Int'l L. & Bus.)* 2014.

[5] Article 52 of the Act of 4 February 2011 on Private International Law. For a Polish view on the Regulations, see P. TWARDOCH, Le règlement européen en matière de régimes matrimoniaux de la perspective du droit polonais, *Rev. crit. dr. int. pr.* 2016, p. 465 *et seq.*

[6] This is for example the case in Slovakia. Article 21(2) of the Act of 4 December 1993 on Private International Law does not seem to make any allowances for a choice of law in agreements on matrimonial property regimes.

[7] R. STAX/ J. STEWART, Pre-Nuptial Agreements under Russian Law, in D. SALTER/ CH. BUTRUILLE-CARDEW/ ST. GRANT (eds.) *International Pre-Nuptial and Post-Nuptial Agreements*, Jordan Publishing 2011, p. 258, para. 6.17.

[8] See *In the Marriage of Hannema* (1981) 7 Fam LR 542 and the discussion by M. KEYES, Financial agreements in international family litigation, *Australian Journal of Family Law* 2011, p. 171-173.

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the parties intended the agreement to be effective without ousting the application of the forum law to govern an application for ancillary relief.[9]

Unification of the conflict of laws rules within the EU therefore pales a little when considering the larger picture of enforcement of prenuptial agreements on a worldwide basis. This should not, however, downplay the importance of the twin Regulations. First, while it may be that a choice of law is not recognised outside the EU, this fact alone does not necessarily mean that the whole marriage agreement will be disregarded. It may be well be that a court holds parties to their bargain even if it leaves aside the choice of law.[10] Second, the fate of the choice of law in non-European jurisdictions obviously goes beyond the powers of the EU. This begs the question of whether the Hague Conference should not attempt to update the 1978 Convention and extend it to other countries.

The difficulty of enforcing a choice of law outside the realm of the EU Regulations is one issue. It should not deflect our attention from the potential shortcomings of the Regulations. While the recognition of party autonomy must be applauded, a close reading reveals some limitations inherent to the European rules. This contribution aims to highlight some of these shortcomings.

We have selected four issues, which reveal the fragility of party autonomy under the twin matrimonial property Regulations, including the lack of coordination between the two Regulations and the Succession Regulation and the uncertainty regarding the possibility of inferring an implied choice of law from the provisions of a matrimonial agreement. We will also discuss the fate of choices made by spouses before the Regulations came into force and finally ask whether the Regulations offer sufficient protection to weaker spouses. Other shortcomings have already been documented. This applies in particular to the uncertainty regarding the choice of law by spouses who happen to possess more than one nationality. The Regulations do not specifically address this issue, unlike the bolder Succession Regulation.[11] A short comment in a recital seems to indicate that when making a choice of law, a spouse or partner who possesses two nationalities may freely choose between any of the nationalities.[12] Most commentators admit that the

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[9] *Radmacher v. Granatino* [2010] UKSC 42 at 74 (per majority), 108 (per majority) and at 182-183 (Lady Hale). The majority explained that “The relevance of German law and the German choice of law clause is that they clearly demonstrate the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them” (at para. 108). According to Lady Hale, the relevance of the choice of law is “not as to the effect of a foreign agreement in English law because, by the time the case gets to the divorce court, it has none. The relevance is as to the parties’ intentions and expectations at the time when they entered into it” (at para. 183).

[10] This raises the intriguing question of the law which applies to the extent of the effects of the nullity of the choice of law. This question is not expressly addressed by the Regulations.

[11] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L201/107, 27.7.2012, art. 22(1).

[12] *Ibidem*, recital 50 of the Preamble.

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validity of such a choice of law may not be questioned.[13] That the Regulations have not fully and overtly addressed this issue is, however, unsatisfactory.

I. Party Autonomy in Matrimonial Matters: Coordination with Succession Issues

It is trivial to state that there are strong links between matrimonial property relations between spouses and succession. The recent decision of the ECJ in the *Mahnkopf* case highlighted how the two fields of law are intertwined.[14] Spouses who wish to plan the devolution of their estate often combine techniques from the two fields of law. If they live in Belgium, the spouses may, for example, be advised to include a renunciation agreement in their prenuptial agreement, so as to limit the effects of a second marriage on the children born out of a first marriage. While included in a marriage contract, such an agreement has unmistakably an impact on the succession of the spouses. From a German perspective, a matrimonial contract providing that certain assets are joint assets, may be combined with a so-called "Berlin will" (*Berliner Testament*) which provides mutual appointment of each spouse as sole heir and their children as final heirs. Again, spouses will borrow from the twin fields of matrimonial property law and successions. This highlights the need to ensure a smooth coordination between matrimonial property and successions.[15]

This need is felt at all levels. While some uncertainty remains regarding the exact delimitation between the various instruments, the EU legislator has first taken care to draft the scope of application of the various regulations so as to ensure that there is no gap between the instruments. The coordination effort also encompasses the rules of jurisdiction. In this respect, it seems that the twin Regulations have adopted a workable model. As indicated in Recital 32 of the two Regulations, the rules of jurisdiction seek to concentrate the jurisdiction on the matrimonial property regime and on the property consequences of registered partnerships in the Member State whose courts are called upon to handle the succession of a spouse or partner. It is regrettable that, under this mechanism, any excess of jurisdiction in succession matters will be carried out in matrimonial issues. The coordination nevertheless ensures at least that the courts of one and the same Member State may decide on all issues.

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[13] P. LAGARDE, Règlement No. 2016/1103 sur les régimes matrimoniaux, *Répertoire Dalloz (Rep. Dalloz)*, para. 93; L. BARNICH, Deux nouveaux règlements européens de droit international privé: quelques changements à venir en matière de régimes matrimoniaux et de partenariats, *Revue du notariat belge (Rev. not. b.)* 2017, p. 158. In general on the exercise of party autonomy by dual nationals, see T. KRUGER/ J. VERHELLEN, Dual Nationality = Dual Trouble?, *J. Priv. Intl. L.* 2011, at p. 618-619.

[14] ECJ, 1 March 2018, *Doris Mahnkopf v Sven Mahnkopf*, ECLI:EU:C:2018:138.

[15] See in general A. BONOMI, The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions, this *Yearbook* 2011, p. 217-232.

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How do the Regulations ensure coordination for choice of law? Article 22 of the two Regulations makes it possible for spouses and partners to choose the law of the State where one of them is habitually resident, or whose nationality he or she possesses. Regulation (EU) No 2016/1104 adds an additional possibility for partners: they may also elect to submit their relationship to the law of the State under whose law the partnership was created.

At first sight, this makes it possible for spouses and partners to streamline the various choices they make and to subject their arrangements to one and the same law. Two French spouses living in Germany may, for example, subject their matrimonial relationships to French law, while also choosing French law to govern their succession. For couples who share a common nationality, the interplay between the various Regulations creates the possibility to organise their property relations both for divorce and for succession in a secure way.

Matters seem more complicated for spouses who do not share the same nationality. As is well known, this situation is more and more common, as marriage does not have an automatic impact on the nationality of the spouses. Spouses do not share the same nationality may choose the law of their habitual residence to govern their matrimonial relations. If they wish to make a matrimonial property agreement, a French national living in France with a Portuguese citizen may choose French law to govern their agreement. The two spouses will, however, not be able to choose French law to govern their succession. This possibility will be reserved to the French spouse.

One easy way out could be to forgo the idea of a choice of law and start from the assumption that the succession of the Portuguese spouse will be governed by French law, as the law of the habitual residence of the deceased. However, this only holds provided the spouses do not move and remain in France. As soon as the spouses move or if some uncertainty exists on their habitual residence, because the spouses divide their time between several locations, matters become more uncertain.

Another solution may be found in the possibility offered by Article 25 of the Succession Regulation to conclude a succession agreement. Article 25(3) indeed makes it possible for parties to such a succession agreement to choose the law which one of the spouses could have chosen to govern their succession. A German and a French citizen living in Belgium could therefore validly choose German law as the law governing their succession agreement.

Unfortunately, the law chosen under Article 25(3) only governs a limited number of issues: it is relevant for the admissibility, the substantive validity and the binding effects between parties of the agreement. Other issues remain governed by the law of the succession. In addition, Article 25(3) only offers a solution provided the parties can choose the law of a country under whose law succession agreements are possible.

At this stage, it is pointless to lament on the fact that the choice possibilities granted by the Succession Regulation are too narrow, or to argue that the Matrimonial Property Regulations should have allowed a choice for the law of

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succession.[16] This will not solve the missing link between the various regulations. The solution may be found in sophisticated estate planning techniques whose validity does not depend on the applicable law. Unfortunately, these techniques may not be accessible to all spouses.

II. Is an Implied Choice of Law Compatible with the Regulations?

Party autonomy is not an innovation of the EU Regulations. In many jurisdictions, spouses have long ago been granted the possibility to choose the law applicable to their matrimonial relationships. It may even be stated that choice of law, as we know it in private international law, was born in the field of matrimonial property relations.[17]

In some countries, such as the Netherlands, it has now become standard to include a choice of law provision in marriage agreements.[18] In other countries, the picture is less clear. Absent conclusive figures, it is difficult to know how often spouses include express choice-of-law provisions in their marriage contracts. Even though the contexts are very different, one may refer to the fact that in cross-border commercial contracts, there exists a significant gap between the theoretical possibility given to spouses to choose the law and the actual use made of this possibility.[19] It would be quite surprising to discover that express choice-of-law provisions are much more prevalent in cross-border marital agreements. Some indications suggest otherwise. There is indeed much discussion in the literature of the existence and limits of implied choice of law in cross-border marital agreements.[20] This discussion is not purely theoretical, as records show that courts have

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[16] See J. WEBER, Interdependenzen zwischen Europäischer Erbrechtsverordnung und Ehegüterrecht – de lege lata und de lege ferenda, *Deutsche Notar-Zeitschrift (DNotZ)* 2016, p. 429, who argues that the policy mistake lies with the Succession Regulation (note 11).

[17] On the history of choice of law, see B. ANCEL, *Eléments d'histoire du droit international privé*, Panthéon-Assas 2017, p. 211-213; more specifically on the role played by the implicit choice of law, E.M. MEIJERS, Histoire de principes fondamentaux du droit international privé à partir du Moyen Age, spécialement dans l'Europe occidentale, *Recueil des cours* 1934, p. 633-635.

[18] Research has demonstrated that a very large majority of marriage contracts include a choice of law. See F.W.J.M. SCHOLS/ F. HOENS, CNR-Huwelijksvoorwaardenonderzoek – deel II: verekkenbedingen en bijzondere facetten, *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* 2014, p. 33-43.

[19] Empirical research has shown that around 20% of cross-border commercial contracts do not include an express choice of law: G. CUNIBERTI, The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern J. Int'l L. & Bus.* 2014, p. 468.

[20] In France, see H. PEROZ/ E. FONGARO, *Droit international privé patrimonial de la famille*, LexisNexis 2017, p. 160; in the Netherlands, see A.P.M.J. VONKEN, *Internationaal privaatrecht. Internationaal personen-, familie- en erfrecht*, Wolters Kluwer 2012,

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often been called to decide whether a matrimonial agreement included sufficient elements to demonstrate the existence of an implied choice of law.[21]

While additional research is needed in order to clarify this issue, some hypothesis may be offered to explain the (perceived) gap between the theoretical possibility offered to parties to select the law governing their matrimonial agreement and the actual use of this freedom through an express choice of law. One of the reasons explaining the rather infrequent use of the choice of law may lie in the fact that unlike commercial contracts, marital agreements are more grounded in a national legal system.

At first sight, marriage contracts do not fundamentally differ from commercial contracts: both types are drafted with the provisions of a given system of law in mind. The draftsmen will ensure that the provisions of the contract remain within the limits of what is allowed under a given system of law. And in most cases, the draftsmen will have their own laws in mind. However, some differences seem to exist between cross-border commercial contracts and marital agreements. In recent decades, there has been a steady movement towards denationalising commercial contracts. This may be apparent when looking at scholarship discussing contract provisions from a global perspective. Many works exist which do not firmly start from the law of one jurisdiction when discussing contract provisions.[22] The circulation of model contracts and provisions has also been extensively studied,[23] suggesting that when it comes to drafting commercial contracts, the starting point is not necessarily the law of one given jurisdiction.

By contrast, marital agreements are mainly studied from a national perspective. While excellent comparative studies exist,[24] they remain confined to a study of the differences between national systems, without any suggestion of bridging the gap.[25] Notaries remain the primary advisers when parties seek to reach a marital agreement. Only a select number of these professionals have intensive

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p. 153-154, para. 174; for Germany, see D. LOOSCHELDERS, EGBGB Art. 15, in R. RIXECKER/ F. JÜRGEN SÄCKER, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 11 Internationales Privatrecht I*, Beck 2018, p. 1085, para. 96; in Belgium: L. BARNICH, Présentation du nouveau Code belge de droit international privé, *Rev. not. b.* 2005, p. 34.

[21] See the case decided by the English High Court: *Z v Z* (No. 2), 2011 EWHC 2878 (Fam) in a situation where two French spouses had concluded an agreement before a French notary. In the Netherlands, see *Hoge Raad*, 29 March 2013, ECLI:NL:HR:2013:BY4352. In France, see Cour de cassation (1st civ.), 13 December 1994, n° 93-15337.

[22] One of the most well-known works is the seminal research carried out by M. FONTAINE/ F. DE LY, *Drafting International Contracts. An Analysis of Contract Clauses*, Transnational Publishers 2006. This book does not focus on one single jurisdiction. Rather, it aims to discuss contract provisions which are actually used in international contracts.

[23] Recently G. CORDERO-MOSS, *Boilerplate clauses, international commercial contracts and the applicable law*, Cambridge University Press 2011.

[24] J.M. SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, Intersentia 2012.

[25] The recent French-German model marital agreement is a clear exception to this. See D. MARTINY, Aspects de droit international privé du régime matrimonial optionnel franco-allemand, *Rev. crit. dr. int. pr.* 2014, p. 843 *et seq*.

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cross-border experience, which makes it more difficult to contemplate embracing solutions coming from other jurisdictions. As one French commentator noted, it is notoriously difficult to convince a French notary to accept that a marriage contract may be subject to a foreign law.[26] Notaries are, furthermore, usually trained in a single, national law. One additional factor, which may explain why migration of specific contract provisions from one jurisdiction to another seems to be inexistent in cross-border marital agreements, is that provisions inserted in marriage contracts are often tailored to meet specific, local tax law requirements. Spouses may be advised to opt for a separation of assets or joint assets regime depending on the tax law outcome under local law. Using contract provisions from other jurisdictions is therefore more difficult. In addition, marital agreements are most often drafted using a standard contract. Those standard contracts are precisely drafted with one national legal system in mind. While they may include a choice of law,[27] the use of such contracts constitute an obstacle to the type of creative drafting necessary in order to accommodate the requirements of two or more jurisdictions.

While this needs to be studied in further detail, we may venture to add that notaries feel more strongly attached to their own national law. Including an express choice of law in marital contracts may, therefore, seem less essential than in cross-border commercial contracts, where the trend towards denationalisation may make it more urgent to choose the law, something to which sophisticated practitioners have grown accustomed.

Since choice of law provisions are not that common in cross-border marital agreements, the existence of an implied choice of law is very much an issue. The 1978 Hague Convention expressly makes room for an implied choice of law. Article 11 of the Convention provides that the designation of the applicable law may "arise by necessary implication from the provisions of the marriage contract". In some national codifications, spouses may also be bound by an implicit choice of law.[28] When no such express provision allowing an implied choice of law exists, court practice has accepted that an implied choice may be derived from various elements of the contract.[29]

Against this background, it is quite surprising that the two Regulations neither explicitly mention that a choice of law may be inferred from the provisions of the marriage contract, nor repudiate this possibility by stating that a choice of law should be agreed upon by express wording. No allusion to this possibility is made in the Recitals. This is even more surprising given that other EU Regulations have made allowances for an implied choice of law. As is well known, the Rome I

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[26] M. REVILLARD, *Droit international privé et européen: pratique notariale*, Defrénois 2014, p. 235.

[27] See *e.g.* C. DE WULF *et al.*, *La rédaction d'actes notariés. Droit des personnes et droit patrimonial de la famille*, Wolters Kluwer 2013, p. 947, para. 1456.

[28] See Art. 53 of the Swiss Act of 1987: "*L'élection de droit doit faire l'objet d'une convention écrite ou ressortir d'une façon certaine des dispositions du contrat de mariage*". Article 15.1 of the Turkish Act on private international law on the other hand seems to suggest that the choice of law should be made expressly.

[29] In Germany, see *e.g.* BGH 1992, BGHZ 119, 400 and OLG Köln, FamRZ 1996, 1479 f.

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Regulation makes it possible to investigate the "terms of the contract or the circumstances of the case" to find out whether parties to a contract meant to select a particular law (Art. 3(1)). Likewise, under Article 14 of the Rome II Regulation,[30] a choice of law may be demonstrated "with reasonable certainty" by the circumstances of the case.

It is true that the Rome III Regulation does not make any allusion to the possibility of inferring, from the circumstances, an implied choice of law. The Succession Regulation, however, makes it clear that such a choice could be "demonstrated" by the terms of a disposition of property upon death.[31]

The proposal put forward by the Commission in 2011 seemed to exclude the possibility of inferring a choice of law from the text of the agreement. Article 19(2) of the proposal indeed explained that the choice should be made "expressly".[32] This wording has, however, disappeared from the final text.

It is by all means preferable that spouses and partners express their choice clearly: spouses and partners should be advised to devote at least one provision of their marriage contract to the issue of applicable law. If they have not done so, is it possible to investigate whether they wanted to subject their contract to a given law, without expressly saying so?

In the absence of a clear position in the Regulations on this issue, some commentators have argued that there is no room for an implied choice of law under the Regulations. It has been argued that the fact that Article 23 of the Regulations provides that the choice of law must be "written, dated and signed", excludes the possibility of accepting the existence of an implicit choice of law.[33] This is not entirely convincing: that a choice of law must be made in writing excludes the possibility of considering the parties' behavior in determining whether a choice has been made. However, the requirement that the choice appears in a written document could also indicate that the scope of the investigations is limited to any writing by the parties.

No decisive answer can be deduced from the Preamble of the Regulations: Recital 46 indicates that no change of law applicable to the matrimonial property regime should be made except "at the express request of the parties". This clearly excludes a silent change of regime, which is possible under the 1978 Hague Convention. It is not, however, sufficient to altogether exclude the long-established

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[30] 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 L199/40, 31.7.2007.

[31] Regarding this possibility, see E. CASTELLANOS RUIZ, Article 22, in A. CALVO CARAVACA/ A. DAVI/ H.-P. MANSEL (eds.), *The EU Succession Regulation. A Commentary*, Cambridge University Press 2016, p. 345-349.

[32] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final.

[33] S. GODECHOT-PATRIS, Commentaire du règlement du 24 juin 2016 relatif aux régimes matrimoniaux: le changement dans la continuité, *Recueil Dalloz* 2016, p. 2295; P. LAGARDE, (note 13), para. 101.

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tradition of implied choices of law.[34] The same can be said in relation to Recital 47: according to this Recital, the formal safeguards put forward by the Regulations aim to ensure that "spouses [or partners] are aware of the implications of their choice". This is a welcome clarification of the purpose of the formal requirements. It is doubtful that this wording is sufficient to disregard the possibility of taking into account various elements of the marital agreement in concluding that the spouses or partners intended to choose a specific law.

The uncertainty is regrettable, particularly in view of the fact that marital agreements are especially conducive to implicit choices of law. It is well known that implied choices of law are notoriously difficult to demonstrate. In a commercial contract, if two businesses have not expressly made a choice, circumstances are often too poor or divided to infer a choice of law with the required certainty. The perspective may be different for marital agreements. Marriage contracts are indeed closely drafted by reference to a given law. When drafting a contract for spouses or partners, a French notary will unavoidably have the provisions of his own law in mind. It is not uncommon for marriage contracts to include references to legal provisions of the country where the notary is established. This makes marital agreements a fertile ground for implied choices of law.

Given the uncertainty on the position of the EU Regulations in this respect, further clarification must come from the ECJ.

III. The Regulations and "Old" Choices of Law

As already indicated, party autonomy is far from being a novelty in cross-border marriage contracts. In fact, there is good reason to believe that party autonomy has made its very first step in this field, though indirectly.[35] Early on, international conventional law also took on party autonomy. Article 5 of the 1905 Hague Convention on the law applicable to relationships between spouses already made some allowances for spouses to choose the law applicable to their relationships.

Since the 1970s, party autonomy has become a standard feature of most national codifications. Party autonomy in matrimonial matters featured in the first generation of national codifications. It appeared in the Austrian Act of 1979, the German Act of 1986, the Swiss Act adopted in 1987 and the Italian Act adopted in 1995. Arguably, the room conceded to spouses differed in these countries: while the Austrian legislator granted large freedom to spouses, the German legislator was much more prudent. However, in all cases, the principle of party autonomy was confirmed. The second wave of codifications also granted spouses the possibility to decide by themselves which law applied to their matrimonial property. This was

[34] J. WEBER, Die Europäischen Güterrechtsverordnungen: Eine erste Annäherung, *DnotZ* 2016, p. 659-680.

[35] On the legal opinion of Du Moulin, see H. MUIR WATT/ B. ANCEL, Annotations sur la consultation 53 de Du Moulin traduite en français, in M.-L. DEMEESTER/ P. JOURDAIN/ C. JUBAULT/ C. PUIGELIER, *Le Monde du droit. Mélanges Jacques Foyer*, Economica 2008.

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the case in Belgium (2004), Poland (2011) and lastly in the Czech Republic (2012), where allowances were made for the choice by the spouses.[36]

Choice of law is not an innovation of the EU Regulations on matrimonial property. The entry into force of the Regulations will, therefore, immediately trigger a question: what is the impact of the new European rules on an existing choice of law? If a Belgian couple married in 2005 and since resided in Spain, but included an express choice in favour of Belgian law in their marital agreement contracted before their marriage with the assistance of a Belgian notary, should one refer to the Regulations if the question of the law applicable to the matrimonial relationships arises in 2020 after one of the spouses passes away and the other now resides in France? Even in the absence of precise figures on the actual use by spouses of their party autonomy, this question needs to be addressed.

Article 69 of the Regulations takes a radical position on this matter: the provisions of the two Regulations dealing with choice of law are said to be only relevant for spouses married or partners whose partnership came about after 29 January 2019 or who have made a choice of law after this date.

Spouses and partners whose marriage or partnership was concluded before this date, therefore, cannot benefit from the EU regime. The Regulations offer a possibility for these couples to fall under the European regime: to this end, they must make a choice of law *after* the Regulations became fully applicable.

This opens the possibility for a number of spouses to reflect upon their matrimonial relationships after 29 January 2019 and consider making a choice of law. If they do so, they will benefit from the Regulations, which guarantee that their choice of law will be upheld in all Member States bound by the Regulations.

A number of couples may be unable or unwilling to avail themselves of this possibility. First of all, making a new choice of law after the Regulations become fully applicable seems of limited use if the spouses are already bound by a valid marital agreement which includes a choice of law. If two German spouses living in the Netherlands entered a marriage contract in 2002 when they got married in Germany, their contract includes a choice for German law. They may reasonably wonder why they should renew their choice of law in order to benefit from the Regulation. The question is not one of pure convenience. Renewing a choice of law will, in most cases, involve calling upon a notary to draft an agreement. The costs involved may appear unwarranted, given that the spouses are already bound by a valid and enforceable choice of law, which they only wish to confirm, especially since notaries in a number of Members States are allowed to charge additional fees when spouses make a choice of law.[37]

It may even be that the spouses cannot renew a choice of law they have already made. This will be the case if spouses have chosen a law which they may no longer choose under the Regulation. Article 22 of the Regulation on matrimonial property is indeed slightly more limited than the options offered under certain national provisions. This is apparent if one takes into account that spouses could, under some previous regimes, limit the scope of the law chosen to a portion of their assets. This was possible under the 1978 Hague Convention, whose Article

[36] Article 49(4) of the Czech Act of 25 January 2012 on Private International Law.

[37] See in Germany § 104 *Gerichts- und Notarkostengesetz*.

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6 allows spouses to designate the law of the place where certain immovables are located. Such a limited choice is also possible under § 15(2)(3) of the German Act. Spouses will be unable to replicate such choices after 29 January 2019, as the Regulations repudiate the possibility of partial choices.

It is regrettable that the European legislator did not include a provision allowing spouses to carry their old choice of law provisions into the new regime. The Succession Regulation does make allowances for old choices of law which may be included under the new regime: under Article 83(2) of the Regulation, a choice of law made by the deceased before the Regulation entered into force remains valid and enforceable if it either meets the requirements of the Regulation or is valid in accordance with the private international law rules of designated Member States. At first sight it may seem pointless to provide in a Regulation that a choice of law made under a national regime, remains valid if it complies with this national regime. The value of Article 83(2), however, is that it applies in all Member States bound by the Succession Regulation. This means that a choice of law which was valid according to the private international law of the Member State whose rules the testator followed, must receive the same treatment in all other Member States. Article 83(2) goes even further, in that it commands that a choice of law, which was not valid when it was made, be taken into account if it appears that it complies with the requirements of the Succession Regulation.[38]

Such a mechanism makes it possible to give a pan-European effect to a choice of law which in essence was only valid under national private international law rules. A choice for French law made by a Frenchman to govern his succession while residing in Belgium in 2007 may not have been valid at that time under the prevailing principles of French private international law. Since this choice complies with the requirements of Article 22 of the Succession Regulation, this choice must be respected in France and in all other Member States if the testator passes away after 17 August 2015.

It may be argued that the need for a mechanism extending the benefit of the Regulation to old choices of law was less pressing in matrimonial matters than it was in succession matters. It is true that the concept of choice of law enjoyed a much wider recognition in the former than in the latter, as many Member States previously allowed spouses to choose the law applicable to their matrimonial contracts. Consider the situation of French spouses who made a choice in favour of French law in 1998 to govern their matrimonial relations and have, since 2004, been living in Germany: even if they do not benefit from the Regulation, their choice of law will be recognised since under German private international law, such a choice is valid and enforceable. Arguably, the need for a sweeping retroactive mechanism was therefore less intense than in succession matters.

Still, the continued application of the private international law rules of Member States to old choice-of-law provisions requires practitioners to study the Regulations while keeping an eye on old conflict-of-laws rules. In a number of cases, the consequences may be more devastating. This will be the case if a choice of law made in application of the rules of a Member State, is denied recognition on

[38] See *e.g.* H. PAMBOUKIS, Article 83, in H. PAMBOUKIS (ed.), *EU Succession Regulation No. 650/2012. A Commentary*, Beck/Hart/Nomos, 2017, p. 685, para. 8.

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the basis of the conflict of law rules of another Member State.[39] Consider the situation of two Italian spouses who reside in the Netherlands. When buying a house in France in 2005, they are advised to make a choice in favour of French law for this immovable, as allowed under the 1978 Hague Convention.[40] The Regulations may not be used to consider whether this choice is valid and effective. Rather, each Member State will continue to apply its own private international law rules. If a court in Italy is called upon to decide on the allocation of assets after divorce, it may well disregard the choice of law, as Italian private international law only allows spouses to make a choice in favour of the law of the nationality or the habitual residence of one of the spouses.[41]

This difficulty could have been avoided by extending the application of the Matrimonial Property Regulations to old choices of law, providing that such choices are effective if they comply with the requirements of the Regulations. Absent such a mechanism, the Matrimonial Property Regulation could have incorporated a possibility similar to that provided by Article 21 of the 1978 Hague Convention. Under this provision, the Convention only applies to those spouses married or who designate the law applicable to their matrimonial property regime after the Convention enters into force. However, Contracting States have the possibility to make a declaration extending the application of the Convention "to other spouses". In his Report, von Overbeck explained that this possibility was particularly interesting in order to validate a choice of law made by spouses before the entry into force of the Convention.[42]

One could also have found inspiration in some national provisions, which have extended the benefit of choice-of-law provisions to older choices. Two such examples may be found, which do not entirely serve the purpose of extending the benefit of new provisions to an old choice of law but nonetheless demonstrate how this idea could have played out. The first example may be found in Article 53 of the Dutch Private International Law Act which provides that a choice made by spouses before the Hague Convention entered into force, cannot be held invalid simply because the rules applicable at the time of the choice did not allow such a choice to be made.[43] This rule, which is limited in time,[44] has far-reaching consequences: it may indeed serve to validate a choice of law which was not valid when made by the spouses.[45] Although it is unclear whether it may also serve to

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[39] On this topic, see also P. MANKOWSKI, Art. 15 EGBGB, in P. MANKOWSKI/ D. HENRICH, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, *Einführungsgesetz zum BGB – Art. 13-17b EGBGB,* Sellier/ de Gruyter, 2011, paras 127-128.

[40] This solution is not exceptional in French practice: see H. PEROZ/ E. FONGARO (note 20), p. 164-166.

[41] See Art. 30 of the 1995 Italian Act on Private International Law.

[42] A.H. VON OVERBECK, Explanatory Report on the 1978 Hague Matrimonial Property Regimes Convention, *Acts & Documents of the Thirteenth Session 1976*, p. 377, para. 218. However, no such declaration was made by the three Contracting States.

[43] This rule already appeared in Article 13 of the "Wet Conflictenrecht huwelijksvermogensregime" of 20 November 1991.

[44] The rule can only apply to choices made after 23 August 1977.

[45] See further A.P.M.J. VONKEN (note 20), p. 181-182, para. 207.

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give effect under the Convention to an old choice of law which was valid when made, the existence of this rule demonstrates that it is possible to take care of old choices of law when adopting a new rule confirming the principle of party autonomy. If need be, this is further demonstrated by the second example: under Article 127(2) of the Belgian Code of Private International Law, a choice of law made by parties before the Code entered into force must be treated as valid if it satisfies the requirements laid down by the Code for such a choice of law. All in all, these precedents make it difficult to understand why the European legislator has neglected to adopt a mechanism to safeguard old choices of law.

No solution to this difficulty can be expected from the ECJ: even if it adopts a very creative reading of the Regulations, it will be difficult to circumvent the strict wording of Article 69. Spouses will therefore be forced to choose the lesser evil: either stay married under an "old" choice of law, with the risk that it is not recognised, or renew the choice of law to ensure that the Regulation applies.

IV. Choice of Law and the Protection of Spouses & Partners

Party autonomy is a basic tenet of the law dealing with matrimonial assets. From a substantive perspective, the law opens the door for (future) spouses to make their own choices. These choices are upheld and respected. Most jurisdictions provide, however, safeguards designed to ensure that spouses and partners are duly protected.[46] These safeguards are needed in the first place because marriage contracts and agreements between partners are long term agreements. Things may change during the marriage, as relationships evolve and life choices may be adapted. External circumstances, such as illness or loss of a job may also have an impact on the situation of spouses. Spouses and partners may not necessarily have anticipated those changes. More fundamentally, the safeguards are needed because the relationships between (future) spouses and partners may not always be based on equality. Earning power may differ, as may existing assets. Spouses may not have the same access to information – one should not underestimate the difficulty of understanding the law of matrimonial assets, in particular with respect to the tax consequences. As has been explained, matrimonial property relationships are often characterised by "power imbalances, bounded rationality and a corresponding potential for exploitation and unpredictability".[47] Finally, marital agreements, unlike commercial contracts, are often reached without extensive bargaining

[46] In his comparative overview, SCHERPE found that "not one of the legal systems" that he analysed allowed for complete autonomy to contract out of the default systems: J.M. SCHERPE, Marital Agreements and Private Autonomy in Comparative Perspective, in J.M. SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, Intersentia 2012, p. 443-484.

[47] M. HOOK, Party autonomy – yes or no? The "commodification" of the law applicable to matrimonial property relationships, *Nederlands Internationaal Privaatrecht (NIPR)* 2012, p. 592.

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between parties, as the emotional involvement of parties may prevent them from conducting negotiations on a purely rational basis.

This explains why one of the central questions of the law of matrimonial assets has always been how to balance private autonomy and fairness between spouses or partners.[48] One common mechanism to protect the economically or emotionally more vulnerable spouse is to provide safeguards which go beyond what is provided by the general rules of contract law. It is usual to distinguish between safeguards applying at the time of the agreement and safeguards applying when the agreement is invoked.[49] Several safeguards may be applied *ex ante*. Scherpe conveniently distinguishes among three possible mechanisms: the provision of legal advice, disclosure requirements and the use of time to allow parties to fully understand the nature of their contractual obligations.[50]

Against this background, a first question which arises in relation to the choice of law in cross-border marital agreements is whether this type of bargain should be subject to additional or specific safeguards. Indeed, the effects of a choice of law should not be overestimated. When the marriage ends, the focus will be primarily on the regime chosen by spouses or partners and not on the law they have chosen. In case of dispute, this substantive choice will be decisive as it will determine the consequences of marital breakdown. The focus of possible safeguards should, therefore, be the primary focus in this type of choice. This is indeed what commentators have investigated[51] and what attracts the attention of policymakers.[52]

Should one go one step further and also consider the potential safeguards which may be imposed when spouses or partners make a choice of law? The answer to this question depends on the effects of such a choice. Arguably, the effect is rather marginal. The main purpose of the choice of law is to ensure that the substantive bargain made by spouses or partners – a choice for a system of joint or separate assets – will be upheld. If the law already provides ample protection ensuring that the substantive bargain is only upheld if certain safeguards are respected, this already goes a long way in guaranteeing the balance between autonomy and fairness.

The choice of law is, however, not a mere addition to marital agreements. It has effects on its own. First, the choice of law ensures that the regime chosen by spouses or partners will not be called in question. Second and more fundamentally, the law chosen may have a decisive impact on the extent to which a judge may control the agreement between parties. Legal systems do not share the same principles regarding the question of whether or not and to what extent a judge may

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[48] See the comparative overview in N. DETHLOFF, Contracting in Family Law: a European Perspective, in K. BOELE WOELKI (ed.), *The Future of Family Property in Europe*, Intersentia 2011, p. 67-94.

[49] J.M. SCHERPE (note 46), p. 443-489.

[50] J.M. SCHERPE (note 46), p. 491-495 (legal advice), p. 495-498 (disclosure) and p. 498-501(time factors, *i.e.* minimum buffer time between contract and marriage).

[51] See N. DETHLOFF, (note 48), p. 67-94 and J. M. SCHERPE (note 46), p. 443 *et seq*.

[52] See *e.g.* the American Law Institute (ALI) Principles of the Law of Family Dissolution: Analysis and Recommendations, 2002.

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adjust a marital agreement because it is deemed imbalanced. The strength of the *pacta sunt servanda* principle is not identical in all countries. The discretionary power granted in some countries to judges contrasts sharply with the strict respect for parties' bargain in other countries.[53] The difference between legal systems may be nuanced if one also takes into account the rules relating to maintenance or other compensatory claims.[54] The situation of spouses may therefore depend to a large extent on the applicable law.

The choice of law is far from being a merely neutral instrument. This justifies enquiring as to how the Regulations protect the spouses or partners when they make a choice of law. The question is warranted precisely because the Regulations grant more weight to such a choice of law. Choice of law is indeed given pan-European effect under the Regulation. A look into the safeguards put in place is therefore necessary.

For the most part, the Regulations take over recipes already used in other areas. The mechanism used by the Regulations is indeed very similar to that found in the Rome III Regulation. In essence, the system shies away from imposing European procedural requirements. Instead, an intricate mechanism is put in place which gives the upper hand to formal safeguards put in place by Member States.

Two levels may be distinguished. On the one hand, the Regulations take over the classic principle under which the existence of consent to the choice must be tested against the law chosen (Art. 24). As in other Regulations,[55] the only limitation to this circular reasoning is that a spouse or partner may rely on the law of its habitual residence to establish lack of consent if "it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law" chosen. This safeguard measure has apparently not been tested in court. It has also been heavily criticized for being inoperative in the field of family law.[56]

On the other hand, the Regulations provide a minimum standard for the choice of law agreement: it must be expressed in writing, dated and signed by the two spouses or partners. Beyond this minimum requirement, Article 23 makes reference to "additional formal requirements" which may be imposed by the law of Member States to partnership property agreements and matrimonial property agreements. Which Member State may impose its formal requirements depends on the circumstances of the case. Most commonly, where both spouses or partners habitually reside in the same country, it is up to the law of that country to decide which additional requirements the spouses or partners should respect.

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[53] N. DETHLOFF (note 48), pp. 79-81.

[54] J.M. SCHERPE (note 46), p. 443 *et seq*.; SCHERPE (note 46), p. 304.

[55] Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008, Articles 3(5) and 10(2) and Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L343/10, 29.12.2010, Article 6.

[56] See also, T. HELMS, Artikel 6 Rom III-Vo, in TH. RAUSCHER (ed.), *EuZPR – EuIPR. Europäische Zivilprozess- und Kollisionsrecht. Kommentar*, Otto Schmidt 2016, p. 847, para. 14.

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It is clear that the Regulations rely heavily on the procedural safeguards adopted by the Member States. This is understandable: by their own account, the Regulations are private international law instruments,[57] which are not meant to unify substantive rules but rather conflict-of-laws rules. The reference to rules adopted by Member States is therefore in the first place understandable from an institutional perspective. Further, this reference allows Member States to craft those safeguard measures which they deem to be fitting for the situations of spouses and partners.

It remains that the end result is far from satisfactory. In the first place, it is striking that Article 23 is strictly limited to the law of Member States. No allowance is made for the application of the law of a third State. While the preference given to the application of the law of a Member State may be understood when the two spouses or partners actually reside in a Member State, the exclusion of the application of the law of a third State is more difficult to comprehend.[58] If a German national lives with a French national in China, the Regulations may prove to be very liberal since they only require that the agreement be signed and dated. As underlined in another context, "[t]he formal requirements – the agreement should be in writing, dated and signed – [do] not guarantee that both spouses know what exactly the effect of their choice will be."[59] Under the Regulations, it is irrelevant whether the agreement concluded by the spouses or partners complies with the requirements existing under Chinese law. This will certainly make it easier for spouses and partners to reach a valid agreement. Whether the agreement will protect the weaker spouse or partner is more difficult to say.

More fundamentally, it is doubtful whether the general level of protection afforded by the Member States is sufficient. Many Member States provide specific safeguards which are meant to guarantee that the process of discussion between the spouses or partners will lead to a fair outcome. When one looks at the existing safeguards, the general impression is, however, that the emphasis is put on purely formal requirements. The involvement of a notary is the epitome of this model. It is indeed true that in many countries, the notary is required (either by law or pursuant to an ethical code) to provide impartial advice. Notaries may also be required to provide clear information to future spouses or partners.

There is, however, little or no empirical evidence testing this assumption. The law assumes that notaries do provide clear and impartial information. A violation of this duty may give rise to professional liability. How this liability plays out in case one of the spouses or partners complains about receiving insufficient information is unclear. The increased competition between professionals for the market of matrimonial agreements will not necessarily lead to a more

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[57] See Recital 4 of the two Regulations (note 55).

[58] Critically on this issue, see P. LAGARDE (note 13), para. 105. According to LAGARDE, "*[i]l aurait été logique d'étendre la règle dans les cas où ces exigences supplémentaires de forme sont prévues par la loi d'un État non membre dans lequel les époux ou l'un d'eux ont leur résidence habituelle*."

[59] K. BOELE-WOELKI, *The Proposal for Enhanced Cooperation in the area of cross-border divorce (Rome III)*, European Parliament – Directorate General for Internal Policies 2010, p. 22.

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careful discussion among the notary and the future spouses or partners regarding the different options available.

In addition, it is striking to note that disclosure requirements, which play a key role in England and the United States,[60] are almost absent from the law of most European countries. Arguably, such disclosure requirement may not be as necessary when the law provides for a sharing of the premarital assets. However, spouses and partners may exclude such sharing. Furthermore, the default option in many countries is that premarital assets fall outside the community property.

Finally, it seems neither customary, nor required by law, that future spouses or partners receive a draft of the agreement in advance. This would, however, certainly improve the possibility for spouses and partners to provide informed consent to the contract.

Lack of information on the chosen law is not merely a theoretical issue. One need only refer to findings made in business transactions. It has been demonstrated that parties to such transactions will often lack precise information on the actual content of the potentially applicable laws when making a choice of law. Parties with bounded rationality will make a choice based on a hypothesis, such as an analysis of the perceived rather than the actual quality of the law.[61] If this proves true in commercial transactions, it is safe to assume that a choice of law in cross-border matrimonial contracts will be even less informed.

The model adopted by the Regulations can, therefore, be likened to a gamble: delegating, to the Member States, the power to regulate formal requirements may lead to situations where future spouses or partners are indeed afforded sufficient information in order to express informed consent. It remains, however, uncertain whether future spouses or partners will be sufficiently protected. Notwithstanding the formal declaration to that effect by the Member States,[62] the answer to the question as to whether the Regulations do provide sufficient protection is, at best, mixed.

V. Conclusion

The twin Regulations on matrimonial property form a welcome addition to the existing European private international law framework. They provide more certainty to spouses and partners and facilitate the work of practitioners. The two

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[60] Article 10(f)(3)(i) of the Uniform Marital Property Act provides that a marital agreement is not enforceable if before the execution of the agreement, one party was not provided a fair and reasonable disclosure of property and financial obligations of the other party. Mandatory disclosure requirements do not, however, exist in every US state, see P. BRONSTEIN, The Pre-Nuptial Agreement in the United States of America, in D. SALTER/ CH. BUTRUILLE-CARDEW/ ST. GRANT (eds.) (note 7), p. 479-480.

[61] On this see V. MAK, Private Actors as Norm-Setters through Choice-of-Law: the Limits of Regulatory Competition, in C. CAUFFMAN/ J. SMITS (ed.), *The Citizen in European Private Law. Norm-setting, Enforcement and Choice*, Intersentia 2016, p. 109-111.

[62] See Recital 47 of the Regulations (note 55).

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Regulations must, in particular, be commended for the room they reserve to the choice made by parties. Empowering citizens to make choices has always been part of the law of matrimonial assets. The recognition given at the European level to party autonomy builds further on this tradition.

Our examination has, however, revealed some of the Regulations' weak spots. The silence kept by the EU legislator on tacit choice of law, the absence of any consideration for old choice-of-law provisions and the lack of a European mechanism dealing with the consent of parties are regrettable. Some of these shortcomings may be remedied by practice. For other issues, we will have to wait until the review of the Regulations, which is scheduled to take place in 2027.

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PUBLIC INTEREST CONSIDERATIONS – CHANGES IN CONTINUITY

COMMENTS ON ARTICLES 30 AND 31 OF THE REGULATIONS ON PATRIMONIAL CONSEQUENCES OF MARRIAGES AND REGISTERED PARTNERSHIPS

Sandrine CLAVEL / Fabienne JAULT-SESEKE*

I. Continuity: Public Interest Considerations of the Forum
- A. Strict Interpretation of the Exceptions
  - 1. Overriding Mandatory Provisions
  - 2. Public Order
- B. Content of the Exceptions
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  - 2. Overriding Mandatory Provisions
    - a) Concept
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    - c) Regime

II. Change: Lack of Consideration of Other Member States' Public Interests
- A. Absence of Reference to the Overriding Mandatory Provisions of Countries Other than the Forum
- B. Appropriateness of the Setting Aside of Overriding Mandatory Provisions of Countries Other than the Forum

In European conflict-of-laws instruments, public interest considerations are traditional exceptions to the otherwise applicable law. Building on past legislation, Regulation (EU) No 2016/1103, applicable in matters of matrimonial property regimes[1] *and Regulation (EU) No 2016/1104, applicable in matters regarding the property consequences of registered partnerships,*[2] *include two such exceptions, based on public policy and overriding mandatory provisions.*

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[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183/1, 8.7.2016.

[2] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30, 8.7.2016.

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 233-246
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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The public policy (ordre public) exception is a standard feature of all PIL regulations. It is set out at Article 31 of each of these regulations. A similar provision exists in the following regulations: Regulation (EU) No 650/2012 ("Successions Regulation") regarding matters of succession (at Article 35),[3] *Regulation Rome III regarding divorce (at Article 12),*[4] *Regulation Rome II on extra-contractual obligations (at Article 26)*[5] *and Regulation Rome I on contractual obligations (at Article 21).*[6] *Through this new standard, the public policy exception may be seen as a first step toward a general PIL theory. But this theory is still to be built, as there is no case law interpreting these provisions. In this regard, the Sahyouni case was a missed opportunity.*[7] *Regarding the public policy exception, this article focuses on the role of this exception in conflict-of-laws as opposed to its use in the recognition of foreign judgements, pursuant to Article 37(a) of both Regulation (EU) No 2016/1103 and Regulation (EU) No 2016/1104.*

The exception based on overriding mandatory provisions, enshrined at Article 30 of both Regulation (EU) No 2016/1103 and Regulation (EU) No 2016/1104, appears less frequently in EU private international law instruments. There is no real precedent in instruments regarding family matters,[8] *although Regulation (EU) No 650/2012, applicable in succession matters, does not totally ignore the exception.*[9] *The reference to overriding mandatory provisions is,*

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[3] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107, 27.7.2012.

[4] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10, 29.12.2010.

[5] 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, 31.7.2007.

[6] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008.

[7] ECJ, 20 December 2017, Case C-372-16, *Soha Sahyouni v Raja Mamisch*, ECLI:EU:C:2017:988. One preliminary question on discriminatory foreign law was based on Article 10 of the Regulation Rome III. The question was the following: does the applicability of that rule depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question? However, the ECJ held that the Rome III Regulation was not applicable to the specific case and did not provide an answer to the preliminary question.

[8] See the analysis based on each regulation: A. PANET, Le statut personnel en droit international privé européen. Les lois de police comme contrepoids à l'autonomie de la volonté?, *Rev. crit. dr. int. pr.* 2015, p. 837 *et seq.*

[9] Article 30 of Regulation (EU) No. 650/2012 states that the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located, when they contain special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, shall apply to the succession in so far as, under the law of that State, they are

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nonetheless, far from being a total novelty; it appears with similar wording at Article 9 of the Rome I Regulation,[10] as well as in the Rome II Regulation.[11] Still, the exception in Regulation (EU) No 2016/1103 and Regulation (EU) No 2016/1104 differ from these precedents, as it is formally limited to the application of overriding mandatory provisions of the forum, and does not refer – explicitly or implicitly – to the overriding mandatory provisions of any other State.[12] This is why, although Articles 30 and 31 of the Regulations are instruments of continuity, in that they – like other instruments – allow courts to derogate from the applicable law based on public interest considerations of the forum (I), Article 30 brings a change, in that it excludes consideration of other Member States' public interests (II).

I. Continuity: Public Interest Considerations of the Forum

Because the objective of the Regulations is to provide couples with "legal certainty as to their property and offer them a degree of predictability" (Recital 15 of the Preamble), all exceptions to the application of the otherwise applicable law are to be strictly interpreted, even if they are driven by considerations of public interest

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applicable irrespective of the law applicable to the succession. Even if the provision does not literally refer to overriding mandatory provisions, academics have stressed its resemblance to the methodology of *lois de police* (L. d'AVOUT, Les lois de police, in T. AZZI/ O. BOSKOVIC (eds), *Quel avenir pour la théorie générale des conflits de lois?*, Bruylant 2015, p. 91 *et seq.*, at p. 101; P. LAGARDE, Les principes de base du nouveau règlement européen sur les successions, *Rev. crit. dr. int. pr.* 2012, p. 691 *et seq.*, No. 26 *et seq.*

[10] See the analysis below.

[11] Article 16 of the Regulation Rome II on the law applicable to non-contractual obligations states that: "[n]othing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation" (Art. 16). Although the reference is limited to the overriding mandatory provisions of *the forum*, it is possible to consider that Article 17, according to which "in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability", makes room for a "*prise en consideration*" of the overriding mandatory provisions of the country where the conduct was taken (H. MUIR-WATT, Rome II et les "intérêts gouvernementaux": Pour une lecture fonctionnelle du nouveau règlement du conflit de lois en matière délictuelle, in S. CORNELOUP/ N. JOUBERT (eds), *Le règlement communautaire "Rome II" sur la loi applicable aux obligations non contractuelles*, Litec 2008, p. 129, at No. 16 *et seq.*).

[12] Whereas Regulation Rome I includes a limited reference to foreign overriding mandatory provisions (see *below* note 36). Regulations Rome II and "Successions", although using a different terminology, also make (very limited) room for such provisions (see *above* notes 9 and 11).

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(A). The public policy exception and the exception relating to overriding mandatory provisions are defined accordingly (B).

A. Strict Interpretation of the Exceptions

The principle that exceptions, based on public interest considerations, shall be strictly interpreted is made clear by both Articles 30 and 31.

1. Overriding Mandatory Provisions

The wording of Article 30 does not in itself call for a strict interpretation of the exception, although the use of the word "crucial" (in "provisions regarded as crucial for safeguarding public interest") as an element of the definition of the concept of *lois de police,* implies that there is a high standard for the characterisation of overriding mandatory provisions.[13] However, the Preamble leaves no doubt regarding the restraint expected from Member States both in terms of the characterisation, and the application of overriding mandatory provisions. As stressed in Recital 52 of Regulation (EU) No 2016/1104 and in Recital 53 of Regulation (EU) No 2016/1103, the "exception to the application of the law applicable to the property consequences of registered partnerships [or to the matrimonial property regime] requires a strict interpretation", and the possibility of applying exceptions based on overriding mandatory provisions exists only "in exceptional cases".

2. Public Order

The wording of Article 31 (like similar provisions in the other PIL Regulations) confirms (more clearly than Article 30) that the public order exception is to be strictly interpreted. Firstly, it includes the adverb "manifestly", which is very strong. This is not novel: the term appears in all PIL Regulations and, since more than half a century, in the Hague conventions. It is, thus, clear that the exception shall not be used to set aside the *lex causae* just because its content is not similar to the one of the *lex fori*.

Secondly, the exception should not lead to the complete setting aside of the *lex causae*. The comparison with Articles 31 and 14 of the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes is interesting in this respect. Article 14 provides that "the application of the law determined by the Convention may be refused only if it is manifestly incompatible with public policy ('*ordre public*')", whereas the European Regulations simply refer to "a provision" of the *lex causae*. As a result, in the European system, the public policy

[13] See on the "Rome I" Regulation S. FRANCQ/ F. JAULT-SESEKE, Les lois de police, une approche de droit comparé, in S. CORNELOUP/ N. JOUBERT (eds), *Le règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux*, Litec 2011, p. 357 *et seq.*, at 363.

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exception only authorises disregard for a specific provision which is, in the case under consideration, against the basic perceptions of the forum. It does not authorise disregard in the abstract for the *lex causae* in its entirety. The Preamble of the regulations (Recital 54) states that "considerations of public interest should also allow courts and other competent authorities dealing with matters of matrimonial property regime in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned". The wording "in a given case" clearly refers to an assessment *in concreto* of the public policy exception. Hence, it is possible to apply a foreign law which is *in abstracto* against the basic conceptions of the forum but which, in the given case, leads to an acceptable solution.[14]

Another limitation to the public policy exception is set by the same recital of the Regulations (Recital 54): "[t]he courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union ('Charter'), and in particular Article 21 thereof on the principle of non-discrimination".

At first glance, this is surprising: fundamental rights are traditionally grounds for the implementation of the public policy exception. Here - and the solution was already provided by the Succession Regulation (Recital 58) and by the Rome III Regulation (Recital 25), both also dealing with family matters -, fundamental rights and specifically the principle of non-discrimination lead to disregard for the public policy exception. Probably one of the functions of public policy is to be considered: the respect for political and social foundations of a Member State does not have the same weight as the implementation of the fundamental rights laid down in the European Human Rights Convention and in the Charter of Fundamental Rights. Indeed, political and social foundations vary from one country to another, and if they were systematically mandatory, discrimination could result. The issue of same-sex marriages offers a relevant illustration: some Member States do not recognise these marriages; thus, there is no definition of "marriage" in the regulations. A Member State can still refuse to celebrate a same-sex marriage but following Article 21 of the Charter, it may be prevented from using the public policy exception to disregard a law authorising this kind of marriage.[15] Probably Article 21 will have more impact on the issue of recognition than on the issue of applicable law.

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[14] Compare with Article 10 of Rome III Regulation which has no equivalent in the other regulations: "[w]here 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". On this provision, see the opinion of advocate general Saugmandsgaard delivered on 14 September 2017 in the *Sahyouni* Case (see *supra* note 7).

[15] See L. USUNIER, Libre, mobile, divers: le couple au miroir du droit international privé de l'Union européenne, *Revue trimestrielle de droit civil (RTD civ.)* 2016, p. 813 *et seq*.

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The strict interpretation of public policy is common within the European judicial area and logically derives from the freedom of movement.[16]

B. Content of the Exceptions

It is with due consideration to the strict interpretation of both exceptions, that the concepts of public policy (1) and of overriding mandatory provisions (2) are to be defined by Member State judges implementing the Regulations.

1. Public Policy

Public policy is a vague notion, and an important issue is to determine the situations in which it should apply. Matrimonial property cases in which it will apply will be rare, and not only because the notion is subject to strict interpretation. Member States may rely on distinct systems, from the "separation as to property" to the "full community property" regimes. But the difference between these various systems is not so fundamental that it should lead to the disregard for other systems through the public policy exception.[17] Several years ago, DROZ could only imagine disregarding the *lex causae* which, in a separation-of-property regime, would strictly prevent a person from representing his or her spouse.[18] But even in this case, the public policy exception is not the best method and an adaptation of the *lex causae* seems preferable.

The main issue regarding the *ordre public* is probably the one related to discriminatory laws. Regulation (EU) No. 2016/1104 and Regulation (EU) No. 2016/1103 do not include a provision such as Article 10, Rome III Regulation which prescribes equal access to divorce or legal separation on grounds of gender. It is however certain that the principle of non-discrimination should apply. In France the question has already been raised: in 1998, the Court of cassation ruled that on the basis of gender equality, the Swiss law was to be disregarded.[19] According to this law, the wife did not have the right to dispose of her assets and when the regime was dissolved, she could not obtain the preferential allotment of the property purchased during the marriage.[20] For the French Court, the judges

[16] See P. de VAREILLES-SOMMIERES, L'ordre public, in O. BOSKOVIC/ T. AZZI (eds), *Quel avenir pour la théorie du conflit de lois,* Bruylant 2015, p. 169 *et seq* at No. 35.

[17] G.A.L. DROZ, L'activité notariale internationale, *Recueil des Cours* 1999-V, p. 13 s., at p. 72. See also, G.A.L. DROZ, Les nouvelles règles de conflit françaises en matière de régimes matrimoniaux, *Rev. crit. dr. int. pr.* 1992, p. 631, at 672.

[18] G.A.L. DROZ, Régimes matrimoniaux, in *Répertoire Dalloz de droit international*, No. 154.

[19] Civ. 1re, 24 February 1998, No. 95-18.646, published in *Recueil Dalloz (D.)* 1999 (21), p. 309; see also the following commentaries: J. THIERRY, *D.* 1999 (21), p. 309; B. AUDIT, *D.* 1999 (33), p. 290; G.A.L. DROZ, *Rev. crit. dr. int. pr.* 1998, p. 637; J. HAUSER, *RTD civ.* 1998, p. 347; B. VAREILLE, *RTD civ.* 1998, p. 458; J.-P. MARGUENAUD, *RTD civ.* 1999, p. 520.

[20] For more details, see G.A.L. DROZ, *Rev. crit. dr. int. pr.* 1998, p. 637.

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were to restore equal treatment. This line of reasoning may be followed to disregard some foreign regimes which are not favourable to the wife, for example, under Hebrew law (Moroccan law, Syrian law, Lebanese law and Iranian law): the wife gets the dowry back but has no rights on the properties purchased during the marriage which are deemed to belong her husband.[21]

Setting aside discriminatory laws should be approved, but the implementation of this principle is risky. On the one hand, the principle of equality should not lead to the disregard for each law that does not know the joint ownership of acquired property, or each spousal agreement which provides an unequal distribution.[22] On the other hand, it is difficult for the judge to restore equal treatment: he has no more provisions to apply but has to decide in equity. The Regulation does not deal with the solution suggested by the French Court of cassation. More broadly, it is silent on the consequences of the public policy exception. Article 31 only provides the negative effect of the exception: the application of the provision which is incompatible with the public policy is to be refused. It does not provide guidance for judges to resolve the dispute after setting aside the foreign provision. There are no obvious solutions though. Some national PIL codifications are incomplete like the regulation. Such is the case for German law (Article 6, EGBGB). Other codifications are clearer: in Belgium, another relevant provision of the *lex causae* should apply and it is only if there is none that the *lex fori* applies; in Italy, another *lex causae* shall be determined according to the subsidiary conflict of laws rules (Article 16 PIL Act adopted in 1995); in France, according to the case law, the judge has to apply the *lex fori*. Thus the solutions are quite different from one country to another. Regarding the French judgment, the question is the following: to restore equal treatment, should the judge decide in equity or should he apply another provision? The judge should only set aside the discriminatory provision, but the risk is an imbalance in the regime.

In the context of the matrimonial property Regulations, and all PIL regulations more generally, the question is whether the judge can refer to his national system or if a harmonised solution is to be found. Regarding this harmonisation, it is interesting to observe that the solution suggested by the French Court of cassation in 1998 – the restoring of equal treatment – is far from the traditional French scheme. It seems to be modelled on Anglo-Saxon rules.[23] Concomitantly, a question of characterisation arises. The *Boogaard* case, referred to the ECJ,[24] is a good example: in the name of equal treatment, the English judge, in a case involving the dissolution of the marriage of two Dutch spouses who had chosen a regime of separation as to property, decided that their agreement was of no relevance for the ancillary relief claimed by the wife, and ordered the transfer of

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[21] G.A.L. DROZ, *ibidem*.

[22] G.A.L. DROZ, *ibidem.*

[23] G.A.L. DROZ, *ibidem*.

[24] ECJ, 27 February 1997, *Van den Boogaard v Laumen*, ECLI:EU:C:1997:91, published in *Rev. crit. dr. int. pr.* 1998, p. 466, note by G.A.L. DROZ; A.M. WELLER, Zur Abgrenzung von ehelichem Güterrecht und Unterhaltsrecht im EuGVÜ, *IPRax* 1999, p.14 *et seq*.

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a painting, an immovable property and a sum of GBP 340,000. In this type of case, equal treatment blurs the line between maintenance and matrimonial property. Moreover, it leads to an important casuistical approach based on equal treatment, which is also partly retained by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Its Article 8-5° provides that "[u]nless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties". Fairness seems to be at stake, more than equal treatment. This idea of fairness is growing in contemporary PIL. In patrimonial family law, the French Court of cassation recently held, in its judgement on the reserved portion on an estate,[25] that unless stakeholders are in an insecure position or a state of need, the law applicable to the succession should not be disregarded even if it is not providing this reserved portion. Maybe the European Court of Justice will also rely upon this idea of fairness to determine when to use the public policy exception.

2. Overriding Mandatory Provisions

Article 30 replicates Article 9 of the Rome I Regulation, firstly in its definition of the concept of "overriding mandatory provisions", and secondly, in the regime that it organises for the implementation of these provisions when enacted by the forum.

a) Concept

Article 30.2 of the regulation defines overriding mandatory provisions as "provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation." The definition is taken verbatim from Article 9.1 of the Rome I Regulation, which was itself inspired by ECJ case-law.[26] This transposition is to be approved, given the interest in having a uniform European concept of "overriding mandatory provisions". The definition is based on the combination of a substantive criterion, taking into account the purpose of the provisions, and a formal or subjective criterion, taking into account Member States' willingness to define the territorial reach of these provisions.

The Preamble emphasises that only "rules of an imperative nature" should fall within this definition. Although the reminder seems to be stating the obvious, it is useful to recall not only that the definition excludes default rules, but also that

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[25] Cass. civ. 1re, 27 September 2017, No. 16-17.198 and No. 16-13.151.

[26] ECJ, 23 November 1999, Case C-369/96, *Arblade*, ECLI:EU:C:1999:575, published in *Rev. crit. dr. int. pr.* 2000, p. 710, note by M. FALLON; see also M. LUBY, *Clunet* 2000, p. 493; ECJ, 19 June 2008, Case C-319/06, *Commission v Luxembourg*, ECLI:EU:C:2008:350, note by S. FRANCQ, *Clunet* 2009, p. 665.

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overriding mandatory provisions are not to be confused with "provisions which cannot be derogated from by agreement" (Recital 37, Rome I Regulation). A *loi de police* is a rule which is "internationally" mandatory. This distinction is stressed by the formal criterion: overriding mandatory provisions apply to all situations falling within their scope, regardless of the law normally applicable. The European law-maker does not define the connecting factors which may trigger the implementation of the overriding mandatory provisions of the forum. This is perfectly understandable, for it is well-known that the territorial scope of *lois de police* must, for the purpose of ensuring their effectiveness, take underlying public policies into account.[27] It is impossible to rigidly set a general and hypothetical, single connecting factor. Each Member State will have to define one connecting factor for each rule. However, it is clear that the EU Commission had a particular hypothesis in mind when it included the exception relating to overriding mandatory provisions in the draft regulations adopted on 2 March 2016.[28] The explanatory report about these draft regulations states that "exceptionally, this Member State may apply its own law to all persons living on its territory in 'preference' to the law normally applicable". It is thus the criterion of the habitual residence of the couples that should constitute the main connecting factor for the implementation of the *lois de police*.

It is important to stress, however, that Member States cannot freely define the scope of application of their laws. Before deciding that a rule shall apply "to any situation falling within (its) scope", a Member State's competent authority, under the control of the ECJ, should implement the "compatibility test"[29] to verify that such a rule is actually crucial for safeguarding public interests and that its implementation is necessary and proportionate to the objective pursued. It is clear that this condition is the central part of the definition set in Article 30: national imperative rules constitute overriding mandatory provisions only if they are "crucial" for safeguarding the State's "public interests". The reference to the "public interests" raised extensive comments at the time the Regulation Rome I was enacted. According to some, by referring to "public interests" only, the European law-maker implied that all provisions pursuing a mixed purpose of protecting public as well as private interests could no longer be seen as overriding mandatory provisions.[30] However, after ten years of application of the Rome I

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[27] On the close link between the definition of the connecting factor, and the underlying public policy, and the need for a case-by-case assessment, see B. AUDIT, Du bon usage des lois de police, *Mélanges en l'honneur du Professeur Pierre Mayer*, LGDJ 2015, p. 25.

[28] For matrimonial property regimes: COM (2016) 106 final [Art. 30 and the corresponding statement]; for registered partnerships, COM (2016) 107 final [Art. 29 and the corresponding statement].

[29] M.-N. JOBARD-BACHELLIER, La portée du test de compatibilité communautaire en droit international privé contractuel, in M.-N. JOBARD-BACHELLIER/ P. MAYER *et al.* (eds), *Le droit international privé: esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Dalloz 2005, p. 475 *et seq*.

[30] L. d'AVOUT, Le sort des règles impératives dans le règlement Rome I, *D.* 2008, p. 2165, at No. 11; L. PERREAU-SAUSSINE, Le Règlement "Rome I" et la protection de

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Regulation, it seems that - as foreseen by S. FRANCQ and F. JAULT-SESEKE[31] – the terminology has not induced major changes in the perimeter of the *lois de police*.[32] As long as a rule is crucial for safeguarding public interests, the mere fact that it is also driven by considerations of protection has no impact on its classification. This conclusion is important in the field of matrimonial property regimes, where public order of direction and protection are intimately related.

b) Application of the Criteria

The number of rules likely to be considered as overriding mandatory provisions seems rather limited. The most obvious ones are the rules, frequently found in Member States laws, protecting the family home. They are explicitly mentioned, in the recitals of the Preamble, as an illustration of rules that could be seen as overriding mandatory provisions. Hence, Member States, such as France,[33] that consider in their own legal systems that rules protecting the family home are *lois de police* shall maintain this characterisation in the context of the Regulation. The characterisation could also apply to rules regarding the solidarity between spouses or partners for the household debts, or to rules applicable to emergency situations. On the contrary, it is doubtful that provisions on the representation between spouses/partners will be considered as overriding mandatory provisions.

c) Regime

By using the same wording as in the Regulation "Rome I", according to which nothing in the Regulation "shall restrict" the application of the overriding mandatory provisions of the law of the forum, Article 30.1 leaves it to each Member State to decide on how its own *lois de police* should be implemented by its own national courts. The application of the *lois de police* of the forum may constitute a mandatory requirement for national judges; this will certainly be the option chosen by most Member States, including France. But Member States could also decide to give national judges a certain latitude, by deciding that they have a mere possibility to apply the overriding mandatory provisions of the forum, and that they should decide, case by case, whether such an application is relevant. The situation is quite different when it comes to overriding mandatory provisions

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l'accession au logement: l'impérativité désactivée de la loi française?, *Revue de Droit Immobilier (Rev. Dr. Immo.)* 2009, p. 512.

[31] S. FRANCQ/ F. JAULT-SESEKE, (note 13) at 366 *et seq.*; P. de VAREILLES-SOMMIERES (note 16).

[32] L. d'AVOUT (note 9), at 103; S. CLAVEL, Le droit international privé européen est-il honorable. Retour sur une controverse doctrinale, in *Mélanges en l'honneur du Professeur Pierre Mayer*, LGDJ 2015, p. 119, at No. 26 s.

[33] Cass. civ. 1re, 20 October 1987, *Cressot*, No. 85-18.877; commented by Y. LEQUETTE*, Rev. crit. dr. int. pr.* 1988, p. 540; see also A. HUET, *Clunet* 1988, p. 446.

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enacted by foreign States. In this respect, the Regulations seem to break with previous European conflict-of-laws instruments.

II. Change: Lack of Consideration of Other Member States' Public Interests

It is now widely admitted that the exception based on overriding mandatory provisions is meant to contribute to the effectiveness of States' public policies, and that, whenever these public policies are legitimate, there is no reason to disregard them for the sole reason that they are related to the interests of a State besides the forum.[34] From this perspective, the Regulations may be subject to criticism since they do not refer at all to the overriding mandatory provisions of countries other than the forum. This political choice is different from the one implemented in equivalent, previous European regulations on conflict-of-laws. Relevant references are Regulation Rome I, on contractual matters and, to a lesser extent, Regulation No. 615/2012, on succession matters, and Regulation Rome II on non-contractual obligations. While these three instruments, though implementing very different methodologies, make room for foreign overriding mandatory provisions, Regulation (EU) No 2016/1103 and Regulation (EU) No 2016/1104 simply ignore them. It is necessary to understand the meaning of this silence (A) before analysing its appropriateness (B).

A. Absence of Reference to the Overriding Mandatory Provisions of Countries Other than the Forum

Whereas the Regulation "Rome I" maintained a limited reference to the overriding mandatory provisions of countries other than the forum,[35] the Regulations on matrimonial property regimes and on property consequences of registered partnerships are absolutely silent on the fate of such rules. What are the consequences of the silence regarding overriding mandatory provisions of other countries? Does it preclude national judges from implementing these provisions in any way? Does it leave them any latitude?[36]

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[34] See on Art. 9 of the Rome I Regulation S. FRANCQ/ F. JAULT-SESEKE, (note 13), at 387; on art. 16 and 17 of the Rome II Regulation H. MUIR-WATT, (note 11), at Nos 2 and 14. And more generally, on this issue, see P. MAYER, Les lois de police étrangères, *Clunet* 1981, p. 277 at No. 45.

[35] Article 9.3 only refers to the overriding mandatory provisions of the country where the place of performance of the contract is located. Also see, on the Regulations Rome II and "Successions": above, footnotes 9 and 11.

[36] See, presenting the state-of-the-art on this issue, S. FRANCQ/ F. JAULT-SESEKE (note 13), at 388-392.

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To answer these questions, it is now possible to rely on the position taken by the ECJ[37] on the interpretation of Article 9.3 of the Rome I Regulation, which states that effect may be given to "the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed." What does this mean for the mandatory provisions of countries other than the country of the place of performance of the contract? The ECJ, after recalling that, as a derogating measure, the exception based on overriding mandatory provisions must be interpreted strictly (§44), considers that the list, at Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect, is exhaustive (§45-50). However, the Court judges that the regulation "does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation" (§51).

Transposed to the field of matrimonial property, the ECJ decision would imply that: 1) there is no possibility for judges to directly apply foreign overriding mandatory provisions, but 2) they may implement the technique known in France as "*la prise en consideration*" of the foreign mandatory rule, which means that this rule will be applicable only if the *lex causae* refers to it. The relevance of these solutions in matrimonial property matters is doubtful.

B. Appropriateness of the Setting Aside of Overriding Mandatory Provisions of Countries Other than the Forum

The prohibition of any direct application of foreign *lois de police*, implied by the drafting of the Regulations and confirmed by the ECJ, seems questionable given the purpose of the exception based on overriding mandatory provisions. Two reasons are traditionally invoked to explain this exception. The first is the willingness of Member States to limit the consequences of party autonomy: when parties are allowed to choose the applicable law, they should not be given an opportunity to escape from the provisions meant to govern their situation, where these provisions are crucial for safeguarding the public interest. This, however, is unlikely to be the reason why the exception was included in the Regulations. Indeed, previous regulations on conflict-of-laws adopted in the family law admitted party autonomy, but did not include the exception based on overriding mandatory provisions.[38] In addition, the exception based on overriding mandatory provisions is not limited to situations where the law has been chosen by the parties.

[37] ECJ, 18 October 2016, *Nikiforidis*, ECLI:EU:C:2016:774; reported by S. Lemaire/ L. Perreau-Saussine, Applicabilité du règlement "Rome I" et prise en considération des lois de police étrangères: la CJUE met en danger la sécurité contractuelle, *JCP G.* 2017 (5), p. 211; see also E. Fohrer-Dedeurwaerder, *Clunet* 2017, p. 197; H. Gaudemet-Tallon, *D.* 2017, p. 1116 and *supra* M. Lehmann/ J. Ungerer, this *Yearbook*, at 53 *et seq.*

[38] A. Panet (note 8), p. 837.

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It also applies, absent any choice, where the applicable law is the one designated by an objective connecting factor defined by the Regulations.[39] Consequently, it seems that the real justification for including the exception based on overriding mandatory provisions in the Regulations on matrimonial property lies in the desire to bring correction to the connecting factor defined by the Regulations, whenever it is not relevant.[40]

Notwithstanding the numerous exceptions to the rule, the law applicable to the matrimonial property regime will normally be the law of the State where the couple had its common habitual residence, or failing that, the law of the couple's common nationality at the time it was formed. For reasons that are perfectly understandable, the connecting factor thus "freezes" the situation at the moment the couple is formed. When the couple changes its place of residence, no space is left – unless the couple voluntarily decides to change the law applicable to its property regime – to the law of the State where the new residence is located, even though there are powerful reasons to allow the application of this law. For example, when it comes to the protection of the family home, it is obvious that the law of the State of the family's current residence has legitimate interest to apply since, if the family is deprived of its home, it is the solidarity of the national community where the family is currently integrated that will be activated.[41] This is why the direct application of the State's rules, as overriding mandatory provisions, is needed.

Unfortunately, if the exception based on overriding mandatory provisions is actually motivated by the objective of correcting the connecting factor when it is irrelevant, it is most probable that the prohibition to apply the *lois de police* of Member States other than the forum will deprive the exception of most of its interest. It is quite obvious, and the Commission has agreed,[42] that the applicable law with the most legitimacy is the law of the current residence of the family. But given the multiplicity of grounds admitted for the jurisdiction of courts,[43] there is no guarantee that the tribunal which will actually have to deal with the situation will be the one of the Member State where the couple has its current residence. In sum, whereas the exception based on overriding mandatory provisions should mainly permit the application of the law of the current residence of the couple, limiting the exception to the sole mandatory provisions of the forum jeopardises this objective.

The ECJ has, however, opened a door by allowing judges to "take into account" foreign overriding mandatory provisions where permitted to do so by the *lex causae*. But this solution raises a second objection. Limiting the activation of the exception to the sole mandatory rules of the forum is a means to reduce the

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[39] See on Regulation Rome I, L. d'AVOUT (note 30), No. 1.

[40] D. BUREAU/ H. MUIR-WATT, *Droit international privé*, t. 1, 4th ed., PUF 2017, No. 561; B. AUDIT/ L. d'AVOUT, *Droit international privé*, 7th ed., Economica 2013, No. 180; L. d'AVOUT, (note 9), at 100-101.

[41] P. MAYER/ V. HEUZE, *Droit international privé*, 11th ed., Montchrestien 2014, No. 824.

[42] See above, note 26.

[43] See the options set in Articles 4, 5 and 6 of the Regulations.

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legal uncertainty driven by the exception. This is why the solution that has been adopted by the Regulations was called for by some academics.[44] Opening the door, as does the ECJ, to the consideration of *any* foreign rule, depending on the sole content of the *lex causae*, creates major uncertainty.[45] It would have been more efficient to seek inspiration in the methodology implemented at Article 30 of the Regulation applicable in matters of succession, according to which "where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession." This provision makes possible the application of a State's overriding mandatory provisions, while limiting such possibility to the States having legitimate interests to regulate the situation. A similar provision, limited to the overriding mandatory provisions of the State where the couple has its current residence, would have been more efficient than simply allowing the application of the *lois de police* of the forum. Because, given the multiplicity of jurisdictional grounds defined by the Regulations, it is extremely difficult to foresee which overriding mandatory provisions will actually impact the implementation of the otherwise applicable law.

The provisions in the Regulations on overriding mandatory provisions are somewhat puzzling. Whereas the regime of the exception based on public policy is consolidated and slowly moving toward a general theory of European PIL, the regime of the exception based on overriding mandatory provisions is still uncertain, given the differences existing between the European regulations. A general theory on this issue is still needed.

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[44] M. BUSCHBAUM/ U. SIMON, Les propositions de la Commission européenne relatives à l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrés, *Rev. crit. dr. int. pr.* 2011, p. 801.

[45] S. LEMAIRE/ L. PERREAU-SAUSSINE (note 37), p. 211.

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CULTURAL PROPERTY AND PRIVATE INTERNATIONAL LAW

LEGAL OBSTACLES TO CLAIMS FOR THE RESTITUTION OF LOOTED ART

Marc-André RENOLD*

I. The Notion of "Looted Art"
   A. The Notion of Art
   B. Looting *vs* Forced Sale
II. Conflicts of Jurisdictions
III. Conflicts of Laws
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V. Good Faith
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VI. Dispute Resolution: Judicial *v.* Alternative Means
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   C. Fair and Just Solutions to Looted Art Disputes

Art looted in armed conflicts and wars is often exported out of the country of looting in order to be kept or sold abroad; as such, most restitution claims and the resulting judicial cases have an international element. Claimants involved in such cross-border restitution cases face multiple legal obstacles, such as the difficult task of determining what constitutes looted art (1), the conflicts of jurisdictions and (2) the conflicts of laws issues (3), the effect of time (statute of limitation and usucapio) on the claim (4) and the ubiquitous question of good faith (5), all of which render their case's outcome less than certain.

Case-law addressing those issues exists in multiple States throughout and outside Europe, which indicates that they currently constitute generalized

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 247-268
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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problems in the international art community.[1] As such, it is difficult, at this point in time, to identify States where restitution claims brought before courts encounter most – or least – problems. For now, it appears that States with the best practices are those who encourage the settlement of conflicts through means of alternative dispute resolution (ADR) and/or who have put in place non-judicial bodies to help solve looted art cases (6).

I. The Notion of "Looted Art"

A. The Notion of Art

Cultural objects can be of major cultural, artistic, historical or scientific importance. In addition, in many cases states assert spiritual and emotional ties with iconic cultural materials as they are important for the national identity. Cultural heritage items are most important to the people who created them or for whom they were created or whose particular identity and history they are connected with. Works of art and antiquities may have a significant financial value, which is established by the market and hence by the demand and supply rule. The illicit trafficking in cultural objects is, among others, due to this latter reason.

Because of artworks' uniqueness and values, as well as the emotional link between dispossessed owners and objects, those deprived of their artworks have often sought restitution instead of financial compensation. It is hence the uniqueness and the cultural importance of artworks that justify a different treatment – for example specific rules – from ordinary commodities.

However, having specific rules dedicated to the protection of art objects implies that the notion of art be defined, which is difficult to do. For example, is a Louis XV buffet an artwork or is it "just" a very valuable object of practical use? Since national and international law instruments do not provide a definition of "art" or "culture", the question will be left to judges, arbitrators or the parties themselves (as the case may be) in each case, which may create uncertainty. What makes art different is its uniqueness and this element should be decisive.[2]

The present contribution is based on a study written in 2016 by the author for the European Parliament on "Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigation". The author would like to thank the Art-Law Centre's team, Dr. Alessandro Chechi, Mrs. Justine Ferland and Mrs. Ece Velioglu-Yildizci for their participation to the study.

[1] See the ArThemis database, (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva (hereinafter: *Platform ArThemis*).

[2] The iconic case in which the issue of the definition of a work of art was central is *Brancusi v. United State,* 54 Treas. Dec. 428 (Cust. Ct 1928). See M. ROWELL, *Brancusi c. Etats-Unis: Un procès historique, 1928*, Paris 2003.

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B. Looting *vs* Forced Sale

The notion of looting refers to the situation whereby an object is taken from a person, against the latter's will and in breach of existing legislation, typically in times of political and military disorder.[3] It can occur with the support of the State or independently of any role played by it. Illicit excavations also fall within the definition of looting. The reason is that many countries have patrimony statutes conferring ownership of unearthed antiquities to the State and prohibiting their removal without a license.

The notion of forced sale, however, is more difficult to define. Broadly understood, a forced sale takes place when State authorities seize someone's property in view of its appropriation. Not all forced sales are illegal. For example, many national legislations authorize the forced sale of the goods of a debtor, under certain conditions. However, especially in times of conflict, illegal forced sales take place, for example, when an authoritarian State or the occupying force decide that certain indivuduals or groups are not allowed to own anything, or some specific items. In such cases, forced sales resemble looting, especially when the proceeds of the sale are confiscated.

In certain cases, it may be difficult for a court to distinguish between those two occurrences (legal *vs.* illegal forced sales amounting to looting), especially when little or no evidence is available on the question.

For instance, a complicated case arises when the owner is forced (for example by racist rules, such as the Nuremberg laws of 1933) to sell his goods to cover fees such as "departure taxes" with the proceeds of the sale. In such a case, the price paid for the goods will be of central significance. When the price obtained for the sold goods is fair, it will be difficult to speak of looting, however condemnable the forced sale might be. On the other hand, if the price of the goods is clearly below the market price at the time of the sale – for example because the goods are purposefully wrongly presented as copies – then it is a case of "partial looting". Such cases can be quite difficult to apprehend because the owner is not fully deprived and the new owner, *i.e.* the buyer, is not necessarily in bad faith.

Another difficult situation arises when the reason for a sale is not obvious and evidence on that matter is not readily available (*e.g.* if the original owner is no longer alive). For instance, a person may have sold art to honour outstanding personal debts (no looting) or to feed his family during times of persecution ("indirect" looting).

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[3] Although most mediatized examples of looting (Nazi looting before and during WWII, ISIS' looting in Iraq and Syria, looting in colonial times, etc.) show looters in a position of power over their victims, it is important to note that cultural property is also often stolen, excavated or looted by the impoverished population living in conflict zones. Indeed, "[l]ooters sometimes have a direct ancestral tie to the crafts of excavated materials. They often have few employment options […]. Essentially, the money illicit excavators earn from unearthing antiquities often goes to feed their families". K.L. ALTERMAN/ C.S. DAHM, National Treasure: A Comparative Analysis of Domestic Laws Criminalizing Illicit Excavation and Exportation of Archaeological Objects, *Mercer Law Review* 2013, 431-465, at 437.

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For these reasons, victims of forced sales often face a specific difficulty that does not appear in cases of outright looting: demonstrating that they are victims and, as a consequence, are entitled either to restitution or to some form of indemnification.

The *Schoeps v. Museum of Modern Art* case illustrates this issue. In December 2007, the Museum of Modern Art and the Solomon R. Guggenheim Foundation jointly asked a federal court in New York to declare them the rightful owners of two Picassos, "Boy Leading a Horse" and "Le Moulin de la Galette". Their ownership of the paintings was challenged by Julius Schoeps, the heir of the Jewish banker Paul von Mendelssohn-Bartholdy, who claimed restitution of the paintings on the basis that they had been sold under duress as a direct result of Nazi policies. Although von Mendelssohn-Bartholdy's will suggested he may have sold the paintings to keep them out of Nazi hands, the museums alleged that there was no evidence showing him to be a target of Nazi persecution, since there was no restraint of his freedom of movement, his right to serve as a director of the bank, or his ability to transfer artworks or other assets.[4] In an interim ruling following the museums' request to have the claim dismissed at a preliminary stage, the U.S. District Court concluded that German law applied to the issue of duress and that under the relevant provisions of the German civil code, Schoeps had adduced sufficient evidence to reasonably support his "forced sale" allegations, thus allowing the case to proceed to trial.[5] However, the parties settled their case before trial under strictly confidential terms, precluding this case from setting an important precedent on the question. The same US judge who had authorized Schoeps' action expressed concern about the confidentiality of the settlement in light of the public interest issues raised by the case.[6]

In another case, still not finally decided, *Laurel Zuckerman (as ancillary administratrix of the Estate of Alice Leffmann) v. The Metropolitan Museum of Art,*[7] the same U.S. District Court held that a sale in 1938 of a Picasso painting by the Jewish family who owned it to French dealers was not to be considered as made under duress, neither under Italian, nor under New York law.

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[4] A.J. Yip/ R.D. Spencer, Untouched by Nazi Hands, but Still…, *The Wall Street Journal*, 28 February 2008, <http://www.wsj.com/articles/SB120416063008298329>.

[5] *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009).

[6] *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009): "The fact that the plaintiffs, who repeatedly sought to clothe themselves as effectively representatives of victims of one of the most criminal political regimes in history, should believe that there is any public interest in maintaining the secrecy of their settlement baffles the mind and troubles the conscience".

[7] *Zuckerman v. The Metropolitan Museum of Art*, (S.D.N.Y. February 7, 2018, Case 1:16 Civ. 7655 LAP), appeal pending.

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II. Conflicts of Jurisdictions

When claiming the restitution of looted art, the claimant must act at the proper venue (choice of jurisdiction) and demonstrate ownership under the applicable law (choice of law). However, the forum and the applicable law will depend on various factors, and some are specific to looted artworks.

First, due to the divergent private international law rules in force in each State, multiple national courts may, by basing themselves on various connecting factors, have jurisdiction over the same claim. In looted art claims, the authorities of the place where the looting took place might claim jurisdiction, as well as the authorities of the place where the artwork was brought after the looting and sold (or lent, donated, pledged, etc.), the authorities of the place where the artwork is located presently, the authorities of the place where the contract related to the artwork is or was to be performed or even the authorities of the place where the current possessor resides.

There are unfortunately no harmonized conflict of jurisdiction rules on all these specific issues at the international level. This creates uncertainty as to which courts are competent in each case, and encourages *forum shopping* by claimants. In Europe, supranational instruments such as the Brussels I-bis Regulation[8] and the Lugano Convention[9] aim at determining in advance which court or courts will have jurisdiction (without regard to each State's private international law rules), thus minimizing uncertainty.[10] In that respect the 2012 Brussels I-bis Regulation contains a specific rule according to which "a civil claim for the recovery, based on ownership, of a cultural object [can be] initiated by the person claiming the right to recover such an object in the *courts for the place where the cultural object is situated at the time when the court is seized*" (emphasis added). Such a rule seeks to achieve uniformity with regards to jurisdiction in cases of stolen or looted cultural property.[11]

Problems, however, remain. First, these instruments generally only apply when the defendant is domiciled in EU or European Free Trade Association (EFTA) Member States. Claims against defendants domiciled outside of Member States (such as in the U.S.) do not fall within the scope of those European instruments. In those cases, the jurisdiction of the courts of the State shall be determined by the private international law rules of that State,[12] thus bringing the parties back to square one.

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[8] 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).

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

[10] In general, the domicile of the defendant determines which of the courts have jurisdiction in a given case. Other courts may also have jurisdiction based on the subject-matter of the dispute.

[11] Art. 7(4) of the Brussels I-bis Regulation.

[12] See, for instance, Art. 6 of the Brussels I-bis Regulation.

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Courts may also dismiss restitution claims on grounds of lack of jurisdiction due to sovereign immunity.[13] In addition, in common law countries such as the UK, the U.S., Australia and Canada, courts which are otherwise competent (as per the applicable private international law rules) may decline jurisdiction based on the principle of *forum non conveniens* when there is a more appropriate forum available to the parties (*i.e.* when another forum has stronger links with the case or the parties).

So, today we can clearly speak of a lack of coordination in the field of jurisdictional rules and that may very well lead to *forum shopping*, also in the field of claims for the restitution of looted art.

III. Conflicts of Laws

Jurisdiction conferred to one court does not mean that the applicable law will be the law of that court. It is frequent for a national court to apply foreign law. Unfortunately, there are in our field no harmonized conflict of law rules in force either at the international or European level.[14] In looted art cases, the applicable law will generally be the law of the artwork's situation at the time of acquisition (*lex rei sitae*), but in some cases the applicable private international law rules may also point to the law applicable to the contract relating to the artwork (sale, pledge, loan, etc.) or the place of destination (if the artwork is in transit). One might also have to take into account the law applicable to the past transactions regarding the artwork.

In looted art cases, the determination of the law applicable to both substantial and procedural issues is crucial since it will often influence the outcome of the claim. It will notably determine which limitation period is applicable and when it started to run (see section IV). In cases where the actual possessor of the item acquired it in good faith, the chosen law may also either close (in common law systems) or open (in civil law systems) the door to a "good

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[13] An interesting example is provided by the case *Andrew Orkin v. The Swiss Confederation and Others*, 09 Civ 10013 (LAK) 770 F. Supp. 2d 612, US Dist Lexis 4357 (2011), U.S. Lexis 24507 (S.D. N.Y 2011), U.S. App. Lexis 20639 (2011).

Andrew Orkin sued the Swiss Confederation, the Oskar Reinhart Foundation and the Oskar Reinhart Collection in the U.S. in order to recover possession of the drawing "View of Les Saintes-Maries-de-la-Mer". Orkin alleged that his great-grandmother, Margarethe Mauthner, sold the painting under duress during the Nazi era. The action was dismissed for lack of subject-matter jurisdiction, on the ground that a court of law can affirm jurisdiction only when the initial taking of an object was committed by a State or a person or entity acting on a State's behalf.

[14] In the EU, some regulations, such as Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations and 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, provide harmonized rules to help determine the applicable law to specific disputes such as contractual and tort disputes, but have no relevance in looted art (theft) disputes.

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title" defence – the whole under certain conditions which also considerably vary, even among civil law systems (see section V).

In other words, similarly situated claimants may face completely different treatment of their cases across different States, depending on the connecting factor the seized court applies to determine the applicable law.

The *Grunbaum Heirs* v. *David Bakalar*[15] case pertaining to a Schiele drawing illustrates the complications faced by litigants in that regard. In 1938, the Nazis expropriated the art collection of Fritz Grunbaum while he was detained in the Dachau concentration camp. In 1963, David Bakalar purchased in New York, from a gallery in Bern, a Schiele drawing that had belonged to the Grunbaum family. In 2004, Bakalar consigned the drawing to Sotheby's for sale but upon discovering that there was an issue on title, the auction house froze the sale. Balakar filed suit in New York in 2005, seeking judgment that he had purchased the drawing in good faith and thus was the legal owner of the drawing. The Grunbaum heirs counterclaimed alleging that under New York law, even a good faith purchaser cannot acquire good title to an artwork that has been stolen in the first place. The New York District Court faced the difficult question of which law to apply in determining who owned the drawing: the law of Austria, where the Grunbaums lost possession; the law of Switzerland, where the drawing allegedly passed to the Gallery; or the law of New York, where Bakalar purchased the drawing and commissioned it for auction. Although Austrian law was rapidly found inapplicable, determining whether Swiss or New York law applied to ownership issues was of central importance. Indeed, under Swiss law, Bakalar could claim title to the drawing unless the heirs proved that suspicious circumstances had existed of which Bakalar was aware, or that each party tracing back to the Grunbaums had failed to act in good faith upon purchasing the drawing. On the contrary, under New York law, Bakalar could never have obtained good title if the drawing was originally stolen. Applying New York State's choice of law rules, the District Court concluded that Swiss substantive law governed the dispute, but that New York law applied to the procedural issues, concluding that Bakalar had purchased the drawing in good faith and therefore was its valid owner. However, on appeal this conclusion on the applicable law was reversed. The Appellate Court held that New York substantive law should have been applied and referred the case back to the District Court for a new adjudication. Although the result was ultimately the same due to Bakalar's laches defense,[16] it took eight years from the date of the first filing for Bakalar's lawful title to be recognized in a final judgment.

Even between two States with more similar legal systems, a judge's choice to apply one national law over another may have important consequences. For

[15] A. WALLACE/ S. JANEVICIUS/ M.-A. RENOLD, Case Schiele Drawing – Grunbaum Heirs v. David Bakalar, *Platform ArThemis* (note 1).

[16] This is an equitable doctrine asserted by *Bakalar* that bars title actions in which there has been a lengthy delay in filing a claim. See A.J. GREENBERG, Seven Year Saga of *Bakalar v. Vavra* Ends in Victory for Current Owner of Schiele Drawing and Settles Concerns Over Application of the Laches Defense, 18 October 2012, available at: <https://itsartlaw.com/2012/10/18/seven-year-saga-of-bakalar-v-vavra-ends-in-victory-for-current-owner-of-schiele-drawing-and-settles-concerns-over-application-of-the-laches-defense>.

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instance, in *Stato Francese v. Ministero per i beni culturali ed ambientali e De Contessini*,[17] two tapestries were stolen from a French state museum, taken to Italy and eventually bought in good faith by defendant De Contessini. When the French government filed an action in Italy for the recovery of the tapestries, the *Tribunale* of Rome held that Italian law applied to the acquisition by De Contessini and that consequently the good faith purchaser had become the owner – this even though under French law the tapestries were classified as inalienable objects because of their artistic importance.[18]

In this context, the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects represents an important instrument in that it aims at resolving the problems resulting from the differences among national rules. More specifically, it establishes a key compromise between civil law and common law jurisdictions at its Articles 3 and 4. Pursuant to these norms, "[t]he possessor of a cultural object which has been stolen shall return it", but "shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object". On the one hand, this means that the *nemo dat quod not habet* principle is respected. On the other hand, the security of commercial transaction is safeguarded by the condition that purchasers of cultural objects can be protected provided they can prove having exercised the required due diligence.

IV. Statutes of Limitations

All legal systems subject the initiating of proceedings to certain time limits which, in looted art matters, may start from the time of the theft, from the discovery of the location of the object or of the identity of the holder or when the claim was rejected by the possessor.[19]

As mentioned above, statutes of limitations often create difficulties for claimants in restitution matters. The objective of these statutes of limitation is to secure a minimum of legal certainty. Indeed, laws are not solely dedicated to the protection of victims, but also to provide commercial transactions with legal security and encourage business transactions. In this regard, it would be difficult to imagine an efficient legal art market if a *bona fide* purchaser who possesses an artwork peacefully for decades could not have good title over said artwork.

Statutes of limitations are therefore necessary and the difficulty is finding the right balance between the protection of the interests of the victims of theft/looting and those of the market.

[17] *Corte di Cassazione (Italy)*, No. 12166, 24 November 1995.

[18] J.H. MERRYMAN, The Good Faith Acquisition of Stolen Art, *Stanford Public Law Working Paper No. 1025515* (2007), 5, available at: <https://ssrn.com/abstract=1025515>.

[19] See R. REDMOND-COOPER, Limitation of Actions in Art and Antiquity Claims, *Art Antiquity and Law* 2000, 185-206.

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The rules on limitation can vary from State to State even though they might seem similar at first glance. For example, within the U.S., most States have a three-year statute of limitations that restricts the time in which a party may sue for recovery of stolen property. The moment at which the "countdown" starts, however, varies between States. In California and Massachusetts, it starts when the claimant discovered or reasonably could have discovered his claim to the artwork and its whereabouts.[20] California attempted twice to adopt statutes extending the time to bring suit for looted-art claims, but they were ruled unconstitutional.[21] In Michigan, a federal court held that the statute of limitations starts from the date the alleged wrong occurred, which, in looted art cases, is when the original owner loses possession of the artwork. Other States are more generous. In New York, for instance, judges seized with a looted art claim generally apply the "demand and refusal rule" under which a claim accrues after the alleged rightful owner demands the property's return and the possessor refuses to return it. Thus, under New York law, the statute of limitations does not begin to run until the possessor refuses a demand.[22] It is to be noted, however, that the recent U.S. *Holocaust Expropriated Art Recovery Act*[23] standardizes the limitation period applicable to Nazi-looted art restitution claims to "6 years after the actual discovery by the claimant or the agent of the claimant of (1) the identity and location of the artwork or cultural property; and (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost" (section 5 of the Act).

V. Good Faith

In principle, claimants must demonstrate that what they allege is true. In other words, claimants carry the burden of proof.

In looted art matters, this implies that claimants face many challenges, and in particular:

a. proving that they (or their ancestors) were the owner of the artwork until it was looted;
b. proving that the artwork was actually looted;
c. demonstrating that the present possessor did not acquire good title, which implies that no one must have acquired such good title between the looting and the beginning of the litigation.

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[20] K.N. SKINNER, Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums, *Vanderbilt Journal of Entertainment and Technology Law* 2013, 673-712, at 686.

[21] K.N. SKINNER (note 20), at 694.

[22] K.N. SKINNER (note 20), at 695.

[23] Holocaust Expropriation Art Recovery Act, Public law 114-308, Dec 16, 2016.

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A. Proof of Past Ownership

Claimants must demonstrate that they had prior ownership of the specific artwork up until the moment it was looted.

In the case of Holocaust-related disputes, the problem of proving ownership can be particularly acute. Since more than half a century has passed since WWII, evidence is often lost or extremely difficult to collect. While many of those involved have passed away, those who are still alive or their descendants may have no documentation, photos, or witnesses, and statements taken from witnesses such a long time after the event are not always fully reliable. Defendants in such cases use the fact that uncertainty remains regarding whether the artwork was sold before the looting actually occurred,[24] or regarding whether the claimants even ever owned the artwork.

Today electronic records as evidence of ownership will help future claimants, but these issues remain regarding claims for "older" looted art. They were notably raised in the *Weinmann Heirs v the Yale University Art Gallery* dispute with regard to the painting *Le Grand Pont* by Gustave Courbet.[25] According to the claimant, Eric Weinmann, this painting had originally been owned by his mother Josephine and her family, but after they were forced to flee Germany from Nazi persecution, the painting was purchased by Herbert Schaefer, a Nazi militant. When Schaefer later loaned the painting to the Yale University Art Gallery, Weinmann learned about it and sued for its return. Multiple evidence issues complicated Weinmann's task. First, there was no written record of his mother's purchase of the painting. The details as to how Schaefer subsequently acquired the painting were also unclear (the detailed date of acquisition by Schaefer was unknown and the documentation pertaining to the sale was lost). Finally, Weinmann had no photos of the painting in his parents' house. In sum, Eric Weinmann lacked proof of ownership and based his claim entirely on his memory of the painting hanging in his childhood home, claiming to have recognized it many years later at the Yale University Art Gallery. Unsurprisingly, the parties ended up settling this claim out of court.

As for looted archaeological heritage, the legislation of many States unequivocally vests ownership of certain categories of objects in the State. Consequently, a State with such legislation may base a restitution claim on its law making it the sole owner of such objects.[26]

However, not all legislations are drafted in clear terms and interpretation issues can arise, especially when the matter is judged before a foreign court. This is often the case as looted antiquities are generally exported from their countries of origin.

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[24] Sometimes for good reasons, e.g. the private sale of a particular artwork before the war and without anyone's knowledge.

[25] L. BURSEY/ J. FERLAND/ M.-A. RENOLD, Le Grand Pont – Weinmann Heirs and Yale University Art Gallery, *Platform ArThemis* (note 1).

[26] For instance, Iran's national ownership law allowed Iran to recover its antiquities before English courts. See *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.*, [2007] EWHC 705 QB.

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Moreover, in certain cases prior ownership by a third party can be established, for instance by the person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership.

In the absence of clear evidence on the origin of illicitly excavated antiquities, States cannot obtain their restitution from possessors located in a foreign country. As mentioned above, in some States the relevant national legislation is too vague in that it does not unequivocally vest ownership of archaeological artifacts in the State. In order to address this specific issue, the UNESCO and UNIDROIT Secretariats have adopted the "Model Provisions on State Ownership of Undiscovered Cultural Objects" (2011). These provisions are intended to assist domestic legislative bodies in the establishment of a legal framework for heritage protection containing sufficiently explicit legal principles to guarantee the State ownership of archaeological artifacts and hence to facilitate restitution in case of unlawful removal. In particular, Provision 3 on State Ownership suggests that national legislation should provide that: "Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership".[27]

B. Proof of Looting

If a claimant succeeds in proving past ownership, he must then demonstrate that the particular object or collection was looted.

With the notable exception of the Nazis, looters seldom keep records of what they loot, when and from whom. Proving that a specific object was looted might hence be difficult, especially when witnesses are unavailable.

The situation might be slightly more favourable to claimants when it is admitted or common place that looting took place frequently during a specific conflict or in specific areas.

Proof of looting may be especially problematic when items are unearthed from archaeological sites, since their existence had never been acknowledged by State authorities prior to the clandestine looting. Provision 4 of the UNESCO-UNIDROIT "Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects" (2011) attempts to address this difficulty by suggesting that States provide in their national legislation that "cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects".[28] However, this provision may not help States to prove looting in cases where the provenance of an item is not obvious (for instance when it has no distinctive features allowing experts to connect it to a particular State or population).

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[27] See <https://www.unidroit.org/instruments/cultural-property/model-provisions>.

[28] *Ibid*.

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C. Good Title: The Acquisition in Good Faith Argument

It is generally presumed that the current possessor of an object is its owner. In looted art matters this implies that the claimant has the burden of proof to demonstrate that the current possessor does not have good title over the artwork.

In civil law systems, good title can be obtained in the following circumstances:

- peaceful possession in good faith over a certain period of time;
- acquisition in good faith;
- acquisition from someone who had good title.[29]

Since the good faith of the people involved in a transaction is presumed, the claimants have the burden to prove that:

- the current possessor did not acquire the artwork in good faith;
- the current possessor did not keep the artwork in peaceful possession for sufficient time;
- no one since the artwork was looted acquired the artwork in good faith nor kept it in peaceful possession for sufficient time.

These questions are central in every restitution claim subject to civil law systems. However, the conditions conferring legal title to a good faith purchaser vary between civil law countries and are often linked to the applicable limitation periods. For instance, Italy is probably the most "generous" European civil law State with regards to the protection of a good faith purchaser since the Italian Civil Code provides that the good faith purchaser immediately acquires valid title, except when artworks belong to public collections.[30] In contrast, in France, a good faith purchaser of a work of art gains title with possession, but the original owner of movable property that has been lost or stolen may reclaim it within 3 years from the date of the loss or theft.[31] In Switzerland, it will depend on when the theft occurred – a good faith purchaser of cultural property can acquire superior title to that of an original owner after 5 years if the theft or loss occurred before 1 June 2005[32] and 30 years if the event occurred on or after that date.[33]

These good faith issues are of much lesser importance in common law countries, because of the *nemo dat quod non habet* rule[34] (usually translated as "no

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[29] See the recent and very comprehensive review of Swiss case law on the matter in J. CANDRIAN, La bonne foi du possesseur d'une œuvre d'art dans la jurisprudence fédérale depuis la fin de la Seconde Guerre mondiale, *Revue de droit suisse* 2018, I 75 *et seq*.

[30] Art. 1153 of the Italian Civil Code. See J.B. PROWDA, The Perils of Buying and Selling Art at the Fair: Legal Issues in Title, in V. VADI/ H.E. SCHNEIDER (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*, Berlin/Heidelberg 2014, 141-163, at 147.

[31] Art. 2276 of the French Civil Code.

[32] Arts. 728(1) and 934(1) of the Swiss Civil Code.

[33] Arts. 728(1ter) and 934(1bis) of the Swiss Civil Code. See J.B. PROWDA (note 30), 146.

[34] M.-A. RENOLD, Stolen Art: The Ubiquitous Question of Good Faith, in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes*, The Hague 2004, 251-263.

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one can transfer better title than he has himself"), which provides that good title cannot pass to the purchaser of stolen property, even if the purchase was made in good faith. Relying on this well-settled principle of common law, Anglo-American courts will generally order the return of looted art to its original owner, no matter how many subsequent owners have purchased it in good faith and how long these subsequent owners have possessed the item (subject to the possible prescription of the claim).

In relation with these matters, difficulties arise when one does not know where the artwork was during a certain period of time, and especially when said period is long enough for a statute of limitations to intervene. Issues also arise in cross-border cases where relevant facts can be linked to both civil and common law States, as shown by the *Grunbaum Heirs v. David Bakalar* example discussed above.

Lawmakers or courts have developed specific solutions with respect to the issue of good faith. For example, in Switzerland, the possessor of an artwork cannot rely on his good faith if he is unable to demonstrate that he paid sufficient attention according to the circumstances at the moment of the acquisition. Buyers should verify the origin of the artwork they are interested in and the status of the transferor and whether it has been legally dealt with. Failure to engage in reasonable efforts to investigate the provenance of art to be bought or sold entails that the standard of care regarding due diligence has not been met. In a 2013 case, the Swiss Federal Tribunal decided that an art collector failed to comply with the due diligence obligation in the acquisition of a Malewicz painting as he had ignored a "rumour" as to the fact that a Malewicz painting had been stolen.[35] In addition, the Swiss *Federal Law on the International Transfer of Cultural Property*[36] imposes high standards of due diligence on sellers and their agents. Article 16 of the law states that dealers or auctioneers cannot enter into an art transaction if they have any doubt as to the provenance of the objects. Therefore, the burden lies not only on the purchasers' shoulders, but also on those of the seller. This type of solutions allows restitution claims to have an actual chance of success and forces the actors of the art market to pay attention to provenance.[37]

VI. Dispute Resolution: Judicial *v.* Alternative Means

Dispossessed owners (or their heirs) can demand the restitution of looted art before domestic courts. However, procedural hurdles and other shortcomings of court litigation (section A) make alternative means of dispute resolution and the possible

[35] *A. v. B.*, ATF 139 III 305, 18 April 2013, *Journal des Tribunaux* 2015 II 79. See also *Insurance X v. A.M.*, ATF 122 III 1, 5 March 1996. See generally on the issue, J. CANDRIAN (note 29).

[36] 20 June 2003, RO 2005 1869. See P. GABUS/ M.-A. RENOLD, *Commentaire LTBC, Loi fédérale sur le transfert international des biens culturels*, Zurich 2006.

[37] For the characteristics of the due diligence obligation, see Art. 4.4 of the UNIDROIT Convention and Art. 10(2) of the EU Directive 2014/60.

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associated solutions more appealing (section B). In this respect, it is useful to note that the Washington Principles on Nazi-Confiscated Art (1998) recommend that States establish alternative dispute resolution mechanisms for resolving ownership issues, in order to reach "just and fair solutions" (section C).[38]

A. Resolution through Courts

A certain number of reasons can guide a claimant to select court litigation. First, by going before courts, claimants will eventually dispose of a final decision proving their ownership over looted objects. This decision can subsequently be enforced through the ordinary judicial machinery if need be, since domestic courts have enforcement and sanctioning powers that are non-existent or weak in supranational legal systems. Second, litigants may be unwilling to enter into a dialogue with their counterparts, thus preventing the access to negotiation, mediation, conciliation, and arbitration – the so-called ADR means – which are only available on a consensual basis. Third, recourse to litigation may exert pressure on the defendant, who may then become more willing to abandon an overly legalistic approach and to agree to a negotiated solution. This is proven by the fact that many lawsuits concerning cultural heritage have not been pursued further as the parties have reached an out of court settlement.

One European example of successful Holocaust-related court litigation[39] is the *Gentili di Giuseppe Heirs v. Musée du Louvre and France* case.[40] In 1998, the heirs of the renowned Jewish art collector Federico Gentili di Giuseppe sued the Louvre Museum seeking the restitution of five paintings. These paintings, which were part of Federico Gentili di Giuseppe's collection, were bought at auction by Herman Göring in 1941 and transferred to the Musée du Louvre at the end of WWII. During litigation, the primary issue was whether the 1941 sale was valid and, consequently, whether the Museum was the legitimate owner of the five paintings. Although the Court of First Instance dismissed all the plaintiffs' claims, the Court of Appeal of Paris reversed, ruled in favor of the heirs and annulled the 1941 sale, thus allowing their restitution. This judgment had great importance for the Gentili di Giuseppe heirs' quest for restitution, since they subsequently used it as a basis for their negotiations with other museums which also held art objects of the Gentili di Giuseppe collection sold during the 1941 auction.[41]

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[38] Principle 8 of the Washington Principles states: "If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case".

[39] For another example decided by American courts, see A. CHECHI/ A.L. BANDLE/ M.-A. RENOLD, Case Two Dürer Paintings – Kunstsammlungen zu Weimar v. Elicofon, *Platform ArThemis* (note 1).

[40] A.L. BANDLE/ A. CHECHI/ M.-A. RENOLD, Case Five Italian Paintings – Gentili di Giuseppe Heirs v. Musée du Louvre and France, *Platform ArThemis* (note 1).

[41] See A.L. BANDLE/ A. CHECHI/ M.-A. RENOLD, Case Adoration of the Magi – Gentili di Giuseppe Heirs and Museum of Fine Arts Boston, *Platform ArThemis* (note 1);

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However, litigation usually remains a matter of last resort in the cultural heritage field; for instance, it has been reported that only ten Holocaust-related suits were filed in US courts in the period 1945-1995.[42] Individuals, institutions and/or States generally go before courts when extra-judicial methods have failed or are not available, since litigation presents certain flaws that can dissuade from bringing an action.

Access to the court system is the first problem. Although several constitutions guarantee the right to bring a claim for the protection of individual rights and legitimate interests, legal action is not always available. The legal hurdles discussed above, such as limitation periods or the lack of evidence to prove ownership reduce the likelihood of restitution.[43] One might also add to this the principle of non-retroactivity of international conventions.

The uncertainty of the outcome, the frequent necessity to have the judgment recognized and enforced in a foreign jurisdiction before it can be executed and the possible embarrassment flowing from an adverse ruling might represent considerations that can deter potential claimants from starting a lawsuit before a court.

In addition, resorting to litigation entails considerable economic and human expenses. Litigants may not only suffer from the loss of time (in some jurisdictions, it may take years before a final judgment is rendered), but also from the burden of paying the counsel fees and legal costs of lengthy proceedings as a consequence of the intricate issues of fact and law involved in transnational cases.

Finally, litigation may cause antagonism between the parties. Indeed, courts of law are not equipped to achieve win-win solutions and resorting to litigation implies that the parties will have to live with a "black or white" decision based on the applicable legal principles: either the Court will recognize the initial owner's title or it will give effect to the present possessor's claim. Unfortunately, rigid adherence to legalistic one-sided stances often hardens into inflexible positions, thus worsening relations. In contrast and, as will be explained in more detail below, ADR allows the tailoring of an original solution founded on the parties' reciprocal interests, thus increasing their chances of maintaining a good relationship.

B. Resolution through Alternative Means

The above shortcomings strengthen the appeal of ADR methods such as negotiation, mediation, conciliation and – to a certain extent – arbitration. As a matter of

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A.L. BANDLE/ A. CHECHI/ M.-A. RENOLD, Case Bust of a Youth – Gentili di Giuseppe Heirs and Art Institute Chicago, *Platform ArThemis* (note 1).

[42] See M. BAZYLER, Nuremberg in America: Litigating the Holocaust in United States Courts, *University of Richmond Law Review* 2000, 1-283, at 165.

[43] For several examples illustrating these issues, see M.-A. RENOLD/ A. CHECHI, Just and Fair Solutions: An Analysis of International Practice and Trends, in E. CAMPFENS (ed.), *Fair and just solutions? Alternatives to litigation in Nazi-looted art disputes: status quo and new developments*, The Hague 2015, 188-189.

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fact, a majority of the disputes concerning looted art objects which have arisen in the past four decades have been settled out of court.[44]

Negotiation is a voluntary, non-binding mechanism that allows the parties to retain control over the process without the intermediation of any neutral third party. As such, it allows like-minded litigants to create win–win solutions, where creative and mutually satisfactory outcomes are envisaged and existing legal obstacles are set aside. It is extensively used to settle looted art disputes.[45] It is also very common that, during a lawsuit, parties reach an agreement and settle the dispute out of court.[46]

When the antagonism between the parties impedes direct negotiations, parties may need the intervention of a neutral third party, such as a *mediator*. The mediator has the limited purpose of assisting the litigants to reach a mutually satisfactory agreement, in a flexible, expeditious, confidential, and less costly manner. To this end, ICOM and WIPO have established in 2011 a special mediation process for art and cultural heritage disputes, the Art and Cultural Heritage Mediation Program.[47] There are not many publicized mediations due, *inter alia*, to the confidentiality that mediation guarantees to the parties; however, one can still find some examples where mediation has been used in looted art contexts.[48] In one case in particular, the Art Loss Register claims to have played the role of mediator in the settlement of a dispute between the current possessor of a Picasso painting and the heirs of its pre-WWII owner.[49]

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[44] See M. BAZYLER (note 42), at 165. See also L.J. BORODKIN, The Economics of Antiquities Looting and a Proposed Legal Alternative, *Columbia Law Review* 1995, 377-417, at 403; and C.C. COGGINS, A Licit International Traffic in Ancient Art: Let There Be Light!, *International Journal of Cultural Property* 1995, 61-80, at 75.

[45] See, for instance, R. CONTEL/ A.L. BANDLE/ M.-A. RENOLD, Affaire des Fresques de Casenoves – Musée d'Art et d'Histoire de la Ville de Genève et la France, *Platform ArThemis* (note 1). In this case, the *Musée d'art et d'histoire* of Geneva returned the Casenoves murals to France in 1997, after more than 40 years of unsuccessful litigation to that effect.

[46] See, for instance, R. CONTEL/ G. SOLDAN/ A. CHECHI, Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum, *Platform ArThemis* (note 1).

[47] ICOM-WIPO Mediation Rules, available at: <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules>.

[48] See, for instance, A.L. BANDLE/ R. CONTEL/ M.-A. RENOLD, Case Ancient Manuscripts and Globe – Saint-Gall and Zurich, *Platform ArThemis* (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva. In this case, the Swiss Confederation acted as a mediator to settle a case between two cantons involving objects that were looted during the religious wars of the 18th century. More recently, a Los Angeles court ordered that the Armenian Apostolic Church and J. Paul Getty Museum spend four months in mediation to resolve their dispute over a medieval manuscript which was in possession of the museum. The parties reached an agreement in 2014, see <http://www.latimes.com/entertainment/arts/culture/la-et-cm-armenian-church-settles-with-getty-museum-20150918-story.html>.

[49] L. NICOLAZZI/ A. CHECHI/ M.-A. RENOLD, Affaire Nature morte au tableau de Picasso – Héritiers Schlesinger et Phillips, *Plateforme ArThemis* (note 1).

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A number of States established non-judicial bodies[50] to handle Nazi-looted art cases. The procedures put in place by these institutions resemble *conciliation*. Conciliation involves an independent commission or an individual acting as a third party. The task of the conciliator is to investigate the dispute and propose a non-binding solution to the parties. Hence, conciliation combines the basic features of mediation and inquiry, therefore requiring a more in-depth study of the dispute as compared to mediation.

The *Beneventan Missal dispute* between the Metropolitan Chapter of the Cathedral City of Benevento (Italy) and the British Library[51] illustrates the importance of such non-judicial bodies in helping resolve looted or "disappeared" art claims. The Missal disappeared in 1943 when the city of Benevento was occupied by the Allied forces during WWII, and was eventually acquired by the British Library in 1973. In 2002, following the refusal of the British Library to return the Missal, the Metropolitan Chapter brought the case before the UK Spoliation Advisory Panel. Since restitution was prohibited by the laws in force at the time, the Panel recommended the UK Secretary of State to amend the existing legislation in order to allow objects looted during the Nazi period and now housed in British collections to be returned to claimants. Thus, in 2006 the UK conducted a *Consultation on Restitution of Objects Spoliated in the Nazi-Era* and, in 2009, the *Holocaust (Return of Cultural Objects) Act*[52] was adopted by the Parliament of the UK.[53] The Metropolitan Chapter then renewed its claim to the Spoliation Advisory Panel for the return of the Missal. This time, the Panel was able to recommend the return of the Missal to the Metropolitan Chapter, and this recommendation was endorsed by the UK Government and accepted by the British Library. It should be noted that because of the applicable statute of limitation, the claimants in this case probably could not have won a judicial case. However, the Spoliation Advisory Panel, being an extra-judicial forum, was able to recommend the return of the Missal by recognizing the moral side of the claim and making it prevailing over the legal side.

All the alternative methods cited so far have a non-binding character. On this point, *arbitration* is different: once parties voluntarily refer a dispute to arbitration, they are bound by the final award. Arbitration is one of the principal non-forensic methods of settling international disputes and it is very often used, as is well known, in the fields of international trade and investments. The primary

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[50] These are the Spoliation Advisory Panel (UK), Kommission für Provenienzforschung (Austria), Commission pour l'indemnisation des victimes de spoliations (France), De Restitutiecommissie (the Netherlands), Beratende Kommission (Germany). For an overview of such national bodies, see A. MARCK/ E. MULLER, National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany, in E. CAMPFENS (note 43), 41-89.

[51] L. NICOLAZZI/ A. CHECHI/ M.-A. RENOLD, Case Beneventan Missal – Metropolitan Chapter of the Cathedral City of Benevento and British Library, *Platform ArThemis* (note 1).

[52] Holocaust (Return of Cultural Objects) Act 2009 (2009 c. 16).

[53] This Act allows 17 cultural institutions, including the British Library Board, to transfer an item of their collections if this action was recommended by the Panel and approved by the Secretary of State.

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benefit of arbitration resides in the parties' power to shape the process to fit their needs. Disputants can agree, *inter alia*, on the selection of one or more arbitrators, the applicable law and the rules of evidence to be applied. Litigants can also include clauses which allow arbitrators to decide according to "equity", "good conscience" as well as principles others than those embodied in the rules of the selected system of law.

Arbitration is however not yet commonly used to resolve looted art claims.[54] To our knowledge, only one Nazi-looted art case has been settled through arbitration, the well-known *Altmann* case, which involved several paintings by Gustav Klimt confiscated by the Nazis in 1938 from Ferdinand Bloch-Bauer, the Jewish uncle of the claimant, Maria Altmann. Although Maria Altmann initially filed a judicial claim in the U.S. against the Republic of Austria and the Austrian National Gallery, the parties eventually reached an agreement to end the litigation and submit the dispute to arbitration in Austria. The arbitration panel ruled that Austria's National Gallery should return the five Klimt paintings which were confiscated by the Nazis from Ferdinand Bloch-Bauer, to his niece Maria Altmann as his sole descendant.[55]

In light of the foregoing analysis, there are grounds to affirm that ADR methods provide the necessary flexibility for handling Nazi-era art claims and facilitating consensual, mutually satisfactory settlements. This is so also because these techniques are available at any time, either together with, or as a part of, other processes. For instance, negotiations often run parallel to lawsuits. ADR methods also allow the parties to take into account ethical and moral principles in addition to – or in replacement of – purely legal principles (which, as previously explained, are generally unfavorable to claimants). In addition, ADR methods allow parties to find original, "fair and just" solutions which are not limited to restitution or rejection of the demand.[56]

Nevertheless, ADR methods are characterized by some important shortcomings. The first is the voluntary essence of ADR mechanisms. Indeed, outside the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives. For instance, it can often be the case that a party has no interest in going into arbitration as long as they cannot be brought in via litigation. They would rather ignore the claim or rely on their rights under the general law of possession and ownership. This problem is illustrated by the *Altmann* case, where the Republic of Austria rejected the initial proposal of Maria Altmann to submit the dispute to arbitration. The same holds true as regards negotiation and mediation, as shown in the case of the painting

[54] For an example of arbitration relating to the destruction of cultural heritage (the Stela of Matara in Eritrea), see D.W. BROOKS, Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration, in B.T. HOFFMANN (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge 2009, 465-468.

[55] C. RENOLD/ A. CHECHI/ A.L. BANDLE/ M.-A. RENOLD, Case 6 Klimt Paintings – Maria Altmann and Austria, *Platform ArThemis* (note 1).

[56] M. CORNU/ M.-A. RENOLD, New Developments in the Restitution of Cultural Property: Alternative means of Dispute Resolution*, International Journal of Cultural Property* 2010, 1-31.

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Dedham from Landham by John Constable. In this case, the Musée des Beaux-Arts of the city of La Chaux-de-Fonds in Switzerland received the painting through a donation in 1986. In 2006, the city authorities were contacted by the representative of the heirs of John and Anna Jaffé, who claimed the restitution of the painting on the grounds that it had been the object of a forced sale by the Nazis in Nice in 1942. After a careful examination of the case on the basis of the information provided by the claimants, the city authorities refused restitution. Although they recognized that the painting had been unlawfully taken by the Nazis and acknowledged the importance of the ideals underlying the 1998 Washington Principles, they decided that the restitution claim was to be rejected on legal grounds. The city maintained that the success of a claim for restitution by the applicants relied primarily on evidence of lack of good faith. Yet, in the absence of such a demonstration, the city held that it had become the owner of the painting at the latest in 1991, *i.e.* five years after the 1986 donation, pursuant to Article 728(1) of the Swiss Civil Code on acquisitive prescription (*usucapio*). Interestingly, the city completely changed its attitude once the Jaffé heirs decided to initiate a suit in early 2017. Seeing the negative impact on public opinion of opening the debate on the delicate issues of the good faith of the purchasers in 1946 and of the city when receiving the donation in 1986, it was decided that a restitution was much more appropriate and the City Council on September 29, 2017[57] decided to accept the principle of a restitution, which eventually took place on March 12, 2018.

Another shortcoming is that negotiation and mediation do not guarantee that a final accord is achieved and subsequently enforced given the lack of a mechanism by which parties can be compelled to honor the settlement.

Finally, it should be noted that ADR methods are not always less costly and less time-consuming than litigation. This benefit is not always attainable by resorting to arbitration. For example the entire arbitration process, including the recognition and enforcement of the award, is not always expeditious and may end up being more expensive than judicial litigation. In part, this explains the marked contrast between the rarity of arbitrated settlements and the abundance of negotiated agreements.

C. Fair and Just Solutions to Looted Art Disputes

As mentioned, ADR methods allow parties to find "fair and just solutions" which do not necessarily imply outright restitution or rejection of the claim.

The first solution to be considered is that of compensation. Indeed, in many Nazi-looted art cases the heirs of victims opt to be compensated rather than obtaining the restitution of the disputed object after a lengthy procedure before courts. The dispute over Egon Schiele's *Portrait of Wally* is one of them.[58] This painting was loaned in 1997 by the Leopold Museum of Vienna to the Museum of

[57] Conseil général de la Ville de la Chaux-de-Fond, *Communiqué de presse,* 29 September 2017.

[58] R. CONTEL/ G. SOLDAN/ A. CHECHI, Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum, *Platform ArThemis* (note 1).

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Modern Art (MOMA) of New York. The descendants of Lea Bondi Jaray, from which Portrait of Wally was illegally taken in 1939, demanded restitution. The MOMA refused, citing its contractual obligation with the Leopold Foundation, and a decade of litigation ensued. The case was eventually settled through negotiations in July 2010, the salient terms of the agreement being: (i) the Leopold Museum pays the Estate US$19 million; (ii) the Estate releases its claim to the painting; (iii) the U.S. government dismisses the civil forfeiture action; and (iv) the Leopold Museum permanently displays signage next to the painting that sets forth its true provenance.

It is also interesting to note that the UK Spoliation Advisory Panel is empowered to recommend an "ex gratia payment" as a redress when the claimant does not have an enduring legal right to the object.[59] It notably did so in 2001, in a case concerning the painting *View of Hampton Court Palace* by Jan Griffier the Elder held by the Tate Gallery.[60]

Sale to a third party is another option. This solution entails that the parties agree to sell on the market the actual claimed work of art in order to divide the proceeds of the sale. This case can be illustrated by referring to a decision of another national body, the Dutch Restitution Commission. In 1935, Nazi authorities took the painting *Road to Calvary* by Brunswijker Monogrammist from Jakob and Rosa Oppenheimer. The painting resurfaced in 2006 when a Dutch citizen brought it to be auctioned at Sotheby's. Having finally discovered the location of the painting thanks to Sotheby's tipoff,[61] the Oppenheimers did not ask for the painting's restitution. Instead, they demanded a proportion of the prospected sale proceeds, the amount of which was, however, disputed. Therefore, the parties submitted a joint request to the Dutch Minister for Education, Culture and Science to have the dispute settled by the Restitutions Committee. In May 2010, the Committee issued its binding advice according to which the heirs would be entitled to 40% of the sale proceeds.[62]

In cases where the claimant wants its ownership title recognized without necessarily having possession of the artworks,[63] museums can consider repurchasing them or obtaining a long-term or temporary loan. The latter is a common solution achieved through ADR mechanisms in looted art disputes. It was notably adopted in the *Nok and Sokoto Sculptures* case between Nigeria and

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[59] N. PALMER, The Spoliation Advisory Panel and Holocaust-Related Cultural Objects, in M. WELLER *et al.* (eds.), *Raub – Beute – Diebstahl*, Baden-Baden 2013, 119-140, at 119.

[60] N. PALMER (note 59), at 130.

[61] The Oppenheimer heirs had previously inscribed the painting in two public registers of looted art: the Art Loss Register and the Lost Art Register.

[62] Dutch Restitution Committee, Binding Advice Concerning the Dispute over the Painting Road to Calvary 3 May 2010, Case number RC 3.95, available at: <http://www.restitutiecommissie.nl/en/recommendations/recommendation_395.html>.

[63] In many cases, the claimants are not opposed to leaving the artwork in a museum or another cultural institution to preserve public access.

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France.[64] In 1998, the French government bought three Nok and Sokoto sculptures from a private dealer in 1998. Soon after it obtained the consent of Nigeria on the acquisition, two of these sculptures were exhibited in the newly opened Pavillon des Sessions of the Louvre Museum. This agreement gave rise to strong criticism since the sculptures had most likely been illegally excavated and exported from Nigeria, and they were on ICOM's Red List of African Archaeological Cultural Objects at Risk. Following the renegotiation between Nigeria and France, Nigeria's ownership was recognized and in return, the sculptures remained in France on a long-term loan.

In disputes where parties cannot agree on sole ownership of an artwork, notably where there have been several possessors for long periods of time, parties could also consider sharing its ownership (co-ownership).[65] One example is the Searle/Gutmann litigation relating to the Degas painting *Landscape with Smokestacks*. The painting originally belonged to the Jewish art collector Friedrich Gutmann, but its trace was lost after Gutmann sent it in 1939 to a Parisian dealer for safekeeping. In 1995, the painting was displayed at the Art Institute of Chicago and two of Gutmann's heirs traced it to the collection of Daniel Searle, a Chicago collector. The Gutmann heirs instituted legal proceedings against Searle for the restitution of the painting. The case raised great public attention and was settled out of court on the eve of trial through a form of co-ownership agreement, where the Gutmann heirs and Searle agreed to equally divide the ownership of the painting, each having freedom to do what he wanted with his share. Searle then transferred his share to the Art Institute of Chicago, where he was a trustee. In turn, the Art Institute bought the heirs' interest at fair market value, as assessed by an independent expert. The Art Institute therefore ended up as the sole owner of the painting, but agreed to credit both families by placing a label commemorating the misappropriation next to the displayed painting.

Finally, one important solution which is often overlooked is the simple recognition of a dispossessed owner's original ownership title and the misappropriation suffered during the war. For obvious reasons, looted art cases are highly emotional for claimants and cases like the Searle/Gutmann litigation discussed above show that dispossessed owners' heirs are sometimes not so interested in keeping ownership of the artwork today, but rather look for some form of recognition for the blatant injustices their parents were subjected to.

The present contribution has reviewed some of the difficulties faced by claimants when they seek to recover art looted from them or their ancestors. The path is a difficult one to follow, but examples such as the Dedham from Langham case show to those who are really motivated that even "No" in the first place does not necessarily mean that this negative answer will not eventually be turned into a

[64] E. VELIOGLU/ A.L. BANDLE/ A. CHECHI/ M.-A. RENOLD, Case Three Nok and Sokoto Sculptures – Nigeria and France, *Platform ArThemis* (note 1).

[65] On this innovative solution, see M.-A. RENOLD, Cultural Co-Ownership: Preventing and Solving Cultural Property Claims, *International Journal of Cultural Property* 2015, 163-176, at 167.

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"Yes". Patience, sophisticated legal reasoning and a certain experience are often the key to the solution.

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WHEN PRIVATE INTERNATIONAL LAW MEETS CULTURAL HERITAGE LAW

PROBLEMS AND PROSPECTS

Alessandro CHECHI*

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V. Conclusion: Towards a *Lex Culturalis?*

Disputes over illicitly traded cultural property are frequently of cross-border nature. That being so, restitution claims are normally directed to the courts in the place where the misappropriated objects are found. This means that the success of the title claims of States, communities, and individuals hinge on the interpretation and application of the private international law rules of that jurisdiction. Regrettably, such rules may have unpredictable if not detrimental effects on the resolution of cultural property-related disputes. Not only are the rules of private international law different from State to State, but they are also not tailored to lawsuits dealing with the delicate question of combatting illicit trade of cultural property.

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 269-293
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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Alessandro Chechi

The purpose of this article is threefold. First, it examines some of the private international law rules that may jeopardise the efforts deployed by States and international organisations to protect cultural objects from illicit trafficking. Second, it discusses a number of judicial decisions in order to demonstrate that the implementation of such rules at the national level is gradually evolving towards greater protection of cultural property. Third, this article posits that the culture-sensitive legislative and judicial developments of recent times in this legal field might ultimately lead to the development of a lex culturalis, i.e. *a composite body of rules aiming to affirm legal uniformity by bringing the uniqueness of cultural property to the fore and by excluding the application to cultural property-related disputes of ordinary private international law rules.*

I. Introduction

"Cultural heritage" is an evolving notion that means different things to different people. It is not an objective fact about the world, but a "social construction" to which historical and religious narratives and individuals have contributed in different and important ways,[1] one that nations and communities within nations recognise as the substratum of their identity and as a glimpse into the lives of their ancestors.[2] Accordingly, there is no universally accepted definition of what constitutes cultural heritage, nor has any general definition been agreed upon in the treaties adopted under the aegis of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),[3] and the Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention).[4] Thus each State is left to define items of cultural heritage pursuant to their own policies and laws.

The term "cultural heritage" is today used to embrace any manifestation of artistic and creative processes – be they tangible or intangible – and the ways of life of nations and groups. As such, it conveys a meaning that is wider than the notion of "cultural property". The latter is used to indicate tangible movable

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[1] J.E. CONKLIN, *Art Crime*, Westport 1994, p. 7, 45; D. GILLMAN, *The Idea of Cultural Heritage*, Leicester 2006, p. 44.

[2] F. FRANCIONI, Culture, Heritage and Human Rights: An Introduction, in F. FRANCIONI/ M. SCHEININ (eds.), *Cultural Human Rights*, Leiden 2008, p. 6; T. LOULANSKI, Revising the Concept for Cultural Heritage: The Argument for a Functional Approach, *International Journal of Cultural Property* 2006, p. 213.

[3] 17 November 1970, 823 UNTS 231.

[4] 24 June 1995, 34 ILM 1322 (1995). This Convention was adopted by the International Institute for the Unification of Private Law (UNIDROIT) upon request of UNESCO.

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assets,[5] such as archaeological and ethnographic materials, objects of fine art, indigenous artefacts, and sacred or ceremonial objects. They are regarded as our inheritance from previous generations, our legacy for those to come, and an irreplaceable repository of knowledge that enriches the lives of people and inspire thinkers, artists and the general public.

Since the end of the nineteenth century, several legal instruments have been adopted in order to safeguard cultural property. At the national level, most States have enacted legislation that recognises the specificity of cultural objects and subjects such assets to a legal regime that is more protective and less trade-oriented than the regime normally applied to ordinary goods.[6] At the international level, international organisations progressively adopted rules and principles due to the perception that the body of domestic law in force was not sufficient to cope with the different challenges posed in this specific field. The result of this gradual process is that international cultural heritage law has emerged as a distinct field of international law.

In spite of the development of this composite protective regime, cultural property is targeted with an alarming frequency. Hardly a week goes by without a new case reported in the press concerning the illicit trade of artefacts stolen from museums, churches and private homes, antiquities ripped out of archaeological sites, works of art exported without required authorisation, or the prosecution of thieves, tomb-raiders or forgers. Illicit trafficking continues to be a lucrative activity because in the global, non-contemporary art market, revenues can be maintained or increased not only through the sale of artworks procured from new discoveries or attributions but also through theft and illicit excavations.[7]

The consequences of the illicit trade of cultural property are many. This paper focuses on one particular problem, namely that of the impact of private international law rules[8] on cross-border judicial claims for the recovery of misappropriated cultural property. When the location of an artefact and the domicile of the claimant link the dispute to more than one jurisdiction, the application of such rules complexify the resolution of restitution claims.

This article begins with an examination of three cases in order to illustrate the real impact of private international law rules on lawsuits concerning

[5] The notion of "cultural property" is also used to indicate immovable assets, such as monuments, archaeological sites, and buildings. However, this paper only focuses on tangible movable cultural property.

[6] G. CARDUCCI, The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations, in B. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge 2006, p. 69-70.

[7] M.H. CARL, Legal Issues Associated with Restitution – Conflict of Law Rules Concerning Ownership and Statutes of Limitation, in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes*, The Hague 2004, p. 185-186; C. ROODT, *Private International Law, Art and Cultural Heritage*, Cheltenham 2015, p. 16-25.

[8] The term "private international law" is used in civil law countries, whereas in common law countries the terms "choice-of-law" and "conflict of laws" are preferred. These will be used interchangeably throughout this paper.

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misappropriated cultural property (section II). This analysis serves to set the ground for the ensuing examination of a selected number of private international law rules (section III). Next, section IV discusses a number of legal and judicial developments that call for an increased protection of cultural property. Section V concludes by emphasising that such developments might ultimately lead to the materialisation of a *lex culturalis*, *i.e.* a composite body of rules that may help to affirm legal uniformity by bringing the uniqueness of cultural property to the fore and by excluding the application to cultural property-related disputes of private international law rules that have been conceived for normal business transactions involving ordinary goods.

II. Private International Law Problems Illustrated

Private international law consists of the domestic rules developed by each State to help domestic judges to decide which is the applicable law in cases that present a "foreign" element. This element (or "connecting factor") may relate to the parties, to the facts, or to the object of the litigation.[9] Instead of directing the forum judges to a particular substantive provision, private international law rules direct the judge's attention to a given legal system from which a substantive solution to a particular case is to be supplied.[10]

The extent to which private international law rules impact on the settlement of disputes concerning cultural property will be introduced in the following sections through a succinct examination of three well known cases.

A. The *Goldberg* Case

The *Goldberg* case[11] related to four sixth-century mosaics that were stolen from the Church of the Panagia Kanakaria in Lythrankomi in Cyprus following the Turkish invasion of 1974. The mosaics were hidden in Germany until 1988, when the art dealer Peg Goldberg bought them at Geneva Airport. Goldberg shipped the mosaics to Indiana (United States), and then tried to sell them to the J. Paul Getty Museum. Notified by the curators of the Getty Museum, the Church of Cyprus contacted Goldberg to offer reimbursement for the purchase price in exchange for the restitution of the mosaics. She refused, so the Church instructed its attorneys to file suit in Indiana. Peg Goldberg based her defence on the claim that she had

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[9] When all the main features of a case are local, the court will instead decide the case by applying the *lex fori*, *i.e.* the domestic law. See L. COLLINS/ J. HARRIS (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, *Vol. 1*, 15th ed., London 2017, p. 3-4.

[10] J.M. CARRUTHERS, *The Transfer of Property in the Conflict of Laws*, Oxford 2005, p. 194-200.

[11] *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), *aff'd*, 917 F.2d 278, 7th Cir. (1990).

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acquired ownership of the mosaics in good faith under Swiss law.[12] Having established that Indiana law governed every aspect of the lawsuit, from the statutes of limitation to the substantive law, the District Court of Indiana rejected these defences and ordered the restitution of the mosaics to the Church of Cyprus.

B. The *Winkworth* Case

The *Winkworth* case[13] concerned a collection of Japanese miniatures (*netsuke*) which were stolen in the mid-1970s in England from the house of the owner, William Winkworth, a British collector. The miniatures were then taken to Italy where they were sold and delivered by an unidentified third party to Paolo dal Pozzo D'Annone, an Italian collector. D'Annone acquired the miniatures in good faith through a contract concluded in Italy and governed by Italian law. In 1977, D'Annone delivered the *netsuke* to Christie's in London to have them auctioned. Having spotted the Japanese miniatures on the catalogue prepared by Christie's for the auction, Winkworth filed a suit against the vendor and the auctioneer. The English court seised of the matter rejected the claim by ruling that the acquisition in good faith by D'Annone under Italian law had extinguished Winkworth's title.

C. The *Ortiz* Case

The *Ortiz* case[14] concerned a number of Maori carved door panels that were exported from New Zealand in 1973 – in breach of the relevant New Zealand export legislation, the Historic Articles Act of 1962 – and taken to New York. Subsequently, the carvings were acquired by the Swiss collector George Ortiz and transported to Geneva. In 1978, when the panels were put on sale at auction in London,[15] the Attorney-General of New Zealand issued a writ declaring that they belonged to New Zealand by virtue of the 1962 Historic Articles Act, and sought an interim injunction to prevent the sale and to ensure their return to New Zealand. The auction was held without the carvings, and the case went through British courts up to the House of Lords. At first instance, STAUGHTON J. held that title had passed to New Zealand upon illegal export. The Court of Appeal reversed this decision by ruling that New Zealand had not acquired title because the items had not been seized under the 1962 Historic Articles Act. On further appeal to the House of Lords, the decision of the Court of Appeal was upheld on the basis that

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[12] On the issue of good faith, see the contribution by M.-A. RENOLD in this *Yearbook*, p. 247 *et seq*. See also J. CANDRIAN, La bonne foi du possesseur d'une œuvre d'art dans la jurisprudence fédérale depuis la fin de la Seconde Guerre mondiale, *Revue de droit suisse* 2018, p. 75-102.

[13] *Winkworth v. Christie, Manson & Woods Ltd.* [1980] 1 All ER 1121, 1136.

[14] *Attorney General of New Zealand v. Ortiz* [1982] 3 QB 432, *rev'd* [1983] All ER 432, *add'd* [1983] 2 All ER 93.

[15] The reason why the artefact went on sale was that the daughter of Mr. Ortiz had been kidnapped, and the latter was selling part of his collection to raise money for the ransom.

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New Zealand had not been able to establish its entitlement to, or ownership of, the carvings. On the grounds that forfeiture was not automatic, it could take place only once the object in question had been actually seized (which it had not).

D. An Appraisal

The cases summarised in the preceding sections demonstrate, first, that the illicit trade of cultural property is fuelled by theft, illicit exportation and clandestine excavation, which may occur in both peacetime and wartime.

Second, they signal that the legitimate art market intersects with the illicit market, in the sense that the demand for works of art and antiquities results not only in the development of a wealthy and legitimate art market with an international dimension, but also in the theft and illicit exportation of artworks and the looting and destruction of archaeological sites and monuments. This means that objects of licit or illicit provenance pass through the same intermediaries – such as auction houses, antiques dealers and galleries – and that in the art market licit and illicit antiquities are mixed. This also means that the distinction between the licit and illicit art market is blurred and that sales of cultural materials often provide the opportunity to launder the proceeds of crimes and hence the cover for wrongdoers to evade criminal responsibility.

Third, and most importantly for the purposes of the present study, the cases examined above show that illicit activities in this field are often of a transnational nature. The reason is that traffickers tend to export misappropriated cultural property in order to complicate law enforcement efforts and to enhance their profits. In particular, thieves and smugglers tend to move cultural property to countries with a weak law enforcement capacity and where the tainted title can be laundered through expiration of the limitation periods required for adverse possession, prescription or estoppel, or the norms protecting *bona fide* purchasers.[16]

The cross-border nature of art crimes entails that restitution claims are normally directed to the courts in the place where the objects are found. This means that the success of the multi-jurisdictional title claims of States, communities, and individuals hinge – inter alia – on the interpretation and application of the private international law rules of that jurisdiction. The problem is not only that such rules differ from country to country, but also that they are not tailored to lawsuits on cultural objects. PROTT observed: "[e]ven the substance of a rule, devised as it was for another purpose and in another context, may have the effect of nullifying State or individual efforts to protect cultural objects from illicit trading".[17] Paradoxically, the application of private international law rules to an art restitution case by the judge of the forum can lead to the protective legislation

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[16] K. SIEHR, The Protection of Cultural Heritage and International Commerce, *International Journal of Cultural Property* 1997, p. 305-307; S. MACKENZIE, The Market as Criminal and Criminals in the Market, in S. MANACORDA/ D. CHAPPELL (eds.), *Crimes in the Art and Antiquities World*, New York 2011; C. ROODT (note 7), p. 28.

[17] L.V. PROTT, Problems of Private International Law for the Protection of the Cultural Heritage, *Recueil des cours*,Vol. 217, 1989, p. 223.

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passed by the country of origin being ignored, even though similar if not identical protection is provided for cultural property by the law of the forum State.[18]

On the other hand, the transnational nature of cultural property-related disputes means that, when claiming the restitution of misappropriated cultural property, claimants must act at the proper venue. Due to the divergent private international law rules in force in each State, multiple national courts may, by basing themselves on various connecting factors, affirm jurisdiction over the same claim, such as the court of the place where theft or illicit excavation took place, the court of the place where the artwork was brought after the illicit exportation, the court of the place where the artwork is located when the lawsuit is filed, or the court of the place where the current possessor resides.

This problem is well illustrated by the *Goldberg* case. Three jurisdictions were involved in this case: Cyprus (the State where the mosaics were removed), Switzerland (the State where the sale of the mosaics took place), and the State of Indiana in the United States (the State of domicile of the defendant and where the mosaics were situated when the lawsuit was filed).[19] The District Court of Indiana eventually determined that the State of Indiana had the closest connection with the legal action. Hence, Indiana law and rules governed every aspect of the lawsuit, from the statutes of limitation to the application of substantive law. In particular, the Court affirmed that, although it was the country where the sale of the mosaics took place, Switzerland bore little connection to the cause of action because none of the parties were Swiss, and the mosaics had never been in the stream of commerce in Switzerland as they remained in Geneva Airport. By contrast, the Court found that Indiana's contacts to this suit were more significant: the defendant was a citizen of Indiana; the purchase of the mosaics was financed by a loan obtained from an Indiana bank; the original resale agreement stipulated that Indiana law would govern any disputes arising out of the agreement; the mosaics were located in Indiana at the moment of the claim.[20]

III. Troublesome Private International Law Rules

Building upon the prominent examples presented above, the present section is intended to outline and discuss the private international law rules that appear to

[18] L.V. PROTT (note 17), p. 265.

[19] *Goldberg*, 917 F.2d 278, 7th Cir. (1990), 288.

[20] *Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), 1393-1394. The conclusion that Indiana had the closest connection with the legal action was confirmed by the analysis of Swiss choice-of-law principles. The Court found that the Swiss Private International Law Act recognised an exception for goods in transit: in situations in which the goods, though physically present in Switzerland, have only a fortuitous or casual connection with the Swiss legal order, the applicable law is the *lex destinationis*, *i.e.* the law of the place of destination. In the case *sub judice*, the law of Indiana. *Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), 1394-1395.

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have a detrimental impact on the expectations of players of the international art market and hence on the settlement of cultural property disputes.

A. The Determination of the Applicable Law

The court having jurisdiction over a case involving a cross-border element is required to deal with the question of applicable law. Jurisdiction conferred to one court does not necessarily mean that the applicable law will be the law of that court. It can, and indeed does, happen that the court where an action is pending is required, under its rules of the conflict of laws, to apply the law of another legal system.

The conflict of law rule applied by national judges to settle proprietary rights concerning tangible movable property is the *lex rei sitae*.[21] Under this rule, the validity of a transfer of movable property is regulated by the law of the country where the property is located at the time of the last transaction. Traditionally, it is argued that simplicity, objectivity, transparency, legal certainty and ease of application are policy reasons supporting the application of the *lex rei sitae* with respect to proprietary rights to movable objects.[22]

In reality, the application of the *lex rei sitae* to art restitution cases can lead to unpredictable, contradictory and arbitrary outcomes since the result of the litigation depends upon the content of the applicable law selected by the connecting factor. In effect, the *lex rei sitae* entails that the ownership title to a stolen artefact will be lost if the sale occurred in another country after the theft has the effect, under that second country's law, of giving good title to the good faith buyer.[23] Therefore, similarly situated claimants may face completely different treatment of their cases across different States. This is due to the legal differences – in terms of substantial and procedural issues – between civil law and common law countries.

In civil law jurisdictions, which favour the security of commercial transactions, the rules on the protection of *bona fide* purchasers establish that once the possessor has satisfied the good faith requirement (which is presumed – it is for the claimant to prove the bad faith of the possessor)[24] and the statutory time-period has expired, he or she acquires good title – even from a thief – while the original owner loses the right to recover.[25] The principle underlying the protection of commercial transactions – and of the rights of good faith purchasers – is captured by the French expression "*en fait de meubles, la possession vaut titre*". Conversely, common law jurisdictions follow the *nemo dat quod non habet* principle (no one can transfer title on stolen property) according to which the mere

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[21] M. Frigo, Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges, *Recueil des cours*, Vol. 375, 2014, p. 158-219.

[22] J.M. Carruthers (note 10), p. 2.

[23] L.V. Prott (note 17), p. 262-269.

[24] On good faith, see M.-A. Renold (note 12).

[25] See *e.g.* Art. 1153 of the Italian Civil Code and Art. 2276 of the French Civil Code.

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fact that a person acquires a stolen object in good faith does not extinguish the title of the true owner, and gives the purchaser neither a valid title nor the right to receive compensation. Thus, common law jurisdictions maintain the title of stolen property in the original owner, whether a third party has purchased it in good or bad faith. This means that the purchaser of an artwork, whether in good faith or not, is vulnerable to a restitution claim by the true owner at any time.[26]

As stated earlier in this contribution, thieves and smugglers invariably seek to launder the title of misappropriated cultural property in countries which allow a good faith acquisition of stolen objects. Therefore, it becomes clear that the application of the *lex rei sitae* can have the effect of enhancing the illicit trade of cultural property, and of thwarting the application of protective legislation passed by the source country – even though similar, if not identical, protection may be provided by the law of the forum State.[27]

The impact of the *lex rei sitae* on cultural property-related cases is demonstrated by the *Winkworth* case. In this case, the claimant sought a declaration against the defendants that a stolen art collection had remained his property at all material times. Furthermore, he sought an order for the return of the collection, or its value, and an order for damages. In addition, the claimant sought an injunction restraining the auctioneer from disposing of the collection and from paying to the vendor any part of the proceeds of sale of that collection. In his counterclaim, D'Annone maintained that he had acquired good title according to Italian law, *i.e.* the law of the *situs* at the material time. The crucial question was whether the sale of the collection in Italy had the effect to confer upon D'Annone a title that was valid against Winkworth. This preliminary point of law had to be resolved either through English domestic law or Italian domestic law.[28] The English court seised of the matter held that the *lex rei sitae* selected by the English conflict of laws rules prescribed the application of Italian law, as the purchase by D'Annone had occurred in Italy. As a result, the Court held that Winkworth's title had been extinguished in favour of the *bona fide* buyer because Italian law recognised that the defendant, having acquired the stolen objects in good faith, had obtained a superior title. Had English law governed the case, the Court would have ordered the restitution of the stolen Japanese miniatures to Winkworth.[29]

Other cases highlight that application of the *lex rei sitae* may lead to unpredictable outcomes. In *De Contessini*,[30] two tapestries were stolen in 1975 from the palace of the Court of Justice of Riom (France) and then sent to Italy, where they were bought two years later by Livio De Contessini, an antique dealer. Having located the tapestries, the French government started a legal action in Italy

[26] Of course, exceptions exist in both civil law and common law countries, either provided by positive law or by jurisprudential interpretation. See M. FRIGO (note 21), p. 170.

[27] L.V. PROTT (note 17), p. 265.

[28] J.M. CARRUTHERS (note 10), p. 86-87.

[29] K. SIEHR, Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property, *Uniform Law Review* 2015, p. 514.

[30] *Ministero Francese dei Beni culturali v. Ministero dei beni culturali e ambientali e De Contessini*, Corte di Cassazione, 24 November 1995, No. 12166.

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to obtain their restitution. The action, which was heard at all levels of the Italian judicial system, ultimately failed because the *lex rei sitae* selected by Italian courts under the Italian conflict of laws rules dictated the application of Italian law protecting *bona fide* purchasers. De Contessini was indeed ultimately held to have acquired the tapestries in good faith.[31] In *Danusso*,[32] which concerned objects of archaeological interest illicitly exported from Ecuador by an Italian citizen, the *Tribunale di Torino* found that the applicable law was the law of Ecuador. That law vested ownership in the State and prohibited the export of archaeological objects. Consequently, the *Tribunale* ordered the return of the antiquities to Ecuador. The case *Duc de Frias v. Baron Pichon* concerned a silver ciborium, recognised as inalienable under Spanish law, which was stolen from the Cathedral of Burgos (Spain) and later sold to Pichon in France. In this case the application of the *lex rei sitae* had the effect of nullifying the status of inalienable property conferred by Spanish law. The *Tribunal civil de la Seine* held that only the French rules on inalienability – not the Spanish ones – would be applied and therefore, as the goods were not inalienable under French law, Pichon's title was admitted.[33]

B. Statutes of Limitation

All legal systems subject the opening of legal proceedings to certain time limits that may start from the time of the theft or from the discovery of the location of the object. It follows that, generally speaking, if the claimant fails to bring an action against the possessor within the period specified in the statutes of limitation, the action is barred, even if the possessor was not in good faith and even if the owner did not have actual knowledge of the whereabouts of the property before the expiry of the relevant limitation period. Accordingly, limitation statutes may have the effect of inviting a thief to steal cultural property and hide it in order to become the owner following the relevant lapse of the prescribed time period. In other words, the rules on limitation may encourage, rather than discourage, the illicit trafficking of cultural property.[34]

The traditional justification for limitation periods is to secure a minimum of legal certainty. Statutes of limitation aim to protect defendants from stale claims and offer legal security of (and encourage) commercial transactions, thereby balancing the rights of victims of theft against the interests of good faith purchasers. It would be difficult to imagine an efficient legal art market if a *bona fide* purchaser who possesses an artwork peacefully for decades could still not have good title over said artwork.

Of course, States provide different responses to the need to strike a balance between the interests of the parties involved in restitution claims. As said, in civil

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[31] As a result, the French government had to buy back the tapestries from De Contessini.

[32] *Repubblica dell'Equador v. Danusso*, Tribunale di Torino, 22 February 1982.

[33] *Tribunal civil de la Seine*, 17 April 1885, *Clunet* 1886, 593.

[34] L.V. PROTT (note 17), p. 254. See also R. REDMOND-COOPER, Limitation of Actions in Art and Antiquity Claims, *Art Antiquity and Law* 2000.

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law countries, the protection of good faith purchasers and the security of commercial transactions are favoured over the interests of the dispossessed owner. As a result, some States allow *bona fide* purchasers to acquire good title once the applicable limitation period has run. In France, a good faith purchaser of a stolen work of art gains title with possession, but the original owner may reclaim it within 3 years from the date of the theft.[35] In Switzerland, a good faith purchaser can acquire superior title to that of an original owner after 5 years if the loss occurred before 1 June 2005,[36] or 30 years if the event occurred on or after that date.[37] In Italy, the Civil Code provides that a purchaser of movable cultural property immediately acquires valid ownership title upon purchase with a valid contract (except in relation to artworks belonging to public collections), notwithstanding any defect in the seller's title or in that of prior transferors, provided that (i) the purchaser acted in good faith at the time of acquisition; (ii) the transaction be carried out in a manner which is appropriate, as regards the documentation effecting or evidencing the sale, for a transaction of the type in question; and (iii) the purchaser not be aware that the goods may have an unlawful origin at the time of acquisition.[38] In common law countries, the protection of ownership is paramount, but there are different approaches as to the point in time from which the period is held to run. In the United States, most jurisdictions operate under a due diligence requirement. According to this requirement, the owner can sue within 6 years of the date upon which he or she discovered or could have been expected to discover, through the exercise of reasonable diligence, the whereabouts of the property or the identity of the possessor.[39] Similarly, under English law ownership to a stolen object cannot be acquired from a thief. The title that the *bona fide* purchaser acquires is "void" but the original owner is required to bring an action within 6 years of the date of the theft.[40]

In the *Goldberg* case, the District Court dwelled upon the question of the timeliness of the legal action. As discussed above, three different jurisdictions were relevant in this case: Cyprus, Switzerland and Indiana. The determination of the competent forum had an impact on the admissibility of the legal action given the differences between these jurisdictions as regards time limitations. Under the law of Cyprus, antiquities were inalienable and could not be acquired by a private person whether through sale, prescription, or otherwise. Swiss law protected buyers in good faith and barred restitution claims filed more than 5 years past the date of the theft. Under Indiana law a thief could not acquire ownership of stolen property but the owner's action had to be filed within 6 years of the theft having

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[35] Art. 2276 of the French Civil Code.

[36] Arts. 728(1) and 934(1) of the Swiss Civil Code.

[37] Arts. 728(1ter) and 934(1bis) of the Swiss Civil Code.

[38] Art. 1153 of the Italian Civil Code. See J.B. PROWDA, The Perils of Buying and Selling Art at the Fair: Legal Issues in Title, in V. VADI/ H.E. SCHNEIDER (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*, Berlin/ Heidelberg 2014, p. 146-147.

[39] See *e.g. Goldberg*, 917 F.2d 278, 7th Cir. (1990), 287-288.

[40] S. 4(1) of the Limitation Act, 1980. See R. REDMOND-COOPER (note 34).

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occurred.[41] Having determined that Indiana had the closest connection with the legal action, the Court held that the claim of the Church of Cyprus was timely due to the "discovery rule" and the doctrine of "fraudulent concealment"[42]. The Court was persuaded that: (i) the plaintiff had exercised due diligence in looking to locate and recover the mosaics from the moment they first became aware of the mosaics' disappearance; (ii) the identity of the possessor and the location of mosaics had been fraudulently concealed from the plaintiff for about 9 years, from 1979, when the mosaics were removed, to 1988, when Goldberg acquired them in Geneva; and (iii) the plaintiff filed the suit within the 6 year limit established by the applicable Indiana statute of limitations.[43]

C. The Non-Application of Foreign Laws

Another problem that critics ascribe to private international law derives from the so-called principle of the inapplicability of foreign public law. This principle reflects the fact that traditionally domestic courts have been reluctant to apply foreign public laws.[44] However, as shall be demonstrated, a jurisprudence whereby domestic tribunals take foreign laws into account is growing also in the cultural heritage field.

In this respect, it is necessary to introduce the distinction between two types of legislation that have been enacted by most States – most notably the so-called "source" countries[45] – in an attempt to curb the illicit trade of cultural property: patrimony laws and export regulations. Patrimony laws provide that ownership of certain categories of cultural property be vested *ipso iure* in the State. The role of the State is not that of guardian or custodian, but that of exclusive owner. This means that, for instance, the person removing an artefact from an archaeological

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[41] *Goldberg*, 917 F.2d 278, 7th Cir. (1990), 288.

[42] The doctrine of "fraudulent concealment" estops a defendant from asserting a statute of limitations defence if the defendant has, either by deceit or by a violation of duty, concealed material facts, thus preventing the plaintiff from discovering a possible cause of action. *Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), 1387-1388.

[43] *Goldberg*, 717 F.Supp., 1374, S.D.Ind. (1989), 1386-1393.

[44] See, on this point, the Wiesbaden Resolution of the Institute of International Law of 1975 ("The Application of Foreign Public Law"): "The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy" (Article I.1.). In the same vein, Prott contended that it is illogical that the courts of the forum State, whose laws and policies are also aimed at ensuring the preservation of the national patrimony, do not recognise and apply the pertinent laws of foreign States, L.V. PROTT (note 17), p. 288-291.

[45] "Source" countries are those which are rich in cultural materials, such as Italy and India. By contrast, "market" countries, such as the United States and Switzerland, are poor in cultural assets but wealthy in economic terms. Although many States may fall into both groups, these categories reflect the dynamics of international art trade. On this distinction, see J.H. MERRYMAN, Two Ways of Thinking about Cultural Property, *American Journal of International Law* 1986.

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site without permission is a thief and that the object is stolen property. By contrast, export regulations either prohibit the export of cultural property that has been designated as belonging to the inalienable patrimony of the State, or allow the (definitive or temporary) export of cultural property provided that the exporter obtain an authorisation from the competent national authorities. Export controls apply not only to artefacts inscribed in the State patrimony, but also to objects that are in private ownership.

The distinction between patrimony laws and export regulations is critical because only the former category enjoys extraterritorial effect. As posited by John H. MERRYMAN, "[i]t is an established principle of private international law that nations will judicially enforce foreign private law right".[46] Such rights include the ownership rights conferred to the State by patrimony laws.[47] This is due to the fact that theft is universally recognised as a crime to be subject to criminal sanction.[48] Therefore, the State whose patrimony has been depleted due to theft is treated as a dispossessed individual collector, and international judicial cooperation in criminal matters will generally enable the restitution of cultural property provided that such State considers the objects in question as stolen on the basis of its patrimony laws.[49]

On the contrary, a State is not obliged to recognise and enforce the export regulations of another State absent a treaty or a statute. In other words, although source countries can legitimately enact export control laws, they cannot create an international obligation for other States to recognise and enforce those measures.[50]

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[46] This author warns that, although this rule is universally recognised, it is subject to the national rules protecting good faith purchasers. See J.H. MERRYMAN, Cultural Property, International Trade and Human Rights, *Cardozo Arts & Entertainment Law Journal* 2001, p. 58.

[47] The courts of the United States have long held that claims for the recovery of objects whose ownership is vested in a foreign country through patrimony laws will be "honoured". See L.M. KAYE, Art Wars: The Repatriation Battle, *New York University International Journal of Law and Politics* 1998-1999, p. 80, referring *e.g.* to *United States v. McClain* (545 F.2d 988 (5th Cir.), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977)), and *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231(1973); 536 F.Supp. 829 (E.D.N.Y.1981), *aff'd*, 678 F.2d 1150 (2d Cir.1982).

[48] J.H. MERRYMAN, A Licit International Trade in Cultural Objects, *International Journal of Cultural Property* 1995, p. 18-19.

[49] In the absence of clear evidence on the origin of illicitly excavated cultural property, States cannot obtain their restitution from possessors located in a foreign country. Likewise, States cannot obtain the restitution of illicitly excavated objects if the relevant national legislation does not unequivocally vest ownership of archaeological artefacts in the State. In order to assist States Parties in the development of effective legislation, an expert group convened by UNESCO and UNIDROIT developed the "Model Provisions on State Ownership of Undiscovered Cultural Objects" (2011). These provisions do not constitute a binding legal instrument, but merely encourage States to modify or enact legislation in order to ensure a standardised understanding of State ownership of archaeological objects and better-focused efforts towards its protection.

[50] For a critical analysis of the rule on non-enforceability of export restrictions, see J. GORDLEY, The Enforcement of Foreign Law, in F. FRANCIONI/ J. GORDLEY (eds.), *Enforcing Cultural Heritage Law*, Oxford 2013.

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It follows that the domestic norms prohibiting or restricting the export of cultural materials are not enforced in foreign States, thereby frustrating the efforts deployed by source countries to protect and recover wrongfully removed cultural property.

The reluctance to accept the extraterritoriality of export laws is typically exemplified by the *Ortiz* case. The two principal issues in this case were (i) whether New Zealand had acquired title under domestic legislation and, (ii) if so, whether New Zealand legislation could be enforced by an English court. The trial court upheld the claimant's case. STAUGHTON J. held that title had passed automatically to New Zealand upon illegal export and that an English court would recognise such ownership rights in accordance with English public policy. The Court of Appeal reversed this decision and held that New Zealand had not acquired title because the items had not been seized before they left the country. Crucially, Lord DENNING asserted (in obiter) that by virtue of international law no State had sovereignty beyond its own frontiers and hence no court would enforce foreign laws to allow a foreign State to exercise such sovereignty beyond the limits of its authority. He therefore affirmed that English courts could not entertain a suit brought by a foreign sovereign to enforce its penal, revenue or "other public laws". He explained that the category "other public laws" had to be understood to include legislation prohibiting the export of works of art. As illustrated above, the decision of the Court of Appeal was upheld by the House of Lords, but the latter did not dwell on the question of whether New Zealand law should be enforced by English courts.

IV. Legal Developments Leading to the Proper Resolution of Cultural Property-Related Disputes

From the analysis set out above, it appears that cultural property, though it should not be considered in the same light as any other commodity, is in reality not submitted to special rules of private international law. Indeed, when they enter into the stream of commerce, items of cultural property lose the privileged status conferred by public laws and become subject to ordinary rules of private international law. Players on the international art market experience various issues when bringing cultural property-related restitution claims, since private international law hereby tends to frustrate the resolution of this type of litigation. As already emphasised, this is due to the fact that private international law rules are not devised for lawsuits on cultural objects.

Nevertheless, a look to the contemporary legislative and judicial practice of the main stakeholders of the cultural heritage field reveals that in reality important culture-sensitive developments are underway. Notably, these developments – which will be pinpointed in the next sections – mainly originate from the courts of market countries, *i.e.* the courts of the countries where stolen or illicitly exported objects are found and where lawsuits are brought.

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A. Looking for Alternatives to the *Lex Rei Sitae*

The application of the *lex rei sitae* to cases concerning cultural property may create uncertainty, and may bring about unpredictable and unsatisfactory outcomes. Indeed, the risk of inadequate outcomes is inherent in the present state of law.[51] In addition, given that artefacts can travel through different jurisdictions and be subject to multiple changes of title, even in States that have no cultural or historical connection with such artefacts, the *lex rei sitae* may facilitate the criminal activities of thieves, smugglers and dishonest art professionals.[52] It is for these reasons that commentators have called for the establishment of a set of choice-of-law rules applicable only to cultural property,[53] and that remedies which would exclude the application of the *lex rei sitae* to cultural property-related cases have been discussed.

Regarding the displacement of the *lex rei sitae* rule, it must be recalled that the plaintiff in *Winkworth* asserted the need to refer to a specific exception derogating from such a rule. He claimed that an exception excluding the application of the *lex rei sitae* should be made on the grounds of public policy in the case of movable objects that were stolen or unlawfully taken from one country without the owner's knowledge or consent, sold in another country, and then returned to the first country. Yet, English judges were not persuaded and rejected Winkworth's request.[54]

An important alternative to the *lex rei sitae* is the principle of the closest connection (or the most significant relationship), *i.e.* the law of the State which is most connected with the legal action. In practice, this is the State where theft, illicit excavation or illicit exportation occurred, or the State which has designated the property in question as being of cultural, historical or symbolic importance and hence belonging to the national patrimony. The application of this principle should be restricted to cases where the *lex rei sitae* leads to the application of a legal system which is extraneous to the case. This means that in various legal systems, even those that treat the *lex rei sitae* as the pre-eminent choice-of-law rule, domestic judges are vested with the discretion to decide which law has the closest connection on the basis of all decisive factors. In other words, in these legal systems the *lex rei sitae* is presumed to have the closest connection, but this presumption can be rebutted if the facts of the individual case point to a connecting factor with a different – but closer – jurisdiction.[55]

This principle was applied in *Goldberg*. In this case the District Court determined that Indiana had the closest connection with the legal action, to the exclusion of the Swiss and Cypriot legal systems, *i.e.* where the mosaics had been

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[51] S.C. SYMEONIDES, A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property, *Vanderbilt Journal of Transnational Law* 2005, p. 1187.

[52] M. WANTUCH-TOLE, *Cultural Property in Cross-Border Litigation*, Berlin 2015, p. 237.

[53] L.V. PROTT (note 17), p. 306.

[54] *Winkworth* (note 13), at 1133-1134. See also J.M. CARRUTHERS (note 10), p. 90-93.

[55] M. WANTUCH-TOLE (note 52), p. 240-241.

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acquired by Peg Goldberg, and where they had resided for over 1400 years before being detached from the Church of the Panagia Kanakaria, respectively. It follows that, ironically, in *Goldberg* the Court reached the correct substantive outcome – the restitution of the mosaics – without applying the law of the only State that had the most evident cultural and historical connection to the mosaics and hence a truly legitimate claim – Cyprus.

The *lex originis* – *i.e.* the law of the country of origin of a disputed cultural object[56] – is the most-discussed alternative to the *lex rei sitae*.[57] Many commentators maintain that the importance of cultural heritage for human society justifies the bypassing of policy reasons supporting the application of the *lex rei sitae*.[58] Indeed, it appears uncontroversial for cultural property to be treated differently from ordinary merchandise and to label the country of origin as having the most legitimate claim to objects constituting its own cultural heritage.[59]

However, there is no convergence over the primacy of the *lex originis*. This is justified by a variety of arguments. First, it is not always obvious what the actual State of origin of an artefact is. This problem surely concerns primarily those relics which have been unearthed from unknown archaeological sites, since clandestine diggers have no interest in documenting the time and location of the find. The same problem affects claims concerning cultural property removed in the distant past. In such cases, it may prove troubling for modern States to invoke the *lex originis* principle if the find spot is uncertain. It is obvious that, if the requesting State has political boundaries that only partially overlap with the boundaries of the ancient nation that produced the cultural property in question, it may not have a stronger claim to such property based on the *lex originis* than any other country that spans the boundaries of that ancient nation.[60] Second, it cannot be excluded that the law of a State designated by the application of the *lex rei sitae* may lead to restitution, as demonstrated for instance by the *Danusso* case.[61] Third, the *lex*

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[56] This rule has been advocated by the Institute of International Law with the Basel Resolution of 1991 ("International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage") and the Wiesbaden Resolution of 1975 ("The Application of Foreign Public Law").

[57] See E. JAYME, Narrative Norms in Private International Law – The Example of Art Law, *Recueil des cours*, Vol. 375, 2014, p. 36-39; D. FINCHAM, How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property, *Columbia Journal of Law and the Arts* 2008; S.C. SYMEONIDES (note 51).

[58] *Supra* notes 10, 22 and related text.

[59] S.C. SYMEONIDES (note 51), p. 1182.

[60] This was the problem in the *Sevso* case, where Lebanon, Croatia and Hungary (whose territories had each formerly been part of the Roman Empire) filed suit in New York asking for the return of a collection of Roman silver jewels. However, none of the claimants could prove that the collection was excavated and illicitly exported from its territory. See H. KURZWEIL/ L.V. GAGION/ L. DE WALDEN, The Trial of the Sevso Treasure: What a Nation Will Do in the Name of Its Heritage, in K. FITZ GIBBON (ed.), *Who Owns the Past?*, Brunswick 2005.

[61] *Supra* note 32 and related text.

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originis may hamper the rights of good faith buyers of stolen cultural property.[62] It is for these reasons that so far legislators and courts have refused to apply the *lex originis*.[63]

The 1995 UNIDROIT Convention and Directive 2014/60,[64] which endorse the *lex originis* principle, have struck a balance between the rights of original owners and of good faith possessors by providing for the payment of compensation to the possessor that exercised the required due diligence at the moment of acquisition.[65] In particular, these instruments contain criteria to assess the circumstances of the acquisition and hence to decide whether the possessor of cultural property that has been stolen, illicitly excavated or illicitly exported is entitled to payment of compensation.[66] All in all, these provisions are meant not only to discourage prospective buyers – be they dilettanti or professionals[67] – from participating in the illicit art market, but also to encourage purchasers to question the origin of items more intensely.[68] Therefore, the criteria for good faith assessment are useful not only for buyers and intermediaries – to exercise properly the required due diligence and avoid dealing in objects having an uncertain or nefarious past – but also for law-enforcement agents – to assess the good faith of the actors involved in disputes concerning the recovery of misappropriated cultural property and eventually to limit their rights.[69]

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[62] S.C. SYMEONIDES (note 51), p. 1187; K. SIEHR, International Art Trade and the Law, *Recueil des cours*, Vol. 243, 1993, p. 75.

[63] Of course, there are some exceptions: Art. 90(1) of the Belgian Code of Private International Law of 2004 endorses the application of the *lex originis* for the resolution of transnational restitution claims (English translation in this *Yearbook*, Vol. VI, 2004, p. 319).

[64] Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, which repealed and replaced Directive 93/7 of 15 March 1993.

[65] On the issue of good faith, see the contribution by M.-A. RENOLD (note 12).

[66] For instance, Art. 4(4) of the 1995 UNIDROIT Convention – which was reproduced in Art. 10 of the EU Directive 2014/60 – states: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances".

[67] Of course, the conduct of art professionals should be carefully scrutinised in order to verify whether they have abided by the higher standards of conduct established by statutory norms or codes of ethics.

[68] N. BRODIE/ J. DOOLE/ P. WATSON, *Stealing History: The Illicit Trade in Cultural Material*, Cambridge 2000, p. 40.

[69] The tightening of the obligation to investigate the provenance of art affects the distribution of the burden of proof: whereas a claimant must prove the existence of suspicious circumstances, the defendant is required to present proof that he or she complied with all obligations of diligence. See B. SCHÖNENBERGER, *The Restitution of Cultural Assets*, Berne 2009, p. 192-193.

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B. Admitting Restitution Claims through the Application of Culture-Sensitive Time Limitations

Statutes of limitation may compel judges to foreclose restitution claims. In many countries, time limits apply even if the owner has been unable to identify where a stolen artwork was and whether or not the owner has been diligent in attempting to locate it. However, criminals, reckless art professionals and dishonest collectors should be prevented from exploiting time limits that were not conceived with the characteristics of cultural property in mind. These are durable, portable, relatively easy to hide and valuable (and likely to become more valuable over time). These characteristics make it possible for works of art to resurface after many years of being thought destroyed or gone for good. It is for these reasons that Robert PATERSON has advocated the non-application of the statutes of limitation defence to cases of misappropriation of cultural property associated with crimes against humanity as a form of respect for the moral and ethical concerns implicated in such cases and a meaningful interpretation of national law in light of the current state of international law.[70] In the same vein, Norman PALMER proposed that governments should consider extending the limitation periods applicable to cases involving restitution claims of Holocaust-related art. According to PALMER, time limits should be stretched not only against the holder of contested artefacts, but also against the persons in the chain of transactions leading back to the original victim, even if they have acted innocently, in order to prevent any person from profiting from Nazi plundering.[71]

These doctrinal opinions are not isolated and must be seen together with national laws and jurisprudence on the one hand, and international instruments on the other.

Many domestic laws provide that the items forming the cultural patrimony of the State are inalienable (*extra commercium*). The consequence is that such property cannot be acquired in good faith by third parties and that its recovery cannot be subject to time limitations.[72] It is interesting to consider the jurisprudence showing that domestic courts have found ways to allow claimants to sue even many years after the wrongdoing. As artefacts are portable and easy to conceal, thieves and smugglers can decide to hide them until limitation periods have elapsed. Most statutes are very specific about the length of limitation periods, but often leave the question of the triggering event for its accrual up to the courts. In the United States, where most State jurisdictions apply a due diligence requirement,[73] the courts of New York and California have taken advantage of this "gap" to develop the "demand and refusal" rule and the "discovery" rule,

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[70] R.K. PATERSON, Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity, in J.A.R. NAFZIGER/ A.M. NICGORSKI (eds.), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, Leiden 2009, p. 374, 379.

[71] N. PALMER, Spoliation and Holocaust-Related Cultural Objects. Legal and Ethical Models for the Resolution of Claims, *Art Antiquity and Law* 2007, p. 14-15.

[72] See *e.g.* Arts. 728(1ter) and 934(1bis) of the Swiss Civil Code.

[73] See *supra* section III.B.

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respectively. According to the former, the cause of action does not accrue until the true owner has made a demand for the return of stolen property and the good faith possessor has refused the demand. The owner then has 3 years to commence the suit.[74] This means that an innocent purchaser's possession cannot be deemed right or wrong until the original owner demands a return. By contrast, the discovery rule provides that actions to recover stolen objects do not accrue until the actual discovery of the whereabouts of the object or the identity of the possessor.[75]

As detailed above, in *Goldberg* the Court held that the claim of Cyprus was timely because the "discovery rule" and the doctrine of "fraudulent concealment" prevented the statute of limitations from running. This case law favours the protection of dispossessed owners at the expense of the interests of good faith purchasers in line with common law jurisdictions' predilection for the *nemo dat quod non habet* principle.

Extended time limitations for cultural property are also provided in international legal instruments. These include Directive 2014/60[76] and the 1995 UNIDROIT Convention.[77] It is also worth considering that Article 13(i) of Resolution No. 1205 (1999) of the Council of Europe Parliamentary Assembly on Looted Jewish Cultural Property calls for "legislative change with particular regard being paid to […] extending or removing statutory limitation periods", whereas Article 1 of the 1968 Convention on the Non-Applicability of Statutory

[74] See *e.g. Solomon R. Guggenheim Found. v. Lubell*, 567 N.Y.S.2d 623 (Ct. App.1991). See also New York Civil Practice Law and Rules, s. 214(3).

[75] See *e.g. Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421 (1996).

[76] Art. 8 reads: "1. Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. Such proceedings may, in any event, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. However, in the case of objects forming part of public collections, defined in point (8) of Art. 2, and objects belonging to inventories of ecclesiastical or other religious institutions in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States providing for a period exceeding 75 years".

[77] Art. 3 reads: "(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft. (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor. (5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation".

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Limitations to War Crimes and Crimes against Humanity[78] establishes that no statutory limitation shall apply, irrespective of the date of their commission, to the plunder of public of private property amounting to a war crime.

C. Admitting Restitution Claims through the Application of the Laws of the Country of Origin

A third group of legal developments comprises the growing jurisprudence with which courts have carefully examined the laws of source countries and subsequently ordered the restitution of claimed objects in the face of the default rule against the extraterritoriality of legislation.

In the United States, the issue of the application of foreign public law on the protection of cultural property has arisen in the context of the implementation of the National Stolen Property Act (NSPA).[79] A violation of the NSPA permits the United States government to impose criminal penalties on the violator and to bring an *in rem* forfeiture action against the stolen property. This act applies to objects that a foreign State has specifically declared as belonging to the national patrimony – thus the property need not be stolen in the United States to bring the NSPA into play and the fact that the rightful owner of the stolen property is foreign has no impact on a prosecution under the NSPA. The fact that the dispossessed State has not had prior possession of the claimed property is immaterial. This statute requires that a person be aware that the objects in question were removed in violation of the laws of the country of origin.

This awareness requirement has allowed the prosecution of numerous traffickers. The *Schultz* case is just one of the relevant authorities.[80] In this case, a New York court convicted an art dealer of conspiring to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce in violation of the NSPA. The defence argued that the relevant Egyptian laws did not vest ownership in the State, and thus there was no theft, but merely a violation of Egypt's export regulations. After listening to expert testimony, however, the court in *Schultz* interpreted the relevant Egyptian Law No. 117 of 1983 as a true patrimony law and cleared the way for the NSPA to be used to recognise and to give extra-territorial effect in the US to Egyptian policy and laws.

[78] UNGA Resolution 2391 (XXIII) of 26 November 1968.

[79] 18 U.S.C. §§2314-2315 (1976). The NSPA is a federal criminal statute prohibiting the transportation, transmission, transfer, receipt, possession, concealment, storage, sale, or disposition of any goods worth $5,000 or more, if they have crossed a State or US boundary, knowing that they have been stolen abroad.

[80] *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003). Among the cases leading up to the *Schultz* case, there are: *United States v. McClain*, 545 F.2d 988, 991-992 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. Pre-Columbian Artefacts*, 845 F.Supp. 544 (N.D. III. 1993).

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The appeal decision of the *Barakat* case brought the law of the United Kingdom into line with the law and jurisprudence of the United States.[81] In this case, Iran sued the London-based Barakat gallery to recover a collection of antiquities affirming that they were taken in violation of its national ownership laws. The Court of Appeal analysed Iranian legislation on the basis of two principles of statutory interpretation: "statutes should be given a purposive interpretation and special provisions dealing with antiquities take precedence over general provisions".[82] The Court then focused on the justiciability of Iran's claim. In this respect, it distinguished between recognition of a nation's ownership rights in its property and enforcement of a foreign nation's laws in British courts. The Court found that in this case Iran did not have prior possession of the collection and that it "asserts a claim based upon title […] conferred by legislation", *i.e.* "a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights". The Court did not consider that "this is within the category of case [sic.] where recognition of title or the right to possess under the foreign law depends on the State having taken possession".[83] Therefore, the Court of Appeal ruled that British courts should recognise Iran's national ownership law as private property law and the defendant should be charged with the obligation to return the items to Iran.[84] The Court further held that, even if Iran's law was public law, British courts were not barred from enforcing such a law. Notably, the Court of Appeal reached this conclusion by relying on the *Schultz* case and on a public policy argument: "[T]here are positive reasons of policy why a claim by a State to recover antiquities which form part of its national heritage […] should not be shut out […]. There is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities".[85] According to the Court, States were required to engage in mutual assistance by virtue of a series of instruments which had the purpose of preventing unlawful dealing in property[86] – despite the fact that these were not directly applicable to this case – as these illustrate the international acceptance of the desirability of protection of the national heritage. A refusal to recognise the title of a foreign State conferred by its law to archaeological objects unless they had come into the possession of such State would in most cases render it impossible for this country to recognise any claim by such a State to recover antiquities unlawfully exported to this country.[87] The Court recognised that if actual possession were required before a State could recover

[81] *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWHC 705 QB, *rev'd*, [2007] EWCA Civ.1374. The Court of first instance ([2007] EWHC 705 QB) dismissed the claim on the grounds that it was not justiciable, as Iranian legislation was not enforceable in the United Kingdom.

[82] Para. 54.

[83] Para. 149.

[84] Para. 163.

[85] Paras. 154-155.

[86] The Court referred to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, Directive 93/7, and the Commonwealth Scheme for the Protection of the Material Cultural Heritage of 1993.

[87] Paras. 155-163.

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archaeological objects illicitly excavated by clandestine looters, as a practical matter they could never be recovered as they are unknown to State authorities prior to exportation.[88] Hence, the Court affirmed that it is British public policy to recognise the ownership claim of foreign nations to antiquities that belong to their patrimony.[89]

In Germany, domestic courts can hear claims based on private law whereby the application of foreign public law is necessary in order to determine preliminary issues relating to these claims, such as the question of ownership. In a case decided in 2006, the Higher Regional Court of Berlin applied a foreign public law – Egyptian Law No. 117 of 1983 on the Protection of Antiquities – in a case filed by Egypt against a German dealer.[90] With this action, Egypt sought to prevent the sale of several archaeological objects to a buyer in the United States. In its investigation, the Court held that Law No. 117 conferred a title of ownership upon the State. However, the claim failed because Egypt could not establish that the antiquities in question were located in Egypt at the time of the enactment of Law No. 117. This is a necessary precondition to apply a foreign law under German choice-of-law rules.[91]

V. Conclusion: Towards a *Lex Culturalis*?

Taken as a whole, the culture-sensitive legislative and judicial developments analysed in the preceding sections could be regarded as the materialisation of a developing international public policy. Based on the needs to warrant the restitution of wrongfully removed cultural property and to fight the illicit trade in cultural property, such international public policy could be employed to nullify or flout the

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[88] The Court of Appeal recalled what STAUGHTON J had stated at first instance in *Ortiz*: "If the test is one of public policy, applied to the foreign law in question in this particular case, there is in my judgment every reason why the English courts should enforce section 12 of the Historic Articles Act 1962 of New Zealand. Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory" ([1982] 3 QB 432, para. 152).

[89] The appeal judgment on the preliminary question of the efficacy of Iranian law was followed by the House of Lords' refusal to grant appeal in mid-2008. The success of the first appeal and the defendant's failure to obtain permission for a second appeal led to a final settlement in late 2011. See N. PALMER, Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims, in M.-A. RENOLD/ A. CHECHI/ A.L. BANDLE (eds.), *Resolving Disputes in Cultural Property*, Geneva 2012, p. 85, 91.

[90] Judgment of 16 October 2006, 10 U 286/05, NJW 2007, 705.

[91] M. WELLER, *Iran v. Barakat*: Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective, *Art Antiquity and Law* 2007, p. 283.

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private international law rules that contravene the fundamental values as to which a broad consensus has emerged in the international community.[92]

Apart from *Barakat*, other well known cases underline the existence of this international public policy argument. In 1972, the German Federal Court of Justice declared that a shipping insurance contract relating to the export of artefacts from Nigeria to Germany was void since such export was contrary to German "good morals" in light of the 1970 UNESCO Convention, as an instrument representing the emerging international public policy on the issue of restitution: "In the interest of the safeguarding of the morality of the international trade in cultural goods, the export of cultural objects in violation of an export prohibition of the State of origin does not deserve the protection by private law including the protection by the insurance of the transportation of cultural goods from the territory of a foreign State in violation of that State's export control laws".[93] Similarly, in 1997 a Swiss court ordered the return of a stolen painting to France and emphasised that the 1970 UNESCO Convention and the 1995 UNIDROIT Convention contain principles expressing an "*ordre public international*" either in force or in formation, and which "*concrétisent l'impératif d'une lutte internationale efficace contre le trafic de biens culturels*".[94] It should be stressed that neither Germany nor Switzerland were parties to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention at the time of these judgments.

The *City of Gotha* case concerned the painting *The Holy Family* by Joachim Wtewael, which was formerly part of the collections of the Duke of Saxe-Coburg-Gotha.[95] The painting was removed from Gotha by Soviet troops immediately after the end of the Second World War. It re-emerged in West Berlin in 1987 where it was acquired by Mina Breslov. In 1988, it was consigned to a major London-based auction house, which sold it to Cobert, a Panamanian corporation, and it disappeared once again. It reappeared in 1992 in London, when it was offered for sale at Sotheby's. The German government and the city of Gotha brought an action in England asking for recovery of the painting. MOSES J. held that German law – the *lex rei sitae* – applied to this multi-jurisdictional ownership title dispute, and focused on the question of whether Cobert could rely on the German statute on prescription.[96] The judge held that the restitution claim was not barred because,

[92] P. MAYER, Effect of International Public Policy in International Arbitration, in L. MISTELIS/ J.D.M. LEW (eds.), *Pervasive Problems in International Arbitration*, Alphen aan den Rijn 2006, p. 61.

[93] *Entscheidungen des Bundeserichtshofs in Zivilsachen*, BGH, 22 June 1972, BGHZ 59 No. 14, 82.

[94] *L. v. Chambre d'accusation du Canton de Genève*, Tribunal fédéral, 1 April 1997, ATF 123 II 134, *SJ* 1997, p. 529. Translation: "highlight the importance of an efficient international response to the trafficking of cultural goods".

[95] *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance SA*, 9 September 1998 (unreported).

[96] S. 1 and 4 of the United Kingdom Foreign Limitation Period Act 1984 provide that where proceedings before an English court are governed by the law of a foreign legal system, that system's law will also apply as regards limitation of actions, to the exclusion of the English statute of limitations.

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according to German law,[97] the period of limitation with regard to the item concerned had begun to run anew when it was transferred into the possession of the person who misappropriated it in 1987 – thereby setting aside the first misappropriation. Consequently, the claim succeeded and the painting returned to Gotha. However, MOSES J. established – in obiter – that had German law barred legal action, thereby protecting thieves or *mala fide* purchasers, then the German limitation period would have been set aside since it conflicted with English public policy: "To permit a party which admits it has not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and possibility of recovering it, is, in my judgment, contrary to the public policy […]".[98]

These cases reflect an important public policy consideration justifying the recognition and application of foreign law, namely the general interest in the protection of cultural property: not only have States adopted legislation in order to protect their own patrimony, but they have also participated in the adoption of international instruments whose underlying rationale is that the cultural property of every State must be protected through the concerted efforts of the international community.

In a way, this public policy argument can be regarded as a safety valve to denounce the failure of domestic systems to yield palatable solutions, solutions which are at variance with the values espoused by the forum State. Since classical choice-of-law rules may result in the application of noxious foreign rules, the public policy reasons embedded in the law of the forum serves as a corrective.[99]

Moreover, it can be argued that this transnational public policy stems from the principles contained in the treaties promulgated under the aegis of UNESCO as well as the instruments crafted by other stakeholders. These include: (i) the resolutions adopted by the United Nations Security Council in order to thwart the illicit trade in cultural property in specifically designated countries;[100] (ii) the documents adopted to guide the resolution of claims over cultural objects misappropriated during the Second World War;[101] (iii) the ethical codes adopted by museums, museum associations and associations of art trade professionals; (iv) the

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[97] § 221 of the German Civil Code contains a limitation period of 30 years on the right to recover property that runs irrespective of whether the claimant was aware of the existence of the claim or the identity of the person in possession.

[98] *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance SA* (note 95), at 212.

[99] F.K. JUENGER, *Choice of Law and Multistate Justice*, Dordrecht 1993, p. 79-80.

[100] See resolutions 1483 of 22 May 2003, 2199 of 12 February 2015 and 2347 of 24 March 2017. Adopted under Chapter VII of the United Nations Charter, these resolutions aimed to stem the looting and trafficking in Iraq and Syria following the Gulf Wars and the rise of the so-called Islamic State.

[101] See *e.g.* the Principles adopted on the occasion of the Washington Conference on Holocaust-Era Assets of 1998; the 1999 Council of Europe Parliamentary Assembly Resolution 1205 on Looted Jewish Cultural Property; and the 2009 Terezin Declaration issued as a result of the Holocaust Era Assets Conference convened under the auspices of the European Union and of the Czech Presidency.

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tailored rules and non-adversarial procedures developed by international and non-governmental organisations aimed at the resolution of cultural property-related disputes;[102] and, finally, (v) the numerous negotiated and mediated agreements entered into by States and museums.

Alternatively, these developments can be seen as a first step towards the formation of a *lex culturalis*.[103] Aimed at bringing the uniqueness of cultural property to the fore, the *lex specialis* would include rules allowing judges to set aside the private international law rules which have been conceived for normal business transactions involving ordinary goods, which disregard the impact of illicit trafficking on the licit art market, and which as such may lead to unpredictable if not harmful effects on the resolution of cultural property-related disputes. Arguably, these are the rules that allow judges to: (i) apply the laws of the State that has the closest connection with the case at the expense of the culture-insensitive *lex rei sitae*; (ii) extend limitation periods in order to prevent criminals, reckless art professionals and dishonest collectors from profiting from the expiry of time limits; and (iii) take into consideration and enforce the ownership rights set out in the patrimony laws. As such, the *lex culturalis* will allow private international law and cultural heritage law to work together with a view to restraining the application of norms that seem deferential to the commercial imperatives that dominate the international art market, and that have proved to be unable either to control or discipline effectively the demand side of the market or to fight the illicit trade in cultural property.[104]

However, it can be argued that a *lex culturalis* will only ever see the light of day if the current predominance of financial and business interests and the greed for profit of traffickers, art merchants and collectors will be reduced.

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[102] See A. CHECHI, New Rules and Procedures for the Prevention and the Settlement of Cultural Heritage Disputes: A Critical Appraisal of Problems and Prospects, in F. LENZERINI/ A.F. VRDOLJAK (eds.), *International Law for Common Goods – Normative perspectives on human rights, culture and nature*, Oxford 2014.

[103] On the *lex culturalis*, see A. CHECHI, *The Settlement of International Cultural Heritage Disputes*, Oxford 2014.

[104] C. ROODT (note 7), p. 11-16.

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NATIONAL REPORTS

INTERNATIONAL SURROGACY ARRANGEMENTS TEST THE PUBLIC POLICY EXCEPTION

AN ITALIAN PERSPECTIVE

Maria Caterina BARUFFI*

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I. Introduction

With increasingly frequent judicial decisions concerning surrogacy arrangements in several countries,[1] a reappraisal of the role of general principles of private

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[1] To date, an increasing number of States allow the recourse to surrogacy arrangements, even though the respective legislation differs in the actual regulation of these practices. From a general perspective, a distinction may be drawn among States where surrogacy is prohibited by law (besides Italy, this is also the case in France and Germany); States where surrogacy is allowed, except for commercial purposes, *i.e.* against remuneration for the surrogate mother; and States where surrogacy is only allowed against reimbursement of expenses (including medical costs) incurred for the pregnancy and the arrangement itself (*e.g.* Argentina, Australia except the Northern Territory, Belgium, Canada, Czech Republic, Japan, Ireland, Netherlands, and Venezuela). In some countries it is possible to enter into an agreement regulating the relations between the intended mother and the surrogate, which shall have effect by means of judicial review (it is so in Australia, Israel, South Africa and, to some extent, New Zealand). Other States also allow the commercial form of surrogacy, for example India (where, nonetheless, it is not permitted for

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 295-312
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Printed in Germany

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international law (PIL) is required. In these cases, in particular, the public policy (or order) exception, meant to protect the founding values of the domestic legal order concerned, needs to be read in light of the best interests of the child.

Considering the situation in Italy as particularly illustrative in this regard, this paper briefly presents the current domestic legislation in relation to surrogacy practices and provides a general overview of the operation of the public policy

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same-sex partners, couples coming from countries that prohibit this practice, and singles), Mexico, Thailand (where it is not permitted for foreign nationals), Russia, Ukraine and certain US States (*e.g.* California). It should be specified that some of the countries permit recourse to surrogacy practices only where the impossibility of becoming pregnant is certified by medical reports, for example Greece and Portugal. The latter State, in particular, has passed on 31 July 2017, Decree No. 6/2017, which implements the Law of 22 August 2016, No. 25, authorising altruistic surrogacy provided that an impossibility to procreate naturally has been medically ascertained (for a comment, see A.J. VELA SÁNCHEZ, La gestatión por sostitución se permite en Portugal. A propósito de la Ley Portuguesa n.° 25/2016, de 22 de agosto, *Diario La Ley* 2016, No. 8868). The Portuguese legislation on surrogacy has already been subject to constitutional review, which held that such practice is consistent with a woman's right to self-determination insofar as it is extensively regulated by law: see *Tribunal Constitucional*, judgment of 24 April 2018, No. 225. For a comparative perspective on the different legislations (albeit somewhat outdated and limited to EU Member States), see *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013, PE 474.403, available at <www.europarl.europa.eu>, where it is proposed to enact a regulation that addresses separately the contractual aspects of the surrogacy arrangement – mainly concerning party autonomy – from those relating to the protection of the child – mainly involving considerations of public interest – at 159 *et seq*. In the extensive literature on the topic, see *e.g.*: K. TRIMMINGS, P. BEAUMONT, *International Surrogacy Arrangements. Legal Regulation at the International Level*, Oxford-Portland 2013; J. BAKER, Eastern and Western perspectives of surrogacy: out with the old, in with the best interest?, *International Family Law* 2016, at 338 *et seq*.; A. MARTONE, La maternità surrogata: ordine pubblico e *best interest of the child* (art. 8 CEDU), in A. DI STASI (a cura di), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2010-2015)*, Milano 2016, 717 *et seq*., at 718; regarding the legislation in Belgium, see P. WAUTELET, La filiation issue d'une gestation pour autrui: quelles règles de droit international privé pour la Belgique?, in G. SCHAMPS, J. SOSSON (sous la direction de), *La gestation pour autrui: vers un encadrement?*, Bruxelles 2013, at 213 *et seq*.; regarding France, see K. MEILHAC-PERRI, National Regulation and Cross-Border Surrogacy in France, this *Yearbook* 2014/2015, at 275 *et seq*.; regarding Greece and the UK, see K. ROKAS, National Regulation and Cross-Border Surrogacy in European Union Countries and Possible Solutions for Problematic Situation, this *Yearbook* 2014/2015, at 289 *et seq*.; concerning the situation in Spain, where a legislative proposal to regulate surrogacy has been submitted on 8 September 2017, see A. BATUECAS CALETRÍO, L'iscrizione della nascita nel registro civile spagnolo dei nati da maternità surrogata all'estero, *Rivista di diritto civile* 2015, No. 5, 1153 *et seq*.; G. PALMERI, Spunti di riflessione su maternità di sostituzione e trascrivibilità del certificato di nascita a partire dalla sentenza 6 febbraio 2014, n. 853/2013 del Tribunal Supremo de Madrid (ricorso 245/2012), *GenIUS* 2015, at 199 *et seq*.; P. OREJUNDO PRIETO DE LOS MOZOS, Maternidad subrogada en España: estado de la cuestión, *GenIUS* 2016, at 10 *et seq*.; L.S. PALLARÉS, La iniciativa legislativa popular para la regulación de la gestación por subrogación en España: un estudio desde la función del notario en el contrato de gestación por sostitución, *Revista de Derecho Privado* 2016, No. 31, at 89 *et seq*.

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exception. Then, the case law of both the European Court of Human Rights and the Italian courts is specifically analysed with a view to highlighting the main trends followed when dealing with the recognition of decisions involving surrogate-born children, whose family status has been lawfully acquired abroad, but is not regulated in the legal order of the requested State. Lastly, provisional conclusions are proposed in light of these (yet) unsettled judicial approaches, recalling in particular the role of international co-operation between States as a possible way forward in order to promote the development of a clearer and more predictable regulatory framework in this area of law.

In Italy, the only legal basis for surrogacy is set out in the Law of 19 February 2004, No. 40, regulating medically assisted procreation.[2] Pursuant to Article 12(6), surrogacy practices[3] are punishable by a term of imprisonment of three months to two years, and by a fine ranging from 600.000 to one million Euros. This prohibition against surrogacy has not yet been amended, notwithstanding subsequent decisions rendered by the Italian Constitutional Court, whereby a number of provisions of the Law were declared unconstitutional.[4] In this context, however, the need to protect children's rights is becoming a prevailing issue in the balance with other sensitive interests. Hence, in cases where surrogacy arrangements were made and performed abroad, it is unclear whether fundamental principles pertaining to the Italian legal order still limit the recognition of foreign values. An answer to this question has been provided by the Constitutional Court in a ruling regarding Article 263 of the Italian Civil Code. This provision establishes that the recognition of a child can be challenged on grounds of truthfulness (*difetto di veridicità*), without specifying that this challenge can be upheld only providing that it is considered in the best interests of the child. In cases concerning surrogacy-born children, this further condition could facilitate the recognition of the family status. The Court, however, despite excluding that the

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[2] Law of 19 February 2004, No. 40, "Norme in materia di procreazione medicalmente assistita". Article 9(2) establishes the primacy of the rule according to which the birthing woman shall be considered as the mother by preventing the mother of the child born via surrogacy practices from opting to remain anonymous. This piece of legislation has been subject to numerous judicial decisions rendered by both the Italian Constitutional Court and the European Court of Human Rights: in the literature, see *e.g.* C. CAMPIGLIO, Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza, *Riv. dir. int. priv. proc.* 2014, at 481 *et seq.*; V. IVONE/ C. MIRAGLIA, Fecondazione assistita e diagnosi preimpianto sulla tutela dell'embrione (art. 8 CEDU), in A. DI STASI (a cura di), *CEDU e ordinamento italiano* (note 1), at 693 *et seq.*; R. SENIGAGLIA, Vita prenatale e autodeterminazione: alla ricerca di un "ragionevole" bilanciamento tra interessi contrapposti, *Rivista di diritto civile* 2016, at 1554 *et seq.*

[3] More precisely, this provision punishes whoever, in any form, performs, organises or advertises surrogacy.

[4] Namely, Article 4(3) of Law No. 40/2004 that prohibited heterologous forms of medically assisted procreation (*Corte costituzionale*, judgment of 9 April 2014, No. 162); Articles 13(3)(b) and 13(4) that imposed criminal liability for the doctor who implanted into the uterus only healthy embryos or those being healthy carriers of genetic diseases (*Corte costituzionale*, judgment of 11 November 2015, No. 229); and Article 14(2)-(3) insofar as it established a limit in embryo production and prevented cryoconservation (C*orte costituzionale*, judgment of 8 May 2009, No. 151).

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assessment of the consistency between the family status and the act of procreation amounts to an unconditional value from a constitutional law perspective, reiterated the high degree of disapproval that the domestic legal order attaches to surrogacy practices (as they are indeed subject to criminal penalty).[5] Therefore, the current wording of Article 263 was not deemed contrary to the Italian Constitution.

As explained in the following sections, a balance must be struck between the ascertainment of the biological origin of the child (being an essential element of his/her personal identity) and his/her best interests.

II. The Public Policy Exception

A general overview regarding the role of public policy in PIL systems is worthwhile. Public policy considerations may come into play in two situations. On the one hand, in the determination of the applicable law, domestic founding values may exclude either the functioning of the conflict-of-laws rules (by means of the so-called "mandatory rules")[6] or the application of the law indicated as applicable by the same conflict-of-laws provisions (public policy exception *stricto sensu*). On the other hand, public order may be invoked at the stage of recognition of foreign judgments.[7] For the purposes of this paper, only the latter situation is taken into account, as international surrogacy arrangements mainly call into question issues regarding the recognition of foreign decisions and/or public documents establishing parent-child relationships.

In Italy, whenever the given situation falls outside the scope of application of either EU or international legal sources, the residual framework on recognition of foreign decisions, as set out at Articles 64 and 65 of the Italian PIL Act,[8] is applicable. The former Article applies on a general basis and provides a number of

[5] *Corte costituzionale*, judgment of 18 December 2017, No. 272, para. 4.3 of the legal reasoning. With regard to the approach to be taken when balancing the conflicting interests at stake and the specific elements to consider, see E. OLIVITO, Di alcuni fraintendimenti intorno alla maternità surrogata. Il giudice soggetto alla legge e l'interpretazione para-costituzionale, *Rivista AIC* 2018, No. 2, available at <www. rivistaaic.it>, at 13 *et seq*.

[6] It must be specified that, in this context, the public policy considerations amount to a direct limit to the application of the foreign law in favour of certain substantive rules of the *lex fori*, which shall apply in any case by virtue of their overriding nature conferred by the legislator. As a result, this limit is said to come into play on a preventive basis, as opposed to the "negative" function of the public policy exception, which can be raised at the stage of the application of the foreign law determined by means of the conflict-of-laws rules, or at the stage of recognition, where it is meant to deny effects of foreign judgments in the legal order.

[7] See M.C. BARUFFI, Maternità surrogata ed interessi del minore, in A. CAGNAZZO, F. PREITE (a cura di), *Il riconoscimento degli status familiari acquisiti all'estero*, Milano 2017, at 244 *et seq*., as far as the Italian PIL system is concerned.

[8] Law of 31 May 1995, No. 218, "Riforma del sistema italiano di diritto internazionale privato".

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conditions for recognition, while the latter is a special rule (not applicable to birth certificates issued without the intervention of judicial authorities).[9] According to this special rule, foreign decisions concerning family relationships, issued by the authority of the State whose law is applicable by virtue of Article 33 of the same Act, can have effect in Italy provided that they are not contrary to public policy. In the context of non-contentious jurisdiction, Article 66 of the Italian PIL Act applies to decisions issued by the authorities of the State whose law is referred to under the same Act, to decisions having effects under the law of that State, and to those issued by an authority having jurisdiction pursuant to the same grounds provided in the Italian legal order. In these cases, recognition is automatic upon compliance with the same requirements of Article 65. Should the request for registration of the foreign decision be dismissed by the civil registrar on grounds that the conditions of Article 66 have not been met, the competent judicial authority shall ultimately rule on the recognition (Article 67 of the Italian PIL Act).

It follows that in situations with cross-border implications, an assessment is required in order to determine whether these elements conform to the domestic legal order or whether national fundamental values should take precedence by virtue of the public policy exception. Said exception is, thus, commonly understood as a limit to diversity and is supposed to preserve ethical, social and economic features of the national community.[10] The protection of human rights is also included and cannot be outweighed by the right of a foreign national to his/her cultural identity and, more broadly, by the right to diversity.[11]

In this context, the Italian PIL Act has settled the much-debated issue on the notions of domestic and international public policy, which were previously considered separately due to the fact that the non-derogation to certain Italian legal provisions may apply only in purely internal situations or on a general basis (*i.e.* also in cross-border situations). In other words, the application of a foreign law or the recognition of a foreign decision may well prevail over a substantial number of national rules, albeit mandatory in purely internal situations (so-called "domestic public policy"), without bearing any unacceptable consequences in the legal order concerned.[12] As a result, the domestic public policy, comprising those rules from which individuals cannot deviate by way of agreement, is a broader concept encompassing also the international public policy,[13] *i.e.* those ethical, economic,

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[9] R. CLERICI, Stato di filiazione e diritto internazionale privato, Sezione I, La filiazione nel diritto internazionale privato, in G. BONILINI (dir.), *Trattato di diritto di famiglia*, IV, *La filiazione e l'adozione*, Milano 2016, 3761 *et seq*., at 3783 *et seq*.

[10] In the extensive literature on this topic, see most recently I. THOMA, Public policy (ordre public), in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO, *Encyclopedia of Private International Law*, Cheltenham-Northampton 2017, at 1453 *et seq*., and the bibliographical references there cited.

[11] For further comments on these aspects, *e.g.* J. OSTER, Public policy and human rights, *Journal of Private International Law* 2015, at 542 *et seq*.

[12] F. MOSCONI/ C. CAMPIGLIO, *Diritto internazionale privato e processuale*. *Parte generale e obbligazioni*, vol. I, Milano 2017, 8th ed., at 258; see also O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano 2012, at 20 *et seq.*

[13] F. MOSCONI/ C. CAMPIGLIO (note 12), at 259.

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political and social values that determine the essential features of national legal institutions and may thus vary according to the different historical backgrounds of the Member State at issue.

Recently, the application of this exception has become less frequent, as it usually requires a substantial clash with the fundamental values of the domestic legal order. Furthermore, in recent times, as required by Article 23 of Regulation (EC) 2201/2003[14] ("Brussels IIa") and by the 1996 Hague Convention,[15] a growing amount of attention has been paid to the best interests of the child, as espoused in the 1989 UN Convention on the Rights of the Child.[16] Should the best interests take precedence in a proper balancing of conflicting principles, it follows that the recognition of a foreign judgment must not only be manifestly contrary to the fundamental values of the requested State, but the court must additionally regard the interests of the child as prevailing over any other consideration. Consequently, the principle extends the discretionary power held by courts, insofar as it requires a further balancing between the rules governing the recognition of foreign decisions – which would allow for refusal – and the necessary compliance with the best interests of the child – which would instead favour recognition.[17] The practical effect of the public policy exception is thus mitigated,[18] also in order to prevent possible situations where the parent-child relationship is not uniformly recognised in each of the States involved.[19]

Nonetheless, the best interests of the child, being the primary consideration in all proceedings where a minor is involved, should not be construed as a

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

[15] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. In Italy it was ratified by Law of 18 June 2015, No. 101, and entered into force on 1 January 2016.

[16] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Italy has ratified it by Law of 27 May 1991, No. 176.

[17] C. Campiglio/ F. Mosconi, Giurisdizione e riconoscimento di sentenze in materia matrimoniale e di responsabilità genitoriale, in *Digesto, Discipline pubblicistiche*, *Aggiornamento*, 4th ed., Torino 2005, 336 *et seq*., at 358.

[18] This relativity of the notion of public policy draws from the French doctrine of *effet atténué*, which distinguishes between the situation where a given right is acquired in the *forum* from that where the right has been acquired abroad, without fraud, and has to be given effect in the *forum*. Similarly, in Germany the notion of *Inlandsbeziehung* has been proposed to determine the violation of the public policy of the *forum* according to the degree of connection of the given factual circumstance to the domestic legal order.

[19] C. Honorati, Maternità surrogata, *status* familiari e ruolo del diritto internazionale privato, in A. Di Stasi (a cura di), *Cittadinanza, cittadinanze e nuovi* status*: profili internazionalistici ed europei e sviluppi nazionali*, Napoli 2018, *passim*, carries out a thorough assessment regarding the role of fundamental rights (and particularly the best interests of the child) in the context of the operation of the public policy exception.

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justification for the recognition of each and every factual situation, even those that have not been regulated by domestic provisions. The same principle may indeed acquire a further purpose and act as a "counter-limit" to prevent the recognition of a decision that was taken with a view to protecting the child, but on the basis of a substantive assessment that is different from that imposed by the domestic legal order. As a result, the same best interests of the child would represent a limit to the continuity of the family status throughout the EU Member States, although the mutual recognition would instead require a narrow interpretation of the scope of the public policy exception.[20] This further purpose would be all the more relevant whenever the circulation of the status involves third States, as they are not bound by the principle of mutual recognition in the absence of the mutual trust which forms the basis of the European integration process.

These evolving trends in the application of the public policy exception are discussed in the following sections with particular regard to the case of international surrogacy arrangements.

III. The Case Law of the European Court of Human Rights

The European Court of Human Rights (hereinafter "ECtHR") has been called upon to verify the compliance of the Italian legislation with the European Convention of Human Rights (hereinafter "ECHR") and, indirectly, to assess the scope of application of the public policy exception in cases involving surrogacy arrangements.[21] In *Paradiso and Campanelli*, the first instance judgment[22] found that Italy had infringed the ECHR but the Grand Chamber[23] ultimately reversed that holding.

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[20] In this sense, R. CAFARI PANICO, Identità nazionale e identità personale, in A. DI STASI (a cura di), *Cittadinanza, cittadinanze e nuovi* status (note 19), at 215 *et seq*. For further comments on the principle of the best interests of the child, which shall be interpreted in accordance with the factual circumstances of each case, and does not amount to an unconditional consideration, see I. PRETELLI, Les défis posés au droit international privé par la reproduction technologiquement assistée. À propos de deux décisions italiennes en matière de maternité de substitution, *Rev. crit. dr. int. pr.* 2015, 559 *et seq*., at 570 *et seq*.

[21] For an overview of the ECtHR case law, see M. WELLS-GRECO/ H. DAWSON, Inter-Country Surrogacy and Public Policy: Lessons from the European Court of Human Rights, this *Yearbook* 2014/2015, at 315 *et seq*.; S. TONOLO, L'evoluzione dei rapporti di filiazione e la riconoscibilità dello *status* da essi derivante tra ordine pubblico e interessi del minore, *Rivista di diritto internazionale* 2017, at 1070 *et seq*.; C.E. TUO, Riconoscimento di status familiari e ordine pubblico: il difficile bilanciamento tra tutela dell'identità nazionale e protezione del preminente interesse del minore, *Il Corriere giuridico* 2017, 952 *et seq*., at 956.

[22] European Court of Human Rights, Second Section, judgment of 27 January 2015, *Paradiso and Campanelli* v. *Italy*.

[23] European Court of Human Rights, Grand Chamber, judgment of 24 January 2017, *Paradiso and Campanelli* v. *Italy*.

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The factual background was as follows: an Italian couple made a surrogacy arrangement in Russia, after failed attempts with medically assisted procreation techniques in Italy and with adoption, though the couple was listed among those eligible to adopt. The couple had been registered in Russia as the child's parents, though neither was biologically linked to the child. The Italian civil status registrar refused, however, to enter the birth certificate, issued under Russian legislation, into the Italian register. The birth certificate established that the new-born was the Italian couple's child. The Italian Consulate was notified of the false data contained in the birth certificate, and criminal proceedings for alteration of public registers were consequently initiated, pursuant to Article 567 of the Italian Criminal Code. In addition, adoption proceedings were commenced before the Juvenile Court of Campobasso, as the child was considered in a state of abandonment. The appeal filed by the couple against the child's removal order was dismissed and the child was thus put up for adoption.

The intended parents applied to the ECtHR arguing that the removal and adoption of the child amounted to an arbitrary interference in their family life. In view of the child's settlement in a foster family,[24] the ECtHR, in its first instance judgment, did not order the return of the child to the intended parents. It nonetheless held that the removal order constituted an infringement of Article 8 of the ECHR as removal should be a last resort measure taken only in cases of immediate risk to the child.[25] The balance struck by public authorities between the best interests of the child[26] and the public policy exception should limit the latter to the extent to which the removal can only be ordered where the child faces a serious and irreparable danger.[27] The best interests of the child were given greater importance in the Court's reasoning, thus leading to the weakening of the public policy exception. The decision indeed stressed the need to regard the best interests of the child as the paramount consideration that should guide the resolution of complex cases.

Even though this approach towards a substantial protection of the child appeared to provide sufficient guidance for national courts, the ECtHR was again called upon to rule on *Paradiso and Campanelli* after the Italian Government

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[24] Also, in the Court's view, the national authorities "did not act unreasonably" in refusing to enter the foreign birth certificate into the Italian civil register due to the lack of any biological link between the child and the intended parents: European Court of Human Rights, Second Section, judgment of 27 January 2015 (note 22), paras. 77 and 84. See also the joint partly dissenting opinion of Judges Raimondi and Spano, paras. 12-14.

[25] European Court of Human Rights, Second Section, judgment of 27 January 2015 (note 22), para. 80.

[26] European Court of Human Rights, Second Section, judgment of 27 January 2015 (note 22), para. 75; Fifth Section, judgment of 26 June 2014, para. 60; First Section, judgment of 28 June 2007, *Wagner and J.M.W.L.* v. *Luxembourg*, paras. 133-134.

[27] European Court of Human Rights, Second Section, judgment of 10 April 2012, *Pontes* v. *Portugal*, paras. 74-80; Fourth Section, judgment of 13 March 2012, *Y.C.* v. *The United Kingdom*, paras. 133-138; Grand Chamber, judgment of 6 July 2010, *Neulinger and Shuruk* v. *Switzerland*, para. 136; Grand Chamber, judgment of 13 July 2000, *Scozzari and Giunta* v. *Italy*, para. 148.

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requested that the case be referred to the Grand Chamber. On 24 January 2017,[28] the Grand Chamber reversed the first instance decision, holding that there had been no violation of Article 8 of the ECHR.[29] The Court, however, did not take into account the further issues of the registration of the Russian birth certificate, the recognition of the legal parent-child relationship in respect of a child born from a surrogacy arrangement, and the legality of the recourse to that reproductive technique. The Grand Chamber first defined the scope of its review under Article 8 of the ECHR, as including the measures taken by the Italian authorities which resulted in the separation, on a permanent basis, of the child from the intended parents in the absence of any biological link between them. Then, it had to establish whether the urgent measures ordered by the Juvenile Court of Campobasso, which led to the child's removal, amounted to an interference in the intended parents' right to respect for their family life and/or their private life within the meaning of Paragraph 1 of the mentioned provision and, if so, whether the challenged measures were taken in accordance with Paragraph 2 thereof. As opposed to the first instance holding, which established that there was a *de facto* family life in the case at issue, the Grand Chamber took the view that no family life existed[30] on the grounds of the lack of biological ties between the child and the intended parents and the uncertainties arising out the relevant legal framework. Instead, the measures taken by the authorities, *i.e.* the child's removal and subsequent placement in a foster family, without contact with the intended parents, and the appointing of a guardian, fell within the scope of the right to private life, equally protected by Article 8 of the ECHR. The Grand Chamber thus verified that these measures were justified under Paragraph 2 of that Article as being in accordance with the law; as pursuing legitimate aims by protecting the child's rights and freedoms and preventing disorder; and, lastly, as being necessary in a democratic society.[31] In particular, when assessing that the conditions required by the last part of the mentioned provision were indeed met, the ECtHR pointed out that the interests of the child were the primary consideration, while less importance was to

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[28] European Court of Human Rights, Grand Chamber, judgment of 24 January 2017 (note 23). For a comment see *e.g.* P. BEAUMONT/ K. TRIMMINGS, The European Court of Human Rights in Paradiso and Campanelli v. Italy and the way forward for regulating cross-border surrogacy, *University of Aberdeen Centre for Private International Law Working Paper Series* (2017), No. 3, available at <www.abdn.ac.uk>; C. HONORATI, Paradiso e Campanelli c. Italia: atto finale, *Quaderni costituzionali* 2017, at 438 *et seq*.

[29] The Grand Chamber supported the view expressed in the joint partly dissenting opinion of Judges Raimondi and Spano annexed to the 2015 judgment, which maintained that the factual circumstances of the case could not lead to the establishment of a family life resulting from the illegality of the surrogacy arrangement entered into in Russia, due to the infringement of the Italian provision on medically assisted procreation and adoption.

[30] In this regard see, however, the joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev annexed to the 2017 judgment.

[31] Indeed, national courts had relied on relevant and sufficient reasons when taking the measures at issue, which were also proportionate to the legitimate aims pursued considering the fair balance struck between competing interests and the wide margin of appreciation enjoyed by the States in this regard: see European Court of Human Rights, Grand Chamber, judgment of 24 January 2017 (note 23), para. 194.

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be attached to the intended parents' interest in continuing their relationship with the child.[32] In addition, in that case national courts were faced with the choice of legalising the situation created by the parents in breach of Italian law or protecting the child by enforcing the relevant national rules and removing him from the intended parents. By following the latter option, according to the Grand Chamber the interference with their private life was ultimately not in breach of Article 8 of the ECHR.

The new approach proposed by the ECtHR with particular regard to the notion of family life may be intended to limit the wide use of Article 8 of the ECHR, to which national courts have resorted with the aim of allowing the registration of any foreign document (and thus, recognising the underlying personal status created abroad) without complying with the relevant domestic rules on surrogacy and adoption. This line of reasoning is further consistent with its previous holding in *Mennesson* v. *France*,[33] where the intended father and the child born to a surrogate mother had a biological link, and therefore enjoyed a parent-child relationship. This factual circumstance, however, was completely lacking in *Paradiso and Campanelli*, as mentioned above.

IV. The Italian Case Law: The Elusive Nature of Public Policy

A. The Best Interests of the Child

In cases of recognition of foreign decisions, the public policy exception has consistently been the core issue in the proceedings before national courts.[34] Generally, in the Italian case law, the existence of shared international values has been referred to in order to justify a scaled approach in the application of the public policy exception depending on how strong is the actual link between the

[32] European Court of Human Rights, Grand Chamber, judgment of 24 January 2017 (note 23), para. 215. For critical remarks on the little attention paid by the ECtHR to the best interests of the child, see A. VIVIANI, *Paradiso e Campanelli* di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?, *GenIus* 2017, 78 *et seq*., at 82 *et seq*.

[33] European Court of Human Rights, Fifth Section, judgment of 26 June 2014, *Mennesson* v. *France*; see also, on the same date, *Labassee* v. *France*. For a comment in the Italian literature, see M.C. BARUFFI, Maternità surrogata ed interessi del minore (note 7), at 263 *et seq*.

[34] For instance, on 25 February 2009 the Court of Appeal of Bari had considered that the requirements set out at Articles 64 and 65 of the Italian PIL Act were met and therefore ordered the competent authority to enter the parental orders issued by an English court into the Italian civil register, so that the parent-child relationship could be positively recognised (the decision is reported in *Int'l Lis*, inverno 2009/2010, at 22 *et seq*., and commented by M.C. BARUFFI, *Maternità surrogata e questioni di status nella giurisprudenza italiana ed europea*).

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cross-border situation and the domestic legal order.[35] In any case, this link should not, in itself, be considered as crucial for the purposes of the *effet atténué* of the exception at hand, but only as one of the relevant elements.

The public policy exception is, furthermore, common to cases regarding birth certificates lawfully issued abroad. The consistency of such instruments and Italian public policy may indeed be questioned to the extent to which these instruments comply with the legislation of the country where they were issued, but nonetheless contain false statements according to the requested State's legal order.[36]

Whether the situation involves a judicial decision or a public document, national authorities are called upon to strike a sensitive balance between the best interests of the child and the public policy exception, the applicability of which appears substantially reduced. This narrow approach was followed in decision No. 19599 of 30 September 2016, rendered by the Italian Supreme Court.[37] In that

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[35] S. TONOLO, La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore, *Riv. dir. int. priv. proc.* 2014, 81 *et seq*., at 89, where it is argued that in cases involving foreign children the public policy exception should be interpreted according to the principle of proximity, and thus applied only whenever there is a substantial link with the *forum*. See also O. FERACI (note 12), at 12 *et seq*.; R. BARATTA, Diritti fondamentali e riconoscimento dello *status filii* in casi di maternità surrogata: la primazia degli interessi del minore, *Diritti umani e diritto internazionale* 2016, 309 *et seq*., at 316.

[36] It should be specified that in this case the public policy exception would not apply by virtue of the Italian PIL Act (namely, Article 65), but rather pursuant to Articles 18 and 19 of the Presidential decree of 3 November 2000, No. 396, concerning civil status records ("Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'art. 2, co. 12, legge 15 maggio 1997, n. 127"), as amended by Legislative decree of 19 January 2017, No. 5, taking into account the introduction of civil partnerships in the domestic legal order ("Adeguamento delle disposizioni dell'ordinamento dello stato civile in materia di iscrizioni, trascrizioni e annotazioni, nonché modificazioni e integrazioni normative per la regolamentazione delle unioni civili, ai sensi dell'art. 1, co. 28, lettere a) e c), della legge 20 maggio 2016, n. 76, che disciplina le unioni civili tra persone dello stesso sesso e le convivenze"). More precisely, according to Article 19(2) of the Presidential decree No. 396/2000 the registration of foreign certificates in the civil status records of the place of residence is not allowed if they are contrary to public policy. It follows that the competent authorities shall have exclusive competence to decide whether a personal status lawfully created abroad may be entered into the domestic records. This applies in cases where the persons involved are foreign nationals and at least one of them resides in Italy, as well as in cases where an Italian national and a foreign national are involved, and provided that the fundamental rights protected by the EU (such as the right to free movement and to non-discrimination) are not infringed. On the importance of certificates of civil status issued abroad see R. CAFARI PANICO, *Lo stato civile e il diritto internazionale privato*, Padova 1992; and more recently, S. TONOLO (note 35), at 83 *et seq*., also with regard to the differences between Articles 18 and 19 of the Presidential decree No. 396/2000 in cases concerning surrogacy, at 87 *et seq*.

[37] *Cassazione civile, sezione I*, judgment of 30 September 2016, No. 19599, commented by G. FERRANDO, Ordine pubblico e interesse del minore nella circolazione degli *status filiationis*, *Famiglia e diritto* 2017, at 190 *et seq*.; C. FOSSÀ, Il paradigma del best interest of the child come roccaforte delle famiglie arcobaleno, *Giurisprudenza italiana*

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decision, the notion of international public policy was interpreted in light of the fundamental human rights espoused in the Constitution, the EU Treaties and Charter, and the ECHR. As a result, only those principles that even the legislator cannot overturn are meant to be included in the notion of international public policy. Therefore, the drawing up of a foreign certificate according to rules that may run counter to Italian legislation (albeit of a mandatory nature) falls outside the limited scope of international public policy.[38] In that case, a Spanish birth certificate that acknowledged the motherhood of two women (both having biological ties with the child)[39] could be recognised on grounds that the rule according to which only the birthing woman shall be considered as the mother does not qualify as a principle having constitutional relevance, and thus cannot be included in the notion of international public policy as defined above.[40]

Along the same lines, the Court of Appeal of Trento, expressly recalling decision No. 19599/2016, ordered the recognition of a foreign decision establishing the parent-child relationship of two children born from a surrogacy arrangement and the male partner of their biological father.[41] Indeed, the right of the children to obtain recognition of their personal status could be outweighed only by concurring principles having constitutional relevance. In this case, the above-mentioned holding of the Supreme Court, which involved a heterologous *in vitro* fertilisation, was thus extended to a different factual background. However, this

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2017, at 2082 *et seq*.; G. PALMERI, Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia *same sex*, *La nuova giurisprudenza civile commentata* 2017, at 362 *et seq*.; S. STEFANELLI, *Status*, discendenza e affettività nella filiazione omogenitoriale, *Famiglia e diritto* 2017, 83 *et seq*., at 91 *et seq*.; for critical remarks see O. FERACI, Ordine pubblico e riconoscimento in Italia dello status di figlio "nato da due madri" all'estero: considerazioni critiche sulla sentenza della Corte di cassazione n. 19599/2016, *Rivista di diritto internazionale* 2017, at 169 *et seq*.

[38] This was further held by *Cassazione civile, sezione I*, judgment of 15 June 2017, No. 14878, commented by S. STEFANELLI, Riconoscimento dell'atto di nascita da due madri, in difetto di legame genetico di colei che non ha partorito. Nota a Cass. Civ., Sezione I, 15 giugno 2017, n. 14878, available at <www.articolo29.it>.

[39] Indeed, one woman was the egg donor, while the other gave birth to the child.

[40] Similar factual circumstances have been the subject of a further Italian decision, which shared the same considerations of the Supreme Court's judgment No. 19599/2016: see *Tribunale di Perugia, sezione I civile*, decree of 26 March 2018, commented by S. STEFANELLI, Atto di nascita formato all'estero e bigenitorialità omosessuale: da Perugia un passo avanti verso il riconoscimento della filiazione intenzionale, available at <www.articolo29.it>.

[41] *Corte d'Appello di Trento*, order of 23 February 2017, commented by M.C. BARUFFI, Co-genitorialità *same sex* e minori nati con maternità surrogata, *Famiglia e diritto* 2017, at 674 *et seq*. The factual background from which this holding originated was common to subsequent decisions in the Italian case law: see *Tribunale di Livorno, sezione civile*, decree of 14 November 2017; *Tribunale di Roma, sezione I civile*, decree of 11 May 2018. Both rulings ultimately ordered the competent civil status registrar to amend the birth certificate of children born from surrogacy arrangements performed abroad whereby the same-sex spouse of the biological father should be recognised as parent as well. Also in these cases, the Supreme Court's judgments No. 19599/2016 and 14878/2017 played a prominent role in the respective legal reasoning in relation to the public policy exception.

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was supported by inadequate reasoning, which cast doubt on the actual legal basis underlying the decision, taken to ensure certainty of the parent-child relationship. These were in fact the grounds on which the order issued by the Court of Appeal of Trento was subsequently appealed before the Italian Supreme Court. More precisely, the applicant (*i.e.* the public prosecutor before the Court of Appeal of Trento) raised two pleas in law: on the one hand, that the recognition of the foreign decision was contrary to the international public policy of the Italian legal order and constituted an infringement of Articles 16 and 65 of the Italian PIL Act and Article 18 of the Presidential decree No. 396/2000; and, on the other hand, that the decision lacked a proper motivation on this point, as mentioned above. In addition, the Mayor of Trento and the Ministry of Internal Affairs filed a cross-appeal for lack of jurisdiction of the Court of Appeal and violation of their legal standing in the lower instance proceedings.[42] The Supreme Court[43] acknowledged that the lower court had taken a narrow view as to the notion of international public policy, by excluding from its scope those provisions that depend on the margin of discretion conferred to the legislative bodies. The pleas in law, however, called into question legal issues that were considered of particular importance, and thus the case was transferred to the First President of the Supreme Court, who will decide whether to defer the decision to the United Chambers of the Court according to Article 374(2) of the Italian Civil Procedural Code.

The narrow interpretation of the public policy exception maintained in the Supreme Court's holding No. 19599/2016 has been recalled also in a different line of case law in the field of parent-child relationships, namely concerning the recognition of foreign judgments granting to same-sex couples the adoption of children. In such a case, the same Supreme Court indeed held that the principle of the best interests of the child supplements the public policy exception, and, therefore, recognition should be deemed contrary to public policy only insofar as the national legislator would be prevented from introducing a provision equivalent to the foreign law due to its conflict with constitutional values.[44]

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[42] As the pleas raised in the cross-appeal mainly involve domestic rules of civil procedure, they fall partly outside the scope of this paper and will thus not be specifically assessed here. For further comments on these aspects, and generally on the Italian Supreme Court's interim order (note 43), see M.C. BARUFFI, Diritto internazionale privato e tutela degli *status* acquisiti all'estero. Le incertezze della Corte di Cassazione con riguardo alla maternità surrogata, in A. DI STASI (a cura di), *Cittadinanza, cittadinanze e nuovi* status (note 19), at 161 *et seq*.

[43] *Cassazione civile, sezione I*, interim order of 22 February 2018, No. 4382.

[44] *Cassazione civile, sezione I*, order of 31 May 2018, No. 14007. For similar considerations in other cases involving the recognition of foreign adoption judgments, see *Tribunale per i minorenni di Firenze*, decree of 7 March 2017, commented together with the previous holding of the Court of Appeal of Trento by G. FERRANDO, Riconoscimento dello status di figlio: ordine pubblico e interesse del minore, *Il Corriere giuridico* 2017, at 946 *et seq*.; C.E. TUO (note 21); and also *Corte d'Appello di Genova*, sezione I civile, order of 1 September 2017.

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B. Public Policy Considerations

Although the majority position in the Italian case law has paid particular attention to the best interests of the child and the ensuing need to protect the family relationships established with the intended parents who have cared for the child from birth, a divergent (but isolated) approach has nonetheless been proposed. In this regard, reference is made to a 2012 decision of the Juvenile Court of Brescia, subsequently upheld by the Court of Appeal in 2013 and the Supreme Court in 2014,[45] which considered the child, born through gestational surrogacy practices without any biological ties to the intended parents, as a minor in a state of abandonment, and thus available for adoption. The facts of the case were as follows: after failed attempts with assisted reproductive techniques and adoption, a heterosexual couple entered into a commercial surrogacy agreement in Ukraine where their child was subsequently born. According to the applicable law of that country, the male genetic material must come from the intended father. After the civil registrar in Italy refused to enter the foreign birth certificate into the register, and civil proceedings were initiated before the Juvenile Court of Brescia, the intended parents learned that the child had no actual biological ties with either of them. As a result, the surrogacy constituted an infringement of Ukrainian legislation, as described above. The child was, therefore, put up for adoption, as the intended parents could not be considered as such, and the child had no other relative that could care for him. The final decision of the Supreme Court, which confirmed the reasoning of the lower courts, recalled an extensive notion of public policy, namely encompassing not only the internationally-shared values, but also those principles that the national legal order deemed essential. Among them, the prohibition against surrogacy arrangements, which are punishable under Italian criminal law, was included. Indeed, this sanction is meant to protect, on the one hand, the human dignity of the birthing mother and, on the other, the domestic legislation on adoption as being the only option allowing a couple to establish a parental relationship in the absence of any biological ties between parents and children.

As opposed to the decisions analysed in the previous section, the approach taken by the Juvenile Court of Brescia, and then by the Supreme Court, does seem to weigh in favour of a woman's dignity rather than the rights of the child, in particular those rights connected to family status. It must, however, be emphasised that the factual circumstances of the case were peculiar, and the extent of this holding should not be extended to those instances where biological ties exist between (at least) one of the intended parents and the child born to the surrogate mother. In addition, the decision to ultimately consider the child as abandoned and to initiate the proceedings for adoption may raise concerns especially where the parent-child relationship has been developing for a significant amount of time.

[45] See *Tribunale per i minorenni di Brescia*, judgment of 14 August 2012; *Corte d'Appello di Brescia*, judgment of 17 January 2013; *Cassazione civile, sezione I*, judgment of 11 November 2014, No. 24001. These decisions are reported in *Il Quotidiano giuridico*, 25 November 2014, and commented by A. FIGONE.

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C. A Different Background: The Supreme Court Ruling on Punitive Damages

As already mentioned,[46] the public policy exception has, by definition, a general scope of application. With regard to the various views on the notion of international public policy adopted in the Italian case law, the interim order No. 4382/2018, analysed above, referred to another judgment of the Supreme Court given in the different context of recognition of a foreign decision awarding punitive damages.[47] It is thus useful to compare the approach proposed in this latter case with those dealing with international surrogacy arrangements.

The case originated from an application, filed with the Court of Appeal of Venice, for recognition, pursuant to Article 64 of the Italian PIL Act, of three United States judgments (issued in Florida). In these foreign decisions, a US-based retailer successfully claimed indemnification from the Italian-based manufacturer of motocross helmets for a one-million-dollar compensation for damages suffered by a motocross rider due to a faulty helmet. The judgment ordering recognition of the US decisions was then appealed before the Italian Supreme Court, which dismissed the three pleas in law raised by the Italian company. The Court, however, deemed it appropriate to state a general principle of law regarding the compatibility of punitive damages with the Italian legal order.[48] In this regard, the exact nature of civil liability under domestic law has been questioned: should it be narrowly understood as a restoration of the economic loss suffered by the damaged party, or should compensation for damages have a sanctioning function?[49] Referring to its previous case law, the Supreme Court took the view that an effective system of civil liability pursues multiple purposes, but each of them (including the sanctioning function) requires a statutory basis. On these grounds, the issue of public policy was specifically assessed. After an overview of the substantial evolution of this notion over time, the Court underlined its "harmonising" effect as a consequence of the closer co-operation between States within the

[46] See Section II of this paper.

[47] *Cassazione civile, sezioni unite*, judgment of 5 July 2017, No. 16601. Among the many comments, see A. Briguglio, Danni punitivi e delibazione di sentenza straniera: "turning point nell'interesse della legge", *Responsabilità civile e previdenza* 2017, at 1597 *et seq*.; G. Corsi, Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di "punitive damages", *Danno e responsabilità* 2017, at 429 *et seq*.; E. D'Alessandro, Riconoscimento di sentenze di condanna a danni punitivi: tanto tuonò che piovve, *Il Foro italiano*, I, 2017, at 2639 *et seq*.; M. Grondona, Le direzioni della responsabilità civile tra ordine pubblico e "punitive damages", *La Nuova giurisprudenza civile commentata* 2017, I, at 1392 *et seq*. See M. Komuczky, Punitive Damages and Public Policy in the EU, in this *Yearbook* at 509 *et suiv.*

[48] *Cassazione civile, sezioni unite*, judgment No. 16601/2017 (note 47), paras. 5-8.

[49] This aspect involves, more properly, civil law considerations that fall outside the scope of this paper. For a comprehensive assessment and further references, see in the Italian literature G. Vettori, La responsabilità civile fra funzione compensativa e deterrenza, in *Liber amicorum per Francesco D. Busnelli*, I, *Il diritto civile tra principi e regole*, Milano 2008, at 691 *et seq*.; P. Sirena (a cura di), *La funzione deterrente della responsabilità civile*, Milano 2011.

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EU legal system and the progressive sharing of fundamental values, in particular those enshrined in the Charter of Fundamental Rights. Notwithstanding the comprehensive EU law considerations on which the proposed definition of public policy was based, the Court held that a foreign legal institution should in any case be consistent with the Italian Constitution and those domestic laws that give effect to the constitutional principles.[50] As a result, the specific case of the recognition of decisions awarding punitive damages has been considered compatible with Italian public policy where these punitive damages comply with the principles of legality, predictability and proportionality.

When setting this approach against the one previously taken in decision No. 19599/2016,[51] the different views of the notion of public policy are apparent.[52] The more recent ruling on punitive damages, indeed, appears to have preferred a broader and more "domestic" understanding of the public policy exception at issue, which also encompasses those laws resulting from the exercise of legislative discretion in light of constitutional principles. Conversely, the 2016 holding expressly excluded these kinds of national provisions from the scope of application of international public policy, which should instead be based on the fundamental values underpinning the Constitution (and, where compatible, the EU Treaties and Charter, as well as the ECHR) that represent a limit to the discretionary power of the Italian legislator. This latter view thus points to a globalisation of the notion of public policy that, however, seems to overlook its fundamental nature. Indeed, the public policy exception, in itself, is meant to protect the national legal order from the negative effects of the application of a foreign law or the recognition of a foreign decision, and therefore should be intended as a substantially domestic concept, albeit open to the influences of supranational legal sources as clarified in the Supreme Court's 2017 decision on punitive damages.[53]

V. Concluding Remarks: The Role of International Co-operation

The different views currently existing in the Italian case law with regard to the concept of international public policy offer a clear example of the many

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[50] In particular, the Constitution and the related body of domestic legislation were referred to as "living limits" coexisting with the fundamental rights considerations stemming from the EU Charter: see *Cassazione civile, sezioni unite*, judgment No. 16601/2017 (note 47), para. 6.

[51] Discussed in Section IV.A of this paper.

[52] For a specific comment on this point, see G. ZARRA, L'ordine pubblico attraverso il giudice di legittimità: in margine a Sezioni Unite 16601/2017, *Diritto del commercio internazionale* 2017, 722 *et seq*., at 728-734.

[53] Similarly also P. FRANZINA, Some remarks on the relevance of Article 8 of the ECHR to the recognition of family status judicially created abroad, *Diritti umani e diritto internazionale* 2011, 608 *et seq*., at 614.

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implications underlying the broader issue of the circulation of personal and family status.[54] Considering the sensitive interests underlying the matter at hand, the decision, taken by interim order No. 4382/2018,[55] to defer the interpretation of the notion of international public policy to the United Chambers of the Italian Supreme Court seems to be a safe (and welcome) one. Indeed, it will be interesting to learn what guidance will be provided in this respect, and whether domestic courts will be able to adjudicate cases regarding the continuity of family status created abroad in a consistent manner.

Against this unsettled background, international co-operation seems, in any case, a path worth exploring. While the development of new instruments of private international law[56] (or the adjustment of existing ones)[57] may be too ambitious a goal, the efforts currently undertaken by international organisations may prove effective in providing a more defined legal framework dealing with the consequences of cross-border circulation of family status and in building a broader consensus on these issues.

Firstly, reference should be made to the Parentage/Surrogacy Project developed within the framework of the Hague Conference on Private International Law.[58] It has been established since 2011, initially with the aim of addressing the complex PIL questions regarding the establishment, contestation and recognition of children's legal parentage, and then broadening its scope towards the increasingly frequent cases of assisted reproductive technologies and surrogacy arrangements. In this latter regard, in 2015 an Experts' Group was appointed in order to "explore the feasibility of advancing work in this area". Since then, three meetings have taken place, and during the most recent one (6-9 February 2018), the topics discussed included the recognition, by operation of law, of foreign decisions (and public documents) on legal parentage, and whether international surrogacy arrangements would require a differentiated approach.[59] Two further meetings are envisaged, with the fifth focused specifically on international surrogacy

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[54] The difficulties still existing in "intra-EU conflicts of family statuses" are well described by G.P. ROMANO, Conflicts and coordination of family statuses: towards their recognition within the EU?, in *Adoption: cross-border legal issues*, 2015, PE 536.477, available at <www.europarl.europa.eu>, at 17 *et seq*.

[55] Discussed in Section IV.A of this paper.

[56] In this regard, see K. TRIMMINGS/ P. BEAUMONT, International Surrogacy Arrangements: An urgent need for Legal Regulation at the International Level, *Journal of Private International Law* (2011), at 627 *et seq*.; P. BEAUMONT/ K. TRIMMINGS, An International Convention on Surrogacy, in I. KUNDA (ed.), *Family and Children: European expectations and national reality*, Rijeka 2014, at 95 *et seq*.

[57] This view is supported, in particular, by C. THOMALE, State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?, *Journal of Private International Law* 2017, at 463 *et seq*., who suggests an adaptation of the existing Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[58] More information on the Project, as well as reports and other official documents, are available at <www.hcch.net>. See also K. ROKAS (note 1), at 300 *et seq*.

[59] See, in particular, the Report of the Experts' Group on the Parentage/Surrogacy Project (Meeting of 6-9 February 2018), available at <www.hcch.net>.

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arrangements. More precisely, the questions that are to be tackled are the feasibility of applying the general PIL regime to these cases, or the possibility of providing additional rules and safeguards.[60]

Another international development in this context involves the work of the International Social Service (ISS), a Swiss-based NGO established in 1924 that promotes children's rights and welfare through advocacy and raising awareness.[61] The specific topic of international surrogacy arrangements was the subject of a 2013 Call for Action launched with a view to studying and campaigning for the best interests of children.[62] Then, following another Call for Action launched in 2016,[63] a Group of Experts was appointed and tasked with the drafting of "Principles for a better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy", given the current lack of regulation in this field.

It remains to be seen whether the EU will follow along the path of international co-operation. Even though surrogacy has already been assessed in a number of instances by the European Parliament,[64] a further step could perhaps be taken, at least for the time being, by means of a "soft law" approach, implementing monitoring activities on Member States' legislation, or exchanges regarding best practices and information.[65]

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[60] *Ibid.*, 7.

[61] See *infra*, S. PANNAIKADAVIL-THOMAS/ V. BUMBACA, The Role of International Social Services in Private International Law, in this *Yearbook*, at 531 *et suiv.*

[62] International surrogacy and donor conceived persons "*Preserving the best interest of the children*", Call for Action by the International Social Service Network, available at <www.iss-ssi.org>.

[63] Call for Action 2016, Urgent need for regulation of international surrogacy and artificial reproductive technologies, available at <www.iss-ssi.org>.

[64] *E.g.*, *A Comparative Study on the Regime of Surrogacy in EU Member States* (note 1); Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter, P8_TA(2015)0470, available at <www.europarl.europa.eu>, especially para. 115 where the practice of surrogacy was expressly condemned as undermining the human dignity of women.

[65] This approach has been proposed, for example, by M. WELLS-GRECO, *The Status of Children Arising from Inter-Country Surrogacy Arrangements*, The Hague 2015.

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NEW ZEALAND'S CHOICE OF LAW RULES RELATING TO TORT

Maria HOOK*

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I. Introduction

New Zealand's Parliament recently reformed the country's choice of law rules in tort by passing the Private International Law (Choice of Law in Tort) Act 2017. The Act abolishes the traditional common law rule for torts (known as the double actionability rule) and substitutes a *lex loci delicti* rule with a flexible exception. It is modelled on Part III of the Private International Law (Miscellaneous Provisions) Act 1995. The purpose of this article is to examine the changes brought about by the New Zealand Act and identify areas for future development.

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 313-331
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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II. The Common Law Position: Double Actionability

Before turning to the Act itself, it is necessary to provide a brief account of New Zealand's choice of law rules in tort as they had developed up to the point of reform. New Zealand inherited its system of conflict of laws from England, along with the common law rule of double actionability for foreign torts.

A. The *Lex Fori* Rule

Historically, the practice that had developed in the English courts was that tortious claims were to be determined in accordance with the law of the forum, whether the tort was committed at home or in a foreign country. This practice found a firm footing in *The Halley*,[1] where the Privy Council held that a shipowner could not be held liable for the negligence of a compulsory pilot in Belgian waters, because English law, unlike Belgian law, did not provide for such liability. The Privy Council reasoned that an English court would not "[g]ive a remedy in the shape of damages in respect of an act which according to its own principles, imposes no liability on the person from whom the damages are claimed".[2]

A number of explanations have been given why English courts came to prefer their own law when confronted with foreign torts. One explanation is that English courts, which initially lacked jurisdiction to hear claims founded on foreign torts, relied on a fiction to surmount this jurisdictional hurdle, and this fiction treated foreign torts as if they had occurred in England. It followed, as a matter of logic, that foreign torts were to be treated as domestic ones for the purpose of determining liability.[3] An additional explanation is that English courts felt more comfortable imposing liability in accordance with their own standards of justice, which they may well have considered to be superior to those of foreign countries.[4] The Privy Council in *The Halley* was seemingly impressed by arguments, based on the writings of Savigny and Story, that the *lex fori* should apply on account of its close connection to criminal law or public policy.[5]

The upshot of the rule in *The Halley* was that a claimant seeking relief for a wrong committed in a foreign country could not succeed in tort if they did not satisfy the legal elements of the action as provided for by the law of the forum.

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[1] *The Halley* (1868) LR 2 PC 193.

[2] *Ibid*, at 203-4.

[3] *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, 210 CLR 491 at [113] per Kirby J.

[4] *Ibid*.

[5] *Ibid*, at [43]-[59] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, citing in particular Otto KAHN-FREUND, Delictual Liability and the Conflict of Laws, *Recueil des Cours* t. 124, 1968, 1 at 13, 20-24.

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B. A Second Limb: Actionability in the Place of the Wrong

But the English courts then made a further – and fundamental – addition to this *lex fori* rule. They introduced a second hurdle for claimants, which was that their claim now also had to be actionable under the law of the country in which the tort was committed. Thus, in *Phillips v Eyre*,[6] the Governor of Jamaica was able to rely on his own Act of Indemnity to protect him from liability under English law. The Court considered that it would be unjust to hold a person liable for a matter that did not attract liability under the law of the place where the wrong was committed. This two-limb approach became the orthodox choice of law position for foreign torts.[7] So in order to succeed, the plaintiff had to establish both that the tort would have been actionable in the forum if it had been committed here and that the tort was actionable under the law of the country in which it was committed. If both elements were satisfied, the law of the forum applied to determine the substance of the claim.[8]

Even though the double actionability rule must have appeared increasingly anachronistic, or even parochial, when set against general developments in the conflict of laws, it stubbornly held on in the twentieth century. The House of Lords affirmed the rule in 1969 in the case of *Boys v Chaplin*.[9] Their Lordships were not attracted to alternative solutions, such as a simple *lex loci delicti* rule or an approach based on the "proper law" of the tort. Lord Wilberforce acknowledged that a *lex loci delicti* rule would offer certainty and that it held a certain logical or doctrinal appeal.[10] But his Lordship also thought that, in personal injury cases in particular, the place of the wrong would often be accidental or arbitrary, and that ascertaining the content of foreign law – the *lex loci delicti* – may be difficult and inconvenient.[11] Both Lord Hodson and Lord Wilberforce concluded that any concerns about the double actionability rule were best addressed by way of a flexible exception, to ensure that the rule would not exclude claims that it would be just to admit.[12]

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[6] *Phillips v Eyre* (1870) LR 6 QB 1.

[7] L. COLLINS (ed) *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed, Sweet & Maxwell, London, 2014, at [35-006].

[8] *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC) at 198; *Richards v McLean* [1973] 1 NZLR 521 at 525. But for the proposition that the first limb is a rule of jurisdiction and does not provide the substantive law to be applied, see *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 41 per Windeyer J (referred to with approval by the High Court in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, 203 CLR 503 at [28], [115]) and *Tolofson v Jensen* [1994] 3 SCR 1022 at 1041 per La Forest J.

[9] *Chaplin v Boys* [1971] AC 356 (HL).

[10] *Ibid*, at 387-8.

[11] *Ibid*.

[12] *Ibid*, at 380 (per Lord Hodson) and at 391-2 (per Lord Wilberforce).

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C. A Flexible Exception to Double Actionability

The Privy Council in *Red Sea Insurance Co Ltd v Bouyges SA* later confirmed the existence of such an exception and that it could be invoked not only to disapply the second limb of the rule (with the result that the *lex fori* exclusively was applicable), but also in favour of the place where the tort was committed.[13] Torts were no longer necessarily a matter of such sensitivity that they had to be governed by domestic notions of justice. Recognising that this was contrary to the strict rule in *The Halley*, Lord Slynn noted that the fact that the court was asked to apply a foreign law "in a situation where its own law would give no remedy" would be "a factor to be taken into account when the court decides whether to apply the exception".[14]

His Lordship adopted Lord Wilberforce's formulation of the exception, which did away with double actionability if one country has "the most significant relationship with the occurrence and with the parties".[15] Curiously, this assessment was to draw on governmental interest analysis, a methodology common in US but not in English courts. The court would have to "identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet."[16] The effect of the decision in *Red Sea*, therefore, was that the law with the most significant relationship could operate to trump the law of the forum (and whatever remained of its rationale).

New Zealand courts generally assumed that the double actionability rule formed part of New Zealand law, without ever determining the question front-on.[17] In *Baxter v RMC Group PLC*, the Court applied the flexible exception as stated in *Red Sea*, to conclude that English law would apply to torts of deceit and conspiracy that had occurred in England.[18] The plaintiff was based in New Zealand, and some of the parties' dealings that were alleged to have given rise to the deceit and conspiracy occurred here. However, the Court found that English law had the most significant relationship with the claim. Most of the representations on which the plaintiff relied had occurred in England; the contract that was said to be the result of the representations was signed in England; the alleged conspiracies were formed and implemented there; and the defendants were residents of England.[19]

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[13] *Red Sea Insurance Co Ltd v Bouyges SA* [1995] 1 AC 190 (PC).

[14] *Ibid*, at 206.

[15] *Ibid*, at 206; *Chaplin v Boys* [1971] AC 356 (HL) at 391-2.

[16] *Chaplin v Boys* [1971] AC 356 (HL) at 391-2

[17] *Waterhouse v Contractors Bonding Ltd* [2012] NZHC 566 at [59]; *Richards v McLean* [1973] 1 NZLR 521 (HC).

[18] *Baxter v RMC Group PLC* [2003] 1 NZLR 304 (HC).

[19] *Ibid*, at [60].

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D. A Rule Rich in Policy

Where did these developments leave the double actionability rule? It had become an amalgamation of potentially competing policies. There were the public policy reasons that justified the exercise of forum control; the need to do justice to a defendant whose acts did not constitute a wrong in the place where they were done (and who should be able to regulate his conduct in accordance with that law, without having to "look over his shoulder" to see whether he would be liable under the New Zealand law of tort);[20] the need to uphold comity, by respecting the laws of the country where the acts were done (at least where they cause damage in that country alone);[21] and the growing relevance of the principle of connection, which – according to Lord Wilberforce's exception – could be based on the policies underlying the applicable laws.

These were potentially difficult policies to reconcile, but they were not inherently – or necessarily – inconsistent. Where application of either of the two limbs of double actionability did not, on the facts of the particular case, meet its designated policy objectives, the flexible exception could step in to prevent a just claim from being excluded.[22] Lord Wilberforce applied the exception because the Maltese state had no apparent interest in limiting recovery between two British parties who had only been in Malta temporarily while serving as members of the British armed forces.[23] The ordinary reasons for applying the law of the place of the wrong – such as comity and the defendant's expectations – did not assume much force on the facts of the case, making it appropriate to disapply the second limb of the double actionability rule.

III. Reform to Abolish Double Actionability: Luck of the Draw

Despite the House of Lords' affirmation of the double actionability rule in *Boys v Chaplin*, it is now commonly perceived as outmoded. Although not unique to common law jurisdictions, it has always been an outlier when compared to the predominant approaches taken internationally to choice of law in tort: rules based

[20] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) at 445-6 per Slade LJ; see also *Chaplin v Boys* [1971] AC 356 (HL) at 389 per Lord Wilberforce ("The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed.").

[21] *Metall und Rohstoff AG* (*ibid*) at 445-6.

[22] See *Sophocleous v Secretary of State for the Foreign and Commonwealth Office* [2018] EWHC 19 at [125].

[23] *Chaplin v Boys* [1971] AC 356 (HL) at 392.

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on the *locus delicti*, the *locus damni* or the proper law of the tort.[24] The law of the forum plays only a limited role in these approaches. It may act as a control mechanism in the preliminary stages of the choice of law process, when it is tasked with characterising the issue, as well as at the end, when it may be used to disapply a rule of foreign law on grounds of public policy. But on the whole, the rules are internationalist in their outlook: they recognise that it may be just to apply foreign law to a dispute involving foreign facts.

A. Reasons for Reform

These were some of the reasons, then, why, in 1995, the UK moved to abolish the double actionability rule for all torts but defamation. The rule was considered to be parochial and inconsistent with international practice. It was also unclear and difficult to apply.[25] In its place, Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the UK Act) substituted a *lex loci delicti* rule with a flexible exception (now largely replaced by the Rome II Regulation[26]). Canada adopted the same approach, by way of judicial reform;[27] and the Australian High Court followed suit by adopting a strict *lex loci delicti* rule without exception.[28]

In the end, the only major common law jurisdiction to retain the rule, apart from New Zealand, was Singapore.[29] There was no opposition in principle to the abolition of the double actionability rule in New Zealand. Members of Parliament described the rule as archaic and emphasised the need to keep up with other legal systems.[30] Submissions on the Bill – of which there were few – were supportive and proposed largely minor changes.[31] One may question, perhaps, whether the rule in *The Halley* is quite as anomalous as it has been made out to be. After all, the *lex fori* continues to serve an important function in other areas of the conflict of laws.[32] Some scholars have spoken in support of the double actionability rule;[33] and

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[24] See S. SYMEONIDES, *Codifying Choice of Law Around the World*, OUP, 2014, Ch 2, 83-85.

[25] See English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (1990, Rep 193/129) at paras 2.6-2.11.

[26] Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

[27] *Tolofson v Jensen* [1994] 3 SCR 1022.

[28] *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, 210 CLR 491.

[29] See *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2006] SGCA 39, [2007] 1 SLR 377 at [65]-[66].

[30] See *e.g.,* (29 November 2017) 725 NZPD (New Zealand Parliamentary Debates).

[31] C. MCLACHLAN/ J. WASS/ M. HOOK, *Submission on the Private International Law (Choice of Law in Tort) Bill*, 1 February 2017; New Zealand Law Society, *Submission on the Private International Law (Choice of Law in Tort) Bill*: available at www.parliament.nz.

[32] Such as divorce, relationship property (see s 7 of the Relationship (Property) Act 1976) and other family matters. See also the growing role of the *lex fori* in the area of employment since the Supreme Court's decision in *Brown v New Zealand Basing Ltd*

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Japan recently decided to retain it.[34] But in this author's view, there is little doubt that New Zealand choice of law will benefit from its turn to internationalism.[35]

B. The Story behind the Bill

In spite of overwhelming support for change, abolition of the double actionability rule came about almost by chance. The catalyst was a Member's Bill, the Private International Law (Choice of Law in Tort) Bill.[36] Members' Bills may be proposed by any Member of Parliament who is not a Minister. This Bill was the brainchild of Hon Christopher Finlayson QC, Attorney-General at the time, who described its genesis in the following terms:

> "Look, we were all sitting around one night wondering what bills could be the subject of members' bills. People were wondering, and I came up with the brilliant idea: what about double actionability? … It's always been a subject that I've found most interesting – possibly a very sad reflection on me, but there you have it."[37]

Because there are too many Members' Bills for Parliament to consider, it holds a ballot – in an old biscuit tin purchased for this purpose – to select a smaller number of Bills to be introduced into the House. The Private International Law (Choice of Law in Tort) Bill was the only Bill selected from a ballot of 79 Bills**.** The Bill was introduced on 22 September 2016 and had its first reading on 7 December 2016. It had been sitting on the ballot since 2012. The fortuitousness of the reform – depending, as it did, on the dedication of individual Members of Parliament, coupled with simple luck of the draw – may provide cause for reflection. It serves as a useful reminder that private international lawyers need to find ways of engaging with the wider legal community. Private international law does not usually assume high priority on Parliament's agenda, and so all too often it depends on individual champions of the discipline for development and reform.

Without legislative intervention, the courts eventually might have stepped in to modernise the common law position. There are even scholars who think that reforms of this kind should be left to the courts – that the conflict of laws should

[2017] NZSC 139. But cf English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 25), at para 2.6.

[33] See, *e.g.,* A. BRIGGS, Choice of Law in Tort and Delict, *Lloyd's Maritime & Commercial Law Quarterly* 1995, 519.

[34] Act on the General Rules of Application of Laws (Law No 10 of 1898 as Newly Titled and Amended on 21 June 2006).

[35] For academic criticism of the rule in the New Zealand context, see D. GODDARD/ C. MCLACHLAN, *Private International Law – litigating in the trans-Tasman context and beyond*, New Zealand Law Society 2012, at 144; E. SCHOEMAN, Tort Choice of Law in New Zealand: Recommendations for Reform, *New Zealand Law Review* 2004, 537.

[36] Private International Law (Choice of Law in Tort) Bill (181-2).

[37] (29 November 2017) 725 NZPD.

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firmly remain a common law subject.[38] The High Court arguably would have been free to depart from the double actionability rule, in the absence of appellate authority on the matter.[39] But even if the right case had come along to test the position, there might have been limited judicial willingness to take up the cause and abolish a rule of such long standing, in an area with which few New Zealand judges are familiar.[40] The Singaporean Court of Appeal has accordingly rejected the possibility of abolishing the rule, noting instead that this is "if at all, a subject for *legislative* reform" and that "a wise and judicious application of the exception" to the rule will ensure that the Singapore courts would still be able "to achieve a just and fair result in the meantime".[41] A 2003 proposal for reform by the Singapore Law Reform Committee has not been enacted.[42]

C. The UK Act as a Model

The Bill was closely modelled on the UK Act and passed without any difficulty. This is unsurprising. New Zealand inherited its rules of private international law from England, and New Zealand private international law has always looked to English law for guidance (to the extent that it has not become Europeanised). Moreover, the UK Act was the product of wide-ranging consultation and debate,[43] and it had proved itself in practice. The general view, therefore, was that there was no need for New Zealand to reinvent the wheel, and that it should simply align its approach with that of other common law jurisdictions.

In terms of substance, the New Zealand Act departs from the UK Act in three main ways. First, it provides that it is not intended to freeze the common law rules on the characterisation of procedural issues.[44] Second, it leaves open the possibility that courts may recognise or develop a rule of party autonomy that takes precedence over the choice of law rules in the Act.[45] These two amendments will

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[38] See F.A. MANN, The Proper Law of the Contract – an Obituary, 107 *Law Quarterly Review* 1991, 353.

[39] J. WASS/ M. HOOK, Reform of choice of law rules for tort, *New Zealand Law Journal* 2017, 24.

[40] In Australia and Canada, reform of choice of law for intra-national torts paved the way for abolition of the double actionability rule for foreign torts (see *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, 203 CLR 503 and *Tolofson v Jensen* [1994] 3 SCR 1022).

[41] *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2006] SGCA 39, [2007] 1 SLR 377 at [65]-[66]; cf *Ang Ming Chuang v Singapore Airlines* [2004] SGHC 263, [2005] 1 SLR 409 at [50].

[42] Singapore Academy of Law's Law Reform Committee *Report on the Reform of the Choice of Law Rule Relating to Torts* (31 March 2003); see W. TONG, Warnings for a New Beginning, *Singapore Journal of Legal Studies* 2005, 288 for a critical analysis of the proposed Torts (Choice of Law) Bill.

[43] See English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No. 87/Consultative Memorandum No. 62) and *Private International Law: Choice of Law in Tort and Delict* (note 25).

[44] Section 11(2)(b) & (3).

[45] Section 11(2)(c).

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be the subject of further discussion below. Third, the Act abolishes the double actionability rule for all torts, including claims in defamation.[46] The UK Act specifically preserved the double actionability rule for claims in defamation to ensure adequate protection of the right to freedom of expression.[47] Under the New Zealand Act, any such concerns simply fall to be addressed under the general public policy exception.[48]

The Act's choice of law rules apply to "issues relating to tort" (s 3). Like the UK Act, it largely leaves the matter of characterisation to the courts. Thus, it provides no substantive guidance on the question whether an issue is to be characterised as a tort (or as an issue relating to tort).[49] Courts are well positioned to develop and refine their approach to characterisation in this area, which is a task best undertaken in the context of a particular case.[50] The Act applies to all issues that are so characterised as tortious, whether they are based on events occurring in New Zealand or overseas;[51] except that it also preserves special choice of law rules that were well-established exceptions to the double actionability rule at common law, such as certain aerial and maritime torts.[52]

IV. The New Position: A Flexible *Lex Loci Delicti* Rule

The Private International Law (Choice of Law in Tort) Act 2017 was passed in November 2017. By virtue of s 10, the Act abolishes the double actionability rule

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[46] Section 10.

[47] Section 13; (27 March 1995) 562 GBPD HL col 1409-22.

[48] Section 11(2)(a)(i).

[49] See s 7(1); but cf W. TONG (note 42) at 293-4.

[50] See *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450, [2006] 2 Lloyd's Rep 455 at [68] for a good statement of the right approach.

[51] Section 7(4) provides: "To avoid doubt, this Act applies in relation to events occurring in New Zealand as well as to events occurring in any other country".

[52] This is the only sensible interpretation of s 11(1): see L COLLINS (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) at [35-017], [35-068]–[35-080]. Critics of the UK Act have pointed out that s 11(1) is potentially unclear. Section 11(1) provides that the Act does not "[affect] any rule of law (including rules of private international law)" other than the rules abolished by s 10 (*i.e.* the double actionability rule and its flexible exception). It is possible to read s 11(1) as requiring that the court work out whether a particular matter would have previously been governed by double actionability before the rules in the Act can apply. Such an approach would likely exclude torts committed in the forum, because the rule of double actionability applied only to foreign torts, and it may exclude matters such as breach of confidence, or foreign torts unknown to English law, simply because there is no authority on whether these matters were to be treated as falling within the scope of the rule: see BRIGGS (note 33) 519; B. RODGER, Ascertaining the Statutory *Lex Loci Delicti*: Certain Difficulties under the Private International Law (Miscellaneous Provisions) Act 1995, 47 *I.C.L.Q.* 1998, 205; W. TONG (note 42). However, this would amount to an overly technical interpretation of s 11(1).

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as well as the flexible exception to the rule. Section 8 introduces the new default choice of law rule for torts – or, more specifically, for issues that have been characterised as relating to torts.[53] Section 9 provides for a flexible exception to this rule, which applies if it would be "substantially more appropriate" for the law of another country to apply.

A. The *Lex Loci Delicti*

Section 8(1) sets out the general rule, based on the *locus delicti*, which is that the applicable law is "the law of the country in which the events constituting the tort in question occur". This poses no further difficulty where the events constituting the tort are confined to one country (for example, a car crash between two Australians in New Zealand that is alleged to be the result of negligent driving). Where the events constituting the tort occur in more than one country, it is the country where "the most significant element or elements of those events" occurred that supplies the applicable law (s 8(1)(c)).

The section particularises how this rule is to apply in two specific cases. Where the action concerns personal injury, the most significant element is the sustaining of the injury, with the result that the applicable law is the law of the country "where the individual was when he or she sustained the injury" (s 8(1)(a)).[54] In the case of an action in respect of damage to property, it is the law of the country "where the property was when it was damaged" (s 8(1)(b)). In all other cases, it is for the court to work out what "the most significant element or elements" of the event constituting the tort may be.[55]

The *lex loci delicti* rule replicates s 11 of the UK Act. It is designed with certainty and predictability in mind. It differs from the Australian *lex loci delicti* rule, which adopts a unitary concept derived from the common law of the "place of the tort". According to this rule, courts must identify the place of the tort by "look[ing] back over the series of events" constituting the tort and asking, "where, in substance did this cause of action arise?"[56] This exercise has proved difficult in cases where the events constituting the tort occurred in multiple countries.[57] Section 8, on the other hand, requires identification of "the most significant element" of the tort, which at least avoids the fiction of treating multi-jurisdiction torts as having occurred in only one country.[58]

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[53] See ss 3 and 7(2).

[54] This was the result of an amendment to the Bill: Private International Law (Choice of Law in Tort) Bill (181-2) (select committee report).

[55] The Act does not include a rule dedicated to breach of intellectual property rights: cf s 5(2)(c) of the Torts (Choice of Law) Bill 2003 proposed by the Singapore Academy of Law's Law Reform Committee, which submits such claims to the place of infringement.

[56] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468; *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, 210 CLR 575 at [43].

[57] See, *e.g.*, *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, 210 CLR 575.

[58] English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 25) at para 3.6.

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What is left implicit in s 8 is the deeper rationale or the underlying values (in short, the policies) that support the rule. Beyond reasons of predictability and certainty, why is it desirable that courts apply the *lex loci delicti*? Whose interests does it serve – the parties', or those of the *locus delicti*? And what kinds of interests are being served? These and similar questions have been addressed elsewhere.[59] The *lex loci delicti* is said to accord with the parties' expectations as well as comity. Where the *lex loci delicti* is closely connected to a party, it is considered just that they should be able to rely on it; and conversely, neither can they complain about its application.[60] The alleged wrong-doer, too, can expect to be judged by the standards of the place where they have done the act in question.[61] But there is much to be gained by further elaboration or refinement of the reasons underpinning the *lex loci delicti*, a task appropriately left to New Zealand courts.

It is to be hoped that this task will assume particular relevance in the context of s 8(1)(c), when determining the country where "the most significant element or elements of those events". How is the "significance" of the elements of the tort to be assessed, if not by reference to the policies underlying the *lex loci delicti rule*? Section 8(1)(a) on personal injury claims may illustrate the kind of exercise that the courts should engage in.

Section 8(1)(a) treats the sustaining of the injury as the most significant element of the tort, reflecting a policy decision, presumably, to emphasise the interests of the injured claimant, "whose expectations will … be based on his rights and liabilities under the law of the country where he was harmed and with which he will usually be independently connected".[62] The alleged tortfeasor, on the other hand, could ordinarily expect to be judged according to the standards of his own environment (unless they foresaw that their actions would lead to injury in the country where the claimant was harmed).[63] But this expectation is not necessarily well-founded in the context of the modern law on personal injury,[64] which is more concerned with balancing the parties' interests, and compensation, than it is with deterrence or punishment. It is the claimant's interests that are adversely affected by the tortfeasor's conduct. Hence, s 8(1)(a) can be taken to rest on the conclusion that "the expectations of all the parties and the purposes of the law will usually make it entirely appropriate to apply the standards of justice of what might be loosely termed the "claimant's law", not those of the "wrongdoer's law", in the resolution of a dispute between them."[65]

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[59] *Ibid*, at para 3.2; English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at paras 4.55-4.60; *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, 210 CLR 491 at [65], [125]-[130]; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047; cf Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40, Recital 16.

[60] English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at para 4.57.

[61] *Ibid*, at para 4.58.

[62] *Ibid*, at paras 4.74 and 4.70.

[63] *Ibid*, at para 4.71.

[64] *Ibid*, at paras 4.74 and 4.70.

[65] *Ibid*, at 4.78.

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Regrettably, English courts seem to have taken an unnecessarily narrow-minded approach to determining the *lex loci delicti* under s 11 of the UK Act, focusing almost exclusively on the legal ingredients of the action under English law. The Court of Appeal has said that s 11 requires "an analysis of all the elements constituting the tort as a matter of law, and a value judgement regarding their 'significance' ".[66] This "value judgement" is made by reference to the English law of tort, and does not seem to include considerations specific to the conflict of laws.[67] What is being examined is the "intrinsic nature" of the elements:[68] for example, whether the law of torts accords more weight to the making of an allegedly negligent misstatement, or to the plaintiff's receipt of the statement, or their reliance on the statement.[69] Crucially, the Court of Appeal did not consider it would be appropriate to examine "the nature or closeness of any tie between the element and the country where that element was involved or took place", an exercise that is "only relevant" if the flexible exception is invoked.[70]

This approach eschews the internationalist spirit that ordinarily imbues the choice of law process.[71] It seems to require exclusive reference to domestic tort law even if the claimant relies on a foreign *lex loci delicti*;[72] and it would leave courts debating the relative importance of legal elements as a matter of substantive legal theory. It has invited arguments, for example, about whether "loss" is a significant element of the causing loss by unlawful means tort – a perplexing proposition that seems beyond meaningful evaluation.[73] It would prevent the court from going further and asking whether the legal consequences of a statement should ordinarily be those provided for by the place of receipt, the place of despatch or the place of reliance. What is more, it would prevent the court from resolving this question by reference to the parties' reasonable expectations, comity and – relatedly – the goals

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[66] *Morin v Bonhams* [2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep 702 at [16].

[67] *VTB Capital plc v Nutritek* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313 at [148] for a summary of the applicable principles; adopted by Lord Clarke on appeal ([2013] UKSC 5, [2013] 2 AC 337 at [199]), whose analysis found the express agreement of Lord Neuberger (at [100]) and Lord Reed (at [240]).

[68] *Ibid*.

[69] See *e.g. Dornoch Ltd v The Mauritius Union Assurance Company Ltd* [2005] EWHC 1887 at [105]-[106].

[70] *VTB Capital plc v Nutritek*, above n 67.

[71] See *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450, [2006] 2 Lloyd's Rep 455 at [68]. The authors of L. COLLINS (note 7) specifically recognise that s 11(2)(c) involves "a process which is an extension of the process of characterisation, to be approached in the same way" (at [35-146]).

[72] But see *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450, [2006] 2 Lloyd's Rep 455 at [76]-[96], which nevertheless was one of the cases relied upon by the Court of Appeal in its summary of the relevant principles in *VTB Capital* (above n 67). Cf *The LCD Appeals* [2018] EWCA Civ 220 at [51].

[73] *Constantin Medien AG v Ecclestone* [2014] EWHC 387 at [325]; cf the Law Commission's inquiry, referred to above: English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at paras 4.70 and 4.74.

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of the law of tort (which may preferably be assessed on a comparative basis).[74] There is no good reason why s 8(1)(c) should be interpreted as precluding such an inquiry.

The English approach is reminiscent of a strict Savignian-style theory of the conflict of laws. It seems to treat the *locus delicti* (or the "seat" of the tortious relationship) as being discoverable as a matter of science, based on an inquiry into the true nature of the relationship and neutral geographical considerations.[75] In this author's view, New Zealand courts would be better off adopting a more contextual approach to s 8, assessing the significance of the tort's constitutive elements by reference to the policies underlying the *lex loci delicti* rule. This, in any event, would accord with the modern common law approach to the conflict of laws.[76]

B. The Flexible Exception

Seeking to resolve the perennial tension between certainty and flexibility, the general rule in s 8 is subject to a flexible exception, which is contained in s 9 (based, in turn, on s 12 of the UK Act). Section 9(1) provides that the general rule is displaced if the court determines that it is "substantially more appropriate" for the law of another country to be the applicable law.[77] In order to determine this question, the court must engage in a comparison. It must weigh "the significance of the factors" that connect a tort with the locus delicti (*i.e.* the country whose law would be the applicable law under the general rule in s 8), with "the significance of any factors connecting the tort with any other country" (subs (2)). Relevant factors include factors relating to the parties, any of the events that constitute the tort in question, or any of the circumstances or consequences of those events (subs (3)). Thus, the connecting factors to be considered under s 9 range much more broadly than under s 8, which is concerned only with the elements of the events constituting the tort.

Even though s 9(3) speaks of "factors that may be taken into account as connecting *a tort* with a country",[78] s 9(4) states that the law of that country applies

[74] Cf English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at paras 5.27-5.28.

[75] See VON SAVIGNY, *System des heutigen Römischen Rechts*, 1849, Ch VIII, who developed the concept of the "natural" seat, based on the principle – derived from the fact of the "community of nations" – that each legal relation has a law to which it "belongs".

[76] This approach is exemplified by the modern approach to characterisation, which seeks to identify "the most appropriate law to govern a particular issue" (*Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 (CA) at [27]) by reference to the functions of the underlying substantive rules (L. COLLINS (note 7) at [2-039]).

[77] See *VTB Capital plc v Nutritek* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313 at [149]; referred to with approval by Lord Clarke on appeal ([2013] UKSC 5, [2013] 2 AC 337 at [203]), whose analysis found the express agreement of Lord Neuberger (at [100]) and Lord Reed (at [240]).

[78] Emphasis added.

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"for the purposes of determining *the issues, or any issue*, arising in the case".[79] In England this has been taken to mean that s 9(4) allows for *dépeçage*, the splitting of the law applicable to the tort, with the result that a specific issue or issues could be governed by a law other than the *lex loci delicti*.[80] This position is consistent with Lord Wilberforce's flexible exception (as adopted by the Privy Council in *Red Sea*).[81] But how is the court to reconcile the prospect of *dépeçage* with its inquiry under s 9(3), which requires identification of factors connecting *the tort* with the respective countries?[82] The better view, perhaps, is that courts ought to avoid an overly technical reading of s 9(3) that excludes consideration of any factors that are not relevant to the tort as a whole.[83] Instead, the court may evaluate the significance of factors insofar as they relate to a particular issue (*e.g.* the availability of a particular head of damage) in order to give full meaning to s 9(4).

This raises more generally the same question that also arises for s 8 and the determination of the *lex loci delicti*: what are the policies that underpin identification of the "substantially more appropriate" law? How is the significance of the connecting factors to be assessed? Where the policy reasons for applying the *lex loci delicti* are not satisfied on the facts of the particular case, this will no doubt be a relevant consideration in favour of invoking the exception. For example, the parties may not have expected the place of the injury to be applicable because the *locus delicti* was fortuitous, the defendant could not foresee that their acts would cause harm in the place of injury, or the plaintiff had no meaningful connection to the place of the injury.[84] The assessment is not limited to the elements of the tort but can include any relevant connecting factors, including the consequences of the events.

It remains to be seen whether courts will continue to be guided by Lord Wilberforce's formulation of the exception. The two exceptions are broadly similar: the common law exception sought to identify the country that had "the

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[79] Emphasis added.

[80] L. COLLINS (note 52) at [35-098]; *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1 at [59] per Lord Rodger.

[81] But Lord Wilberforce's reasoning was heavily influenced by governmental interest analysis, a method that provides for the identification of the applicable law on an issue-by-issue basis: see A. MILLS, The Application of Multiple Laws under the Rome II Regulation, in J. AHERN/ W. BINCHY (eds) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Brill 2009, 133 at 140-1.

[82] See *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304 at [12]; *VTB Capital plc v Nutritek* [2013] UKSC 5, [2013] 2 AC 337 at [204].

[83] See L. COLLINS (note 52) at [36-106] ("[W]hether there is a clear preponderance [of factors declared relevant by s 12(2)] in any particular case will depend, in part, on the particular issue or issues which arise in the case … it would seem that the particular issue which arose [in *Boys v Chaplin*] would be substantially more appropriately governed by English law, not least because heads of damage is an issue strongly linked to the country where the claimant normally resides"); but cf *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304 at [12].

[84] See English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at para 4.93; cf also *Sophocleous v Secretary of State for the Foreign and Commonwealth Office* [2018] EWHC 19 at [125].

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most significant relationship with the occurrence and with the parties".[85] But, as noted earlier, Lord Wilberforce's exception drew heavily on governmental interest analysis. The question to be asked was whether, in relation to the particular issue at hand, "the foreign rule ought as a matter of policy … to be applied" and whether application of the foreign rule "would serve any interest the rule was devised to meet".[86] In *Boys v Chaplin*, Lord Wilberforce concluded that the Maltese state had no apparent interest in applying a rule that denied recovery for pain and suffering, to persons resident outside of Malta.[87] Orthodox choice of law methodology does not ordinarily engage with such considerations (*i.e.* whether the respective states have a concrete interest in the application of their laws to the particular case).

At the same time, it is obvious that s 9 is based on more than a purely abstract notion of connection. It is likely that, in assessing the significance of the connecting factors, the court may take into account the purposes of the law of tort, or even the purposes of the law more generally (*e.g.* whether application of the general rule would run counter to the protection of consumers, the general public or the environment).[88] So it may not be so far-fetched, in some cases, to have regard to the subject-matter of the applicable laws in question, and to ask whether application of these laws would serve a social or public purpose.[89]

The facts of *Boys v Chaplin* serve to illustrate this point. If one of the reasons for applying the *lex loci delicti* is comity, a judge evaluating the significance of the place of the injury would have to ask: on the facts of the case before me, would application of the law of England to the question of recovery of damages conflict with Malta's expectations of comity? The judge may answer this question in the negative, on the basis that application of Malta's law on pain and suffering would not serve a broader social or public function. The parties were two members of the British armed forces temporarily stationed within the jurisdiction who had no personal connection to the state or its community. Whether one English resident is required to compensate another is of no concern to the law of Malta.

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[85] *Chaplin v Boys* [1971] AC 356 (HL) at 391-2.

[86] *Ibid*.

[87] *Ibid*.

[88] See English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 43) at para 4.74. In fact, this is not an unusual occurrence (see, *e.g.*, the well accepted proposition that the validity or effectiveness of the transfer of tangible movables must be governed by the *lex situs* because, amongst other things, the *lex situs* protects security of title and commercial convenience: *Winkworth v Christie Manson & Woods Ltd* [1980] Ch 496 at 513). Cf Recitals 21 and 25 of the Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

[89] Cf L. COLLINS (note 52) at [35-106] and note 89, taking the view that s 12 does not necessarily preclude reliance on Lord Wilberforce's approach.

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C. Exclusion of *Renvoi*

Finally, it is notable that the Act, like the UK Act, excludes the doctrine of *renvoi* (s 7(3)). In light of the difficulties that the doctrine has engendered in the Australian courts,[90] this was no doubt a wise decision. The application of *renvoi* may lead to much uncertainty, and it arguably lacks a sound basis in principle.[91]

V. Areas for Development

The Act provides a clear and tested framework for choice of law in tort, but there are a number of issues – issues that the UK Act did not address specifically or that are unique to the New Zealand context – that Parliament has left to the courts for possible further development.

A. Party Autonomy

Section 11(2)(c) of the Act clarifies that it does not preclude "recognition or development of a choice of law rule giving effect to an agreement as to the applicable law". It is not clear whether the choice of law rules in the UK Act, which omits such a provision, were intended to be mandatory, in the sense that parties would not be able to contract out of them by selecting the law applicable to any tortious disputes arising between them. Although the UK Act would have left intact an established common law rule recognising the parties' power to select the law applicable to their tortious relationship, it is unlikely that such a rule had in fact crystallised. Thus, the only way to give effect to the parties' choice under the UK Act is to rely on the flexible exception.[92]

Section 11(2)(c) recognises that the availability of such a power may be a beneficial development. It is the result of an amendment to the Bill by the Justice and Electoral Select Committee, which noted that it was "common for parties to international commercial contracts to choose the applicable law" and that respect for party autonomy promoted "legal certainty".[93] There is, of course, support for the principle of party autonomy in this area of choice of law. The Rome II Regulation makes express provision for the principle in Art 14, which gives effect

[90] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005 HCA 54, 223 CLR 331.

[91] English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (note 25) at para 3.56.

[92] See *e.g. Morin v Bonhams* [2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep 702 at [23]; *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450, [2006] 2 Lloyd's Rep 455 at [103]; *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147; L Collins (note 7) at [35-148].

[93] Private International Law (Choice of Law in Tort) Bill (181-2) (select committee report).

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to "freely negotiated" choice of law agreements between commercial parties, and which further enables all parties to select the applicable law "after the event giving rise to the damage occurred".[94] US courts, too, seem to be willing to enforce choice of law agreements between parties who had a pre-existing contractual relationship, provided the scope of the agreement is interpreted to be sufficiently wide to cover tortious issues.[95]

There is much to commend this approach, and the New Zealand courts will have to give serious consideration to it. Party autonomy is a principle of inherent value and introduces much needed certainty into cross-border dealings. Ultimately, however, the question comes down to the purposes pursued by ss 8 and 9 of the Act. Whether or not parties should be free to contract out of these rules must necessarily depend on the policies behind the rules.[96] This means that courts will need to delve into the theoretical underpinnings of the Act – the policies on which it is based. It is to be hoped that New Zealand courts will make use of this opportunity.

B. Substance-Procedure

The Act clarifies that it does not have the effect of freezing existing rules on the characterisation of procedural issues, so that they may continue to be the subject of common law development. The Act thus avoids the situation that had resulted in the House of Lords' decision in *Harding v Wealands*,[97] where the UK Act was held to have codified the common law rules on characterisation as they stood at the time of enactment. The defendant in that case sought to argue that issues relating to quantum of damages were not to be characterised as procedural, because questions of procedure were confined to "rules governing or regulating the mode or conduct of court proceedings".[98] This approach to characterisation was consistent with recent Australian and Canadian authority but represented a departure from the orthodox common law position, which, according to the House of Lords, the UK Act had codified. Hence it was not free to depart from the orthodox position, which characterised issues of quantum as procedural.

Sections 11(2)(b) and (3) of the New Zealand Act leave the New Zealand courts free to adapt their approach to the substance-procedure distinction. Section 11(2)(b) states that the Act does not affect the common law rule that submits matters of procedure to the law of the forum, and s 11(3) clarifies that subs (2)(b) "must be applied in accordance with the rules of New Zealand private international law in force at the time that the rules or questions referred to in that provision fall to be applied or determined in relation to a claim".

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[94] Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

[95] See S. SYMEONIDES, *Choice of Law,* OUP 2016, at 393-4.

[96] M. HOOK *The Choice of Law Contract*, Hart Publishing 2016, Ch 3.

[97] *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1.

[98] *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, 203 CLR 503 at 543-4.

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C. New Zealand's Accident Compensation Scheme

A unique feature of New Zealand substantive law is that it bars proceedings for damages arising out of personal injury that is covered by the country's accident compensation legislation.[99] The accident compensation scheme provides no-fault compensation for claimants who suffered personal injury in New Zealand, as well as for claimants who suffered personal injury overseas but are ordinarily resident in New Zealand.[100] As noted above, the general choice of law rule in s 8 submits personal injury claims to the law of the country where the individual was when he or she sustained the damage. There is limited authority on whether the personal injury bar has overriding mandatory effect.[101] Hence, its precise relationship with s 8 is still a matter of argument.

Where the injury is suffered in New Zealand, the applicable law is likely to be the law of New Zealand (unless the exception in s 9 applies), so the issue does not arise. But would a New Zealand tourist who suffers injury in France be able to bring a claim in New Zealand against the French wrongdoer, in accordance with French law, even though the Accident Compensation Act 2001 extends cover to him? Parliament was clearly alive to this issue.[102] Nevertheless, the Justice and Electoral Committee did not take up a suggestion to amend the Bill by conferring express overriding mandatory effect on the personal injury bar.[103] This means that claimants remain free to argue that foreign law affords them a right to claim damages for personal injury that is covered under New Zealand's no-fault regime, although such an argument may meet with limited success.[104]

IV. Conclusion

The Private International (Choice of Law in Tort) Act 2017 represents a fortuitous development of New Zealand's private international law. Modelled on the Private International Law (Miscellaneous Provisions) Act 1995 (UK), it is a well-considered, and well-tested, set of rules for choice of law, which nevertheless provides ample scope for the New Zealand courts to develop their own jurisprudence

[99] Accident Compensation Act 2001, s 317.

[100] Sections 20(1)(a) and 22(1).

[101] This is not an issue that arose under the double actionability rule; see *McGougan v DePuy International* Ltd [2018] NZCA 91 at [56]-[61] on the territorial scope of s 317.

[102] (26 July 2017) 724 NZPD 19556 ("… because the injury was suffered in France, New Zealand law would be excluded and in those circumstances the statutory bar would apply only if it was a mandatory rule under the bill, and that would override the choice of law in tort").

[103] See C. McLachlan/ J. Wass/ M. Hook (note 31).

[104] This was clearly the view of the Ministry of Business, Innovation and Employment which considered that the Bill would not affect the Accident Compensation Act: Ministry of Justice, Departmental Report on the Private International Law (Choice of Law in Tort) Bill, at [42]: available at www.parliament.nz.

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on the subject. There remains much to be said on such issues as characterisation, the meaning of the substance-procedure distinction, the identification of the *lex loci delicti* (and its displacement), and the availability of party autonomy. In short, the Act is a welcome opportunity for New Zealand courts to explore the normative richness of choice of law.

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THE NEW HUNGARIAN PRIVATE INTERNATIONAL LAW CODE

A MIXTURE OF MODERN AND TRADITIONAL SOLUTIONS

Tamas Dezso ZIEGLER* / Vanda VADASZ** / Sarolta SZABÓ***

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IV. Jurisdiction and Procedural Issues
  A. Jurisdiction

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 333-363
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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B. Recognition and Enforcement of Judgments
V. Conclusions

I. Introductory Remarks

On 4th April 2017, the Hungarian Parliament adopted Act No. XXVIII of 2017 on Private International Law ("New PIL Code" or "Code"), which entered into force on 1st January 2018. The New PIL Code replaced Law Decree No. 13 of 1979 on Private International Law ("old PIL Code"), which was created under the supervision of the late Professor Ferenc Mádl, President of Hungary and Member of this Yearbook's Advisory Board.[1] The adoption of the new law is part of a major transformation of the Hungarian legal system. A number of crucial laws have been amended in recent years, including a new constitution,[2] a new Civil Code,[3] as well as a new Code of Civil Procedure.[4] This kind of "legal palingenesis" (re-birth of the national legal system) has had grave consequences on legal practice, since many of the major laws that previously applied have been repealed. In certain fields the changes were highly debated.[5] However, for most domestic scholars, including the authors of this article, the creation of a new PIL Code seemed to be a possibly advantageous and in any event necessary endeavour.[6] There are several reasons for this *consensus*.

First, the old PIL Code was adopted in 1979, and even though for its time it used many modern methods, several of its solutions became outdated. Many of the problems were related to the certainty and flexibility *equilibrium*, as Symeonides points out mentions in his book on PIL codifications.[7] The applicability of alternative solutions was limited, and the "ladder" of finding the proper law applicable was in most cases also not very differentiated. A good example of this is the relatively limited applicability of choice of law by the parties, which was not available for example for non-contractual obligations and family relationships. Furthermore, there was a strong need to use the "general escape clause"

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[1] Prof. Ferenc Mádl and Prof. Lajos Vékás, the doyens of Hungarian private international lawyers, wrote a classic and eminent work on Hungarian PIL in 1981. This book has many Hungarian and two English editions. See e.g. F. MÁDL/ L. VÉKÁS, *Nemzetközi Magánjog és a Nemzetközi Gazdasági Kapcsolatok Joga [Private International Law and the Law of International Economic Relations]*, Budapest 2015.

[2] The Fundamental Law of Hungary (entered into force on January 1st, 2012).

[3] Act V. of 2013 on the new Civil Code (entered into force on March 15th, 2014).

[4] Act CXXX of 2016 on Civil Procedure (entered into force on January 1st, 2018).

[5] G.A. TÓTH (ed.), *Constitution for a Disunited Nation*, Budapest 2012; T.D. ZIEGLER, The Links Between Human Rights and the Single European Market – Discrimination and Systemic Infringement, *Comparative Law Review*, Vol. 7, 2016, p. 1-23.

[6] K. RAFFAI, The New Hungarian Private International Law Act – a Wind of Change, *Acta Universitatis Sapientiae, Legal Studies*, 6, 1, 2017 119–13.

[7] S.C. SYMEONIDES, *Codifying Choice of Law Around the World*, OUP 2014, p. 173-174.

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("*allgemeine Ausweichklausel*")[8] and allow judges some discretion if they felt that the case was more closely related to a law different to the conflict of law rules as set by the Code. There was also a demand to use rules allowing the application of the law of the most closely connected country in case other laws could not be applied.[9]

Second, the institutions and solutions in the old PIL Code had to be reshaped in light of the EU legislation. Inevitably, the Code was amended several times to reflect to the increasing numbers of PIL developments in the EU. Some of the most important changes were introduced by Act IX of 2009 reflecting on the adoption of Rome I[10] and II Regulations,[11] but even earlier changes were made to make the old PIL Code consistent with EU requirements or international agreements.[12] Some of them were major changes, for example provisions related to contractual and non-contractual obligations were amended comprehensively in 2009. Others related only to specific legislation, like Act CXXVII of 2010, which amended the text in light of the EU maintenance regulation.[13] However, even though changes were made, some basic structural issues were not resolved. As a result, many of the old PIL Code's solutions were significantly different to EU solutions, even when applied in very similar circumstances (like torts covered or not covered by Rome II regulation). Another example could be seen in the old PIL Code's interpretation of habitual residence, which was significantly different to the EU solution, as it did not use the more complex approach of a person's habitual residence.[14] This led to two kinds of habitual residence: the one applicable under

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[8] See Art. 15 of the Swiss, Art. 19 of the Belgian PIL Act and Art 10:8 of the Dutch Civil Code.

[9] See Art. 24 of the Czech PIL Act, Art. 2 of the Chinese PIL Act and Art. 12:1 of the Polish PIL Act.

[10] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *OJ* L 177 of 04.07.2008.

[11] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* L 199 of 31.07.2007.

[12] S. SZABÓ, An Overview of the Hungarian PIL Codification: Law Governing Contracts. Available at <https://www.ajk.elte.hu/file/JM_Szabo_HuPILContracts.pdf> p. 1.; For a detailed analysis about Hungarian law see T. D. CZIGLER/ I. TAKACS, The Quest to Find a Law Applicable to Contracts in the European Union - A Summary of Fragmented Provisions, *Global Jurist*, 2012. Article 6. p. 31. and I. ERDŐS, The Impact of European Private International Law on the National Conflict of Laws Rules in Hungary, *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae - Sectio Iuridica* LIV. 2013, p. 161-189.

[13] Council Regulation No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. OJ L 7, 10.1.2009, p. 1–79.

[14] Section 12 of the old PIL Code said that habitual residence was "the place where the person stayed for a longer period of time without the intention of settling", and domicile (place of residence) was the place "where the person lived permanently, or stayed with the intention of settling there". According to the interpretation of the Court of Justice of the EU, "habitual residence is the place where the person had established, on a fixed basis, his

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EU law, and the other applied to relations falling under the scope of the old PIL Code.

Third, the adoption of the new Civil Code also raised questions in PIL, especially regarding the architecture of the New PIL Code. This is because the way we classify certain legal relationships in substantive law may have an effect on the rules on applicable law. For example, the classification of marriage contracts or succession agreements may impact the applicable law or jurisdiction, or both.

Finally, as a result of the interdependency of States, international relations became more intensive in recent decades, and it seemed necessary for the law to reflect these changes. People are now more likely to live in foreign countries, and in many cases, using the law of their habitual residence seems more appropriate than applying other connecting factors – this is also in line with the general direction of EU legislation (and The Hague Conference).[15]

Consequently, in 2016, the government adopted a "Concept"[16] on the new PIL Code, and the law itself was adopted in 2017. The new Act mixes modern and traditional solutions and certain new ones, which could be questioned. It consists of twelve chapters: General provisions, Persons, Family law, Civil and registered partnerships, Rights *in rem*, Intellectual property rights, Law of obligations, Law of succession, Procedural provisions (including rules on jurisdiction), Recognition and enforcement of judgments and the Closing provisions.

II. General Provisions

As mentioned previously, the structure of the New PIL Code recalls the main structure of its predecessor. The Act is divided into three major parts, the first of which covers the general rules. The general rules are found in the First Chapter, consisting of fourteen sections.

The instruments of the General Provisions are discussed here as follows: first, those provisions that have not changed in their content significantly (scope of the Code, characterization); second, those that have been expanded compared to their old PIL Code content (application of foreign law and establishing its content, public policy and overriding mandatory rules, *renvoi*); finally, the entirely new solutions (choice of law, general escape clause, general subsidiary rule and change of applicable law).

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permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence", see P. ROGERSON, *Collier's Conflict of Laws,* 4th ed., CUP 2013, p. 36.

[15] For reasons why the trend to use "habitual residence" is especially strong in Europe see J. BASEDOW, *The Law of Open Societies – Private Ordering and Public Regulation in Conflict of Laws*, Brill/Nijhoff, Hague 2015, p. 311 *et seq*.

[16] See Government Decree No. 1673 of 2016. (XI. 29.) on the Concept of the New Private International Law Code.

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A. The Scope of the Code

First of all, the new PIL Code defines its own scope. The Code first clarifies that it covers all three aspects of private international law. It contains rules regarding the applicable law, the determination of jurisdiction, procedural issues and the conditions of recognition and enforcement of foreign court decisions.[17]

Of course the new PIL Code settles the issue of legislative hierarchy at the very beginning of the text. In the process of creating the Code, the first task was to align the Act with so-called external legal sources. In particular, the legislative activity of the European Union has challenged legislators. The old PIL Code (at the time of its adoption in 1979) only guaranteed consistency with international conventions.[18] Since the Amsterdam Treaty has entered into force,[19] the European Union has unified the PIL of Member States by directly applicable regulations in many areas.[20] Therefore, the power of the national legislature has narrowed to the areas omitted from the scope of the EU regulations.[21] During the drafting of the law, the relationship between the EU regulations and the new PIL Code was raised as a technical issue. It has been considered that specific choice of law rules should refer to relevant EU regulations when it seemed necessary. This method increases transparency and provides support for legal practice. The disadvantage of the method is that every time the EU law changes, an amendment of the Code will be needed.[22] In light of this, after several controversies, the codifiers unfortunately decided to settle the question solely in the General Provisions. The Code states in its second Section: "the provisions of this Act shall apply to cases which are not covered by any directly applicable act of the European Union that is binding in its entirety or by any international agreement."[23]

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[17] New PIL Code Section 1.

[18] See Section 2 of the old PIL Code "This Law-Decree shall not apply in matters which are regulated by international conventions".

[19] The Amsterdam Treaty entered into force on May 1st, 1999.

[20] L. VÉKÁS, Egy új nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről [On Some of the Principle Issues of Creating a New Private International Law Code], *Jogtudományi Közlöny* 2015/6. p. 293; J. KUIPERS, *EU Law and Private International Law*, Boston 2012, p. 14-15.; W. POSCH, The "Draft Regulation Rome II" in 2004: Its Past, and Future Perspectives, this *Yearbook* 2004, p. 135-137.

[21] Harmonization efforts are made even harder by the fact that the legal notions are not identical at the EU and at the national level, *e.g.* as to the delimitation of contractual and non-contractual obligations (as it was mentioned in the Introductory Remarks).

[22] See "Concept of the New Private International Law Code" (note 16), p. 5.

[23] Certain rules refer to specific EU regulations in other parts of the new PIL Code, *see* Sections 30, 59, 77, 81, 101, 106 and 127. These sections address issues that have been referred to the competence of the Member States by the EU regulations.

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B. Characterisation

The starting point for the regulatory reform was that unless strictly necessary, there should be no deviation from the old PIL Code. From this perspective, the rationale of many PIL institutions remained the same, albeit using modernized and clarified methods and systems. Characterisation (or "*qualification*" in the original French terminology) should be mentioned in this context. When a case involves an international element, the court must decide which juridical concept is appropriate to deal with the factual problem.[24] When the New PIL Code was drafted, there was dispute regarding the need to codify this institution.

Opponents objected to the complexity of the process,[25] also arguing that only a few national PIL regulations contain provisions regarding classification.[26] Those who supported the regulation have expressed their conviction that the disappearance of the institution would cause confusion in the established legal practice.[27] Qualification was finally added to the legal text with a differentiated and detailed content. Both the old and the new PIL Codes provide that characterization shall be governed by Hungarian law. So, in general, a court must decide on the basis of the concept of its own domestic law. In those cases when *lex fori* does not recognize a legal institution, the matter shall be assessed on the legal basis of the foreign law governing such an institution.[28] The third subsection of Section 4 sets up a provision, which differs from the provisions of the old Code only in its detailed wording: "if the foreign legal institution is not alien to Hungarian law, but its function or purpose differs from that intended in said foreign law, then in the process of classification the foreign law must also be taken into consideration."[29]

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[24] To the theoretical background of characterisation, see P. BEAUMONT/ P. MCELEAVY, *Private International Law*, Edinburgh 2011, p. 90-97; R. BARATTA, The Process of Characterization in the EC Conflict of Laws: Suggesting a Flexible Approach, this *Yearbook* 2004, p. 155-169, K. SIEHR, General Problems of Private International Law in Modern Codifications – *de lege lata* and *de lege europea ferenda* –, this *Yearbook* 2005, p. 39-41.

[25] L. BURIÁN, Általános részi jogintézmények szabályozása a régi és az új nemzetközi magánjogi Kódexben [Legal instruments of the General Part of the Old and the New Private International Law Codes], *Kézirat [Manuscript]* 2017.

[26] P. MANKOWSKI, The New Japanese Private International Law Act from a European Perspective, in K. AKIRA/ K. MORIKAWA/ T. MORI (eds.), *Japanese Yearbook of International Law,* Tokyo 2008, p. 289.

[27] The Concept (note 16), p. 44.

[28] Foreign law does not necessarily correspond to the applicable law, for example if the law applicable does not know the legal institution, another legal system regulating the institution that comes into play can be taken into account, regardless of whether its law is being applied. Old PIL Code Section 3 Subsections (1)-(2), new PIL Code Section 4 Subsections (1)-(2).

[29] *E.g*. European States give different legal effects to the registration of same-sex partnerships. When assessing the facts, Hungarian *fora* must take this into consideration. See the Explanatory memorandum to Section 4 of the Act.

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C. Application of Foreign Law and Establishing Its Content

With regard to the question of the application of foreign law and the determination of its content, the essence of the provisions remained the same. The basis for the amendments was the idea that the *forum* should be supported in the complex process of establishing the content of foreign law. On the other hand, emphasis was needed to ensure that the rules were consistent with other general rules, specific choice of law rules and EU legislation.[30] In accordance with the tradition of more than 100 years, foreign law is treated in Hungarian law as a law, not as a fact. This nature of foreign law and the acknowledged principle of "*iura novit curia*" mean that the court must apply the foreign law *ex officio*.[31] The old PIL Code did not explicitly mention this principle, but its legitimacy has never been questioned. The new PIL Code settles the issue of application of foreign law, separately from the issue of the establishment of its contents, in a special section. After ordering *ex officio* application of foreign law, it states that the court shall interpret it according to its own rules and practices thereof.[32] It may seem obvious that if a conflict of laws rule prescribes the application of foreign law, there is no other option for the *forum* and the case needs to be decided according to the designated law.[33] The old PIL Code, however, provided a special opportunity for the parties to jointly request during proceedings that the otherwise applicable law be disregarded. In this event, the court had to apply Hungarian law instead. The provision was originally due to practical reasons, but undoubtedly served an undesirable "homeward trend". Considering this, the flexibility given by the general escape clause[34] and the fact that the parties did not often use this option,[35] the new PIL Code no longer contains such provisions.

The court shall determine the content of foreign law *ex officio*. The Code allocates the burden of proof of the content of foreign law to the authorities. The court is obliged to take all feasible steps to acquire the necessary knowledge. The parties are not required to prove the foreign law, regardless of whether they have chosen it.

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[30] S. SZABÓ, A külföldi jog alkalmazásának (tartalma megállapításának) problematikája [The Issue of Treatment (and Determination of Content) of Foreign Law], in B. BERKE/ Z. NEMESSÁNYI (eds), *Az új nemzetközi magánjogi törvény alapjai. Kodifikációs előtanulmányok [The Basics of the New Private International Law Code. Blueprints of Codification]*, Budapest 2016, p. 61.

[31] The foreign law shall be applied in accordance with the interpretation given to it in the foreign country. This means that in addition to specific rules, the court must take into consideration the practices thereof. New PIL Code Section 7 Subsection (2).

[32] New PIL Code Section 7.

[33] The conflict rules have mandatory character, so these norms are binding on the judge.

[34] See Chapter II. G.

[35] L. BURIÁN/ S. SZABÓ, Inconsistencies between Theory and Practice in the Treatment of Foreign Law in Hungary, in Y. NISHITANI (ed), *Treatment of Foreign Law – Dynamics towards Covergence?*, Springer 2017, p. 241.

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The application of foreign law is difficult in practice. In general, judges lack the resources, the language skills and adequate training to deal with these issues easily. These factors make the process time-consuming.[36]

The new PIL Code, therefore, indicates some of the means which can be used by judges. Firstly, it encourages the parties to collaborate with the judge in establishing the content of foreign law.[37] In addition, expert assessments can be obtained, or the judge may take the opportunity of seeking information from the Minister of Justice.[38]

The Code provides for the situation where it is not possible to ascertain the foreign law's content at all. If the relevant foreign rule cannot be determined within a reasonable period of time,[39] Hungarian law shall be applied.[40] The Code contains a new and flexible approach regarding matters that cannot be adjudged under the auxiliary Hungarian law. In this case, the foreign law closest to the applicable law ("neighbor law") shall apply.[41] Under the codification process "the next best choice" approach (*i.e.* the foreign law having a close relationship to the dispute)[42] was proposed as an alternative, however this was finally rejected.

The provisions on the application of foreign law and on the establishment of its content also determine the solution of inter-regional and interpersonal conflicts of law, according to Art. 5 of the new Code.[43]

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[36] J. BASEDOW, The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law, *Max Planck Private Law Research Paper No. 14/17*, p. 86.

[37] It should be noted that the refusal of the court's request is not sanctioned. Assistance in establishing the content of foreign law is not a burden of proof for the party in a procedural sense.

[38] New PIL Code Section 8 Subsection (2). The old PIL Code in Section 5 Subsection (2) engaged the following: "At the request of a court or another authority, the Minister of Justice shall provide information on foreign laws." The phrasing of the Subsection caused some misunderstandings in practice. The courts have interpreted the provision such that the Minister is obliged to provide assistance in respect of the content of foreign law. As a result, the New PIL Code is more precisely worded.

[39] The criterion of reasonable time has been transposed into the rules as a result, *inter alia*, of the decision of the European Court of Human Rights, *Karalyos and Huber v. Hungary and Greece,* App. No. 75116/01 [2004].

[40] New PIL Code Section 8 Subsection (3). There are practical reasons for applying *lex fori* as auxiliary law, *e.g.* to prevent a disproportionate delay in the procedure and to simplify the process of judicature.

[41] A similar solution can be found, for instance, in Lithuanian legislation (Civil Code of the Republic of Lithuania Article 1.10. Section 6).

[42] *E.g.* the *lex patriae* instead of the *lex domicilii*. See more M. BOGDAN, *PIL as Component of a Law of a Forum*, Brill Nijhoff, Hague 2012, p. 165.

[43] New PIL Code Article 5 (States with two or more legal systems). "Whether it is an inter-regional or interpersonal conflict, the applicable law shall be identified based on the conflict of laws rules of the State whose law was indicated by the reference. If no such rule is available, the law of the State to with which the matter on hand had the closest connection shall apply".

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D. Public Policy and Overriding Mandatory Rules

In most codifications one finds statutory rules that make a general reference to the exception clause of public policy (*ordre public*).[44] The old PIL Code also contained such a defensive provision.[45] It was intended to exceptionally[46] prevent the application of a foreign law, which would conflict with the Hungarian public order. However, this rule did not contain a definition of public policy. The provision ruled that the application of the conflicting foreign law shall be omitted. Instead of the disregarded foreign law, the old PIL Code assessed the application of *lex fori*. In addition, it contained a rule prohibiting discrimination of legal systems.[47] During the review of the provision, the aim was to create a wording that was conducive to legal practice and consistent with EU regulations. The new legislation provides guidance on the content of public policy and reduces the possibility of applying Hungarian law instead of the applicable law.[48] The outdated discrimination rule has thus been eliminated.[49]

The different role of overriding mandatory rules in private international law is acknowledged by the EU and by the European Court of Justice.[50] As a novelty, the new PIL Code, in keeping with the international trend,[51] enacts the issue, however without a clear-cut definition. The provision reads as follows: "those

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[44] See, for example the Belgian, Bulgarian, Estonian, Polish, Serbian, Slovenian and Swiss Codes of PIL.

[45] Old PIL Code Section 7.

[46] It is widely acknowledged that a mere difference between the law of the *forum* and the applicable law should never trigger deployment of the exception of public policy. See for instance S. C. SYMEONIDES, *Choice of Law*, Oxford 2016, p. 79.

[47] "The application of foreign law cannot be disregarded merely because the social and economic system of the foreign state is different from that of the Hungarian." Old PIL Code Section 7 Subsection (2).

[48] Section 12 of the new PIL Code enacts, that foreign law shall not be applied, "if the outcome thereof is likely to manifestly and seriously undermine the fundamental values and constitutional principles of the Hungarian legal system." Hungarian law should only be applied if there is no other way of averting the breach of public policy.

[49] The provision was justified at the time of the birth of the old PIL Code, but the economic and social structure of the country has significantly changed since then. It is no longer necessary to maintain this awareness-raising provision. For the same reason, the provision on reciprocity is not included in the new Code.

[50] Overriding mandatory rules appear at the level of European secondary law in many legal sources, for example in Article 9 of Rome I Regulation, or in Article 16 of Rome II Regulation. The following choices are of utmost importance in the practice of the Court: see ECJ, 23 November 1999, *Jean-Claude Arblade, Arblade & Fils SARL v Bernard Leloup, Serge Leloup, Sofrage SARL*, ECLI:EU:C:1999:575; ECJ, 9 November 2000, *Ingmar GB Ltd v Eaton Leonard Technologies Inc*., ECLI:EU:C:2000:605; ECJ, 17 October 2013, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663. See K. RAFFAI, Néhány gondolat az imperatív normák szabályozásának szükségességéről [Some Ideas about the Necessity of Overriding Mandatory Provisions], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 35-42.

[51] Such rules can be found, *inter alia*, in the Swiss, Spanish, and Belgian Codes.

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provisions of Hungarian law whose content and purpose clearly show that they must be considered to be imperative in the legal relationships covered by this Act shall apply without prejudice to the law that is considered governing in accordance with this Act (internationally mandatory rules)."[52] The wording refers to the direct application of the internationally mandatory rules, without the need to verify its harmony or disharmony with the foreign provision. The defensive function is also apparent. As with the rule of public policy, this section fails to circumscribe the specific norms that are covered by the rule. The obvious reason is that delimiting these rules is not desirable. The application of both the exception of public policy and the overriding mandatory rules is left to the judge's discretion.[53] The Code also contains an innovative provision regarding foreign mandatory rules (both the *lex causae* and the law of a third state).[54] These imperative norms may be taken into consideration if they are closely related to the matter in question and are of substantial importance for the purpose of assessment thereof. This substantive novelty of the Code, which originates from the Rome Convention and the Rome I Regulation, will probably encourage Hungarian judges to apply the overriding mandatory rules of the *forum* or of a third State while preserving the principle of legal certainty.[55]

E. *Renvoi*

Renvoi is declining at the international level.[56] Whether we think of international conventions or the PIL regulations of the European Union, it can be said that they mostly exclude the mechanism.[57] Even before the old PIL Code was created there existed a great tradition regarding the exclusion of *renvoi* in Hungarian PIL scholarship.[58] Consequently, during the codification process of the new PIL Code, the idea of removing *renvoi* was raised again.[59] The old PIL Code included a compromise provision on *renvoi* (it should be borne in mind that this was enacted in 1979). As a primary rule, it established the substantive rules of the designated State as reference points. As an exception, it assessed that if the foreign law refers back to the Hungarian law, the Hungarian law had to be applied. The old PIL Code thus accepted only remission, which obviously was a tool of the "homeward

[52] New PIL Code Section 13 Subsection (1).

[53] There are apparent differences in the nature and function of public policy and mandatory rules, but the purpose of the two provisions is the same: protecting public order.

[54] On the practice of applying overriding mandatory rules of *lex causae* and third states, see Y. GAN, Mandatory Rules in Private International Law in the People's Republic of China, this *Yearbook* 2012/2013, p. 313-315.

[55] See A. BONOMI, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts, this *Yearbook* 2009, p. 295-300.

[56] P. MANKOWSKI (note 26), at 291.

[57] L. BURIÁN (note 25).

[58] I. SZÁSZY, *Az európai népi demokráciák nemzetközi magánjoga [The Private International Law of European People's Democracies]*, Budapest, 1962, p. 118-119.

[59] L. BURIÁN (note 25).

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trend". The new PIL Code adopts the position that conflict of law rules must result in the application of the substantive law rules of the assigned foreign law. Remission and transmission can be taken into consideration when the applicable foreign law is determined on the basis of citizenship.[60] *Renvoi* is acceptable in the form of first transmission.

Hungarian PIL applies the connecting factor of nationality when it determines the applicable law on persons.[61] However, it is worth noting that not only the applicable law on persons is based on the principle of nationality in the new PIL Code. One can find this same connecting factor in the field of family law, rights *in rem* and succession law. Taking into account the tendency for States that apply the connecting factor of domicile or habitual residence to refuse *renvoi*, while States applying the connecting factor of nationality typically accept it, this solution seemed to be the one that best contributes to international harmony of decisions.[62]

F. Choice of Law

The presence of the party autonomy principle in General Provisions is an innovative solution of the new PIL Code.[63] The purpose of this provision is to reflect the significant expansion of party autonomy in PIL relations. The old PIL Code originally only ensured the right to choose the applicable law to contracts.[64] With the development of EU legislation, the circle of party autonomy has widened. This development was also the subject of later – sometimes inappropriate[65] –

[60] Personal status is one of the areas in which the principles of *renvoi* probably apply. See A. BRIGGS, *The Conflict of Laws*, Oxford 2013, p. 26-27.

[61] There is no EU regulation yet in this area that would duplicate the internal regulation.

[62] L. BURIÁN, *Nemzetközi magánjog. Általános rész [Private International Law. General Provisions]*, Budapest, 2015, p. 180-181.

[63] The Polish PIL Act and Dutch Civil Code include similar solution. The "Concept", (note 16) did not contain the provision; it was incorporated into the text in the final phase of the codification process.

[64] From 2009 the choice of law is enabled regarding to the right to bear a name, due to the Garcia Avello case (ECJ, 2 October 2003, *Carlos Garcia Avello v Belgian State*, ECLI:EU:C:2003:539). Section 10 Subsection (2) of the old PIL Code reads as follows: "Having regard to the right of any person to bear a name, the national law of the person shall apply. Upon request, the registration of a birth name shall be effected under the national law of the country of second citizenship […]." With the provisions in Section 16 Subsections (1) and (2), the new PIL Code also allows the choice of law in the area: the personal law of the person, or upon his or her request, Hungarian law shall apply. A person who has multiple nationalities have the option to choose the law of the State of either nationality with respect to bearing his birth name.

[65] For example, Act IX of 2009, which was meant to bring the old PIL Code in line with the Rome I and Rome II regulations. This effort was unsuccessful since the rules governing the choice of law in the field of the law of contractual obligations were inaccurate and the rules governing non-contractual obligations were improperly formulated. See more in L. BURIÁN, Die Partieautonomie im neuen ungarischen Gesetz über das Internationale

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amendments to the old PIL Code. The new PIL Code, in line with the international direction, extends the possibility of choice of law[66] to fields where internal legislation did not previously allow it. Outside the scope of law of obligations, the choice of law is also now permissible in relation to personal law, rights *in rem* and family law.

Among the General Provisions, the Code lays down rules that apply to all paragraphs that regulate the opportunity to choose the applicable law. These are the following: *a)* conditions of choice of law ("express" choice of law is needed),[67] *b)* the existence and validity of an agreement on choice of law (it exists and is valid if the law chosen by the parties, or the law of the place where the contract is concluded requires so) *c)* protection of third parties.[68] Nevertheless, this Section would arguably be much more logical if it contained the provision of express and implied choice of law[69] as a main rule, and if it were expanded to the modification and withdrawal of the choice of law clause.[70]

G. General Escape Clause and the General Subsidiary Rule

In the General Provisions of the New PIL Code, two remarkable legal institutions have been introduced, which were absent from the old PIL Code. One of these is the general escape clause (Section 10).[71] This clause serves the purpose of

Privatrecht, in A.O. HOMICSKÓ/ R. SZUCHY (eds.), *Studia in honorem Péter Miskolczi-Bodnár*, Budapest 2017, p. 83-93.

[66] Though this is not explicitly stated, both the old PIL Code and the new PIL Code make it possible to choose a law of a State. L. BURIÁN/ K. RAFFAI/ S. SZABÓ, *Nemzetközi magánjog [Private International Law]*, Budapest 2017, p. 374.

[67] "(1) Unless otherwise provided by this Act: a) choice of law shall be made expressly, […]" Section 9 of the Code.

[68] New PIL Code Section 9.

[69] For example, both Polish PIL Act and Dutch Civil Code clearly make possible to establish choice of law when it emerges from the circumstances of the case. Article 10:10 of the Civil Code of the Netherlands reads as follows: "To the extent that a choice of law is allowed, it must have been made explicitly or it must appear otherwise sufficiently clear." Article 4.2 of the polish PIL Act states out, that "(t)he choice of law shall be made expressly or shall clearly result from the circumstances of the case, unless the provision allowing a choice of law provides otherwise." A similar solution would be desirable in Hungarian law as well.

[70] For example, the Polish PIL Act of 2011 includes rules on the modification and withdrawal of the choice of law in its Article 4. See L. BURIÁN, Die Neukodifikation des ungarischen internationalen Privatrechts – Probleme des Allgemeinen Teils, in M. PAZDAN/ M. JAGIELSKA/ E. ROTT-PIETRZYK/ M. SZPUNAR (eds.), *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi*, Warsaw, 2017, p. 27-36.

[71] The general escape clause can be found in many national codifications, such as the Swiss, Slovenian, Czech and Dutch Acts. The creators of the New Code drew inspiration from these rules. However, note that the escape clause was not completely unknown in the previous regime of Hungarian PIL since many of the regulations of the European Union contain it.

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eliminating the "blindness" of the conflict of laws rules. PIL regulations typically aim to create conflict of laws rules that lead to the law with the closest connection to the matter. A problem arises when the case, due to its specific factual circumstances, shows a closer relationship with a law other that the one that was designated by reference to the objective connecting factors.[72] The clause is the means to resolve this situation.[73] The provision reads as follows: "If, according to the circumstances of the case, it is apparent that the case is manifestly more closely connected with the law of a State which is different from the law designated by this Act, the law of another State may be exceptionally applied."[74] The clause may be applied at the request of the parties or by the discretion of the court.[75] In the text of the clause, the adverb "exceptionally" serves to prevent a possible "homeward trend".[76] It would not be abusive use of the rule if the court prevented the fraudulent connection (*fraude à la loi*) with it. This is especially desirable, as set out in the Explanatory memorandum.[77] According to the example of the Memorandum, if a moveable asset is transferred to the territory of Hungary in bad faith only for the purpose of shortening the time that is needed to acquire ownership of goods, the court may not use the *lex situs*[78] but the law of the country where the property was located previously. Such use of the rule should be encouraged because, contrary to old PIL Code, the new PIL Code no longer contains provisions for fraudulent connection.[79]

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[72] According to G. GÜNEYSU-GÜNGÖR, Article 4 of the Rome I Regulation on the applicable law in the absence of choice – methodological analysis, considerations, in P. STONE/ Y. FARAH (eds), *Research Handbook on EU Private International Law*, Essex 2015, p. 173, escape clauses give to the system a "principled flexibility".

[73] L. VÉKÁS, A törvény szerkezetéről és néhány általános részi kérdésről [On the Architecture of the Law and Certain Questions Regarding Its General Part], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30) p. 28-29.

[74] New PIL Code Section 10 Subsection (1).

[75] It is necessary to pay attention to the following: the clause should not be invoked merely because it is difficult to weigh the various facts of the case against each other, so by the use of the clause it would easier to find the law applicable. C.M.V. CLARKSON/ J. HILL, *The Conflict of Laws*, Oxford 2011, p. 227.

[76] According to Explanatory memorandum to Section 10 of the Act, application of the *lex fori* as a consequence of the general escape clause could lead to an undesirable phenomenon of homeward trend.

[77] Explanatory memorandum to Section 10 of the Act.

[78] According to Section 39 Subsection (1) of the New PIL Code, "(u)nless otherwise provided for by this Act, the law applicable at the place where the property is situated shall apply to proprietary rights and other rights in rem, as well as to lien and possession."

[79] The Codification Committee did not consider it necessary to maintain the regulation of fraudulent connection. Section 8 Subsection (1) regulated the instrument in the old PIL Code, which was worded as follows: "A foreign law which is attached to a foreign component created by the parties artificially or through pretense for the purpose of avoiding the law otherwise applicable (fraudulent connection) shall not apply." Considering that the rule is uneven, because it places the Hungarian law in the forefront and that it has not developed its judicial practice, the new Code does not contain it.

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The choice of law by the parties naturally limits the scope of the escape clause. However, there is another limiting formulation in the Code. A provision on the deadline for the clause has also been included in the legal text, which has not yet been included in "the Concept".[80] Accordingly, "(t)he court shall adopt such a decision at the latest within thirty days from the date of receipt of the statement of defense."[81] In our view, this time limit is not just unusual, it is in fact completely causeless. Furthermore, it makes the application of the clause rather difficult or impossible, notwithstanding that its original aim was to bring flexibility to the system of the Code.

The other new institution of the Code is the general subsidiary rule (Section 11), which at first glance resembles to the general escape clause, since it is also a general principle and works with the connecting factor of the "closest connection". It is therefore important to clarify that the subsidiary rule has a completely different function.

In the case of the escape clause, the PIL regulation leads to a law of a given country. Nevertheless, because of its particular circumstances, a case is more closely connected with the law of another State. Thus, by using the clause, the judge may deviate from the originally designated right. The general subsidiary rule differs from the former. This applies when the Act does not provide rule on applicable law to a legal relationship that otherwise falls within its scope. In this case, the law that is most closely connected to the legal relationship shall apply. The use of such a "stop-gap clause" is not unusual for national PIL regulations – the Slovenian and Bulgarian PIL regulations have similar solutions.[82]

H. Change of Applicable Law (Statute)

The final article of the General Provisions regulates the change of applicable law (*Statutenwechsel*). This provision applies to situations where the applicable law may change as a consequence of a change in circumstances relevant to the case. In accordance with Section 14 of the new PIL Code, such changes in circumstances do not, in principle, have any effect on the law applicable to the legal relationship.[83] The old PIL Code used a different codification technique: rules containing such content were not listed in the General Provisions of the Act, but rather in the rules governing the various legal relationships subject to the *Statutenwechsel* or *conflit mobile*.

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[80] The Concept (note 16)

[81] New PIL Code Section 10 Subsection (1).

[82] See Article 3 of the Private International Law and Procedure Act of Slovenia and Article 2 (2) of the Bulgarian Private International Law Code.

[83] Comp. Section 7 of the Austrian PIL Act of 1978.

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III. Applicable Law

A. Persons

Chapter II on persons (Section 15-23.) attempts to summarize the most important provisions on the law applicable to persons.

In Section 1.5, concerning the "personal law" of a person, the New PIL Code uses a very similar, but slightly simplified "ladder" as the Old PIL Code did, and introduces the closer connection principle as well as the place of habitual residence as a connecting factor, instead of the domicile (or, to be more precise, the former residence, which was like the concept of domicile). This personal law is applied to the legal capacity and personality rights of a person, but has relevance in other questions like the law applicable to the right bearing a name or regarding marriage, whether the marriage was valid or not, and also regarding certain other family law relationships. Under personal law, the Code means the law of the country the person's citizenship. If the person has double citizenship and one of them is Hungarian, Hungarian law must be applied, unless the person has closer connection to the other citizenship. This is in line with domestic criticism regarding the similar provisions of the old PIL Code, which was found to be discriminative by many in the Hungarian academia,[84] since (without the escape clause) the application of the law of the country of citizenship could conflict with EU rules, and particularly with Article 18 of the Treaty Founding the European Union ("TFEU") on non-discrimination based on nationality. In case the person has double nationality, but no Hungarian citizenship, the closer connection test applies. Otherwise, habitual residence must be applied. In the absence of this, Hungarian law must be applied. If someone was granted asylum in Hungary, Hungarian law must be applied [Section 15 (7)].[85]

The new PIL Code also re-shapes the provisions on names. Just like in the old PIL Code (see Art 10. thereof), this subject is placed among the provisions on persons. In this regard, the lawmaker had to follow the practice of the ECJ.[86] In

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[84] M. CSÖNDES, A Róma III. rendelet, különös tekintettel az EU-jog által nem szabályozott kérdésekre [The Rome III Regulation, with Special Regard to The Questions Not Governed by EU Law], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 208 and the references to the works of Csehi and Mádl/ Vékás.

[85] This does not completely conform with Article 12 of the 1951 Geneva Convention (in Hungary proclaimed by Law Decree 15 of 1989), which says that "the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence". Please note that the change of the personal law of the refugee cannot harm rights already acquired, as Section 14 of the new Code says that any change in the circumstances determining the applicable law shall have no effect on tlegal relationships established earlier.

[86] ECJ, 30 March 1993, *Christos Konstantinidis v Stadt Altensteig* ECLI:EU:C:1993:115; ECJ, 2 October 2003, *Carlos Garcia Avello v Belgian State* ECLI:EU:C:2003:539; ECJ, 14 October 2008, *Stefan Grunkin and Dorothee Regina Paul* ECLI:EU:C:2008:559; ECJ, 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* ECLI:EU:C:2010:806; ECJ, 12 May 2011, *MalgožataRunevič-Vardyn* ECLI:EU:C:2011:291; ECJ, 2 June 2016, *Nabiel Peter Bogendorff von*

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2009, a first amendment was made to the law, however the changes did not take all the aspects of the development of EU case law and domestic practice into consideration, so a major reform was again necessary. According to Section 16, in relation to the right of a person to bear a name, the personal law of the person, or upon his request, Hungarian law shall apply. A person with multiple citizenship may choose the law of any of these countries. Similar rules apply to married names (in these cases, the spouse may ask for the application of Hungarian law). For the name after the dissolution of the marriage, the law of the country under which the married name was adopted have to be applied. Interestingly, the law also tries to solve the problems regarding recognition of names among the provisions on applicable law, which is unfortunate, as in our opinion this problem should be handled among the provisions on recognition of foreign judgments/decisions. It says that the name of a Hungarian citizen shall be recognized if the Hungarian citizen or his/her spouse is the citizen of the country which registered the name, or the habitual residence of the citizen is in that state. On the other hand, even in this case, a name contrary to Hungarian public order may not be registered.

The personal law of a legal person (legal entity) is the place of registration. The law also sets some rules if no registration was made, or if the company was registered in two or more states: in such cases, the company's founding document must be examined to allocate the seat of the company. In the absence of this, the law of its central headquarter (*i.e.* real seat) must be applied.

B. Rights *in rem*

1. General Provisions on Rights **in rem**

Rights in rem are governed by Chapter V of the Code. The Chapter is divided into general and specific provisions. The General Rules first declare the main connecting factor to legal relationships, which are subject to a right *in rem*. According to Section 39 of the Act, "(…) the law applicable at the place where the thing is situated shall apply to proprietary rights and other rights *in rem*, as well as to lien and possession." Thus, the law applicable in principle remains the *lex situs*.[87] The relevant date for establishing the *lex situs* is the time of occurrence of the fact giving rise to the legal effect.

As a new measure, the law provides rules as to the *status* of ensemble and to the destiny of adjuncts and accessories of the property. The latter are shared, by definition, the fate of the principle and the former shall be governed by the law that it has the closest connection with. The new PIL Code also defines the scope of the applicable law. This exemplary list contains elements such as the holder of the right *in rem*, the content of the right *in rem*, the effect of rights *in rem* vis-à-vis

Wolffersdorff ECLI:EU:C:2016:401; M. LEHMANN, What's in a Name? – A Comment on the ECJ's Decision in Grunkin-Paul, this *Yearbook* 2008, p. 135-164. This collection was taken from RAFFAI (note 6) at 128, fn 16.

[87] Most European regulations, and also the old Code apply this solution.

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third parties, and so on.[88] The purpose of this rule is to give assistance to application of the Code.

The general provisions also take into account the situation when there is a change in rights *in rem*. Regarding the fate of the rights previously acquired, the Code says that these rights may be recognized according to the law applicable in the State where the property is situated. If the acquisition of rights had not been completed at the previous location of the property, the law of the State whose territory the property was transported to shall apply. The provision regarding adverse possession remained the same.[89]

2. Exceptions

Exceptions to the general rules are outlined in the second part of the Chapter. The scope of exceptions has been expanded and has changed in some cases. Conflict of laws rules that apply to the registered watercraft and aircraft (*lex bandi*), movable property under transportation (law of the State of destination with the exception of forced instruments) and personal effects of the traveler (*lex personae*) are unchanged. It is a novelty that the list of vehicles has been supplemented with railroad vehicles. As with other vehicles, the law of the State in which the railroad vehicle was put into service shall apply to *in rem* issues.

Previously, in the area of rights *in rem*, choice of law was not allowed.[90] The Code changes this attitude.[91] According to the Code, parties can enjoy autonomy by choosing the applicable law in two areas. First, the parties to a contract for the transfer of ownership of movable property have the right to choose between the *lex situs* and the law of the State of destination. Secondly, in the case of an asset-deal, the parties may choose the personal law of the predecessor.[92]

These provisions raise two completely new issues. Complex rules have been developed for security *in rem* by Section 44 of the Code. Conflict rules are different depending on whether the security *in rem* is registered or not. If it comes into existence upon registration, the law of the State where the security is regis-

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[88] New PIL Code Section 40.

[89] "The law of that State shall apply to the adverse possession of movable property, in the territory of which the thing was at the time of the expiry of the duration of adverse possession." New PIL Code Section 41. Subsection (3) During the codification process, there was a dispute over the relevant date. In a previous version, the starting point of the limitation period had to be taken into account. This solution, however, would have made it difficult to apply the rule in practice, as it is more difficult to find out where the property was situated at the beginning of the limitation period.

[90] For a detailed analysis, see Z. CSEHI, A nemzetközi magánjog dologi jogokra vonatkozó kollíziós szabályainak vizsgálata és javaslatok a jelenlegi magyar szabályok módosítására [Examining Rules of Law Applicable to Rights *in Rem* and Suggestions for Modifying the Current Hungarian Provisions], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 136-159.

[91] See more in R. WESTRIK/ J. VAN DER WEIDE, *Party Autonomy in International Property Law*, Sellier, 2011.

[92] L. BURIÁN/ K. RAFFAI/ M. SZABÓ (note 66) at 338.

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tered shall apply. If no registration is required, the personal law of the provider of security shall apply. The Section provides separate rules for security provided in connection with a payment account, bank deposit and dematerialized securities,[93] and also to security on receivables. The *lex situs* shall apply to the reservation of title, except if the parties decided to choose the law of the State of destination of the transferred movable property.

3. Cultural Goods

Another innovative feature of the Code is the special conflict of laws regulation on cultural goods. Previously, the general connecting factor had to be applied to determine the applicable law in disputes relating to these goods. However, the connecting factor of *lex rei sitae* by itself is not able to handle the particular problems that arise in such cases. According to the function of the connecting factor, the law of the State will be applicable to the dispute in which the cultural property lies at the time when the dispute arises. Due to the peculiarities of cultural goods,[94] the use of this principle may easily lead to an increase of the *forum shopping* phenomenon,[95] and eventually promote the flow of illegally acquired treasures towards States which provide more favorable ownership rules. For these reasons,

[93] The provision is a correct transplantation of Article 9 of the Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements.

[94] The unique aspects of cultural goods and the disputes over these goods can be summarized as follows. The countries of origin try to preserve their cultural goods, usually through strict export regulations, and to recover the cultural goods unlawfully removed from their territory. On the other hand, art dealers, auction houses, etc. try to exploit the commercial benefits attainable through cross-border movement of works of art. It is hard to reconcile these interests, as shown by the divergent legal solutions applied by the different nations regulating the area of cultural goods, according to their respective egoistical interests. The other reason for regulatory diversity in the field of the restitution of cultural property lies in the different attitudes towards the *bona fide* purchaser. Recovery cases oppose an original owner reclaims his stolen or misappropriated object to a new one, who may be in good faith and have ignored the origin of the purchased object. The existing differences in national rules on the acquisition of stolen goods undermine the predictable outcome of these kind of lawsuits and create legal uncertainty, also resulting in *forum shopping*. V. VADÁSZ, Lessons of Sevso Case: Restitution Challenges of the Illegally Exported Cultural Property, in M. SZABÓ/ P.L. LÁNCOS/ R. VARGA (eds), *Hungarian Yearbook of International and European Law 2016*, Hague 2017, p. 51-52.

[95] According to the different systems of law, a good faith purchaser can acquire good title by rules of substantive law (with the well-known 'nemo plus juris' principle with the exception of the bona fide purchaser), or by procedural legal assets (for example, the UCC provides the valid title of ownership to the original owner as long as one of its limitation doctrines is applied). Legal systems that reinforce the *status* of good faith purchasers should take the same approach with the phenomena of stolen goods flowing in to their country's territory. The most radical legislation was introduced in Italy, where the *bona fide* buyer becomes owner, in the absence of any further requirement (Italian Civil Code Section 1153). Solutions which provide extreme protection to the original owner – like in the United States – in turn create iniquitous situations for the buyer who is reliant on his contract. V. VADÁSZ (note 94) at 57.

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the introduction of the connecting factor of *lex originis* was considered by the international community and lead to the so called "Basel Resolution".[96] Had it been approved, this rule would have prescribed the application of the law of the country of origin.[97] The beneficial effect of this connecting factor is that the rules which the country of origin has established for the protection of cultural goods will prevail and *forum shopping* will be reduced. However, the great disadvantage is that this rule is difficult to apply, since determining the origin of goods may be problematic years after the act giving rise to the dispute.[98] Consequently, in some cases it leads to legal uncertainty.

The new PIL Code applies a modern, compromise solution. If a State lays claim of ownership for a property that a State considers a part of its cultural heritage, the applicable law could be either the *lex situs* (or the purpose of establishing the applicable law, the relevant time is when the ownership claim evaluates) or the *lex originis*, according to the claiming State's decision.

The Act, as well as the Belgian Code,[99] provide rules not only for the actions of the State but also of individuals. With regard to a claim of ownership of a property unlawfully removed from the possession of its original owner, the applicable law shall be the *lex situs* or the *lex originis* – at the original owner's discretion.[100]

The advanced approach of the Code provides protection for the *bona fide* possessor in both cases. In the first case, if the law of the claiming State offers no protection for the *bona fide* possessor, he or she may claim protection under the *lex situs*. In the second case, according to the new PIL Code, if the original owner chooses the *lex originis* and it provides no protection to the good faith possessor, he or she may claim protection under the *lex situs*.[101]

[96] See the comment on the "Basel Resolution" by E. JAYME, Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law, *International Journal of Cultural Property*, 1997/2 p. 376-378.

[97] The "nationality" of cultural property is discussed by E. JAYME, Internationaler Kulturgüterschutz – *Lex originis* oder *lex rei sitae* – Tagung in Heidelberg, *IPRax* 1990, p. 347-348.

[98] See more M. WANTUCH-THOLE, *Cultural Property in Cross-Border Litigation*, Gruyter, 2015, Chapter 4, § 4, IV.6.; S. SZABÓ, A kulturális javak (és a lopott dolgok) speciális védelme az új nemzetközi magánjogi törvényben [Special Protection of Cultural (and Stolen) Goods in the New Private International Law Code], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 167

[99] Belgian Code of Private International Law Art. 90 and 92.

[100] "As regards a claim of ownership of a thing unlawfully removed from the possession of its original owner, the law applicable shall be – at the original owner's discretion – either of the State where the thing in question was situated at the time it went missing, or the State where the thing in question is situated at the time the ownership claim is evaluated." New PIL Code Section 46 Subsection (1).

[101] New PIL Code Sections 46 and 47.

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C. The Law of Obligations

1. The Structure of the Rules on Obligations

There were some structural changes made by the lawmaker to the law applicable to obligations (former Chapter V, Sections 24-35., now Chapter VII, Sections 50-63 of the new PIL Code). The structure of the Chapter becomes clearer, as it separates three major subchapters: 26) The law applicable to contracts; 27) The law applicable to securities, like stocks and bonds and 28) The law applicable to non-contractual obligations (especially damages). In a major change, the legislator inserted a detailed section on the law governing arbitration agreements, as these agreements are exempt from Rome I.[102] The notifications inserted into the relevant chapter of the old PIL Code, which mentioned that the law can only be applied if the scope of Rome I or II[103] regulations do not cover the relationship, were deleted notwithstanding that such provisions were very useful for legal practitioners.[104] The architecture of the Sections tried to reflect to the rules of the Rome regulations: regarding contractual obligations, the provisions on the choice of law became codified in the first paragraph [Section 50 (1)], just like the choice of law of the parties is in a prominent place in Rome I regulation. Regarding damages, the newly introduced choice of law of the parties was codified only in the second place compared to the law applicable in the absence of such a choice. This solution also followed the solution used in Rome II regulation (see Section 14 thereof). However, we are not sure whether drawing this distinction was appropriate, notwithstanding that a similar connecting factor is used by other laws such as the EGBGB.[105] The solutions of a code should be standardized and easily accessible for practitioners; therefore, using different architecture in different sections for similar relationships is questionable.

As mentioned previously, the rules on contracts were not erased from the New PIL Code as occured in the case of Art. 27-37 EGBGB, and they can be found in Section 50-56. As before, the existence and validity of a contract shall be determined by the law which would govern it if the contract were valid. The New PIL Code regulates civil partnerships separately from family relationships and contractual obligations in a different chapter.[106] Furthermore, it does not have

[102] Rome I (note 10), Article 1, Section 2(b)

[103] Rome II (note 11).

[104] L. VÉKÁS, A törvény szerkezetéről és néhány általános részi kérdésről [On the architecture of the law and certain questions regarding its general part], in *Az új nemzetközi Magánjogi Törvény Alapjai* [*The Fundaments of the New Private International Law Ac*t] (eds. B. Berke and Z. Nemessányi), Budapest 2016. p. 17. Similar provisions can be found in Art 3 of the German EGBGB and in Section 35 of the Austrian IPRG.

[105] See Art 41-42 EGBGB. On the other hand, in the German law, the rules of contracts were erased.

[106] However, the new Civil Code handles civil partnership as a special form of contract, see Art. 6:514 thereof. This only regulates the family law effects of civil partnerships in its book on family law. Moreover, in an unfortunate way, registered partnerships are regulated in a separate act called Act XXIX of 2009 on registered partnerships.

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special rules regarding the law applicable to marriage contracts. Just like the old law, the new PIL Code also has some special provisions on validity: it says that the existence or validity of a contract shall be governed by the law applicable to the contract (Section 53), and it also adds extra layers (*e.g.* if the parties are present in the same State it could be valid if the law of this State considers the contract to be valid).

2. Rules on the Law Applicable to Contracts

Regarding choice of law to contractual obligations, the new PIL Code follows the solutions of the Rome I regulation. It expressly mentions that the choice of law shall be made in the preparatory stage and within a court-imposed deadline at the latest, which is a rather strange rule. In Hungarian academia, many were of the opinion that this choice could be made until the last evidence had been presented in the court procedure.[107] The parties may make an implied (tacit) choice of law as well. However, in this case, just like in the old PIL Code, this fact must be "clearly demonstrated" by the "terms of the contract or the circumstances of the case".[108] The Code also mentions that the parties may change the law applicable to a contract. The parties must respect the cogent rules of the law which would be applied in the absence of a choice if all the circumstances of the case are linked to one sole country (this provision was also copied from Art. 3(3) Rome I regulation).

In the absence of a choice, the new PIL Code uses a fundamentally different solution to the Rome I regulation, and it maintains the former, rather laconic text inspired by the 1980 Rome Convention on applicable law. It renders the law of the country which has the closest relationship to the contract applicable, without any further guidance. It seems like a fraction of Art. 4 1980 Rome Convention remained in force, of course, without reference to the habitual residence of the person who performs. The habitual residence of the parties, unlike in the Austrian PIL Code (§ 35(2) IPRG),[109] or a choice of a forum are in themselves irrelevant, since all the elements must be taken into consideration. This connecting factor reflects a trend of several Eastern European codifications, for one of its latest forms see § 87 of the new Czech PIL Code, or the Bulgarian, Estonian, Lithuanian, or Slovenian PIL Acts.[110] The Explanatory Memorandum of the new PIL Code[111] mentions that the legislator chose this almost limitless solution because it is simpler than the rules of Rome I regulation. However, one motivation behind this

[107] See L. BURIÁN/ L. KECSKÉS/ I. VÖRÖS/ T. D. CZIGLER, *Európai és magyar nemzetközi magánjog* [European and Hungarian Private International Law], Budapest 2010, p. 212.

[108] This means that a choice of forum cannot be interpreted as a choice of law in itself, only if all the circumstances would lead us to this conclusion.

[109] One reason for the phenomenon described above could be that the Code does not use general connecting factors as the Austrian IPRG does in his Art. 1 codifying the closest connection principle, see SYMEONIDES (note 7) at 176.

[110] See p. 180 *ibid.*

[111] See Law Proposal No. T/14237.

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could be that in such cases courts could use domestic law as this "simplest" solution, since they do not receive any proper guideline which law to apply. Furthermore, as with the old approach, all elements of the contract should be taken into consideration.

3. Special Rules (Arbitration, Securities)

The new PIL Code has some new and special provisions in Section 52 on the law applicable to arbitration agreements. Here, the Code follows the doctrine of separability of arbitration clauses and the rest of a contract, thereby changing the method formerly used.[112] This solution could lead to a possible *dépeçage* of the contract,[113] but it has the benefit that as an *ultima ratio*, the law of the forum can also be used in such agreements. It is important to note that a major reform of arbitration courts has recently been completed in Hungary. The law re-regulating their status (Act LX of 2017 on arbitration[114]) was adopted in 2017. According to the new PIL Code, parties may choose the law applicable to their arbitration agreements. In absence of such choice,[115] the law of the relationship between the parties must be applied (either if the parties chose a law for this relationship, or in the absence of such a choice). If it is more closely connected to the agreement, the law of the forum of the arbitration procedure must be applied. Finally, the new PIL Code says that arbitration agreements must be considered valid if either the law mentioned above, or the *forum* of the law accepts them as valid.

The law has special rules on securities (Sections 57 and 58) which render different laws applicable to different aspects of securities (such as formal requirements and types of securities, in rem rights and obligations and other obligations and rights arising of such securities). Some of these provisions are more open to the actual situation of securities than the former law. For example, obligations under securities were previously governed by the law of the country in which performance took place, while according to the New PIL Code, choice of applicable law is also available for the parties.

4. Non-Contractual Obligations

The last part of the Chapter on obligations, being the rules on non-contractual obligations, can be found in Section 59-63. It is worth noting that the New PIL Code has special rules for the violation of personality rights in Section 23, which

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[112] See Section 49 of Act LXXI. of 1994 on arbitration.

[113] C.M. GERTZ, The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual *Depeçage*, 12 *Northwestern Journal of International Law and Busine*ss 1, 1991 p. 170.

[114] Should be applied for procedures as of 1st January 2018.

[115] See D. JONES, Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties 26 *Singapore Academy of Law Journal* 2014, p. 911-941.

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are also fundamentally different to the old provisions. Burián mentions[116] that according to a report created for the European Commission,[117] a vast majority of the European Countries do not use special rules regarding the harm of personality rights, and only certain countries (Hungary, Lithuania, Belgium, Romania, Poland and the Czech Republic) have such provisions. According to the New Hungarian PIL Code, generally, for such claims the habitual residence of the person whose rights have been harmed must be applied.[118] Unlike in Section 10 (3) of the Old PIL Code, the place of the harmful event became irrelevant in the first place. However, the person whose rights were hurt may chose the law of the country where the center of his interests are, or Hungarian law, or the law of the habitual residence of the person who conducted the infringement.[119] These changes may collude with Article 3 of the Directive on Electronic Commerce,[120] which (according to the

[116] L. BURIÁN, A Róma II. rendelet, különös tekintettel a személyiségijog- sértésekre [The Rome II Regulation, With Special Regard at the Infringement of Personality Rights], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 292.

[117] Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. JLS/2007/C4/028. Annex III.

[118] A similar solution was proposed decades ago by Imre Vörös to protect the persons harmed, see L. BURIÁN, Das auf die Straßenverkehrsunfälleanzuwendende Recht nach dem Geändertenvorschlag der Europäischen Kommission („ROM II."), *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio iuridica*, 2006. 47. tom., p. 190 *et seq*.

[119] The latest Eastern European codifications do not allow party autonomy in case of infringement of personality rights. For example, Section 16 of the Polish PIL Act renders applicable the law of the country where the harmful event or the harm occurred, or, according to its Section 16 (3), if the harm was made in the media, the law of the seat of the company must get applied. Furthermore, Section 101 of the Czech PIL Act says that such claims 'shall be governed by the law of the state in which the violation occurred'. However, there, the person may choose the law of the affected person's habitual residence or where the violator has habitual residence or seat, or where the result of a violating conduct appeared.

[120] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, p. 1–16. M. BLASI, *Das Herkunftslandprinzip der Fernseh- und der e-Commerce-Richtlinie*, Köln/ Berlin/ München, 2004; M FALLON/ J. MEEUSEN, Le commerce électronique, la directive 2000/31/CE et le droit international privé, *Rev. cr. dr. int. pr.* 91, 2002, p. 435–490; N. HÖNIG, The European Directive on e-Commerce (2000/31/EC) and its Consequences on the Conflict of Laws, *Global Jurist Topics*, 2005, 2, p. 17-18; S. NASKRET, *Das Verhältnis zwischen Herkunfts- landprinzip und Internationalem Privatrecht in der Richtlinie zum elektronischen Geschäftsverkehr*, Münster/ Hamburg/ London, 2003.

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latest interpretation of the ECJ[121]) does not allow the application of a law which would be harmful for the provider instead of the law of the provider's seat.[122]

Regarding other damages, another major change took place: the New PIL Code allows a broader selection of law for the parties, without limitations, while the Old PIL Code did not allow this at all. Domestic academia had regularly called for such an approach.[123] The choice must be made at the preparatory stage of the court procedure, and the courts give a deadline for its latest applicability – this rule, similar to the one applied regarding contractual obligations, is questionable. Just like in the case of contracts, the text mentions that the selection of a law cannot lead to the abrogation of the rules which "cannot be derogated" (*ie.* which are cogent rules).

If the Parties did not choose a law, the law of the country must be applied, where the effects, i.e. the damage of the event establishing the obligation occurred. To put it differently, this rule puts *lex damni* in a prominent place. This is a big change in Hungarian law, as Section 33 of the Old PIL Code rendered the *lex loci delicti commissi* applicable, and, as an exception, *lex damni* was only applied in cases where it was more beneficial for the person harmed.[124] However, similarly to Article 4 (2) Rome II regulation and Section 33 (3) of the Old PIL Code, if the parties have a common habitual residence, the law of this place should be applied. Moreover, just like in 4 (3) Rome II regulation, an escape clause has been inserted into the text: if the law of another country is more closely connected to the case, this law should be applied.

D. Family Law

The family law provisions of the new PIL Code can be separated into four major parts: the rules on 1) marriage 2) children 3) adoption and 4) civil partnership and registered partnership. As mentioned previously, unlike the majority of provisions codified under Family law in Chapter V, the fourth group was put into an independent chapter (Chapter VI).

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[121] Joined cases ECJ, C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and C-144/09, *Hotel Alpenhof GesmbH v Oliver Heller* ECLI:EU:C:2010:740.

[122] I. ERDŐS, Javaslatok a személyhez fűződő kollíziós szabályok kialakításához az új nemzetközi magánjogi törvényben [Recommendations regarding the provisions related to persons in the new Act on Private International Law], in B. BERKE/ Z. NEMESSÁNYI (eds) (note 30), p. 108.

[123] The lack of a choice was compensated in legal practice with dubious decisions. For example, "in the case of a traffic accident caused in Romania by a Hungarian to a Slovakian citizen, the Supreme Court applied the Hungarian law instead of the Romanian law... stating that with their implicit conduct the parties requested the disregard of the applicable foreign (Romanian) law". K. RAFFAI/ S. SZABÓ, Selected Issues on Recent Hungarian Private International Law Codification, *Acta Juridica Hungarica* 51, No. 2, 2010 p. 153.

[124] For the circumstances of its codification, see L. BURIÁN, Hungarian Private International Law, this *Yearbook* 1999, p. 182, and also L. BURIÁN (note 116) at 191 *et seq.*

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1. Marriages

The laws on marriage (Section 26-30) govern the validity of marriage. The new PIL Code kept the provisions of the old PIL Code, which said that marriage can only be considered valid if it is valid under the personal laws (*i.e.* under both laws) of the parties. This solution is different from those used in many international agreements or in certain national rules like Art. 11 and 13 EGBGB. Many of these rules refer to the law of the place of the marriage, instead of personal law, which in most cases is the law of the citizenship of the parties. Despite not being in line with these trends, the connecting factor of the new PIL Code creates a clear situation, and it has some support in domestic academia.[125] Regarding formal requirements, the law in force at the place of marriage shall apply. A marriage cannot be concluded in Hungary, if there is an obstacle to concluding it under Hungarian law (the Explanatory Memorandum of the new PIL Code Proposal[126] mentions that such an obstacle could be the existence of a former marriage, or family relationship between the spouses[127]). For the personal relationships of the spouses (Section 27), the law of their citizenship must be applied (or, if they have different citizenships, the law of their common habitual residence, or their last common habitual residence). In this last case, the new PIL Code shifts from the residence of the spouses (*i.e.* from domicile, the place where they lived permanently) to the habitual residence. If no such place existed, the law of the *forum* must be applied. Interestingly, the law does not consider the problem of having two or more similar citizenships at this point. However, in a previous Section (Section 24) it says that in such cases the closer connection test applies. This solution is rather unconventional, as practitioners cannot find the proper provisions in their proper place in the structure of the Code, where they normally belong.

2. Matrimonial Property Regimes

As a major change, the new PIL Code allows the parties to select the law applicable to matrimonial property regimes (Section 28). This Section is applicable to marriages and to civil and registered partnerships as well. However, this choice is limited to certain laws: a) to the citizenship of one of the parties b) the law of their joint habitual residence at the time the agreement was reached 3) the law of

[125] M. CSÖNDES (note 84) at 219. She also mentions Mádl-Vékás to support her view, see F. MÁDL/ L. VÉKÁS (note 1) at 423.

[126] Explanatory Memorandum, p. 55.

[127] This rule creates some serious problems in legal practice, as many countries do not issue such certificates, and most countries do not have an official form to certify that someone is able to marry. Moreover, "in a highly problematic way, Hungarian authorities do not provide Hungarians with such status certificates since they cannot prove the Hungarian person did not married abroad. Consequently, they only issue a statement that the person is not married in Hungary". T.D. ZIEGLER, Hungary, in LIFE EVENTS OF EU CITIZENS - D7.5 Report on case study (iii): "Obstacles that (mobile) EU citizens face in dealing with life events" bEUcitizen 7p7 report (eds. P.J. BLANCO/ Á.E. MENÉNDEZ), Available at <http://beucitizen.eu/wp-content/uploads/D7.5-FINAL.pdf p. 236.>

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the *forum*. This selection of available laws is very similar to Section 16 of the Commission Proposal about matrimonial property regimes,[128] which was withdrawn in 2017 by the Commission.[129] Moreover, it is quite similar to the European Parliament's text on the same Proposal.[130] It is also in line with some recent Eastern European codifications like Section 49 (4) of the Czech, Section 52(1) of the Polish, or Section 2.590(2) of the related Romanian Act, but is slightly different from those Codes, which render the application of the domicile of the parties, instead of their habitual residence (*e.g.* from Section 52 of the Swiss PIL Code). According to Section 28(4), unless otherwise agreed, the agreement on the applicable law is only binding for the future, it does not have retrospective effect. Moreover, just like in the case of contracts, it can only be made in the timeframe set by the court, not until the end of the court procedure. In the absence of a choice, for the matrimonial regime, the new PIL Code renders the same rules applicable as to the personal relations of the parties (Section 27): thus, the law of their citizenship (or the law of their common habitual residence, or their last common habitual residence, or the law of the forum) must be applied.

3. Children

Regarding children, the new PIL Code mentions in its Section 25 that the law of the *forum* should apply in family law matters regarding children if it is more favourable to them. On the existence of paternity or maternity, the personal law of the child applies. In the case of unborn children, the mother's personal law must be applied. The relationship between the child and the parents is governed by the *lex fori*, or, if it more beneficial for the child, the law of another country which is closely related to the case (Section 34).

The laws on adoption (Section 33) have great importance in Hungary, since according to Act CLIV of 1997 surrogacy is not allowed to be made in the territory of Hungary[131] (however, surrogacy in itself is not a crime). Moreover Section 4:130 of the Civil Code says adoption cannot take place for financial or other gain (or, to be more precise, all the involved parties, including the facilitating organisations

[128] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. COM(2011) 126 final.

[129] Withdrawal of Commission proposals. OJ C 160, 20.5.2017, p. 2–3.

[130] Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS))PE 494.578v02-00 A7-0253/2013, Amendment 60.

[131] CS. I. NAGY, Hungary, in K. TRIMMINGS/ P. BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Hart 2013, p. 175-186; K. ROKAS, National Regulation and Cross-Border Surrogacy in European Union Countries and Possible Solutions for Problematic Situations, this *Yearbook* 2014/2015, p. 289-314.

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may only accept financial support for their reasonable expenses).[132] This is in line with Section 8 and 32 of the 1993 Hague Convention on adoption. Adoption is not allowed in Hungary for those living together in civil partnership or registered partnership. These rules are complemented in the new PIL Code, which says that the "adoption shall be considered valid only if the conditions for adoption are satisfied under the personal laws of the adoptive parent and the person to be adopted" at the time of adoption. To the effects of adoption as well as the effects of the termination of the adoption, the personal law of the adoptive parent should be applied. If the adoptive parents are married, this law changes: for such situations, the law of the spouse's common citizenship should apply, or, in absence thereof, the law of the country of their last habitual residence or, if no such country exists, the law of the forum. To highlight the difference, if the personal law could not be set according to the citizenship of the parties involved, in the case of married persons the law of their habitual residence applies, while in the case of singles or persons living in registered or civil partnerships, the closest connection principle applies. It is an open question whether this solution could lead to possible discrimination in case of joint adoptions of civil or registered partners abroad, especially in the light of the recent ECJ case law,[133] even though certain differences conform with European human rights standards.[134]

4. Civil and Registered Partnerships

As mentioned previously, the New PIL Code has provisions on extra-marital relationships: Section 35-36. deal with civil partnerships, and Section 37-38. with registered partnerships. Regarding the establishment and termination of civil partnerships, the law of the parties' common citizenship must be applied (if they have several common citizenships, just like in the case of marriages, the one must be chosen which is closer to them). In the absence of such a country, the law of their common habitual residence, or their last habitual residence must be applied. As a last resort, the law of the forum applies.

The rules on registered partnerships contain some special provisions, but the general rules on civil partnerships equally apply in these circumstances. Here, the fact that the family law regime does not accept registered partnerships is not

[132] Generally, according to Hungarian law, "the woman giving birth to the child is considered to be the mother. However, in countries where surrogacy is allowed, in certain cases the biological mother is signed as mother on the birth certificates (this causes serious problems and uncertainty e.g. in Ukrainian-Hungarian family relations). Since the Hungarian authorities normally do not know anything about the background of the birth, they must accept the biological mother as mother, whose name is registered on the birth certificate as mother. If they later learn that the mother did not give birth to the child, there is a high chance the parentage will not be recognised by the authorities..." T.D. Ziegler (note 127) at 226.

[133] In the light of the latest ECJ case law, difference making could move into discrimination, see Case C 267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823.

[134] ECHR, 16. July 2014, *Case of Hämäläinen V. Finland*, App. No. 37359/09.

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relevant to Hungarian authorities, provided that they are able to verify their right to marry under their personal law, and at least one of the spouses is a Hungarian citizen or has habitual residence in Hungary. This means that in such cases, if they do not have either Hungarian citizenship or habitual residence in Hungary, they cannot register their relationship, which may lead to quasi-discriminative situations. To put it clearly: someone who originates from a country that recognizes same sex marriages will have rights others do not; similarly, someone who has habitual residence in Hungary will have rights others do not. Even though the legality of such a provision could probably be defended from a constitutional point of view, we are not sure whether this differentiation conforms with modern interpretations of equality under the law.[135]

Finally, regarding the termination of the registered partnership (Section 38.) the common habitual residence of the spouse, or the last common habitual residence of the spouse, or the citizenship of the spouses must be applied. In the lack of such countries, the law of the forum applies.

E. Other Relevant Provisions

Apart of the above-mentioned rules, the new PIL Code has special rules on the validity of successions made in an oral form (Section 64).

It also has some short provisions implemented on copyright and industrial property rights (Section 48-49). For copyrights, the law of the country where the protection is granted shall apply. Regarding industrial property rights (like patents), the law of the State where protection was granted, or where the persons asked for such a protection shall apply.

IV. Jurisdiction and Procedural Issues

A. Jurisdiction

The rules on jurisdiction can be found in Chapter X of the new PIL Code, while the rules on recognition and enforcement of judgments are in Chapter XI and other procedural issues can also be found in Chapter IX. The chapter on jurisdiction of the new PIL Code does not deal with arbitration courts, despite the fact that, as we have seen, the Code has some provisions on arbitration agreements. This is especially important, since, as mentioned previously, a new law was adopted in this field (Act LX of 2017 on arbitration). The new law centralized the system of arbitration courts in Hungary by abolishing the Permanent Court of Arbitration on Money and Capital Markets as well as the Energy Arbitration Court. In the future, in commercial matters, only the Arbitration Court of the Hungarian Chamber of

[135] However, it seems, in such cases, the person intending to register his/her partnership "brings" his/her laws to Hungary, so this rule could be interpreted as a lighter form of the country of origin principle as well.

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Commerce shall proceed. Moreover, for a period from 2012 onwards, national asset-related disputes in Hungary could not be solved by arbitration (not even by international arbitration courts), and the application of arbitrational clauses were also banned for such matters.[136] Otherwise, the rules on State immunity can be found in Section 82-87, so they were cut out of rules on jurisdiction. Many of latter rules are similar to the earlier regulations, however, some points were modified[137] to conform to the UN's Immunity Convention.[138]

The rules on jurisdiction can be found in Section 88-108 of the Code. They set the scope of exclusive jurisdiction (Section 88), the matters in which Hungarian courts have no jurisdiction (Section 89), the heads of jurisdiction regarding assets and property including contracts and non-contractual obligations (Section 92 *et seq.*) and those regarding family matters (Section 101 *et seq.*). Just like in the case of applicable law, the Code does not refer to EU legislation in this part. The Code says that Hungarian courts shall have jurisdiction in contract-related legal disputes if the place of performance of the disputed obligation is in Hungary. Under place of performance, the new PIL Code means the place of the disputed performance, which was an important *addendum* to the text, and a notable change from the old law.[139] The law also reflects the famous e-Date ECJ case.[140] In its Section 94 (1) it says that "Hungarian courts shall have jurisdiction in disputes relating to non-contractual obligations also if the legal fact underlying the obligation emerged or may emerge in Hungary, or the result thereof materialized or may materialize in Hungary. This provision shall also apply to claims for personal injury cases as well".

[136] E. MACHIN Hungary outlaws arbitration involving state-owned assets GLG- https://cms.law/en/content/download/79260/3007549/version/1/file/CDR%20Hungary%20outlaws%20arbitration%20involving%20state%20owned%20assets.pdf. See also Section 17 of Act CXCVI of 2011, Section 2 of Act LXV of 2012. However, Act VII of 2015 and the new Act on arbitration abolished the ban. It could have been an answer to the high number of disputes between the Hungarian State and investors, see *e.g.* the statistics of ICSID: https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU%20(English)%20Updated%20June%2013%202016%20Final.pdf

[137] K. RAFFAI (note 6) at 132.

[138] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004.

[139] Official commentary of the Explanatory Memorandum to Section 93 of the Code. According to the Code, the place of performance of the disputed obligation is the place fixed by parties in the contract as the place of performance, or in the absence of such clause the place where, under the contract, the goods were delivered or should have been delivered. In the case of services, it is the place where the services were provided or should have been provided. Regarding other contracts, it is the place of performance of the disputed obligation.

[140] Joined Cases ECJ, C-509/09 and C-161/10 *eDate Advertising GmbH and Others v X and Société MGN Ltd*, ECLI:EU:C:2011:685. See also Case C-194/16. *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766 and Section 7(2) Brussels Ia regulation. 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, OJ L 351, 20.12.2012, p. 1–32.

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B. Recognition and Enforcement of Judgments

The rules on recognition and enforcement of foreign judgments in Section 109-123. contains some important changes. The new PIL Code seemingly tried to follow European developments which abolished special requirements regarding the recognition and enforcement of judgments,[141] as it abolished the requirement of reciprocity. However, Section 113 (1) makes it clear that this change cannot be applied to cases concerning assets (property). This seems to be a serious limitation of the scope of the relevant provisions, particularly since international legal practice issues belonging to this latter group constitute the majority of the relevant cases. Consequently, if a dispute occurs between two businesses regarding some assets, and a court decision is adopted in a foreign court, this decision can only be easily recognized in Hungary if it falls under the scope of the new Brussels Ia regulation, otherwise reciprocity, or bilateral agreements between Hungary and the relevant country will be needed. However, the law tries to solve this problem by adding that in the absence of reciprocity, a judgment may be also recognized if Hungarian courts had no jurisdiction in the case, or the jurisdiction of the foreign court was based on an agreement of the parties in the case which was in compliance with Hungarian law.

Finally, the law also has detailed rules on legal assistance in international cases (Section 72 *et seq.).*

V. Conclusions

The new PIL Code significantly modernizes Hungarian PIL. It contains major changes to enhance flexibility, as the introduction of a general escape clause, the extension of party autonomy in various areas and the extensive usage of alternative connecting factors, as well as simpler rules on recognition and enforcement of judgments. On the other hand, it also preserves solutions which were already present in the old PIL Code, like the limited rules on applicable law to contracts in the absence of a choice of law of the parties (for cases when Rome I regulation is not applicable). Finally, it also contains some arguable solutions.

First of these is the unreasonable deadline for the usage of the general escape clause. As mentioned before, Section 10 says that if the relationship is more closely connected with the law of another State, the rules on applicable law must be put aside and the law of that other State may be applied. However, the court

[141] P. BEAUMONT/ L. WALKER, Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project, *Journal of Private International Law*, 2015 Vol. 11, No. 1, 35 *et seq.*; M. R. ISIDRO, The Enforcement of Monetary Final Judgments Under the Brussels Ibis Regulation (A Critical Assessment), in V. LAZIĆ/ S. STUIJ (eds.), *Brussels Ibis Regulation, Changes and Challenges of the Renewed Procedural Scheme*, Asser Press, 2017, p. 71-95.

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shall use this law at the latest within thirty days from the date of receipt of the statement of defense. This limitation, in our opinion, is a rather causeless rule.

Second, the reasons behind the temporal limitation of choice of law by the courts could also be questioned. The New Code stresses that the choice of law to contracts (Section 50) shall be made in the preparatory stage of a trial and within a court-imposed deadline at the latest. In legal practice, this rule can cause some uncertainty. In our opinion, it is not fortunate to connect choice of law to the decisions of courts.

Third, difference making between registered partners from different countries or those who want to adopt a child is also slightly problematic. In these cases, the Code's provisions could lead to some unjust situations, even if they conform to the law.

Apart from the above mentioned criticism, taken as a whole, with all its strengths and weaknesses, the new PIL Code is still a modern re-codification of PIL. It tried to balance universalism and particularism and even if the outcome is not perfect, it is still a vast improvement compared to the former stage of PIL in Hungary.

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CHOICE OF COURT AGREEMENTS UNDER TURKISH LAW

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I. Introduction

The increasing globalization of markets has resulted in cross-border disputes becoming a common feature of practice for most lawyers. Parties in international

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 365-394
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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transactions are particularly interested in determining the forum for litigation in advance of a legal dispute arising in order to enhance certainty as to jurisdiction. In principle, Turkish private international law recognizes the freedom of the parties to conclude an agreement which designates Turkish courts and/or foreign courts as having jurisdiction for the resolution of their existing or future legal disputes. Under Turkish law, the requirements for the validity of an agreement designating a Turkish court and that of an agreement designating a foreign court are divergent and indeed regulated under different legal codes.

The focus of this study is to examine the Turkish legal rules regarding jurisdiction agreements.[1] In elaborating on this issue, the first step will be to set out the relevant sources of law in this area (II). Following this, agreements granting jurisdiction to foreign courts will be examined, mainly through the requirements and consequences of forming such an agreement (III). Next, rules governing agreements granting jurisdiction to Turkish courts will be explained (IV). Asymmetrical jurisdiction agreements will then be discussed (V). Subsequently, the requirements for the recognition and enforcement of a foreign judgment rendered by a court designated by a jurisdiction agreement will be set out (VI). Finally, agreements that include co-existing jurisdiction and arbitration clauses will be addressed (VII).

II. Sources of Law Relating to Jurisdiction Agreements

The relevant law on the requirements and consequences of a choice of court agreement are identical within Turkish jurisdiction since Turkey is a unitary state. As the Turkish judicial system is influenced by the that of continental Europe,[2] precedent is not deemed to be binding and judges apply statutory sources of law to resolve a dispute. Thus, unlike the common law system, Turkish court decisions only have the effect of interpreting the existing statutory law and precedent is not traditionally considered as a source of law. Although previous Turkish court decisions may guide the Turkish judges to arrive at a conclusion, judges are not considered bound by the case law. Consequently, to understand the rules governing jurisdiction agreements, it is principally the statutory laws which shall be examined.

The principal statutory sources of law which deal with jurisdiction agreements are as follows: *(i)* the relevant international conventions to which Turkey is a party, *(ii)* the Turkish Private International Law and International Civil

[1] In this paper, “choice of court agreement” is used interchangeably with “jurisdiction agreement”.

[2] For further information on Turkish law see T. ANSAY/ D. WALLACE, *Introduction to Turkish Law*, Wolters Kluwer (6th ed.), Ankara, 2011.

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Procedure Code[3] (hereafter: "PIL Code") and *(iii)* The Turkish Code of Civil Procedure[4] (hereafter: "CCP"). Besides the statutory sources, *(iv)* court decisions regarding jurisdiction agreements are also applied in interpreting and filling the internal gaps of the statutory law.

There is an order in the application of the abovementioned sources of law regarding jurisdiction agreements. Accordingly, international conventions to which Turkey is a party prevail over domestic rules. Thus, domestic rules apply only when there are no rules regarding jurisdiction agreements under international conventions that Turkey has ratified. Within the domestic rules, the PIL Code is *lex specialis* in relation to the CCP. In other words, the rules under the PIL Code prevail over the CCP rules. Therefore, CCP rules are applied only to those issues which the PIL Code does not cover. For example, in relation to jurisdiction agreements, the PIL Code only regulates agreements that designate foreign courts. On the other hand, the CCP encompasses rules regarding jurisdiction agreements designating Turkish courts. Thus, the validity of an agreement designating a foreign court is to be evaluated according to the PIL Code, whereas agreements which designate a Turkish court are governed by the CCP.

It is important to note that, regarding rules of civil procedure, Turkish private international law recognizes the principle of *lex fori.*[5] In other words, even where the proceedings contain a foreign element, the domestic civil procedural rules such as those concerning the functioning of the court, means and burden of proof, and time limits are applied as stipulated under the CCP. The application of the principle of *lex fori* in connection to the rules of civil procedure is exempted only when an international convention or the PIL Code itself exceptionally requires otherwise.

(i) International Conventions: Art. 90 of the Turkish Constitution[6] reads in part that international agreements duly put into effect have the force of law. Moreover, pursuant to Art. 1 (2) of the PIL Code: provisions of international conventions to which the Republic of Turkey is a signatory are reserved. When the aforementioned provisions are read together, the conclusion is that the rules under the international conventions which Turkey has ratified shall prevail over the domestic rules. Thus, systematically, domestic rules and, more specifically, the PIL Code and the CCP shall apply only in instances where an issue is not regulated by an international convention.

Turkey is a signatory to many international conventions that contain conflict of laws rules, international procedural rules and/or rules regarding recognition and enforcement of foreign decisions and arbitral awards. Turkey is

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[3] Law No. 5718, *Resmî Gazete* (Official Gazette – hereinafter OG) 12.12.2007/26728.

[4] Law No. 6100, OG 4.2.2011/27836.

[5] E. NOMER, Devletler Hususi Hukuku (*International Private Law*), Beta Yayınları, 22nd ed., Istanbul 2017, pp. 392-393; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE, Milletlerarası Özel Hukuk (*International Private Law*), Vedat Kitapçılık, 6th ed., Istanbul 2018, pp. 338-339; A. ÇELIKEL/ B. ERDEM, Milletlerarası Özel Hukuk (*International Private Law*), Beta Yayınları, 15th ed., Istanbul 2017, pp. 481-482.

[6] Law No. 2709, OG 9.11.1982/17863.

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also a member of the Hague Conference on Private International Law and a party to a total of fourteen international conventions drafted by the Hague Conference.[7] Examples of such conventions are: Convention Relating to Civil Procedure; Convention on the Civil Aspects of International Child Abduction; Convention on the Law Applicable to Maintenance Obligations; Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Nevertheless, Turkey is not a party to the Hague Convention of 30 June 2005 on Choice of Court Agreements. Regarding the enforcement of foreign arbitral awards, Turkey is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[8]

(ii) PIL Code: The PIL Code is composed of three main sections which respectively encompass rules related to the conflict of laws, international jurisdiction of Turkish courts, and the recognition and enforcement of foreign court decisions and arbitral awards.

The formation of a jurisdiction agreement designating a foreign court is regulated by the PIL Code. In addition, rules pertaining to the recognition and enforcement of a foreign court decision rendered by a court designated through a jurisdiction agreement are also regulated by the PIL Code. Nevertheless, the PIL Code only regulates such specific issues and the more comprehensive and general rules regarding the functioning and jurisdiction of the Turkish courts are stipulated under the CCP. In other words, the PIL Code is *lex specialis* in relation to the CCP. Thus, the rules under the PIL Code prevail over the CCP rules and only where an issue is not covered by the PIL Code, is the CCP applied.

(iii) CCP: The CCP is the principal domestic code that regulates Turkish civil procedural rules. The CCP regulates issues pertaining to civil procedure, such as rules of evidence, structure of trials and pleadings, competence and the jurisdiction of Turkish courts. The CPP governs the rules regarding jurisdiction agreements containing a foreign element only to the extent that an international convention ratified by Turkey and the PIL Code do not govern them. For example, in the current legal framework, Turkey is not a party to any international convention regulating jurisdiction agreements and the PIL Code alone regulates jurisdiction agreements designating foreign courts. Thus, regarding agreements designating Turkish courts as the competent forum, the rules of the CCP will be applied. Regarding the rules of jurisdictional competency of Turkish courts the same reasoning is employed. The PIL Code stipulates rules of competence of Turkish courts only in relation to certain particular disputes with a foreign element; namely those related to personal status of foreigners and Turkish citizens, inheritance, employment contracts/relations, consumer contracts, and insurance contracts. With regard to any other lawsuits with a foreign element, the competent Turkish court shall be determined pursuant the domestic rules which are principally stipulated under the CCP.

[7] The whole list of conventions is available at: <http://www.uhdigm.adalet.gov.tr/sozlesmeler/coktaraflisoz/lahey.html>.

[8] Law No. 3731, OG 21.5.1991/20877.

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(iv) Court Decisions: The Turkish court system is structured under three categories of courts, namely: military courts, administrative courts, and judicial courts. Judicial courts are composed of civil courts and criminal courts.[9] With regard to private international law disputes, civil courts have the competence to deal with them. Civil courts are composed of a three-degree court system, namely; first instance courts, regional courts of appeal and the Court of Cassation (*Yargıtay*). The Court of Cassation is the last instance court for reviewing decisions rendered by the first instance courts and regional courts of appeal. The Court of Cassation is composed of chambers and amongst them the civil law chambers of the Court of Cassation deal with issues arising from private law.

In principle, under Turkish law, previous court decisions are not binding. Nevertheless, in exceptional instances judges from the same chamber of the Court of Cassation or different chambers may render contradictory decisions when resolving identical legal issues due to divergence in the interpretation of the statutory law. To avoid such contradictory interpretations, the General Assembly on the Unification of Judgments is gathered[10] in such circumstances to render a final decision. Decisions rendered by the General Assembly on the Unification of Judgments are binding on all other first instance courts and on the Court of Cassation itself.

III. Agreements Granting Jurisdiction to Foreign Courts

Parties to a cross-boundary transaction may wish to choose a foreign forum for litigation regarding an existing or future dispute. Under Turkish law, requirements for enforceable jurisdiction agreements designating foreign courts are covered by the PIL Code.

In this section, jurisdiction agreements designating foreign courts will be elaborated in further detail. This section will first set out the requirements for a valid agreement granting jurisdiction to one or more foreign courts (a). Following this, the restrictions under the PIL Code, regarding jurisdiction agreements pertaining to the disputes arising from employment, consumer and insurance contracts will be examined (b). The following discussion will outline the instances where Turkish courts assume jurisdiction despite a valid choice of foreign court agreement (c). Within this last section, the substantial validity of a choice of foreign court agreement, rules governing an objection to jurisdiction, and the competence of Turkish courts to grant an interim measure will be discussed.

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[9] For further information on Turkish law of procedure and court structure see *e.g.*: A.C. BUDAK/ B. KURU/ T. ANSAY/ H. KONURALP, Chapter 11, *Law of Procedure*, in T. ANSAY/ D. WALLACE (note 2), pp. 213-236.

[10] For further information on sources of Turkish law see *e.g.* A. GÜRIZ, Chapter 1, *Sources of Turkish Law* in T. ANSAY/ D. WALLACE (note 2), pp. 1-18.

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A. Requirements for a Valid Agreement Granting Jurisdiction to a Foreign Court

The PIL Code is the main legal source for rules regulating jurisdiction agreements designating foreign courts. Art. 47 of the PIL Code stipulates the validity requirements as regards agreements granting jurisdiction to foreign courts. According to the first paragraph of the aforementioned article, except in cases where the jurisdiction of a court is determined as exclusive subject-matter jurisdiction, the parties may agree to choose a foreign court in a dispute that contains a foreign element and which concerns their legal relations. The agreement shall be invalid unless it is proved by written evidence. Pursuant to Art. 47 (1), the grounds for a valid agreement granting jurisdiction to a foreign court are listed below.

(i) The dispute shall involve a foreign element: The first requirement to conclude a valid jurisdiction clause designating a foreign court is that the dispute between the parties shall involve a foreign element.[11] Turkish statutory law does not stipulate a clear, descriptive explanation for what constitutes a foreign element. On the other hand, the Court of Cassation adopts a broad interpretation in examining what may constitute a foreign element in a given dispute.[12] In this regard, elements such as the nationalities or domiciles of the parties, the place of performance or formation of the contract, the place where the tortious act was committed are taken into account.[13] In other words, as long as the dispute has some sort of a connection with a non-Turkish jurisdiction, it is considered as having a foreign element.

(ii) The subject matter of the dispute shall not be within the exclusive jurisdiction of the Turkish courts: When a legal subject matter is within the exclusive jurisdiction of Turkish courts then all disputes arising out of the relevant matter shall be resolved by the Turkish courts alone. In line with this finding, the parties shall always have a competent Turkish court to resort to for the resolution of a matter that is within the exclusive jurisdiction of Turkish courts.[14] Nevertheless, the PIL Code does not provide an exhaustive list for the subject matters of disputes that fall under the exclusive jurisdiction of the Turkish courts.

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[11] E. NOMER (note 5), p. 491; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 413; A. ÇELIKEL/ B. ERDEM (note 5), p. 616.

[12] In this decision, the Civil General Assembly of Court of Cassation examined a choice of court agreement under a credit contract involving a foreign element: Case No. 1998/12-287, Decision No. 1998/325, 6.5.1998 (<www.kazanci.com>). In another decision, the Court of Cassation decided on the presence of foreign element due to the fact that the company where the claimant was working was registered in a foreign state: 9th Civil Chamber of Court of Cassation, Case No. 2016/28517, Decision No. 2016/20723, 24.11.2016 (<www.kanunum.com>).

[13] E. NOMER (note 5), p. 490.

[14] E. NOMER (note 5), p. 486; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE, (note 5) pp. 417-419 and 534-535; A. ÇELIKEL/ B. ERDEM (note 5), p. 618. For exemplary decisions supporting this finding see: 23rd Civil Chamber of Court of Cassation, Case No. 2015/8353, Decision No. 2017/2320 21.9.2017; General Assembly of Court of Cassation, Case No. 2015/894, Decision No. 2013/18-1628 4.3.2015 (<www.kazanci.com>).

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Exclusive jurisdiction of the Turkish courts due to the subject matter of the dispute in the area of private international law is different from and narrower than the concept of exclusive jurisdiction regarding domestic civil procedure rules.[15] Academic commentary has considered that Turkish courts have exclusive jurisdiction regarding disputes concerning the rights *in rem* on immovable properties situated in Turkey, infringement of intellectual property rights registered or deemed to be registered in Turkey, and cancellation of a general assembly decision of a company whose center of business activities is located in Turkey.[16]

(iii) The dispute shall concern the legal relations of the parties: The second requirement for the conclusion of a valid jurisdiction agreement designating a foreign court concerns the type of the legal relationship between the parties. Accordingly, the jurisdiction agreement connected to the dispute shall govern legal relations of the parties. Thus, the dispute shall concern either a contractual relationship, tortious liability, or unjust enrichment.[17] In other words, the parties cannot conclude a valid agreement that grants jurisdiction to a foreign court in relation to the issues of family law, law of persons or inheritance. For example, if the parties enact a jurisdiction agreement regarding their divorce that grants jurisdiction to a foreign court, such an agreement is invalid from the perspective of Turkish law. On the other hand, if the foreign court invalidly designated under this contract finds itself competent according to its own national rules and makes a judgment on the case, the fact that the proceedings were held at a foreign court designated by an invalid jurisdiction agreement under Turkish law does not interfere with the recognition of this decision in Turkey. The requirements for the recognition and enforcement of a foreign court decision are listed under the PIL Code and cannot be extended by way of interpretation. The effect on the recognition and enforcement of a decision by a foreign court that was designated by an invalid jurisdiction agreement shall be explained in further detail under section VI of this paper.

(iv) The agreement is invalid unless it is proved by written evidence: Art. 47 of the PIL Code does not require a special form for the validity of the jurisdiction agreement. However, for reasons of evidence, the agreement is required to be

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[15] E. NOMER (note 5), p. 485; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 417, fn. 172; A. ÇELIKEL/ B. ERDEM (note 5), p. 583-617-618.

[16] E. NOMER (note 5), pp. 485-486; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 417-419; A. ÇELIKEL/ B. ERDEM (note 5), p. 583-588. In a recent decision, the Court of Cassation discussed whether the claims in question were related to rights *in rem* in order to understand if the Turkish courts have exclusive jurisdiction: 18th Civil Chamber of Court of Cassation, Case No. 2016/571 Decision No. 2016/8080, 17.5.2016 (<www.kanunum.com>); 14th Civil Chamber of Court of Cassation, Case No. 2010/5842, Decision No. 2010/6880, 11.6.2010 (<www.kanunum.com>).

[17] E. NOMER (note 5), p. 491; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 413; A. ÇELIKEL/ B. ERDEM (note 5), p. 618. In a recent decision, the Court of Cassation explicitly explains the requirements of a valid jurisdiction agreement under Art. 47, PIL Code and, in carrying out this evaluation, it examines the agreement to understand if it is rooted in a contractual relationship: 11th Civil Chamber of Court of Cassation, Case No. 2015/7244, Decision No. 2016/1657, 17.2.2016 (<www.kanunum.com>).

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made in writing. The parties are not required to sign the jurisdiction agreement.[18] As long as the agreement is concluded through any communication device such as e-mails, letters, exchange of documents which shows the content of the agreement, the writing requirement is deemed to be fulfilled.

(v) Assigning a particular court: Although not explicitly stipulated under Art. 47 of the PIL Code, there is an academic debate as to whether there is an additional requirement that the chosen court be specifically indicated. In other words, the wording of the relevant provision is not clear as to whether a general clause designating the courts of a foreign state is sufficient or whether the parties must choose the specific place of the court within the chosen jurisdiction. One view[19] argues that a general indication of a foreign court is sufficient to conclude a valid jurisdiction agreement. For instance, a clause such as "*German* Courts have jurisdiction to resolve any disputes that may arise from this sales contract." would be a valid clause according to this view. The opposite view[20] argues that, for practical reasons, choosing the courts of a foreign state in the abstract is not sufficient to render a jurisdiction agreement valid. According to this view, instead of generally choosing to submit their action to foreign state courts, the parties must instead conclude an agreement such as "*Berlin* Courts have jurisdiction to review any disputes that may arise from this sales contract."

Decisions of the Court of Cassation in connection to this issue are not consistent. In one of them,[21] it was concluded that in order to have a valid jurisdiction agreement that designates a foreign court, the competent foreign court shall be specifically stated in the agreement. In the dispute that led to this decision, the parties had made an agreement conferring jurisdiction on the English courts. The Court of Cassation ruled that, instead of a general reference to the courts of England, the parties should have specifically indicated which particular court in England they wish to grant jurisdiction to. On the other hand, the same chamber of the Court of Cassation in another decision[22] ruled that a jurisdiction agreement designating the Federal Courts of the United States of America is valid.

Another question that may be asked regarding the choice of a foreign court is whether the parties are allowed to choose one court only, or whether they may

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[18] E. NOMER (note 5), p. 490; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 441, fn. 179; A. ÇELIKEL/ B. ERDEM (note 5), p. 621.

[19] E. NOMER (note 5), p. 491; A. ÇELIKEL/ B. ERDEM (note 5), p. 589; F. SARGIN, Milletlerarası Usul Hukukunda Yetki Anlaşmaları (*Jurisdiction Agreements in International Procedural Law*), Yetkin, Ankara 1996, p. 171.

[20] N. EKŞI, Uluslararası Ticarete İlişkin İki Güncel Sorun: Sözleşme Bedelinin Yabancı Para Olarak Ödenmesi ve Yabancı Mahkemenin Yetkisinin Tesisi (*Two Current Issues Regarding International Trade: Payment of the Consideration Through Foreign Currency and Granting Jurisdiction to a Foreign Court*), Istanbul Barosu Dergisi, 2011/97, p. 38; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 414; A. ÇELIKEL/ B. ERDEM, (note 5), p. 619.

[21] 11th Chamber of the Court of Cassation, Case No. 2015/7244, Decision No. 2016/1657, 17.2.2016 (<www.kanunum.com>).

[22] 11th Chamber of the Court of Cassation, Case No. 2008/10853, Decision No. 2010/1688, 15.2.2010 (<www.kazanci.com>).

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point to alternative courts under their jurisdiction agreement. The doctrine[23] interprets Art. 47 of the PIL Code in such a way that the parties have the right to select more than just one foreign court. Accordingly, the parties to a jurisdiction agreement may designate multiple courts to hear their cases.

The recognition of the principle of good faith constitutes the final condition for the validity of ascertaining jurisdiction to a foreign court even though it is not explicitly codified under the PIL Code. It is established by academic commentary and case law that jurisdiction agreements designating foreign courts shall not be contrary to good morals and to the principle of good faith.[24] For example, in an instance where the jurisdiction agreement was stipulated as a clause under one party's general terms and conditions and was not brought to the counterparty's attention, such jurisdiction clause may be deemed as invalid.[25]

B. Disputes Regarding Employment, Consumer and Insurance Contracts

The second paragraph of Art. 47 of the PIL Code stipulates a rule that restricts parties' freedom to conclude a jurisdiction agreement regarding employment contracts or relations, consumer contracts and insurance contracts. Accordingly, the parties cannot waive the international jurisdiction of the Turkish courts regarding disputes arising from employment contracts or relations, consumer contracts and insurance contracts which are stipulated under Art. 44, 45 and 46 of the PIL Code. The lawmaker, in enacting such a provision, intended to protect the financially weaker party. The said jurisdiction rules are as follows:

(i) Employment contracts or relations: International jurisdiction of Turkish courts regarding disputes arising from employment contracts and employment relations is regulated under Art. 44 of the PIL Code. Accordingly, the court of the place where the employee habitually performs his work in Turkey is competent. In lawsuits filed by the employee, the Turkish courts in places of the domicile of the employer or the domicile or habitual residence of the employee are competent as well.

(ii) Consumer Contracts: Conflicts arising from consumer contracts are regulated under Art. 45 of the PIL Code. Pursuant to this provision, according to the preference of the consumer, the Turkish courts at the places where the consumer's domicile or habitual residence or the counterparty's workplace, domicile or habitual residence is located are competent. Regarding the conflicts arising from consumer contracts, the competent court is the court of the place where the consumer's habitual residence is located.

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[23] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 415, fn. 166; A. ÇELIKEL/ B. ERDEM (note 5), p. 619.

[24] E. NOMER (note 5), p. 490; C. ŞANLI/ E. ESEN /İ. ATAMAN-FIGANMEŞE (note 5), p. 415.

[25] E. NOMER (note 5), p. 490. For an illustrative decision from case law supporting this view see Civil General Assembly of Court of Cassation, Case No. 1998/12-287, Decision No. 1998/325, 6.5.1998 (<www.kazanci.com>).

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(iii) Insurance Contracts: Regarding disputes arising from insurance contracts, the international jurisdiction of Turkish courts is determined pursuant to Art. 46 of PIL Code. Accordingly, the 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 disputes arising from insurance contracts. However, regarding lawsuits filed against the policy owner, the insured or the beneficiary, the court having jurisdiction shall be the court of their domicile or habitual residence in Turkey.

Views from academic commentary[26] argue that a jurisdiction agreement concluded regarding disputes arising from employment, consumer or insurance contracts shall be valid as long as such agreement provides alternative courts to the weaker party, that is, to the employee, consumer or the insured while not excluding those courts having jurisdiction under the PIL Code. Nevertheless, Court of Cassation decisions[27] do not support this view. Court decisions are in the direction that any jurisdiction agreements pertaining to employment, consumer and insurance contracts are invalid, regardless of whether they exclude or provide alternatives to the weaker party regarding the international jurisdiction of Turkish courts stipulated under the PIL Code.

C. Jurisdictional Competency of Turkish Courts Despite a Valid Agreement Designating a Foreign Court

During the application of the former code on Private International Law and Procedural Law (from herein: "Code No. 2675"), there was ambiguity as to whether it was possible to bring a lawsuit before a Turkish court despite a jurisdiction agreement designating foreign courts. The reason for this ambiguity was caused by the interpretation of the relevant provision on jurisdiction agreements, namely Art. 31 of Code No. 2675. Academic discussion aside, decisions of the Court of Cassation were no more coherent. Certain decisions held that a jurisdiction agreement does not provide alternatives to Turkish courts but exclusively designates the foreign court in question, and thus, the Turkish courts shall decline jurisdiction.[28] Other decisions ruled that Turkish courts continue to have jurisdiction despite a valid agreement designating a foreign court. The

[26] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 420-421; A. ÇELIKEL/ B. ERDEM, (note 5) pp. 626-627.

[27] 9th Chamber of Court of Cassation Case No. 2010/7381, Decision No. 2010/16168, 3.6.2010 (N. EKŞI, Milletlerarası Özel Hukuk I Pratik Çalışma Kitabı: Kanunlar İhtilâfı Kurallarına ve Milletlerarası Usul Hukukuna İlişkin Seçilmiş Mahkeme Kararları (*International Private Law Practice Questions: Chosen Court Decisions on Conflict of Laws Rules and International Procedural Law*), 3. Baskı, Beta Yayıncılık, Istanbul, 2016, pp.123-129; 9th Chamber of Court of Cassation, Case No. 2007/12043, Decision No. 2007/17765, 4.6.2007 (<www.kazanci.com>). E. NOMER's view is parallel to the interpretation offered by the Court of Cassation. See E. NOMER (note 5), p. 492, fn. 212.

[28] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 424-425; A. ÇELIKEL/ B. ERDEM, (note 5), pp. 615-616, Civil General Assembly of Court of Cassation Case No. 1998/12-287 Decision No. 1998/325, 6.5.1998 (<www.kazanci.com>).

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reasoning in the latter decisions was that a refusal of jurisdiction by the Turkish courts due to a jurisdiction agreement would indicate a mistrust in adjudication by the Turkish courts and would be contrary to public order.[29]

With the entry into force of the PIL Code to clarify this ambiguity, the controversial rule regarding the jurisdiction agreements under Art. 31 of the Code No. 2675 was replaced by Art. 47 with a slightly different wording.[30] Consequently, the principle within the currently applicable law is established such that where a valid jurisdiction agreement designates a foreign court, Turkish courts shall decline jurisdiction in favor of that court.[31] In addition, Art. 47 of PIL Code provides for two exceptional cases where the Turkish courts may assume jurisdictional competency despite the existence of a jurisdiction agreement designating foreign courts: *(i)* where the foreign court designated under the jurisdiction agreement declines competence for whatever reason; or *(ii)* where the claimant files a lawsuit before a Turkish court contrary to the valid jurisdiction agreement and the respondent does not raise an objection before that Turkish court. In addition to these exceptional cases, Turkish courts may assume jurisdictional competency despite a jurisdiction agreement designating a foreign court, in relation to *(iii)* interim measures.

1. Non-Competence of the Foreign Court

A jurisdiction agreement that fulfils the requirements envisaged under Art. 47 of the PIL Code may not meet the jurisdictional competency requirements of the state whose courts are designated by the jurisdiction agreement in question. The substantive validity of a choice of court agreement is subjected to the law of the state of the court or courts designated in the agreement. When parties choose a foreign court through a jurisdiction agreement, for that foreign court to assume jurisdictional competency, the jurisdiction agreement must meet the validity requirements under the law of the foreign state whose courts are chosen.[32] Therefore, it is advisable at the stage of contract drafting to make sure that the

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[29] 19th Chamber of Court of Cassation, Case no. 1995/1632, Decision No. 1995/9151, Date 02.11.1995; Civil General Assembly of Court of Cassation, Case No. 1988/11-246, Decision No. 1998/476, Date 15.6.1988 (<www.kazanci.com>). For further information on the evolution of case law regarding this issue, see *e.g.*: C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 423; ÇELIKEL/ B. ERDEM (note 5), p. 622-625.

[30] In the case where there is a valid jurisdiction agreement designating foreign courts, Art. 31 of the former code No. 2675 stipulated that "Turkish courts shall have jurisdiction if the foreign court decides that it has no jurisdiction". On the other hand, the wording under Art. 47 of the PIL Code is as follows: "The competent Turkish court shall have jurisdiction *only if* the foreign court decides that it has no jurisdiction...".

[31] E. NOMER (note 5), p. 486; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 426; A. ÇELIKEL/ B. ERDEM (note 5), p. 625. For a decision supporting this finding, see 11th Chamber of Court of Cassation, Case No. 2007/3087, Decision No. 2008/4981, 14.4.2008 (<www.kanunum.com>).

[32] E. NOMER (note 5), p. 489; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 427; A. ÇELIKEL/ B. ERDEM (note 5), p. 617.

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choice of court agreement is in conformity with the domestic laws of the chosen forum. For example, the *forum non-conveniens* doctrine,[33] which is not recognized under Turkish law, may prevent a foreign court from establishing jurisdiction even in the instances where there is a valid jurisdiction agreement.

If a jurisdiction agreement which is valid pursuant to Art. 47 of the PIL Code does not fulfill the requirements under the law of the chosen foreign court, and the foreign judge thereby refuses to establish jurisdiction, Turkish courts shall have jurisdiction to resolve the dispute. Where the foreign court designated under the jurisdiction agreement has not yet made a judgment on refusal of jurisdiction but the parties have presented concrete evidence before the Turkish courts showing that the foreign court will definitely refuse to establish jurisdiction, Turkish courts shall also have jurisdictional competency to resolve the dispute.[34]

Besides, if the dispute between the parties are resolved by the foreign court as validly designated under the jurisdiction agreement but the foreign decision cannot be recognized or enforced in Turkey, then Turkish courts will also become competent.[35] One view from academic commentary argues that if the debtor's assets are exclusively situated in Turkey and if it is proven that the decision to be rendered by the foreign court designated under the jurisdiction agreement will not be recognized or enforced before the Turkish courts where the debtor's assets are situated, Turkish courts shall have jurisdiction to resolve the dispute.[36]

2. *Objection to the International Jurisdiction of Turkish Courts and Plea of* **Lis Alibi Pendens**

Under Turkish private international law, rules governing civil procedure are subject to the principle of *lex fori*, and thus, governed by the law of the forum. Consequently, the procedural rules regarding objections to the jurisdictional competency of a Turkish court on grounds that a valid jurisdiction agreement designating a foreign court is present, are governed by the CCP. The rules governing jurisdictional objections before the Turkish courts diverge depending on whether the objection is raised before *(i)* or after *(ii)* the lawsuit was filed.

(i) Before the lawsuit is filed before the designated foreign courts: If one of the parties to the jurisdiction agreement files a lawsuit before a Turkish court contrary to what is determined under the jurisdiction agreement, the opposing party shall raise an objection to jurisdiction of the Turkish court. Pursuant to CCP Art. 19 (2), the absence of jurisdiction of Turkish courts may be asserted only as a

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[33] The doctrine of *forum non conveniens* originated from Scots law and is currently applied in the United States of America and England and Wales. According to this doctrine, a court which has jurisdiction to hear a case may decide that it lacks jurisdiction if there is another court which is more closely related to the dispute and so is more appropriate to render a judgment. See E. NOMER (note 5), p. 495; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 368-369.

[34] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 431.

[35] E. NOMER (note 5), p. 494.

[36] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE, (note 5), p. 431.

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primary objection within the initial rebuttal petition; that is, within two weeks of the arrival of the notification of the lawsuit at the respondent's premises.[37] Upon such objection, if the court considers that it does not have international jurisdiction, it shall dismiss the case on the grounds of a lack of competence.

Where such an objection to jurisdiction is not duly made by the respondent, the Turkish judge shall not on its own motion take into account the respondent's claim regarding jurisdiction at a later stage of the adjudication. Indeed, CCP Art. 19 (4), explicitly provides that where there is no primary objection to jurisdiction, the court will automatically gain jurisdiction over the case. The rationale behind this provision is that where the defendant does not assert a primary objection concerning the absence of international jurisdiction of a Turkish court, s/he is assumed to have implicitly consented to the international jurisdiction of the Turkish court and the jurisdiction agreement is assumed to be implicitly altered. Thus, the case shall be heard before the Turkish court.[38]

This rule governing jurisdictional objections is applied in all cases including where the defendant is domiciled abroad and is unfamiliar with Turkish law. One could take the example of a contract between a German party and a Turkish party containing a jurisdiction clause referring to the competence of the courts in Berlin. In our example, the Turkish party may opt to file a lawsuit against the German party in a Turkish court notwithstanding the valid jurisdiction clause under Turkish law. Under these circumstances, the German party must raise an objection concerning the absence of international jurisdiction of the Turkish court as a primary objection, that is, within two weeks of the arrival of the notification of the lawsuit at the respondent's premises, in accordance with CCP Art. 19. Otherwise, the Turkish courts will assume jurisdiction and hear the case.

Remarkably, under certain circumstances despite a valid jurisdiction agreement and an objection duly made in time, the Turkish Court of Cassation may take into account the principle of good faith and establish a Turkish court's jurisdiction. Such a situation occurs when the respondent's domicile is in Turkey and the claimant files a lawsuit against the respondent in Turkey before the court situated in the place of domicile of the respondent. Under such circumstances, if the respondent raises an objection to the jurisdiction of the Turkish court of his/her domicile based on the jurisdiction agreement that designates a foreign court, the Court of Cassation may still disregard this objection and establish the Turkish court's jurisdiction.[39] The idea behind the position of the Court of Cassation is that

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[37] E. NOMER (note 5), p. 482; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 432; A. ÇELIKEL/ B. ERDEM (note 5), p. 624; 23rd Chamber of the Court of Cassation, Case No. 2015/8353, Decision No. 2017/2320, 21.9.2017.

[38] E. NOMER (note 5), p. 485; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 427 and 432; A. ÇELIKEL/ B. ERDEM (note 5), p. 624.

[39] E. NOMER (note 5), p. 493, fn. 215; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE, pp. 427-428; 11th Chamber of the Court of Cassation, Case No. 2016/3848, Decision No. 2017/5825, 30.10.2017; 11th Chamber of the Court of Cassation, Case No. 15/11534, Decision No. 2016/8512, 31.10.2016; 11th Chamber of the Court of Cassation, Case No. 2015/9758, Decision No. 2016/4646, 25.04.2016; 11th Chamber of the Court of Cassation, Case No. 2015/5517, Decision No. 2015/12591, 25.11.2015 (<www.kazanci.com> and <www.kanunum.com>).

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the respondent can best defend him/herself in his/her domicile and so raising an objection notwithstanding the presence of a valid jurisdiction agreement would be contrary to principle of good faith. This reasoning of the Court of Cassation has been heavily criticized by academic commentary.[40]

It should be noted that, despite the recognition of the *lex fori* principle in relation to the civil procedural rules, there may be certain exceptional deviations from CCP rules in relation to proceedings having a foreign element. As regards objection to the international jurisdiction of Turkish courts, the second and third paragraphs of the relevant CCP provision, namely CCP Arts. 19 (2) and (3), are not applicable. According to CCP Art. 19 (2), the party who files the objection must state the competent court as the basis of the claim. Otherwise, the objection will be dismissed by the judge. Art. 19 (3) indicates that the court shall also declare which Turkish court has jurisdiction after the party's objection. While domestic rules are stipulated as such, as regards objection to international jurisdiction of Turkish courts the parties are not required to indicate the foreign court that has jurisdiction. Nor shall the court determine which foreign court has jurisdiction. This deviation in the application of CCP Art. 19 is rooted in the well-established principle that the jurisdictional competency rules of a forum shall be determined in accordance with the sovereignty rights and legislative powers of the foreign state where the forum is situated. Turkish courts shall not determine the jurisdictional competency of the courts of a foreign state based on a jurisdiction agreement, but shall only decide on their own lack of competence.[41]

(ii) After the lawsuit is filed before the designated foreign court: One of the parties to a jurisdiction agreement may file a parallel lawsuit before a Turkish court while there is an ongoing lawsuit before a foreign court designated under the very same jurisdiction agreement between the parties. In such an instance, the opposing party shall raise a motion that an action is already pending (*lis alibi pendens*), instead of raising an objection to jurisdiction.[42]

The plea of *lis alibi pendens* is raised when there is a continuing litigation process before another court between the same parties, regarding the same dispute matter and on the same cause of action. Under Turkish private international law,

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[40] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 428; E. ESEN, Yabancı Mahkeme Lehine Yapılan Yetki Anlaşmasına Dayanan Yetki İtirazının Değerlendirilmesinde Dürüstlük Kuralının Etkisi ve Yargıtay 11. Hukuk Dairesinin 6.3.2009 Tarihli İçtihadının Eleştirisi (*The Effect of the Principle of Good Faith in Evaluating the Opposition to Jurisdiction Based on a Jurisdiction Agreement Designating a Foreign Court and a Critique of the Decision dated 6.3.2009 by the Court of Cassation*), Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Year 31, No. 1, 2001, p. 203.

[41] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 434; A. ÇELIKE/ B. ERDEM, pp. 589-591. For decisions supporting this finding see: 8th Civil Chamber of the Court of Cassation, Case No. 2013/219, Decision No. 2013/10820, 10.7.2013; 11th Civil Chamber of the Court of Cassation, Case No. 2007/12254, Decision No. 2009/1912, 20.2.2009 (<www.kazanci.com>).

[42] E. NOMER (note 5), p. 492-493; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 438-439; A. ÇELIKEL/ B. ERDEM (note 5), p. 596. For further information see: G. BAYRAKTAROGLU ÕZGELIK, International *Lis Pendens* As a Contemporary Problem of Turkish International Civil Procedure, this *Yearbook* , vol. 18, 2016/2017, p. 393-422.

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the plea of *lis alibi pendens* is taken into account by the Turkish courts only under exceptional circumstances, one of which is the aforementioned instance where the parties have signed a jurisdiction agreement and the case is being heard by that foreign court. A plea of *lis alibi pendens* is a condition to commence an action under CCP Art. 114. Thus, the parties can assert a plea of *lis alibi pendens* at any time during the proceedings, unlike an objection to jurisdiction. In addition to this, pursuant to CCP Art. 115, the Turkish judge upon understanding from the case file that there is an ongoing lawsuit before the foreign court designated under the jurisdiction agreement between the same parties and regarding the same dispute, shall *ex officio* take this situation into account and dismiss the case.[43]

3. Jurisdictional Competency of Turkish Courts Regarding Interim Measures

Problems may arise in relation to the Turkish courts competence to render interim measures at the instances where the parties determine, in advance of a dispute, a foreign forum for litigation. The jurisdictional competency of Turkish courts is disputed in cases where the parties have exclusively chosen a foreign court under their jurisdiction agreement. Under the PIL Code, there are no provisions pertaining to the competency of Turkish courts in granting interim measures when the parties agreed upon a foreign court regarding the resolution of their dispute. Thus, relevant CCP rules shall apply. The legal issues regarding this matter are dealt with differently depending on whether the interim measure is demanded from the Turkish court prior to (i) or after (ii) the filing of the lawsuit at the designated foreign court.

(i) Prior to the filing of the lawsuit before a foreign court: According to CCP Art. 390 (1), prior to the filing of a lawsuit, the court which has the jurisdiction to decide on the merits of the case is also competent to grant an interim measure. Pursuant to CCP Art. 397, following the granting of the interim measure, the claimant shall file the lawsuit at the court competent to hear it within two weeks; otherwise, the interim measure is automatically annulled. This two-week-long time limit causes problems in situations where the party who holds an interim measure rendered by a Turkish court has also agreed upon a foreign court to review his/her case on the merits. In such an instance, the question arises as to whether the filing of the lawsuit at the foreign court chosen by the parties within two weeks fulfils the requirement under CCP Art. 397 or whether the parties shall file a lawsuit on the merits of the case before a Turkish court. If the court before

[43] For a decision supporting this view see *e.g.*: 11th Civil Chamber of Court of Cassation, Case No. 2016/4200, Decision No. 2016/5291, 11.5.2016 (<www.kazanci.com>). On the other hand, there is an opposing view within academic commentary with regards to the process of raising the plea of *lis alibi pendens*. Accordingly, the plea of *lis alibi pendens* shall be raised as a primary objection for the reason that a Turkish judge may not be able to examine whether there is an ongoing action in a foreign forum. Authors argue that this rule under the CCP was stipulated for domestic cases where it is convenient for the Turkish judge to examine *ex officio* whether there is an ongoing action before another Turkish court. In support of this view see *e.g*: A. ÇELIKEL/ B. ERDEM (note 5), p. 640.

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which the parties have to file the actual lawsuit within two weeks following the granting of interim measure has to be a Turkish court, then any interim measures shall always be automatically annulled after two weeks where there is a jurisdiction agreement exclusively designating a foreign court. In addition, when one of the parties applies to the Turkish courts for an interim measure, the opposing party will tend to raise an objection against the Turkish courts' jurisdiction due to the jurisdiction agreement designating a foreign court. Such an interpretation would deprive the parties of their right to legal protection. Academic commentary[44] argues that in such instances, documentation indicating the commencement of legal proceedings within two weeks at the foreign court that was designated by the jurisdiction agreement shall fulfill the requirement under Art. 397. However, the case law[45] regarding this issue does not support the view of commentators.

(ii) After filing of the lawsuit before a foreign court: According to CCP Art. 390 (1), after the filing of a lawsuit, only the court before which the lawsuit was filed has jurisdiction to grant interim measures. The application of this rule is problematic regarding the instances where the parties have already filed a lawsuit outside of Turkey based on a jurisdiction agreement that designates a foreign court, since a Turkish domestic rule cannot designate a foreign court to grant an interim measure. It is argued that CCP Art. 390 (1) was intended for purely domestic cases and that disputes with foreign elements were not taken into account by the lawmaker. Thus, commentators have taken the view that in cases where the parties have chosen a foreign court to decide on their dispute and commenced an action before that court, they shall nevertheless be able to apply to Turkish courts for interim measures. A contrary interpretation would deprive the parties of their right to interim protection and would be against the purpose of the aforementioned provision. As the parties cannot be denied of their right to legal protection, commentators support the aforementioned interpretation of CCP Art. 390 (1).[46]

In conclusion, the existence of a jurisdiction agreement between the parties granting jurisdiction to a foreign court regarding an existing or future dispute, does

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[44] E. NOMER (note 5), p. 487; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 501; A. ÇELIKEL/ B. ERDEM (note 5), p. 627-629.

[45] Turkish courts' approach in relation to interim measures where the parties have designated a foreign court through a jurisdiction agreement does not reflect that found in academic commentary. In a dispute where the parties had signed an arbitration clause and the arbitral process had begun, one of the parties wanted to obtain an interim measure. The First Instance Civil Court of Şanlıurfa (which is a city in south-east Turkey) decided that due to the arbitration agreement between the parties designating International Cotton Association Arbitration as the competent authority to decide on the merits of the case, Turkish courts did not have jurisdiction to render interim measures (Şanlı Urfa 3rd Civil Jurisprudence Court, Case No. 2012/190, Decision No. 2012/189, 9.11.2012. The case is not published). For further information on this case see İ. ARSLAN, Milletlerarasi Ticari Tahkimde Türk Mahkemelerinin İhtiyati Tedbir ve İhtiyati Haciz Kararı Verme Yetkisi (*Jurisdiction of Turkish Courts on Interim Injunction and Provisional Attachment Decisions Regarding Disputes Subject to International Arbitration*), Türkiye Adalet Akademisi Dergisi, Year 7, 2016, pp. 691-727.

[46] E. NOMER (note 5), p. 487; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 494; A. ÇELIKEL/ B. ERDEM (note 5), p. 627-628.

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not eliminate the jurisdictional competency of the Turkish courts to render an interim measure. This statement, however, reflects the dominant view from academic commentary and there is clearly a need to amend the PIL Code to ensure a solid positive legal ground for this interpretation.[47]

It should be noted that this problem has already been resolved with regards to the jurisdictional competency of Turkish courts to grant interim measures during international arbitration disputes.[48] According to Art. 6 (1) of the Turkish International Arbitration Code,[49] existence of an arbitration agreement does not deprive the Turkish courts of the competence to issue an interim measure neither prior to nor after the commencement of arbitration proceedings. Furthermore, according to Art. 6 (5) of the above law, the court decision on interim measures is automatically annulled when the arbitral award becomes enforceable or when the dispute is dismissed by the arbitral tribunal.

IV. Agreements Granting Jurisdiction to Turkish Courts

As stated above under Section II, where the PIL Code as the *lex specialis* does not contain specific provisions pertaining to specific jurisdictional rules, the CCP as the general law applies. Since the PIL Code regulates solely the rules pertaining to agreements granting jurisdiction to foreign courts, the rules regulating jurisdiction agreements designating Turkish courts are governed by the CCP. The requirements for enacting a jurisdiction agreement that designates Turkish courts are regulated under CCP Arts. 17 and 18. Such requirements are listed below

(i) Only merchants and public legal entities are allowed to conclude a jurisdiction agreement: Accordingly, only merchants and public legal entities are allowed to choose a Turkish court in their jurisdiction agreement.[50] In other words, the law allows for the conclusion of a jurisdiction agreement granting jurisdiction to a Turkish court only in-between merchants or between merchants and public entities. With this restriction, the lawmaker intends to protect consumers by trying to prevent financially stronger parties such as merchants from enforcing jurisdiction clauses which may be to the disadvantage of consumers. It is important to note that there is no restriction as regards the parties of a jurisdiction agreement that grant jurisdiction to foreign courts pursuant to Art. 47 of the PIL Code. In other words, while a physical person, for instance an architect, is not capable of validly

[47] E. NOMER (note 5), p. 487; A. ÇELIKEL/ B. ERDEM (note 5), p. 629.

[48] E. NOMER (note 5), p. 488.

[49] Law No. 4686 OG No. 5.7.2001/24453.

[50] E. NOMER (note 5), p. 483; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 406; A. ÇELIKEL/ B. ERDEM (note 5), p. 632. For illustrative decisions applying this rule see: 12th Civil Chamber of the Court of Cassation, Case No. 2016/22765, Decision No. 2017/14559, 23.11.2017; 12th Civil Chamber of the Court of Cassation, Case No. 2016/21765, Decision No. 2017/13784, 8.11.2017.

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concluding a jurisdiction agreement designating a Turkish court, s/he is capable of becoming a party to a jurisdiction agreement designating a foreign court.

(ii) The chosen court(s) should be specific: The parties must specify in their jurisdiction agreement which particular Turkish court they are willing to grant jurisdiction to. For instance, a jurisdiction clause that states "Istanbul Commercial Courts shall have jurisdiction to settle the disputes arising from this sales contract" does meet this condition. Consequently, a jurisdiction clause or an agreement which grants jurisdiction generally to all Turkish courts would be invalid. For example, a jurisdiction clause that states "Any court situated in Turkey shall have jurisdiction to review the disputes arising from this sales contract" does not meet this condition.[51]

(iii) The dispute should not be on a subject which the parties may not freely dispose of: According to CCP Art. 18 (1), for a jurisdiction agreement that designates a Turkish court to be valid, the dispute between the parties shall be on a matter which they can freely dispose of.[52] It is important to note that, unlike the requirements for a valid jurisdiction agreement designating a foreign court, the dispute may not necessarily be grounded on a contractual relationship. Under Turkish law, disputes which the parties may not freely dispose of are disputes relating to family law, law of persons, inheritance, and insolvency.

(iv) The dispute shall not fall under the exclusive jurisdiction of a particular Turkish Court: Certain disputes are exclusively within the jurisdiction of Turkish courts. There does not exist a comprehensive list of disputes that fall under the exclusive jurisdiction of Turkish courts. However, through interpretation of the relevant provisions of various statutes, we can infer the exclusive jurisdiction of Turkish courts in some situations. CCP Art. 12 constitutes an example of a rule that stipulates exclusive jurisdiction. Accordingly, if there is a dispute regarding rights *in rem* on immovable properties located in Turkey, only the courts where the immovable property is located shall have jurisdiction. Another example is offered under CCP Art. 14. Accordingly, regarding disputes between shareholders and their company, only the courts at the place where the relevant legal entity is located shall have jurisdiction.

(v) The parties are allowed to grant jurisdiction to more than one Turkish court. The parties are allowed to determine more than one Turkish court to have jurisdiction; there is no restriction under the law in this regard. However, a jurisdiction clause that allows the parties to start proceedings in "any court in Turkey" shall be invalid.[53]

(vi) The legal relationship upon which a dispute may arise or has been raised should be identified or identifiable. According to CCP Art. 18 (2), the dispute regarding which Turkish court is designated must be identified or identifiable. A jurisdiction clause such as "from now on, all disputes that might

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[51] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 408; A. ÇELIKEL/ B. ERDEM (note 5), p. 633.

[52] E. NOMER (note 5), p. 483; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 409; A. ÇELIKEL/ B. ERDEM (note 5), p. 633.

[53] B. KURU/ R. ARSLAN/ E. YILMAZ, Medeni Usul Hukuku (*Civil Procedural Law*), Yetkin Yayınları, Ankara 2014, p. 115.

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arise from any sales contract between the parties shall be resolved by Istanbul courts" would not fulfill this criterion and would be deemed as invalid. On the other hand, the parties can designate a Turkish court regarding all of the disputes that might arise from a particular legal relationship between them. For instance, a jurisdiction clause such as "Courts of Istanbul shall have jurisdiction to resolve all of disputes arising from this agreement" would fulfill this criterion and thus be deemed as valid. Jurisdiction would also be granted to the chosen courts regarding an existing or a possible dispute.

(vii) The agreement shall be made in writing. According to CCP Art. 18, a jurisdiction agreement that designates Turkish courts shall be made in writing to be deemed as valid. In addition, although not explicitly stipulated under the law, any jurisdiction agreement which designates Turkish courts shall not be contrary to the principle of good faith. For instance, a jurisdiction clause designating a Turkish court under a general terms and conditions agreement which the counter party was not given enough time to examine may be considered as invalid.[54]

It is important to note that, for a jurisdiction agreement designating Turkish courts to be considered as valid, a connection with Turkey is not required.[55] Parties regardless of their nationalities and facts triggering their dispute are allowed to designate Turkish courts under their jurisdiction agreement. Turkish law does not accept the forum *non-conveniens* doctrine. Furthermore, whether the decision by the Turkish court designated under a jurisdiction agreement will be recognized or enforced in the respondent's jurisdiction is irrelevant to the validity of the jurisdiction agreement.[56]

V. Asymmetrical Jurisdiction Agreements

An asymmetric jurisdiction agreement provides one of the parties to the jurisdiction agreement with alternative options to sue the other party, but does not provide as many options to the other party. It is disputable whether asymmetrical agreements are valid under Turkish law. One view from academic commentary argues that asymmetrical jurisdiction agreements tilt the balance between the parties against the financially weaker party while violating the right to a fair trial and right to justice of the weaker party. This view asserts that in such instances asymmetrical agreements shall be invalid.[57]

It is important to note that this doctrinal view is rooted in the former Code of Civil Procedure (Code No. 1086), which did not stipulate a restriction as regards the parties of the jurisdiction agreement that designates Turkish courts. Thus, the

[54] C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 396.

[55] E. NOMER (note 5), p. 484; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 409-410; A. ÇELIKEL/ B. ERDEM (note 5), p. 634.

[56] E. NOMER, pp. 484-485; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 410.

[57] E. NOMER (note 5), p. 490; A. ÇELIKEL/ B. ERDEM (note 5), p. 620-621.

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aforementioned view is rather obsolete; since the CCP only allows merchants and legal entities to designate Turkish courts in their jurisdiction agreement. Consequently, the aforementioned argument may only be relevant where the parties assign a foreign court, since the PIL Code Art. 47 does not envisage a restriction regarding the parties of a jurisdiction agreement that designates foreign courts.

The approach of the Court of Cassation is not clear on the issue of the validity of asymmetrical jurisdiction agreements. A recent Court of Cassation decision[58] may be interpreted in such a way that asymmetrical jurisdiction clauses are considered as valid. In this decision, the parties, who were both merchants, had concluded an asymmetrical jurisdiction clause. Accordingly, the parties agreed on the jurisdiction of a foreign court but also provided only the claimant with an additional option to bring a legal action at the courts of the defendant's domicile which is situated in Turkey. The Court of Cassation upheld this option provided to the claimant. Thus, the Court reasoned that there were no obstacles against the commencement of a lawsuit against the defendant at the courts of his/her domicile. In this regard, it may be interpreted that the Court of Cassation considered an asymmetrical jurisdiction clause as valid. It is important to note that in the aforementioned decision both parties were merchants with comparable bargaining power to conclude a choice of court agreement. Thus, this decision cannot be interpreted as a benchmark case regarding asymmetrical jurisdiction clauses under Turkish law. The dominant view under Turkish academic commentary still views asymmetrical jurisdiction clauses as invalid due to the concern of protecting the financially weaker party from being forced to conclude a choice of court agreement against its benefit.

VI. Recognition and Enforcement of Decisions of Foreign Courts Designated by a Jurisdiction Agreement

In the instances where the parties have chosen a foreign court to resolve their dispute, the prevailing party will most probably try to enforce the foreign judgment in Turkey if the counter-party has its assets in Turkey. In this regard, requirements for the recognition and enforcement of foreign judgments need to be taken into account. Under Turkish law, rules regarding recognition and enforcement of court decisions are regulated under Arts. 50-59 of the PIL Code. Art. 50 stipulates the preconditions for recognition and enforcement of court decisions, whereas Art. 54 regulates the grounds upon which the decision is not recognized or enforced.[59] The conditions stipulated under the aforementioned provisions are limited and so the

[58] 11th Chamber of the Court of Cassation, Case No. 2015/9758, Decision No. 2016/4646, 25.4.2016 (<www. kazanci.com>).

[59] For further information on the recognition and enforcement of foreign judgments in Turkey see *e.g.*: C. SÜRAL/ Z.D. TARMAN, Recognition and Enforcement of Foreign Court Judgments in Turkey, this *Yearbook*, 2013/2014, pp. 218-240.

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Turkish judge has no discretion to refuse enforcement upon any ground other than those listed in Article 54 or any rights to make further inquiries as to the merits of the case (prohibition of *révision au fond*).[60] The invalidity of a choice of court agreement is not a reason for non-enforcement under the law. Thus, non-conformity of a jurisdiction agreement with Art. 47 of the PIL Code, that is, the invalidity of the jurisdiction agreement, does not in principle prevent the recognition and enforcement (a) of the foreign judgment. Moreover, the prerequisites under Art. 50 of the PIL Code (b) as well as the conditions under Art. 54 of the PIL Code (c) shall still be fulfilled, and thus, the parties in drafting a choice of court agreement should take into account such requirements for the recognition and enforcement.

A. Invalidity of a Choice of Court Agreement Does Not Prevent Enforcement

Non-conformity of a jurisdiction agreement with Art. 47 of the PIL Code, that is, the invalidity of the jurisdiction agreement, does not in principle prevent the recognition and enforcement of the foreign judgment. As explained above in Section III, each State shall determine pursuant to its own domestic law whether a jurisdiction agreement is capable of granting jurisdiction to its courts. A foreign court may establish its jurisdictional competency based on a choice of court agreement which is invalid under Turkish law and decide on the merits of the case. A decision rendered by a foreign court that established jurisdiction based on a jurisdiction agreement which is invalid under Turkish law, can still be recognized and enforced in Turkey.[61] For example, pursuant to Art. 47 (1) of the PIL Code, a valid jurisdiction agreement shall be on a dispute grounded in a contractual relationship. If a couple chooses a foreign court under a jurisdiction agreement to decide on their divorce, such an agreement would be invalid from a Turkish law perspective. However, if the designated court of the foreign state decides on the merits of the case, the foreign decision may be recognized in Turkey to the extent that it complies with the requirements of recognition under the PIL Code. In other words, the invalidity of a jurisdiction agreement based on which a foreign decision was given, is not in itself a ground for non-recognition or non-enforcement of that foreign decision.

On the other hand, if the invalidity of the jurisdiction agreement is caused due to a reason that is also a ground for non-enforcement, then such invalidity will pose a problem for its enforcement. Such an instance will only arise where the parties have chosen a foreign court on a subject matter on which the Turkish courts have exclusive jurisdiction since, pursuant to Art. 54 (b) of the PIL Code, foreign court decisions on subject matters regarding which Turkey has exclusive jurisdiction shall not be enforced. The details of the requirements for the recognition and enforcement of foreign court decisions are explained below. Any of the parties to a

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[60] E. NOMER, 516; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 511-512; A. ÇELIKEL/ B. ERDEM (note 5), p. 690.

[61] E. NOMER, *Ibidem*; A. ÇELIKEL/ B. ERDEM (note 5), p. 617.

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choice of court agreement wishing to enforce the decision by that court in Turkey, shall consider these requirements when drafting the jurisdiction agreement.

B. Prerequisites of Enforcement and Recognition (Art. 50 of the PIL Code)

(i) The judgment shall be on a civil or commercial matter: Art. 50 of the PIL Code requires that the decision subjected to recognition or enforcement be related to either civil or commercial matters. Whether an action is classified as a civil action is determined under Turkish law.[62] Thus, if the parties choose a foreign court with regard to administrative and criminal matters, notwithstanding the invalidity under Art. 47 of the PIL Code, even if that foreign court assumes its competency, the judgment shall not be subjected to recognition and enforcement. Moreover, if the designated foreign court renders a judgment on punitive damages, that decision will not be enforced in Turkey due to their punitive character.[63]

(ii)The decision shall be rendered by a state court: The decision which will be subjected to the recognition or enforcement proceedings must have been rendered by a foreign court.[64] Thus, in principle,[65] any decisions issued by administrative bodies such as the municipality, governorship or notary cannot be enforced in Turkey pursuant to the PIL Code. Whether the foreign decision is a court decision or not shall be determined in accordance with the law of the country where it was rendered. Hence, parties in their jurisdiction agreements must choose a state court for the foreign decision to be recognized or enforced in Turkey in the future.

(iii) The court decision shall be final: The foreign judgment which will be subjected to recognition or enforcement in Turkey, shall be final and enforceable under the law of the state where the judgment was rendered.[66] Thus, except where it is exceptionally allowed under international agreements, foreign provisional and

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[62] E. NOMER (note 5), p. 509; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 517; A. ÇELIKEL/ B. ERDEM (note 5), p. 685.

[63] E. NOMER (note 5), p. 510; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 518; A. ÇELIKEL/ B. ERDEM (note 5), p. 685-686.

[64] E. NOMER (note 5), p. 508; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), pp. 513-515; A. ÇELIKEL/ B. ERDEM (note 5), p. p. 685-686. 8th Chamber of the Court of Cassation, Case No. 2017/6212, Decision No. 2017/13546, 24.10.2017 (<www.kanunum.com>).

[65] There are certain exceptions to this requirement stipulated under international conventions to which Turkey is a party or domestic laws. These concern the recognition of decisions pertaining to maintenance obligations, adoption and divorce. For further information see C. SÜRAL/ Z. DERYA TARMAN (note 59), p. 220.

[66] E. NOMER, pp. 513-514; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 519; A. ÇELIKEL/ B. ERDEM (note 5), p. 687-689. For exemplary decisions regarding this requirement under PIL Code, Art. 50, see: 3rd Chamber of the Court of Cassation, Case No. 2016/9464, Decision No. 2016/12221, Date 27.10.2016; 11th Chamber of the Court of Cassation, Case No. 2015/1049, Decision No. 2015/2238, 19.2.2015 (<www.kazanci.com>).

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protective measures cannot be recognized or enforced under Turkish private international law.

C. Conditions of Enforcement and Recognition (Art. 54 of the PIL Code)

Art. 54 of the PIL Code, provides five conditions for enforcement of the foreign judgment. Pursuant to Art. 58 (1) of the PIL Code, except for the condition regarding reciprocity, the same conditions listed under Art. 54 of the PIL Code apply to the recognition of court decisions.[67] The grounds listed under Art. 54 are as follows:

(i) Reciprocity: Pursuant to Article 54 (a), in order for a foreign judgment to be enforced in Turkey, there needs to be reciprocity between Turkey and the foreign state from whose courts the foreign judgment is rendered.[68] Thus, when choosing for a foreign court to have jurisdiction, the parties shall take into account whether there is reciprocity between Turkey and the chosen forum. Hence, if any of the parties to a jurisdiction agreement wish to enforce the decision to be rendered by the chosen court in Turkey, they must choose the courts of a state with whom Turkey has reciprocity.

The reciprocity requirement can be established through three ways. There may be a multilateral or bilateral agreement providing for the mutual enforcement of foreign judgments between Turkey and the state from whose courts the foreign judgment was given. 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. In this regard, reciprocity shall be deemed as clearly satisfied if the foreign court judgment may be enforced in the relevant foreign state with similar conditions as under Turkish law. In other words, where the foreign state does not require the existence of further conditions and burdens in order to enforce Turkish judgments, it is considered that there is reciprocity.[69] For example, if the relevant State does not apply the prohibition of *révision au fond* principle, reciprocity will be deemed not to exist. If no such statutory provisions exist, Turkish court decisions shall *de facto* be enforced in that state. However, it should be noted that statutory reciprocity will not be sufficient in certain cases where despite the existence of statutory provisions in the foreign law enabling

[67] 8th Civil Chamber of the Court of Cassation, Case No. 2017/6212, Decision No 2017/13546, 24.10.2017 (<www.kanunum.com>).

[68] For illustrative decisions regarding this requirement under Art. 54, PIL Code see: 11th Civil Chamber of the Court of Cassation, Case No. 2014/4148, Decision No. 2014/10274, 02.6.2014; 11th Civil Chamber of the Court of Cassation, Case No. 2013/17269, Decision No. 2014/1375, 22.1.2014; 2nd Civil Chamber of the Court of Cassation, Case No. 2010/11237, Decision no. 2011/2718, 16.2.2011; 11th Civil Chamber of the Court of Cassation, Case No. 2003/1872, Decision No. 2003/7813, 15.9.2003 (<www.kanunum.com>).

[69] E. NOMER (note 5), p. 520; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 529, fn. 375; A. ÇELIKEL/ B. ERDEM (note 5), p. 705-707.

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enforcement of Turkish court judgments in that foreign country, Turkish court decisions are not being enforced in practice.[70]

(ii) Exclusive Jurisdiction: According to Art. 54 (b) of the PIL Code, the foreign judgment must have been rendered on a subject matter not falling within the exclusive jurisdiction of the Turkish courts. As explained above, what constitutes exclusive jurisdiction is not codified under the PIL Code. It is established under the case law that decisions pertaining to *rights in rem* on immovable property situated in Turkey, decisions relating to intellectual property rights and decisions regarding appointment of a conservator are among the issues that the Turkish courts have exclusive jurisdiction.[71] As this condition is also a requirement for the conclusion of a valid jurisdiction agreement under Art. 47 of the PIL Code, parties to a jurisdiction agreement shall carefully consider the subject matter of the dispute resolution attributed to the foreign court in question through the choice of court agreement.

(iii) Exorbitant Jurisdiction: The decision shall not be rendered by a foreign court that lacks a real connection with the facts surrounding the dispute (*exorbitant jurisdiction*).[72] On the other hand, Art. 47 of the PIL Code which regulates the conditions for the validity of a jurisdiction agreement designating foreign courts, does not require any connection between the chosen foreign court and the dispute. Thus, evoking *exorbitant jurisdiction* as a ground for non-recognition and non-enforcement is against the principle of good faith where the parties have themselves chosen the foreign court whose ruling is subjected to the enforcement procedure in Turkey. Hence, an objection to the recognition and enforcement of a foreign court decision on the grounds of exorbitant jurisdiction will not be taken into account by the Turkish judge if the parties have chosen this court through a choice of court agreement.

(iv) Public Policy: The court decree shall not be manifestly contrary to public policy or order. The definition of public policy is not regulated under the law. In order to consider public policy as a ground for non-recognition or non-enforcement, the effects or consequences of foreign judgments should be manifestly incompatible with the fundamental principles of Turkish law, human rights and ethics of Turkish society.[73] According to Art. 54 (c) of the PIL Code, the contradiction to public policy must be “manifest”. This wording intends to strictly

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[70] E. NOMER (note 5), p. 519; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 533; A. ÇELIKEL/ B. ERDEM (note 5), p. 710. For a decision supporting this view see: 11th Chamber of the Court of Cassation, Case No. 2008/1284, Decision No. 2009/980, 30.1.2009 (<www.kazanci.com>).

[71] E. NOMER (note 5), p. 521; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 535; A. ÇELIKEL/ B. ERDEM (note 5), p. 714-719. For illustrative decisions regarding this requirement under Art. 54, PIL Code see: 8th Civil Chamber of the Court of Cassation, Case No. 2017/6212, Decision No. 2017/13546, 24.10.2017; 8th Civil Chamber of the Court of Cassation, Case No. 2016/4772, Decision No. 2016/5813, 30.3.2016 (<www.kanunum.com>).

[72] E. NOMER, pp. 524-527; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 541; A. ÇELIKEL/ B. ERDEM (note 5), p. 719-722.

[73] 8th Civil Chamber of the Court of Cassation, Case No. 2017/6212, Decision No. 2017/13546, 24.10.2017 (<www.kanunum.com>).

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limit the application of public order by judges. Indeed, in practice, Turkish courts prevent enforcement based on the argument of public order only under very exceptional circumstances such that the General Assembly of the Court of Cassation even decided[74] that the absence of legal reasoning within a foreign judgment does not constitute a breach of public policy. Accordingly, if one of the parties to a jurisdiction agreement that designates a foreign court wishes to enforce the decision rendered by this court in Turkey, the Turkish judge shall *ex officio* make an examination with regards to Turkish public order.

(v) Requirements Pertaining to the Respondent's Rights of Defense: According to the last paragraph of Art. 54 of the PIL Code, if the person against whom the enforcement is requested was not duly summoned pursuant to the laws of that foreign state or to the court that has rendered the judgment, or was not represented before that court, or the court decree was pronounced in his/her absence or by a default judgment in a manner contrary to these laws, and the person has objected to exequatur based on the foregoing grounds before the Turkish court, then such foreign decision shall not be recognized or enforced in Turkey. Accordingly, if one of the parties to a jurisdiction agreement that designates a foreign court wishes to enforce the decision rendered by this court in Turkey, the Turkish judge may upon the request of the respondent make an examination with regards to the respondent's rights of defense. It is important to note that, the principle of *révision au fond* does not prevent an examination by the Turkish court upon an assertion by the respondent, as to whether the respondent's rights of defense were violated by the foreign court.[75]

VII. Arbitration and Jurisdiction Agreements

Parties to international commercial contracts may choose different methods for the resolution of disputes arising from contractual relations. The parties may prefer litigation and to file lawsuits to national courts, or select alternative dispute resolution methods, including arbitration and/or mediation. Under Turkish law, problems might arise in relation to the validity of the arbitration agreement, where the parties have also alternatively agreed on a choice of court agreement for the same dispute.

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[74] General Assembly of the Court of Cassation, Case No. 2010/1, Decision No. 2012/1, 10.2.2012 (<www.kazanci.com>). For the doctrinal views criticizing this decision see C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 543, fn 404.

[75] E. NOMER (note 5), p. 439; C. ŞANLI/ E. ESEN/ İ. ATAMAN-FIGANMEŞE (note 5), p. 557, fn 426; A. ÇELIKEL/ B. ERDEM (note 5), p. 740.

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A. General Remarks on Turkish Law Regarding Arbitration

The Turkish International Arbitration Code[76] is based on the UNCITRAL Model Law and the international arbitration sections of the Swiss Federal Private International Law of 1987. Therefore, it contains regulations generally accepted in the arena of international arbitration. In this regard, parties have equal rights and competency in arbitral proceedings whilst both parties must be given the opportunity to submit their claims and defenses in full. Party autonomy is encouraged and the intervention of the state courts in arbitral proceedings is limited to specific circumstances. Overall, arbitration rules in Turkey are at an international level which creates a positive legal framework for foreign contracting parties.[77]

The recognition and enforcement of foreign arbitral awards is regulated separately under the PIL Code. As explained in the introduction section above, international agreements duly ratified have force of law and prevail over domestic rules. In other words, if an issue falls within the scope of an international convention, the international convention takes the precedence of provisions of the national law. Turkey is a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965),[78] the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),[79] and the Geneva Convention on International Commercial Arbitration (1961).[80] These conventions constitute a major part of Turkish arbitration legislation. Thus, only when there is an arbitral award emanating from a state which is not a party to any international agreement do the rules under the PIL Code apply. This is the reason why, in practice, Art. V of the New York Convention, which stipulates the conditions for the recognition and enforcement of arbitral awards, is applied more frequently than the PIL Code.

B. Coexisting Jurisdiction and Arbitration Clauses

One of the principal elements of the validity of an arbitration agreement is the clear intent of the parties to arbitrate.[81] In the event that the parties choose arbitration as an alternative dispute resolution method, it is crucial to precisely express that intention to resolve any related dispute by arbitration within a contract and avoid any contradictory statements. The Court of Cassation has stated that there should be no doubt concerning the parties' intent to arbitrate for there to be a

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[76] Law No. 4686, OG 5.7.2001/24453.

[77] For further information on arbitration in Turkey see *e.g.*: Z. DERYA TARMAN, Chapter 16 "International Commercial Arbitration in Turkey", in T. ANSAY/ E.C. SCHNEIDER, *Introduction to Turkish Business Law*, (2nd ed.), January 2014, pp. 245-255.

[78] Law No. 3460. OG 2.6.1988/19830.

[79] Law No. 3731. OG 21.5.1991/20877.

[80] Law No. 3730. OG 21.5.1991/20877.

[81] Z. AKINCI, Milletlerarası Tahkim (*International Arbitration*), Vedat Yayıncılık, Istanbul 2016, p. 98.

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valid arbitration agreement.[82] If the parties have not eliminated the possibility to resort to the national courts, it is very probable that the arbitration agreement shall be deemed as invalid.[83]

In this regard, coexisting jurisdiction and arbitration clauses in a contract may raise a question on the intent of the parties to arbitrate. In other words, where an agreement encompasses a jurisdiction clause designating national courts and at the same time an arbitration clause, it becomes very probable that the arbitration agreement shall be deemed as invalid. In line with this finding, in a dispute[84] brought before the Court of Cassation, it was decided that the arbitration agreement in question was void since the contract between the parties both stipulated an arbitration clause and a jurisdiction clause designating the courts of Istanbul.

In another decision[85] the Court of Cassation held that the arbitration agreement was invalid since the arbitral tribunal was not the only body which was designated to resolve the dispute between the parties. In this case, the agreement between the parties envisaged that that any dispute regarding the contract shall be resolved by an arbitral tribunal. Nevertheless, the agreement also stipulated that if the parties could not reach a consensus within 30 days upon the submission of the case to the arbitral tribunal, Istanbul Courts shall have jurisdiction to resolve the dispute, which caused uncertainty regarding the parties' intent to arbitrate.

In another dispute where the parties through an asymmetrical agreement granted only one of the parties with the right to apply to arbitration, the Court of Cassation held that the agreement was void. It was reasoned that the party who was deprived of the option to apply to arbitration still had the right to commence a legal action before a national court. Thus, such an asymmetrical arbitration agreement indirectly resulted in providing for both arbitral and judicial adjudication regarding the same dispute, which casted doubt on the parties' intent to arbitrate and rendered the arbitration clause as invalid.[86]

In conclusion, the dominant approach in Turkish private international law supports the view that where there is a jurisdiction clause co-existing with an

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[82] 9th Chamber of the Court of Cassation, Case No. 2013/1773, Decision No. 2013/6664, 25.2.2013; 15th Chamber of the Court of Cassation, Case No. 2007/2680, Decision no. 2007/4137, 18.6.2007 (<www.kazanci.com>).

[83] See the dissenting opinion: 15th Chamber of the Court of Cassation, Case No. 2014/3330, Decision No. 2014/4607, 1.7.2014 (<emsal.yargitay.gov.tr>).

[84] 15th Chamber of the Court of Cassation, Case No. 2009/1438, Decision No. 2013/2153, 13.4.2009 (<www.kazanci.com>).

[85] 15th Chamber of the Court of Cassation, Case No. 2015/2198, Decision No. 2015/2758, 22.5.2015 (<www.kazanci.com>).

[86] 11th Chamber of the Court of Cassation, Case no. 2009/3257, Decision no. 2011/1675, 15.2.2011 (<www.kazanci.com>). For further analysis on this decision see: E. ESEN, Taraflardan Sadece Birine Tahkime Müracaat Hakkı Tanıyan Tahkim Anlaşmalarının ve Özellikle Kıyı Emniyeti Genel Müdürlüğü'nün Kurtarma Yardım Sözleşmesi'nde Yer Alan Tahkim Şartının Geçerliliği (*Validity of Arbitration Clauses that Grant Only One of the Parties the Right to Apply to Arbitration: in Particular the Validity of the Arbitration Clause under the General Directorate of Coastal Safety Rescue Assistance Contract),* Istanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, Year 9, Vol. 9, No. 2, 2010, pp. 145-155.

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arbitration clause, the arbitration clause is deemed as invalid[87]. In such instances, the reason for the invalidity is the lack of certainty and clarity pertaining to the intent of the parties to arbitrate. Thus, it is recommended that the parties avoid drafting clauses that provide options to the parties to the effect that adjudication by national courts becomes an alternative to arbitration. Since the clear and absolute intent of the parties to arbitrate is a principal element for the validity of the arbitration agreement, it is recommended that the parties avoid co-existing choice of court and arbitration clauses in their agreements.

C. Arbitration Objection as a Primary Objection

Under Turkish law, where a valid arbitration agreement[88] is present, the Turkish courts shall decline jurisdiction in favor of arbitration upon objection by a party seeking to enforce the arbitration agreement. If one of the parties files a lawsuit before state courts despite a valid arbitration agreement, the other party can raise an arbitration objection. Pursuant to CCP Arts. 116 and 117, an arbitration objection must be made as a primary objection in the response petition; that is, within two weeks of the arrival of the notification of the lawsuit at the respondent's premises. Unless the parties make this primary objection, the judge cannot *ex officio* take into account the arbitration clause

VIII. Conclusion

With the increase in cross-border trade, the number of jurisdiction agreements concluded between parties have also increased. Turkish law has responded to this legal trend. At the time when the former Code on International Private Law and Procedural Law No. 2675 was in force, there was ambiguity as to whether it was

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[87] For further information on Turkish case law regarding coexisting arbitration and jurisdiction agreements see *e.g.*: H.Ö. KOCASAKAL, Yargıtay 15. Hukuk Dairesi'nin bir Kararı Çerçevesinde Mahkemelere de Yetki Veren Tahkim Anlaşmalarının Geçerliliği ve Bu Geçerliliğin Tespitinin Mahkemeler Tarafından Yapılıp Yapılamayacağı (*In the Framework of a Decision by the 15th Chamber of the Court of Cassation The Validity of Arbitration Agreements that also Grant Jurisdiction to National Courts and whether this Validity Assessment Shall be Made by National Courts*) in E. ERDEM et al. (eds.), *Prof. Dr. H. Y. Armağan*, On İki Levha Yayıncılık, 2017, p. 509; N.Ş. ÖZÇELIK, Resmi Yargı ve Tahkimin Ayrı Ayrı ve Birlikte Yetkilendirildiği Anlaşmaların Geçerliliği (*Validity of Arbitration Agreements in which Arbitration and National Courts are Jointly or Separately Designated*), Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Year 36, No. 2, 2016.

[88] Where the place of arbitration is Turkey and the dispute involves a foreign element, the Turkish International Arbitration Act determines the validity of an arbitration agreement. According to Art. 4 of the Turkish International Arbitration Act, the validity of an arbitration agreement is determined in line with the chosen law by the parties to apply to the arbitration agreement or where there is no such choice made, by Turkish law.

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possible to bring a lawsuit before a Turkish court despite a jurisdiction agreement designating a foreign court to resolve the dispute. Former decisions of the Court of Cassation used to uphold the jurisdiction of Turkish courts despite a valid jurisdiction agreement on the grounds of public order and reliance on the Turkish courts. The approach of the Court of Cassation has evolved in such a way as to interpret jurisdiction agreements as granting exclusive jurisdiction to the foreign court designated under the relevant jurisdiction agreement. The lawmaker has recognized this issue and amended the law so that where a valid jurisdiction agreement confers jurisdiction on a foreign court, the Turkish court shall decline jurisdiction in favor of that court.

As explained above, the law applicable to the validity of a jurisdiction agreement differs depending on which courts are designated by the parties. If the parties choose a foreign court to resolve their dispute, the validity of the jurisdiction agreement is subject to the PIL Code. On the other hand, if the parties want to choose a Turkish court, they must abide by the rules under the CCP. Since the parties are allowed to select more than one court under their jurisdiction agreements, in instances where the parties chose both foreign and Turkish courts, the jurisdiction agreement shall be subjected to a dual inquiry. The conditions for the validity of the choice of the Turkish courts will be evaluated in light of the CCP, while the evaluation for foreign courts shall be done following the rules under the PIL Code.

One of the major discussions that still remains regarding jurisdiction agreements boils down to the question of whether the parties are obliged to specify which particular court of a foreign state they want to choose under their jurisdiction agreement or whether it is sufficient to generally choose the courts of a foreign state. While there are conflicting decisions from the Court of Cassation, there is no consensus among academics on this issue either. In this regard, until the issue is clarified through an amendment to the law or a unification judgment, parties are recommended to indicate the specific foreign court when drafting their jurisdiction clauses to avoid any risks as to validity. Besides this discussion, the question of whether asymmetrical jurisdiction agreements are valid is still unresolved.

One other point that might create uncertainty for the parties is the application of the doctrine of good faith by the Court of Cassation to claim the jurisdiction of the Turkish courts. The court tends to establish jurisdiction in instances where the claimant files a lawsuit at the residence of the respondent contrary to the jurisdiction agreement between the parties, on the grounds that the respondent can best defend itself at its residence. There is a clear need for a shift in the court's approach in favor of party autonomy regarding this issue. Moreover, a Turkish court's jurisdiction to render an interim measure is also a problematic issue when there is a jurisdiction agreement designating a foreign court. There is a need to draft a special rule on interim measures which takes into account legal actions with a foreign element.

It is also extremely important to note that Turkish civil procedural law considers the objection to jurisdiction as a primary objection. The Turkish judge cannot *ex officio* take into account the existence of a choice of foreign court agreement. Therefore, the parties must object to jurisdiction within the timescale

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prescribed by law, which is two weeks. Where such objection is not made, the Turkish court will gain competence.

Despite the academic debates surrounding particular aspects of jurisdiction agreements, it must be said that the legal treatment of choice of court agreements in Turkey is effective and well-justified. While, there may be a need for amendments to the law to clarify certain points pertaining to the validity of jurisdiction agreements, the Turkish legal framework in this area is sufficient for the parties to securely conclude jurisdiction agreements.

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THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN MONGOLIA

Tamir BOLDBAATAR*

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 395-419
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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VI. Jurisdiction, Recognition and Enforcement of Judgements
A. Jurisdiction
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I. Introduction

Before the current Civil Code of 2002, Mongolia had used four Civil Codes, which were enacted in 1926, 1952, 1963 and 1994. These Civil Codes follow respectively the Constitutions of 1924, 1940, 1960 and 1992, which reflected the political, economic and social developments within the country. For the purpose of this article, we shall set aside all considerations relating to constitutional law and focus on the development of private international law in Mongolia.

At the dawn of constitutionalism in the country, Mongolian law was heavily influenced by the Soviet (communist and socialist) ideology. Thus, even though Mongolia had, in 1990, abolished the totalitarian regime and rejected the planned economy system, the regulation on private international law provided for in the 1994 Civil Code was still substantially inspired by the Russian Civil Code. However, the new Civil Code of 2002 is widely considered to be a reflection of German law. A demand to further develop private international law regulations was triggered by a flow of foreign trade, marriages between Mongolian citizens and foreigners, foreign investment, and the needs of Mongolians living, studying and working abroad.

This article will focus on the changes brought by the new Civil Code of 2002, as compared to the previous Civil Code of 1994. Moreover, it aims at providing an insight of the rules laid down by the Family Law.

II. The Relationship and the Main Features of the Constitutions and Civil Codes of Mongolia

A. The Socialist Constitution of 1924 and Civil Code of 1926

The first Constitution of the Mongolian People's Republic was approved in November 1924. This document is of major historic significance in that it establishes the independence of the country, and legally ensures a completely new political structure, core principles of law, and a national democratic transformation through the abolition of the monarchy for the first time in the history of the

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Mongolian State.[1] This was the beginning of the development of a modern legal system based on the European model.[2]

The enactment of the 1924 Constitution triggered the adoption and drafting of major laws in the country, such as the Civil Code and the Criminal Code between 1926 and 1929. The concepts, principles, and structures of the abovementioned codes were, for some, influenced by the terms and practices of continental law.[3] For instance, some concepts of the 1922 Soviet Civil Code inspired the Mongolian Civil Code.[4]

The Code intended to regulate marital relationships, including those between foreigners, or between a foreigner and a Mongolian citizen. However, at that time, it did not contain private international law rules.

B. The 1940 Constitution of the Republic of Mongolia and Civil Code of 1952

The Constitution of 1940 was of a socialist and class-based character, whereby declaring to develop a non-capitalist system. The concept of the Soviet Civil Code was also transposed into the Mongolian Civil Code of 1952.[5] The main ideology of this Civil Code was to develop national property relations between state cooperatives and private property owners. There was no private international law rule worth mentioning in the Civil Code of 1952. In other words, the adoption of new rules on private international law was not an emergency.

C. The Constitution of 1960 and Civil Code of 1963

The major achievement of the Constitution of 1960 is that it realized and guaranteed the social and economic rights of citizens, such as the right to work, the right to receive a fair salary, and the right to free education.

The socialist Civil Code of 1963 was aimed at strengthening planned economy and protecting state property.[6] Other types of property, as well as the

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[1] J. Boldbaatar/ D. Lundeejantsan, *Mongol Ulsiin tur erkh zuin tuuhen ulamjlal* [Historical overview of Mongolian's State and Legal Tradition], Ulaanbaatar 1997, p. 228-229.

[2] S. Narangerel, *Legal System of Mongolia*, Ulaanbaatar 2004, p. 31.

[3] T. Munkhjargal, *Mongol Ulsiin Irgenii tsaaziin tovchoon* [Mongolian Civil Code Chronology], Ulaanbaatar 2006, p. 174.

[4] S. Narangerel (note 2), p. 32.

[5] Z. Sukhbaatar/ B. Batbayar/ P. Oyundelger (eds), *Mongol Ulsiin irgenii huuli togtoomj-tuuhen emhetgel 1206-2012 on* [Mongolian Civil Codes – historical compilation 1206-2012], Ulaanbaatar 2012, p. 81.

[6] T. Munkhjargal (note 3), p. 185.

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principles of freedom of contract and equality of the parties to a civil law relationship, were therefore limited.[7]

Private international law, inspired by Soviet regulations, was first introduced into Mongolian legislation through Part IX of the 1963 Civil Code.[8] Soviet regulations were also reflected in the following laws of Mongolia:

- Section V of the 1973 Family Act (this section was abolished by the 1999 Family Act);
- Bilateral treaties signed with socialist countries since 1958;
- Section VI of the 1963 Civil Procedure Code;
- Part 17 of the 1994 Civil Procedure Code.

D. The Democratic Constitution of 1992 and Civil Code of 1994

In 1990, Mongolia abolished the totalitarian regime, rejected planned economy, and engaged in a comprehensive transition toward a new political system. The Constitution adopted on January 13, 1992 resulted from the democratic movement that took place in 1989. It intended to develop a country respecting human rights, democratic values, market economy, and the rule of law. All this led to the complete reform of the legislative system and structure. Universally recognized principles of international law and international treaties were, from then on, recognized as part of the Mongolian legal system. Many laws have since been adopted to regulate new social relationships, and old legislations have been reformed or amended in order to conform to the Constitution.[9]

The 1963 Civil Code was revised in 1994 by the Parliament of Mongolia in order to meet the requirements of market economy. For the first time in history, property was qualified as private and public. Unlike the 1963 Civil Code, the revision of 1994 contained a detailed chapter on private international law, which, however, was a mere reflection of the provisions found in an earlier legislation, the 1991 Basis of Civil Legislation of the USSR and Republics.[10]

[7] D. NARANCHIMEG, Mongol Ulsiin Irgenii huuli togtoomj – Erkh zuin shinetgel [Mongolian civil legislation – Legal reform], in *Mongoliin erh zuin shinetgel -8 jil: Iltgel bolon zuvlumjuudiin emhetgel* [Mongolian legal reform – 8 years. Compilation of reports and recommendations], Ulaanbaatar 2003, p. 181.

[8] T. MENDSAIKHAN, *Olon Ulsiin huviin erh zuin undes* [The Basis of Private International Law], Ulaanbaatar 2002, p. 85-87.

[9] S. NARANGEREL (note 2), p. 37-39.

[10] T. MENDSAIKHAN, 2002 oni Irgenii huuli ba Zurchilduunii hem hemjee [Civil Code of 2002 and Conflict of Laws], in *Irgenii huuli: Shineleg zohitsuulalt* [Civil law: New regulations], Ulaanbaatar 2003, p. 229.

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III. The Sources of Mongolian Private International Law

The Mongolian rules on the applicable law are not codified in a single autonomous code or statute. The most important source is the 2002 Civil Code, in its Articles 539 to 552. Further, we find a number of conflict of laws rules provided in various special statutes, such as Articles 4.6, 6, 12.3, 14.10, 14.11, 23.3 to 23.5, 58, 67.3 and 67.4 of the Family Act, and Article 40.1 of the 2017 Law of Arbitration. Other sources are several international treaties, conventions and mutual legal assistance treaties in civil matters. In some areas of law, Mongolia has signed up to international treaties, such as the United Nations Convention on Contracts for the International Sale of Goods (1980), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), and the Convention on Civil Procedure (1954). The abovementioned conventions can be invoked directly and override the rules on private international law provided for in domestic legislations.

Also, customary law and case law have provided important sources to Mongolian private international law.

IV. The New Civil Code of 2002: Private International Law Rules

In 1998, the Parliament of Mongolia adopted the Legal Reform Program, which laid the foundation for the 2002 Civil Code currently in force. Since 1995, the Ministry of Justice and Home Affairs of Mongolia and the German Technical Cooperation (*Gesellschaft fur Technische Zusammenarbeit – GTZ*) have collaborated on implementing a civil law reform through the Mongolian-German Technical Cooperation (MIT-GTZ) project.[11] The Civil Code of 2002 was thus elaborated according to civil law tradition with an active participation of German legal scholars.

The Mongolian Civil Code is a product of the convergence of certain aspects of the Russian and German Civil Codes, which were both highly

[11] The MIT-GTZ Project is a Mongolian-German joint project that focuses on the elaboration of a regulatory institutional environment, which is beneficial to export-oriented business sectors. The aim of this project is to draft a legislation, conduct legal training for Mongolian lawyers, and disseminate legal information to the public. It provides advice and support to government institutions, as well as other relevant stakeholders in the field of industrial and trade policy, by means of a flexible and target-oriented change management system. For more information on this project, see <http://www.asia-studies.com/MIT GTZ.html>.

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influential, although the new Civil Code of 2002 is generally considered to be a reflection of German law.[12]

A. The Connection between the Civil Code and International Treaties

The relation between private international law and national law is defined in the Constitution. Mongolia shall not abide by any international treaty or other instrument incompatible with its Constitution. Article 10(3) of the 1992 Constitution of Mongolia stipulates that the international treaties to which Mongolia is party shall become effective as domestic legislation upon their entry into force, ratification or accession. All treaties and conventions become domestic norms after the ratification process, and prevail over domestic law in cases of conflict.

International treaties play an increasingly important role in the area of private international law. For instance, the Mongolian National Chamber of Commerce and Industry solves certain international commercial disputes by applying the CISG.[13]

Article 539(2) of the Mongolian Civil Code provides that, where an international treaty to which Mongolia is signatory contains provisions providing otherwise than those of the Civil Code, and they do not contradict the Constitution of Mongolia, the provisions of the international treaty shall prevail.

B. The Main Differences and Similarities between the New and Old Civil Codes

1. Structural Changes

The table below outlines the structure of private international law rules in the Civil Codes of 1963, 1994 and 2002:

Civil Code of 1963	Civil Code of 1994	Civil Code of 2002
Part IX. Legal capacity of foreign citizens and stateless person, the application of foreign law and international treaties	**Part VII. Private international law**	**Part VI. Private international law**
Art. 400 Foreign legal persons	Art. 423 International treaty	Art. 539 International Treaty

[12] S. NARANGEREL (note 2), p.104.

[13] Mongolian International and National Arbitration Center (ed.), *Mongoliin Undesnii Arbitriin shiidverlesen herguudiin emhetgel (2000-2005)* [The compilation of cases of Mongolian National Arbitration (2000-2005)], Ulaanbaatar 2013, p. 32-94

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Art. 401 Stateless person	Art. 424 The legal grounds for applying foreign law	Art. 540 The application of foreign law
Art. 402 Foreign trade transaction by foreign entities	Art. 425 Determining the foreign law content	Art. 541 Determining the foreign law content
Art. 403 Applicable law in transactions	Art. 426 The limitation of application of foreign law	Art. 542 Liability period
Art. 404 Applicable law in foreign trade contractual obligations	Art. 427 Liability period	Art. 543 Legal capacity of foreign nationals and stateless person
Art. 405 Applicable law in inheritance	Art. 428 Foreign nationals, stateless person's legal capacity	Art. 544 Legal capacity of legal person
Art. 406 The limits of application of foreign laws	Art. 429 Legal capacity of legal person	Art. 545 State participation to international civil relations
Art. 407 International Treaty	Art. 430 Counter limiting of legal capacity in civil law	Art. 546 Declaration of disappearance and death
	Art. 431 The protection of non-property rights	Art. 547 The right of property
	Art. 432 The right of property	Art. 548 Transactions
	Art. 433 Transactions and power of attorney	Art. 549 Choice of law by parties in contractual relations
	Art. 434 The duties and rights of participants of foreign trade transactions	Art. 550 Transfer of claim right
	Art. 435 Torts	Art. 551 Torts
	Art. 436 Succession	Art. 552 Succession

The above table briefly reflects the development of private international law in Mongolia. The private international law rules provided for in the Civil Code of 1963 mostly addressed the issue of the applicable law in contractual matters to strengthening planned economy and protect state property. It lacked provisions on torts.

The 1994 Civil Code, as compared to the previous one, had achieved success not only by focusing on specific matters such as property, torts, power of attorney and legal entities, but also by determining the applicable law in foreign trade transactions.

As for the 2002 Civil Code, it modified the system in the following ways: the notion of "counter limitation of legal capacity in civil law", which was embedded in the 1994 Civil Code, was not included in the text of 2002; Article

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424 of the 1994 Civil Code, entitled "the legal grounds for applying foreign laws", was broadened by Article 540 of the 2002 Civil Code; and new provisions were introduced, in particular state participation to international civil relations (Art. 545 of the CC), the declaration of disappearance and death (Art. 546 of the CC), the transfer of claim right (Art. 550 of the CC), the application of Mongolian laws where stipulated by foreign legislation (Art. 540 of the CC), the legal status of refugees (Art. 543 of the CC), the types of transactions and their validity (Art. 548 of the CC), and the choice of law in contractual relations (Art. 549 of the CC).

2. Substantive Changes and Shortcomings

Both Civil Codes of 1994 and 2002 attempted to reflect global developments.

In 2002, Germany adopted the Act on the Modernization of the Law of Obligations, which amended the German Civil Code. This Code has the advantage that it was recently remodeled and now contains a rather broad range of provisions on contract law, including consumer contracts, new marketing techniques, and standard terms.[14] Also in 2002, a fundamental reform of the Mongolian Civil Code was implemented on property law, obligation law, contract law, prescription, transportation, property lease, and insurance contracts. The new Civil Code of 2002 also contains many new provisions, such as those on neighborhood rights, hypothec, trust, bank guarantee, standard terms and conditions, franchise agreements, leasing, and letter of credit.[15] However, Section VI of the 2002 Civil Code, and especially the general provisions of private international law, is not sufficient and ambiguous. Therefore, general regulation lacks when there is a gap in the regulation by special parts, or when the application of conflict of law rules seems problematic. Helmut Grote, a German professor at the Bremen University, agreed with the abovementioned deficiency of Mongolian private international law regulations.[16]

The Civil Code does not specify what is to be understood as a "foreign related civil relationship". Such relation is however generally admitted if the object of the dispute is located abroad, if a foreigner or a foreign legal entity is involved, or if relevant facts are located abroad.[17] As Section VII of the 1994 Civil Code, which contains provisions of private international law, was transposed in the 2002

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[14] S. GRUNDMANN/ M. SCHAUER (eds), *The architecture of European codes and contract law*, Alphen aan den Rijn 2006, p. 81.

[15] T. MUNKHJARGAL/ D. TSOLMON (eds), *Irgenii ekh zuin shineleg zohitsuulalt* [New regulations of civil law], Ulaanbaatar 2003, p. 3.

[16] H. GROTE, Irgenii bolon hudaldaani erkh zuin tsaashdiin hugjliin talaarh sanal, zuvlumj [The opinion and recommendations on civil and commercial law's development], in *Mongoliin erh zuin shinetgel -8 jil: Iltgel bolon zuvlumjuudiin emhetgel* (note 7), p. 205-207.

[17] T. MENDSAIKHAN/ B. TAMIR, *Olon ulsiin huviin erkh zui* [Private International Law], Ulaanbaatar 2011, p. 37-38; T. MENDSAIKHAN (note 8), p. 4-5.

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Civil Code almost as it stands, it is assumed that the long standing Russian impact on the Mongolian legal system has lived on in the 2002 Civil Code.[18]

a) Connecting Factors

The common connecting factors are the habitual residence,[19] nationality, and the place where an event has occurred.[20]

The nationality of a party is used as the main connecting factor in determining the status of persons and corporations.[21] It is of no relevance as far as property rights on movable and immovable assets are concerned. The habitual residence considers not only the length of residence, but also the person's intention or purpose to remain in a given place (*animus manendi*).

The "closest connection" factor plays the role of a gap-filler in cases for which the codification does not provide a choice of law rule, or for which a particular rule does not provide a clear choice of law solution. However, the closest connection principle is not mentioned in the Mongolian Civil Code. Professor Symeon Symeonides argues that Mongolian codification authorizes resort to unspecified "foreign laws" when Mongolian law is silent or unclear.[22]

> Article 540. Grounds for application of foreign law
>
> 540.3. Foreign laws and acts can be considered for establishing the legal framework in case Mongolian law does not specify clearly the civil relation's aspect or defines it under different legal context, or where it is impossible to clear the case through the interpretation of Mongolian law.[23]

As regards non-property rights (i.e., personal rights), Article 547.1.7 of the 2002 Civil Code replaced Article 431 of the 1994 Civil Code, thus amending the applicable connecting factors. In fact, the previous Code stated that "[…] the applicable law shall be that of the country in which the facts and other circumstances of the case occurred, or that of the country chosen by the plaintiff, provided that he permanently resides there". The 2002 Civil Code, on the other hand, states that "…it shall be determined by the law of the country where these rights are being used".

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[18] T. MENDSAIKHAN (note 10), p. 231.

[19] See Articles 543.3 and 546.2 of the Mongolian Civil Code.

[20] See Article 551.1 of the Mongolian Civil Code.

[21] See Articles 543.2, 544.1 and 546.1 of the Mongolian Civil Code.

[22] S. C. SYMEONIDES, *Codifying Choice of Law Around the World: An International Comparative Analysis*, New York 2014, p. 187-188.

[23] An unofficial translation of the Civil Code of Mongolia is available at <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=45607&p_country=MNG&p_count=135&p_classification=01.03&p_classcount=4>. Those translations where slightly modified by the author.

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Articles 543.5, 543.6, 543.7, 548.6, 548.7, 551.2 and 552.4 of the 2002 Civil Code contain only unilateral provisions, i.e. norms providing for the exclusive application of Mongolian law. For example, in cases where two Mongolian citizens have concluded a commercial contract concerning an immovable property located abroad, the question of the laws applicable in order to fulfill the contractual requirements will arise. First of all, our Civil Code lacks multilateral conflict of law rules regarding the above cases. Moreover, Mongolian private international law has unilateral conflict of law rules only applicable to immovable properties located in Mongolia.

Many countries make sure that their legislation on private international law has multilateral conflict of law rules that allow for the application of national legal norms as well as foreign laws. Article 548.1 of the 2002 Civil Code offers this type of multilateral regulation. The same kind of regulation can also be found in Articles 543, 544 and 546-552, such as civil legal capacity of foreign citizens and stateless persons, legal capacity of foreign entities, business transactions, etc.

Articles 543.7 and 546 of the 2002 Civil Code, the latter dealing with declaration of disappearance and death, are complicated. They derive from Article 428.6 of the previous Civil Code, and resulted in the repetition, by Article 546, of provisions contained in Article 543.7 of the same Code.

> Article 546. Declaration of disappearance and death
>
> 546.1. In announcing a citizen to be missing or dead, the law of the state of which he or she held the citizenship while alive, or that of the state where he or she was last seen alive shall be considered.
>
> 546.2. In announcing a stateless person to be missing or dead, the law of the country of his/her permanent residence shall be considered. In case he or she has no country of residence, Mongolian law shall apply.
>
> Article 543. Legal capacity of foreign citizens and stateless persons
>
> 543.7. The declaration of disappearance or death of a person on Mongolian territory shall be made in accordance with Mongolian law.

b) Protection of the Weaker Party

Mongolian private international law is silent on the issue of protection of the weaker party in areas such as product liability, consumer contracts, and employment contracts. It remains to be seen how such protection will work in practice. It might be a challenge for a judge to find out which law is most favorable to the weaker party.

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3. *"Ordre Public" and "Renvoi"*

Ordre public is obviously not used to prevent the application of all foreign laws, but only those that are manifestly incompatible with Mongolia's core principles of public policy. For instance, a Mongolian court will refuse to recognize a same-sex marriage.[24]

Article 10.4 of the 1992 Constitution, which is a very important provision for conflict of law rules, states that Mongolia shall not abide by any international treaty or other instrument incompatible with its Constitution. Therefore, Article 540.1 of the Civil Code provides that foreign laws, legislative acts and internationally accepted practices not contradicting Mongolian law or the international treaties to which Mongolia is signatory, may apply to civil litigations and disputes, as well as for regulating other civil legal relations.

Ordre public is also dealt with in Article 540.1 of the 2002 Civil Code, although the provision is ambiguous on the issue. On the one hand, it determines the acceptable sources of private international law of Mongolia. Essentially, this means that foreign laws cannot be applied. That is because not all foreign laws are compatible with Mongolian laws, and foreign laws do not apply when they are in contradiction with the relevant provisions of Mongolian law. This goes against the concept of *ordre public*, which, as stated above, is limited to provisions that are *manifestly* incompatible with national law. Therefore, there is a necessity to revise Article 540.1 of the 2002 Civil Code in order to meet the definition of *ordre public*. For example, defining *ordre public* should be approached as follows: when the application of foreign law would be against the *ordre public* of Mongolia, such application shall be precluded.

Article 540.2 states that if the applicable foreign law points to the application of Mongolian law, then Mongolian law shall apply. In other words, if foreign law refers back to Mongolian law, only Mongolian substantive law shall apply. Here, mention is made only to the incidence of *renvoi* by foreign conflict of law rules, the issue of *renvoi* to foreign laws by domestic legislation being completely left behind by the legislator.

4. *State Immunity*

Unlike countries such as the USA,[25] the United Kingdom,[26] Canada[27] and Australia,[28] Mongolia does not have a special act on state immunity, and is not

[24] See Article 6.2 of the Mongolian Family Act.

[25] See the 1976 Foreign Sovereign Immunities Act, available at <http://archive.usun.state.gov/hc_docs/hc_law_94_583.html>.

[26] See the 1978 State Immunity Act, available at <http://www.legislation.gov.uk/ukpga/1978/33>.

[27] See the 1982 State Immunity Act (SIA), available at <http://laws-lois.justice.gc.ca/eng/acts/S-18/FullText.html>.

[28] See the 1985 Foreign States Immunities Act, available at <https://www.legislation.gov.au/Details/C2016C00947>.

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party to the Convention on Jurisdictional Immunities of States and Their Property dated 2 December 2004. Thus, it is merely impossible to determine which doctrine of state immunity, absolute or restrictive, shall be observed by Mongolia in international civil law relations. However, the new Article 545 incorporates a regulation of state participation to international civil relations. Article 545.1 states that, unless otherwise provided by law, this law (i.e. the Civil Code) shall apply in cases where the State enters into civil relations.

To address the issue of state immunity, Mongolia needs to accede to the Convention on Jurisdictional Immunities of States and Their Property and to adopt relevant domestic laws.

C. Contract Law

1. The United Nations Convention on Contracts for the International Sale of Goods (CISG)

The United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980 became effective in Mongolia on December 31, 1997.[29] Mongolia made a reservation that contracts be made in writing.[30]

In order to meet international standards, the Mongolian Parliament made sure that the new Civil Code was compatible with the Vienna Convention.

2. Freedom of Choice

Generally, a choice of law is allowed within a contractual framework. As a starting point, the parties are free to make their own agreement. A contract is governed by the law chosen by the parties. Article 549.1 of the Civil Code states that the rights and obligations of parties to a contract, the content of the contract, fulfilment of obligations, termination or revocation, implementation of duties or failure shall be regulated by the law of any country designated by the parties. Furthermore, in 2017, the new Law of Mongolia on Arbitration was adopted and followed the UNCITRAL Model Law on International Commercial Arbitration (1985).[31] Its Article 40.1 determines the law applicable to the substance of the dispute. According to this article, the arbitral tribunal shall decide the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given state shall, unless otherwise expressed, be construed as

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[29] Available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=en>.

[30] See Article 2 of the 1997 Mongolian Law on Accession to the Convention.

[31] See <http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/>; the UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006, and the explanatory note by the UNCITRAL Secretariat relating thereto, are available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

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directly referring to the substantive law of that state, and not to its conflict of law rules.

Internationality is a "geographic" requirement under which the parties or the contract must be linked to more than one state. This requirement is different from the more specific geographic requirement imposed by some systems, which requires a reasonable relation to the state whose law is chosen by the parties. In contrast, Article 549 of the Civil Code has eliminated the requirement for a geographic nexus to the chosen state.[32] Choice of law is limited by the exception of *ordre public* provided for in Article 540 of the Civil Code. The parties can, upon mutual consent and at any time, change the applicable law initially chosen.[33]

Mongolia is party to a number of multilateral instruments dealing with international transportation. Those include the Warsaw Convention of 1929 for the Unification of Certain Rules Relating to International Carriage by Air,[34] the Geneva Convention of 1975 on the International Transport of Goods under Cover of TIR Carnets,[35] the Montreal Convention of 1999 for the Unification of Certain Rules for International Carriage by Air,[36] and the Geneva Convention of 1956 on the Contract for the International Carriage of Goods by Road.[37]

3. Applicable Law in the Absence of Choice

If the law applicable to a contract has not been validly chosen by the parties, the law of the place of habitual residence of the party performing the characteristic obligation applies.[38] The characteristic performance is usually the contractual obligation that has to be carried out in fact, and is not only monetary. When it comes to internet transactions, no applicable law has been stipulated by the Mongolian Civil Code.

Article 40.3 of the 2017 Law on Arbitration provides that if the parties have not reached an agreement upon the applicable law to be used in settling their dispute, the arbitral tribunal shall choose the applicable law that it considers appropriate in the given case.

Also, this new Act introduced two new provisions: (1) the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so;[39] (2) in all cases, the arbitral tribunal shall decide

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[32] S.C. SYMEONIDES (note 22), p. 118.

[33] See Article 549.2 of the Mongolian Civil Code.

[34] For a list of all contracting parties to this Convention and their reservations, see <https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf>.

[35] For a list of all contracting parties to this Convention and their reservations, see <https://treaties.un.org>.

[36] For a list of all contracting parties to this Convention, see <https://www.icao.int/MemberStates/Member%20States.English.pdf>.

[37] For a list of all contracting parties to this Convention and their reservations, see <https://web.archive.org>.

[38] See Articles 549.4 to 549.9 of the Mongolian Civil Code.

[39] See Article 40.4 of the 2017 Law on Arbitration.

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in accordance with the terms of the contract, and shall take into account the usages of the trade applicable to the transaction.[40]

D. Torts

Mongolia did not ratify any convention or treaty on the law applicable in tort cases. Therefore, general domestic conflict of law rules apply. There is a widely accepted conflict of laws principle applicable in cases of tort: the *lex loci delicti* rule, according to which the applicable law is that of the country in which the harmful event or the injury occurred (Art. 551.1). Article 551.2 provides that if the injury occurred outside Mongolia, and the tortfeasor is a Mongolian natural or legal person, Mongolian law governs both liability and damages. In other words, the *lex fori* (i.e. Mongolian law) shall apply to foreign torts involving domestic defendants. The Civil Code imposes this requirement only in favor of Mongolian defendants.

There is no special choice of law rule for specific kinds of torts such as unjust enrichment, product liability, environmental damage or infringement of intellectual property rights. Although the country's foreign trade has been expanding, Mongolia remains dependent on importation. At the same time, there has been an increase in cross-border product liability cases. For example, in early September 2008, reports surfaced about milk contaminated with melamine. The case involved the Sanlu Group, a Chinese company that had produced and sold illegal "protein powder" made with melamine and other ingredients. The contaminated milk products reportedly claimed the lives of at least six babies and left 300.000 others with various urinary tract ailments, including kidney stones, resulting in the biggest food safety scandal in Chinese history.[41] The contaminated milk was also imported into Mongolia and affected the health of Mongolian babies. However, victims of the product never approached civil courts or the producer itself for compensation. Eventually, the first instance administrative court settled the case.[42] The 2002 Civil Code lacks regulation applicable to product liability, and consumers have limited knowledge on how to file a case against foreign-based producers. But more importantly, lawyers themselves tend not to file cases against foreign-based producers. Thus, it seems to be time that Part VI (International Civil law) of the Civil Code be enriched with provisions on non-contractual obligations. A solution can be found by studying, in a comparative perspective, the regulations of certain foreign countries and the European Union. Within the European Union, the conflict of law rules have been harmonized in certain areas. For example, the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which lays down a uniform code that courts of the Member States must apply "in situations involving a conflict of laws, [to

[40] See Article 40.5 of the 2017 Law on Arbitration.

[41] A. MCDOUGALL/ P. POPAT (eds), *International Product Law Manual*, Alphen aan den Rijn 2012, p. 185.

[42] See <http://home.inspection.gov.mn/news/256>.

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determine] the law governing non-contractual obligations in civil and commercial matters”, [43] provides for a broad regulation on product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, and unjust enrichment.

E. Succession Law

The 1992 Constitution of Mongolia guarantees the right to inheritance. The succession is governed by the law of the place where the deceased had his permanent residence at the time of his/her death. The inheritance of immovable properties located on Mongolian territory is governed by Mongolian law. Mongolian private international law does not allow a choice of law in inheritance relations.

The will should be made in writing, signed, dated, and certified by a notary. In absence of a notary, the Governor of *soum*/district and *bag*/*khoroo* (sub-district) – the smallest administrative units – shall certify the will. Furthermore, wills are also deemed valid when certified by a commander of a military unit, a warden in prison, or an aircraft captain.[44] The testator shall make two original copies of the will, one of which shall be kept by him/herself, and the other be in the possession of a notary. If the will was made in a foreign language, a certified translator shall translate the will into Mongolian and the notary shall attest the translation. The questions of the testator’s legal capacity, as well as the form, creation and amendment of the will shall be regulated by the laws of the country in which the testator had his/her permanent residence at the time the will was made or amended. It is prohibited to void a will only on the basis that it does not comply with formal requirements, provided that it was created and amended according to the requirements of the laws of the country where it was made, or in accordance with Mongolian law.

Generally, inheritance is regulated by mutual legal assistance agreements between two states. To date, Mongolia has concluded 8 mutual legal assistance agreements regarding the law applicable to inheritance. Most legal assistance agreements cover the following aspects: a) the applicable law; b) property without owner; c) the will and its form; d) notification of the testator’s death; e) rights of diplomatic or consular missions; f) opening and disclosure of the will; g) measures to protect the inheritance.

V. Private International Law Rules in the Family Act

During the socialist period, family law was considered to be part of public law. This emphasized the role played by the state in internal family relations. However,

[43] Article 1(1) Rome II.

[44] See Articles 523.1 and 523.2 of the Mongolian Civil Code.

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family law is now regarded as a branch of private law. The first Family Act in Mongolia was adopted in 1973. Part V of this Act contains a special section entitled "Application of family legislation to foreign nationals or stateless persons, and application of foreign family laws and international treaties." That same section provides with conflict of law rules for cases involving foreign elements in family relations. The 1973 Family Act covered rules on:

- The applicable law to the celebration of marriage (Art. 107)
- Its application to stateless persons (Art. 108)
- The celebration of marriage between Mongolian citizens living abroad (art. 109)
- The registration of a child's nationality (Art. 110)
- The applicable law to the termination of a marriage between foreigners or between a Mongolian citizen and a foreigner (Arts. 111 and 112)
- The application of foreign laws to family relations (Art. 113), etc.

However, the 1973 Family Act omitted a number of important issues, such as matrimonial property regimes and child support. The new Family Act was adopted on June 11, 1999 and became effective on August 1, 1999. Its provisions cover the personal and economic obligations of family members towards each other. The 1999 Family Act also introduced some important conflict of law rules. However, Section V of the 1973 Family Act (relating to the applicable law in family matters), which had been considered a success, was diminished by the 1999 Act, as it mixed up conflict of law rules with substantive law rules. There are no rules on the applicable law to relations between husband and wife or parent and child, nor on the applicable law to adoption or child maintenance issues involving international factors. In other words, the previous Family Act had more comprehensive provisions regarding conflict of law rules in family relations. In general, the current Family Act tends to use the *lex fori* in family law relations and in matters where authorities have to recognize or refuse recognition of marriages and divorces registered in foreign countries.

There are many international conventions on family matters, such as the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. However, Mongolia is not signatory to any of these conventions. Therefore, in Mongolia, conflict of law rules in family matters are regulated by the provisions of the national Family Act and bilateral treaties.

A. Marriage

In Mongolia, marriage is only legal when performed in the presence of a state official working for the Citizens Family Registration Office, and in the presence of witnesses.

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According to Article 6.4 of the Mongolian Family Act, a marriage registered abroad between Mongolian citizens, or between a Mongolian and a foreign national or a stateless person, shall be considered valid in Mongolia. In other words, such marriage celebrated abroad shall have the same legal consequences as a marriage celebrated in Mongolia. Let us take the example of citizens A and M, Mongolian nationals whose marriage took place at a Catholic Church in the United States. Even though the type of their marriage is unfamiliar in Mongolia, the marriage is, as mentioned, considered valid according to Article 6.4 of the Family Act. However, in order for the marriage to be considered valid, the requirements set out in Article 9 of the Family Act have to be met, i.e. the substantive requirements of marriage are governed by national law with regard to each prospective spouse. Article 9 lists certain impediments to marriage, such as:

- the existence of an earlier marriage;
- the age of one of the spouses; neither can be a minor under 18 years of age;
- consanguinity;
- marriage between a trustee and a person under his/her custody;
- marriage between an adopter and an adoptee; and
- a serious mental illness suffered by one or both spouses, that might remain in the bloodline.

The marriage of a foreign national or a stateless person shall be regulated by Mongolian law.[45]

The performance of a marriage ceremony by a consular officer is widely accepted in Mongolia, where civil registrars are officially recognized. Such function is assigned to consular officers by the 1963 Vienna Convention on Consular Relations.[46] Moreover, Article 7.1.6 of the Law on Diplomatic Service of Mongolia recognizes that Mongolian citizens shall be entitled to celebrate their marriage before the diplomatic missions of Mongolia. Therefore, marriages celebrated abroad are recognized in Mongolia.

When a Mongolian citizen married a foreign national or a stateless person abroad, their rights and duties are subject to the laws of a country of their choice. In case they have not chosen the applicable law, Article 6.6 of the Family Act then provides that the *lex fori* shall be applied.

Mongolia concluded, with ex-socialist states, several bilateral treaties that usually address family and succession matters. These bilateral treaties use the *lex patriae* as main connecting factor in certain family matters. For example, the Agreement between the Government of Mongolia and the Government of the Republic of Bulgaria provides that celebration shall be subject to the laws of the country in which the marriage is taking place. The main requirements for a marriage to be valid should be determined by the national law of one of the spouses.[47]

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[45] Article 6.3 of the Family Act.

[46] Article 5 of the Vienna Convention on Consular Relations of 1963.

[47] Article 18 of the *Bugd Nairamdakh Mongol Ard Uls, Bugd Nairamdakh Bolgar Ard Ulsiin khoorond Irgenii ba Ger Bul, Eruugiin Khergiin talaar Erkhiin Tuslaltsaa Hariltsan Uzuulekh tuhai Geree* (1968.11.27) [Treaty between the People's Republic of Mongolia and the People's Republic of Bulgaria on Mutual Legal Assistance in Civil,

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As of today, Mongolia has concluded bilateral consular conventions with 14 countries, namely: China (1989), Romania (1967), Cuba (1968), the Democratic People's Republic of Korea (1969), Russia (1972), Bulgaria (1972), Poland (1973), Hungary (1974), Czechoslovakia (1976), Vietnam (1979), Laos (1983), Afghanistan (1983), the USA (1990) and Kazakhstan (1993).

The 1973 and 1999 versions of the Mongolian Family Act have not provided provisions on marriage agreements. Moreover, there is no regulation on registered partnerships in Mongolia. This is highly influenced by legal, historical, traditional, and social specificities. Article 6.2 of the 1999 Family Act states that a man shall have one wife and a woman shall have one husband, thus clearly prohibiting same-sex marriage. It also means that a marriage between a Mongolian national and a person of the same sex in a foreign country shall have no effect in Mongolia as it will be considered a violation of the *ordre public*.

B. Matrimonial Property

Mongolia is not yet party to any international legal instrument applicable to property relations between spouses. Following the 1999 Family Act, property and non-property rights and duties between spouses shall be regulated by the laws of their residence. Furthermore, when a Mongolian citizen gets married abroad to a foreign national or a stateless person, their rights and duties shall be subject to the laws of their choice, and in case they have not chosen the applicable law, Mongolian law shall then be applied.

C. Divorce

Mongolia does not participate in an enhanced cooperation for divorce and separation matters. In Mongolia, a divorce is settled either by administrative or judicial means. Article 12.3 of the Family Act states that, unless an international treaty adopted by Mongolia provides otherwise, the divorce of a foreign national or a stateless person who is a permanent resident of Mongolia shall be settled by Mongolian law.

However, it is still unsure which country's law is applicable if a Mongolian citizen wants to file a divorce against a non-resident foreign national in Mongolia. According to Article 14.10 of the Family Act, a divorce between Mongolian nationals living abroad under a permanent resident status, or a divorce that took place abroad between a Mongolian and a foreign national or a stateless person, shall be considered valid in Mongolia.

Matrimonial and Criminal Matters], available at <http://mojha.gov.mn/images/files/geree/Bulgaria.pdf>.

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D. Parent-Child Relationship

The Mongolian Family Act does not contain rules on the law applicable to parent-child relationship.

However, Mongolian law is applicable the issue of determining parentage of a child when it involves a foreign national or a stateless person (Art. 23.3 of the Family Act). A foreign decision establishing that a Mongolian citizen is the parent of a child shall be considered valid in Mongolia (Art. 23.4 of the Family Act). Under the Family Act, if either one of the parents of a child who resides abroad is a Mongolian national, a request to determine parentage of the child may be submitted to a diplomatic mission of Mongolia.

In accordance with mutual legal assistance treaties on civil, matrimonial and criminal matters, concluded between Mongolia and Bulgaria, Hungary, Romania, the People's Republic of China, Poland, Kazakhstan, etc., the national law of the child shall be applied in the following cases:

– the determination of the paternity of a child;
– the relationship between the parents and the child.

However, those treaties all provide that the duty to support the child shall be regulated by the national law of the recipient of child support.[48]

As for the relationship between an unmarried couple and their child, it shall be regulated by the national law of the child.

E. Adoption

The 1999 Family Act does not identify the applicable law for adoption matters. However, the mutual legal assistance treaties on civil, matrimonial and criminal matters[49] provide that the applicable law to these cases is determined according to the *lex patriae* of the child. The Mongolian Family Act provides that Mongolian law exclusively governs the requirements relating to adoption in Mongolia.

According to Article 58.1 of this Act, a foreign national who wishes to adopt a Mongolian child shall submit his/her request to the competent Mongolian authority through the authority having similar competence in his/her own country. However, Article 58.1 is not applicable in instances where a foreign national who resides in Mongolia for less than 6 months wishes to adopt a Mongolian child, or decides to submit a request before a Mongolian diplomatic mission to adopt a child who resides in a foreign country.

Mongolia is not party to the 1965 Hague Convention on Jurisdiction, Applicable law and Recognition of Decrees relating to Adoptions.

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[48] See <http://mojha.gov.mn/legal_assistance_treaty.html>.

[49] See <http://mojha.gov.mn/legal_assistance_treaty.html>.

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F. The Draft of the New Family Act

The draft of a new Family Act was submitted to the State Great Khural (the Parliament); it regulates family relations involving foreign elements. This draft proposed a new regulation in its Part IX, entitled "Application of family law in family relations involving foreign nationals and stateless persons". The draft focuses on the following issues:

- Unless otherwise specified by the international treaties to which Mongolia is party, the marriage of foreign nationals or stateless persons who reside permanently in Mongolia shall be celebrated on Mongolian territory;
- The marriage of a Mongolian citizen who permanently resides in a foreign country shall be celebrated by the diplomatic or consular missions of Mongolia located in his/her country of residence;
- Based on the principle of reciprocity, the marriage of a foreign national that was celebrated by his/her diplomatic mission in Mongolia shall be recognized in Mongolia;
- When a Mongolian citizen is married to a foreign national or a stateless person in a foreign country under the national laws of that foreign country, and that law does not contradict provisions of the Mongolian Family Act, the marriage shall be considered valid in Mongolia. Furthermore, the rights and duties of the spouses shall be subject to the law of their choice, and the Mongolian Family Act shall be applicable when no law has been chosen;
- If a Mongolian citizen is married to a foreign national or a stateless person in a foreign country, the property and non-property rights, and related duties, are subject to their country of permanent residence;
- As for divorce, the draft suggests to apply the following rules:
- Even where a marriage is celebrated outside the territory of Mongolia, the Mongolian Family Act shall be applicable;
- Unless otherwise provided by international treaties signed by Mongolia, the issue of marriage annulment between a Mongolian citizen and a foreign national or a stateless person shall be settled by the Mongolian Family Act;
- Regardless of the spouse's nationality, a Mongolian citizen who lives permanently in a foreign country shall be eligible to file a divorce before Mongolian courts. The latter shall decide the case in accordance with the Mongolian Code of Civil Procedure.
- Lastly, if a marriage is to be annulled by administrative means, it can be arranged by the diplomatic or consular mission of Mongolia.

The draft also provides the following rules on the rights and duties of parents and their children:

- The rights and duties of parents and children shall be regulated by the law of the country of their common habitual residence;
- If parents and children do not live together, the national law of the children shall be applicable;
- Claims related to child maintenance and other matters between parent and child shall be settled by the law of the country of the child's permanent residence;

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– The duty of adult children to take care of their parents, or the duty of care between family members, shall be regulated by the law of the country of their common habitual residence;[50]

VI. Jurisdiction, Recognition and Enforcement of Judgements

A. Jurisdiction

The 2002 Mongolian Code of Civil Procedure governs, in its section VII, the allocation of jurisdiction before Mongolian courts. Mongolia has concluded 18 bilateral mutual legal assistance agreements. These agreements allow the courts, on the one hand, to settle claims on civil, family, labor and inheritance matters and, on the other hand, to recognize and enforce relevant decisions.[51]

When they present a case before Mongolian courts, foreign citizens, foreign legal entities and stateless persons shall have the same rights as Mongolian citizens and Mongolian legal entities, unless otherwise provided by law. Certain restrictive measures can be applied against the rights of foreign nationals or stateless persons in order to ensure national security and public order. For example, as stipulated by the Mongolian Law on Land, the right of foreign nationals to possess or dispose of a land shall be limited.[52] However, inherent human rights enshrined in the international treaties to which Mongolia is party shall never be infringed.

The Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters was adopted on 22 December 22, 2000 and entered into force on March 1, 2002. It replaced the Brussels Convention of September 27, 1968, which bore the same name. This framework is commonly referred to as the Brussels I Regulation (a revised version of the Brussels I Regulation was adopted on December 12, 2012). Meanwhile, the Mongolian Code of Civil Procedure was adopted in 2002. There are many similar provisions between the 2000 Brussels I Regulation and the Mongolian Code of Civil Procedure. For instance, the letter provides rules relating to general, special and exclusive jurisdiction. The Brussels I Regulation was based on the general principle that a defendant should be sued in the court of the country of his domicile (Art. 2(1)). This is often the most appropriate venue in which to bring proceedings, as the defendant is not required to leave his domicile to defend himself and his assets are generally located in that jurisdiction.[53] The Mongolian Code of Civil

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[50] The integral text of the Draft is available at <http://www.mlsp.gov.mn/uploads/news/files/bd07fbaa9d3c614fabfbfd74f1ea87f5fc91c26a.pdf >.

[51] T. Mendsaikhan, *Olon Ulsiin Irgenii Protsess. Protsessin erh zui: onol, turshlaga* [International Civil Procedure, in Procedure Law: theory and practice], Ulaanbaatar 2014, p. 398.

[52] See Articles 6, 31 and 44 of the Mongolian Law on Land.

[53] M. Harding, *Conflict of Laws*, 5th ed., London/New York 2014, p. 37.

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Procedure also has the same provision. Article 189.2.1 of this Code states that Mongolian courts shall have jurisdiction when the defendant permanently resides or operates business in Mongolia. This is the general jurisdiction rule in Mongolia. The provisions of the Mongolian Code of Civil Procedure on special and exclusive jurisdiction are also similar to those of the Brussels I Regulation. The bases of jurisdiction under Article 189 of the Civil Procedure Code rely on the existence of a factual connection between the subject matter of the dispute and the court.

The table below summarizes the similar provisions between the Mongolian Code of Civil Procedure and the Brussels I Regulation:

No	Mongolian Code of Civil Procedure, 2002	Brussels I Regulation
	Special jurisdiction:	
1	A claim is filed because of the failure to fulfill or the improper performance of contractual obligations that were to be performed in Mongolia (Art. 189.2.3)	Art. 5.1
2	Damages were caused to a person on Mongolian territory (Art. 189.2.4)	Art. 5.3
3	A dispute has arisen with respect to activities of a legal entity's subsidiary or representative office located on Mongolian territory (Art. 189.2.5)	Art. 5.5
4	In cases where a Mongolian citizen, a foreign citizen or a stateless person permanently residing in Mongolia files a claim aimed at identifying a father, and in matters relating to child maintenance (Art.189.2.6)	Art. 5.2
	Exclusive jurisdiction: In the following cases, a court of Mongolia will have exclusive jurisdiction regardless of the defendant's domicile:	
1	In proceedings related to ownership, possession and usage of an immovable property located on Mongolian territory (Art.190.1.1)	Art. 22.1
2	In disputes related to the re-organization or liquidation of a legal entity based in Mongolia, or for decisions made by such legal entity, its subsidiary or its representative office (Art. 190.1.2)	Art. 22.2
3	In disputes on the validity of a registration made by a court or another authorized organizations in Mongolia (Art.190.1.3)	Art. 22.3
4	In proceedings concerned with the registration before a Mongolian authority or the validity of patents, trademarks or other similar intellectual property rights (Art.190.1.4)	Art. 22.4
5	In proceedings concerned with the enforcement of foreign judgements in Mongolia (Art.190.1.5)	Art. 22.5

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Article 189.2.7 of the Mongolian Code of Civil Procedure provides that claims on inheritance fall within the jurisdiction of Mongolian courts. There are different types of inheritance disputes:

- claims related to the right to inherit;
- claims related to the division of property;
- claims related to inheritance by will; and
- claims related to the performance of certain obligations in relation with the property of a descendent, etc.

Article 190.1.3 of the Mongolian Code of Civil Procedure regulates disputes related to the validity of an official registration of foreign nationals, legal entities or stateless persons.

There are different types of disputes:

- registration of branches and representatives of foreign legal entities in Mongolia;
- registration of travelers, residents on long or short-term stay, and registration of immigrants in Mongolia;
- registration of their marital status; and
- registration of immovable properties owned by foreign nationals or legal entities.

The 2000 Brussels I Regulation did not apply to matrimonial property or decisions relating to marital status. However, Article 192 of the Mongolian Code of Civil Procedure provides for the special jurisdiction of Mongolian courts in cases related to marital relationships when:

- one of the spouses is or was a citizen of Mongolia at the time of the marriage;
- the defendant permanently resides in Mongolia, regardless of his/her nationality;
- one of the parties involved in a dispute that aims to determine the relationship between parents and children or to recognize or withdraw parental rights is a Mongolian citizen or a permanent resident in Mongolia.

Article 5(4) of the Brussels I Regulation allowed claimants making a civil claim for damages or for a restitution based on an act giving rise to criminal proceedings to present their claim before the courts seized of the criminal proceedings. On the contrary, Section VII of the Mongolian Code of Civil Procedure does not generally confer jurisdiction upon criminal courts to deal with civil claims.

The 2000 Brussels I Regulation laid down special rules on jurisdiction in respect of insurance contracts, consumer contracts, and contracts of employment in Articles 8 to 21, in order to protect the party considered to be economically weaker and less experienced in legal matters. As mentioned earlier, the 2002 Mongolian Civil Code is silent on the protection of weaker parties in cases relating to product liability, consumer contracts and employment contracts. Moreover, there are no special rules on jurisdiction in the 2002 Civil Procedure Code to protect weaker parties either.

In Europe, Article 23 of the Brussels I Regulation regulated prorogations of jurisdiction. In Mongolia, Article 18.1 of the Civil Procedure Code recognizes prorogations of jurisdiction. However, this provision is not applicable to the jurisdiction of Mongolian national courts over cases involving international

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elements. The 1994 Code of Civil Procedure contained provisions on written choice of court agreement (*prorogatio fori*), but the 2002 Code of Civil Procedure did not incorporate any provision on this issue.[54]

According to Article 193.1 of the Civil Procedure Code, citizens of foreign states who enjoy diplomatic immunity, and members of their families, shall be immune from court proceedings in Mongolia, unless they voluntarily consent to submit to their jurisdiction.

B. The Recognition and Enforcement of Judgements

Article 194 of the Civil Procedure Code and Section 11 of the Mongolian Law on Judicial Enforcement provide that procedures for the enforcement of Mongolian decisions and foreign court decisions are determined by Mongolian legislation, as well as international treaties concluded between Mongolia and foreign countries. The issuance of a bailiff's order means that a foreign court decision shall be recognized in Mongolia.[55] Before accepting to recognize a foreign decision, Mongolian courts reserve a right to examine certain conditions of recognition:

– the judgment must be final;
– the foreign court must have acted within its jurisdiction;
– the defendant's procedural rights have not been infringed during the proceedings before the foreign court;
– the decision does not contravene Mongolian *ordre public*; and
– there should be material reciprocity.[56]

VII. Conclusion

The civil law tradition in Mongolia, combined with specific legislative changes introduced in recent years to meet social needs, have dramatically changed the Mongolian legal landscape. However, it can hardly be said that the Mongolian legal framework is similar to Western models. Indeed, Part VI of the current Civil Code still reflects the influence of the Soviet Union. Therefore, Mongolian private international law needs to undertake some significant changes. Foreign scholars commonly agree on this need.

The Mongolian Family Act contains very few provisions regarding choice of law in family law relations involving foreign elements. Indeed, this law mainly focuses on recognizing marriages celebrated in foreign countries and matters related to divorce. Although some issues are regulated by bilateral legal assistance agreements, it is still uncertain which law is applicable in family law relations involving citizens of countries that have not entered into any agreement with

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[54] T. MENDSAIKHAN/ B. TAMIR (note 17), p. 129.

[55] See Articles 10.1.2 and 81 of the Mongolian Law on Judicial Enforcement.

[56] T. MENDSAIKHAN (note 51), p. 405.

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Mongolia. The issue is further complicated by the fact that Mongolia has not ratified or acceded to any international convention on family law. Therefore, it is of great significance that the draft of the new Family Act addresses issues such as the choice of law in marriage, divorce or parent-child relationships.

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THE RUSSIAN IMPLEMENTATION OF THE HAGUE CHILDREN CONVENTIONS

Oleg ZAYTSEV*/ Vladimir ZAYTSEV**

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 421-448
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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IX. Recognition and Enforcement of the Measures Adopted by Authorised Bodies
X. Conclusions

I. Introduction[1]

The protection of children's rights and legitimate interests has often been brought up at the international level. At the start of the 20th century, The Hague Conventions on Regulation of Trusteeship over Minors (1902) and on Trusteeship over Minors (1905) had been accepted. These conventions never came into common use, but they had brought to light the necessity for an in-depth discussion of the relevant issues. This goal was achieved at the International Congress on Child Protection in 1913, which acknowledged a child as a subject who needs special protection and care. In 1924 the League of Nations accepted the Geneva Declaration on the Rights of the Child. The provisions of this Convention were later widely developed in international treaties on economic, social and cultural rights (1966), civil and political rights (1966) and, finally, in the UN Convention on the Rights of the Child (1989). With this, the need to focus international efforts on certain aspects of child protection became obvious. This led to the accession by Russia to The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children the Convention on the establishment of maternal descent of natural children (signed at Brussels on 12 September 1962), *etc*.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Convention") and The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Convention") represent an important step in the development of international child protection in light of the inevitable increase of international marriages and cross-border disputes regarding the upbringing and communication with children by parents or close relatives who do not share their habitual residence.

The 1980 Convention provides for the prompt return of children, wrongfully removed or retained in any of the Contracting States, to the State of their habitual residence, and the mutual respect and effective provision of custody and access rights envisaged by the laws of the Contracting States. Its primary focus is on the procedure for the return of the child and the refusal to order the return of the child, as well as on the guarantees with respect to the protection of the rights and legal interests of the child. By unifying the conflict-of-laws and relevant substantive rules, the 1996 Convention, in turn, creates conditions for the harmonised regulation of implementation, termination, forfeiture or limitation of

[1] Unless otherwise specified or unless apparent from context, the original version of the contributions cited herein is in Russian language. The English version of the title of those contributions as well as the name of the review or magazine hosting them is the translation by the Authors of this contribution.

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parental rights; establishment of custody or trusteeship; the determination of their place of residence; a possibility to temporarily reside in another place; international co-operation in this sphere; and, the provision of acknowledgement and enforcement of the decisions taken by relevant foreign authorities.

The accession by the Russian Federation, to these Conventions has been a logical step toward establishing the framework for maternity, childhood and family protection policy (Cl.1 Art. 38) in accordance with the Constitution of the Russian Federation. At the same time, the accession to the Convention encouraged the State to carry out its obligations in accordance with Article11 of the UN Convention on the Rights of the Child (1989), which envisages the taking of measures to combat the wrongful removal of children abroad and their non-return.

II. The Place of the Conventions in the Russian Legal System

The acceptance of the 1980 Convention was due in large part to the multiple cases of illegal removal of children outside the territory of the Russian Federation or their non-return to Russia. It was also meant to deal with refusal by the parent residing outside of Russia, to provide access to the other parent, a citizen of the Russian Federation, either by way of communication with the child or in terms of his/her upbringing. All of these issues gained ground given the absence of bilateral treaties with a number of States (a majority of the European Union Member States, the United States, Israel, *etc*.) on mutual legal assistance with respect to civil cases, as well as the unlikelihood of future relevant bilateral treaties. The efficiency of Russian measures to return a child depended, as such, on the national legislation and law enforcement practices of a foreign state. Moreover, there was no universal, coordinated mechanism to ensure access to the child or the child's return.

The Convention's efficiency in regulating the procedures for the relevant authorities of Contracting States and its effectiveness in protecting the rights of children removed or retained wrongfully have allowed for the prompt resolution of conflicts in this sphere. This has been an encouraging factor for the acceptance of the Convention and the reasonable belief that "the mere fact of the accession to the Convention by the Russian Federation and communication of this fact to Russian and foreign citizens and organisations will become an efficient preventive measure, which will allow for a reduced number of child abductions, and will guarantee the protection of their rights and lawful interests."[2] As for the 1996 Convention, it was noted that accession provided the possibility to effectively resolve, at an intergovernmental level, disputable issues associated with the provision of parental rights and obligations, custody and trusteeship, as well as the taking of measures to protect identity or property of the child without preventing the signing of bilateral

[2] See "Interpretative note" to the Project of a Federal Law "On the Acceptance by the Russian Federation of the Convention on the Civil Aspects of International Child Abduction" <http://www.consultant.ru> (access date 12.2.2018).

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treaties on relevant issues with Contracting States of this and other Conventions, including agreements on legal assistance.[3]

A. National Legislation and the Conventions

Given the potential for conflict between the norms of international agreements and national legislation, there is a need to define the place of these international agreements within the national legal framework. Although the Constitution of the Russian Federation does not provide a clear hierarchy among the sources of Russian law, it implies that international treaties of the Russian Federation are an integral part of its legal system and enjoy priority over the rules envisaged by the law (Part 4, Art. 15 of the RF Constitution). Scholars discuss the balance of the legal power of international treaties and the Constitution, which is – by nature – a law. On the basis of legal determinations of the Constitutional Court of the Russian Federation, D. Shustrov concludes that generally recognised principles and norms of the international law and international treaties signed by the Russian Federation (Part 4, Art. 15) are, in terms of legal power, inferior to the RF Constitution itself (Part 1, Art. 15), bills by the Constitutional Assembly (Part 3, Art. 135) and the laws of the Russian Federation on the amendment to the RF Constitution (Art. 136), but have more legal power if compared with other laws.[4]

It is recognised that the Russian legislator acts within the framework of a general trend commonly found in the majority of States, which "prefer not to substitute national law with the norms of international treaties, but timely provide harmonisation of the national law with the international contractual obligations.[5] As a rule, two implementation mechanisms are used to incorporate international legal norms in national law: a State can either include, in its own norms, references to the norms of international law, thereby enabling the incorporation of the latter in national law; or, it can accept new legal norms, change or reverse existing laws in accordance with the requirements of an international agreement, or adapt the terms of an international agreement to the local legal system. The 1980 and 1996 Conventions are both implemented *de facto* in Russia.

Prerequisites for the implementation of the 1980 Convention are created by Article 6 of the Family Code of the Russian Federation, which establishes the priority of relevant international treaties signed by the Russian Federation. It codifies the following: if the international treaty establishes rules which are different from those envisaged by national legislation, the rules of the international treaty should be applied. In practice, a similar approach was implemented for the

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[3] See "Interpretative note" to the Project of a Federal Law "On the Acceptance by the Russian Federation of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children" < http://www.consultant.ru> (access date: 12.2.2018).

[4] D. SHUSTROV, Essentia Constitutionis: The Constitution of the Russian Federaton in the Focus of the Theory of Constitutions in XX – XXI Centuries, *Comparative Consitutional Survey*, 2017, N 4. p. 124.

[5] B. OSMININ, The Priority Application of International Treaties in National Legal System: Conditions and Consequences, *The Russian Law Magazine*, 2017, p. 173.

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terminology used in the 1980 Convention. However, from the point-of-view of law enforcement, it is more efficient to correct the national legislative norms to comply with the new international obligations undertaken by the State.

B. The Laws Accepted for an Effective Implementation of the Conventions

When the 1980 Convention was ratified in 2011, none of the federal laws were amended, suspended or repealed and no new federal laws were enacted as a consequence. However, this position was reviewed in order to create a national mechanism of effective implementation of the Convention's provisions. One of the arguments in favour of this new position was the increasing number of European Court of Human Rights decisions against States which had not taken the necessary measures to promptly and efficiently exercise parents' rights to the return of a child. In order to prevent such situations in the Russian Federation, a decision was made to complement the Civil Procedure Code with an article defining the procedural details of hearing and resolving these cases. In order to trace a child, provide for the implementation of court decisions on the return of wrongfully removed or illicitly retained children, and exercise in respect of these children the right of access, the Russian legislature offered to amend the Federal Law dated 2 October 2007, No. 229-FZ "On Enforcement Proceedings", the Federal Law dated 21 July 1997, No. 118-FZ "On Law Enforcement Officers" and the Federal Act of the Russian Federation dated 11 March 1992, No. 2487-1 "On Private Detective and Security Activity".[6]

C. Shared Jurisdiction of the Russian Federation and its Constituent Entities in the Implementation of the Conventions

The federal structure of the Russian Federation makes it necessary to take the legislation of the Federation's constituent entities into account as under Cl. "k" of Article 72 of the Constitution of the Russian Federation, the Federation and its constituent entities have shared jurisdiction over the regulation of family relations. This provision was developed in the Family Code of the Russian Federation, dated 29 December 1995, N 223-FZ (hereinafter the "FC of the RF").[7] Pursuant to this Code, the laws of the constituent entities of the Russian Federation regulate family issues for cases placed by the Code within the jurisdiction of these entities, as well as cases not directly regulated by the Code. Defining the limits of regional rulemaking, the legislator highlights the hierarchy of laws and regulations, pointing out that the family rights norms, defined by the laws of constituent entities of the Russian Federation, should comply with the FM of the RF. Special emphasis

[6] Federal Law dated 5 May 2014, N 126-FZ "On Amendments to Certain Legislative Acts of the Russian Federation Based on the Accession of the Russian Federation to the Convention on the Civil Aspects of International Child Abduction", Official Gazette of the Russian Federation (RF), 2014, n. 19, Art. 2331.

[7] Official Gazette of the RF, 1996, n. 1, Art. 16.

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should be placed on the fact that the right of citizens in families can only be limited on the basis of the Federal Law and only to the extent necessary to protect morals, health, rights and legal interests of other members of the family and other citizens (Cl. 4 Art 1 of the FC of the RF).

The FC of the RF envisages relatively few questions in the jurisdiction of the constituent entities of the Russian Federation. The laws of these entities may establish the order and conditions for entering into a marriage with a person who has not reached the age of sixteen years (par. 2 Cl. 2 Art. 13 of the FC of the RF); the rules for choosing the surname upon marriage (Cl. 1 Art 32 of the FC of the RF); the rules for defining the first name, the patronymic name and the last name of a child, which includes national traditions (Art. 58 of the FC of the RF); the rules regarding local self-governing authorities and their right to regulate custody and trusteeship (Art. 77, 121 of the FC of the RF); and, the possibility of creating a foster family as a form of family placement for children without parental care (Cl. 1 Art. 123 of the FC of the RF). An analysis of the Russian regional legislation demonstrates that the laws of the constituent entities of the Russian Federation with respect to the regulation of family relations often refer to the federal legislation and reproduce its norms, reflecting reluctance on the part of the constituent entities to make use of their rulemaking authority.

The fact that some questions are delegated to constituent entities and that there are possible associated discrepancies in the legislation does not affect the fully-fledged implementation of the provisions of the 1980 Convention. First of all, the norms of the FC of the RF are so formulated such that a reference to regional legislation does not create a gap in legal regulation. Secondly, only a very limited set of questions are delegated to the constituent entities, and only two of them may more or less affect the application of the norms defined by the Convention. In particular, in accordance with the legislation of a constituent entity of the Russian Federation, a child must be sixteen years or under in order for a demand for the child's return to be heard. But if the child enters a marriage before he/she turns sixteen, the marriage will be viewed as an argument against the child's return, as the change in the child's social status will mean that he/she is granted full legal capacity. The marriageable age is defined differently in this context, and is established at 14 years (in particular, in Vologodskaya, Moskovskaya, Nizhegorodskaya, Novgorodskaya, Orlovskaya oblasts),[8] 15 years (in particular, in

[8] See Law of the Vologodskaya Oblast dated 2 November 2016 n. 4050-03 "On the Procedure, Conditions and Exceptional Circumstances for Getting a Marriage License for Persons under the Age of Sixteen Years", *Krasnyj Sever*, 12 November 2016; Law of the Moskovskaya Oblast dated 30 April 2008 n. 61/2008-03 "On the Procedure and Conditions of Marriage on the Territory of Moskovskaya Oblast for Persons under the Age of Sixteen Years", *Daily News*, *Podmoskovje*, 14 May 2008; Regional Law of the Novgorodskaya Oblast dated 2 February 2009 n. 465-03 "On the Procedure and Conditions of Marriage on the Territory of the Novgorodskaya Oblast of Persons under the Age of Sixteen Years", *Novgorodskiye Vedomosty,* 11 February 2009; Law of the Orlovskaya Oblast dated 4 March 2011 n. 1177, "On the Procedure and Conditions of Issuing a Marriage License to Persons under the Ager of Sixteen Years in Orlovskaya Oblast", *Orlovskaya Pravda*, 12 March 2011; Law of the Murmankaya Oblast dated 18 November 1996, n. 42-01-ZMO "On the Conditions and Procedure of Entering a Marriage for Persons under the Age of Sixteen Years", *Statute Roll of the Murmanskaya Oblast*, 1996, p 92; Law of the Ryazanskaya

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the Kabardino-Balkarian Republic, Murmanskaya, Ryazanskaya, Chelyabinskaya oblasts),[9] or – in accordance with the norms of the FC of the RF – 16 years when the legislator does not consider it necessary to establish such derogations.

To implement the provisions of the 1980 Convention in Russia it is very important to delegate the authority over custody and trusteeship to local self-governing organisations. This is not an impediment to the administration of the norms envisaged in the Convention, as their authority in the protection of rights and lawful interests of children does not depend on the nature of the dispute. Their obligatory participation in court hearings regarding a demand to return a child or access rights (Art. 244.15) is a logical extension of a general practice when custody and trusteeship authorities are involved in court proceedings involving children.

D. The Conditions of Operation of the Conventions on the Territory of the Russian Federation

More serious challenges in the 1980 Convention's implementation stem from its conditions of application. In accordance with Article 35, the 1980 Convention should be applied among Contracting States only with respect to wrongful removals or retentions which have occurred after the entry into force of the 1980 Convention among these Contracting States. In addition, in accordance with Article 38, the accession will come into force only between the acceding State and those Contracting States that acknowledge the accession by way of a relevant declaration with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. It follows that a full-scale co-operation with the Russian Federation will only be possible if two conditions are met: Russia is a State Party to the 1980 Convention and it is recognised by other countries as a full participant. Since 2 August 2017, 68 of the 98 Contracting States have accepted the Russian Federation as a participant to the 1980 Convention.[10] Notably, the majority of EU Member States did so relatively recently, as of April 2016.

This has translated into refusals of petitions for the return of children to their habitual residences. The decision of the Kanavinsky district court in Nizhniy Novgorod on 26 October 2017 is noteworthy in this regard. The court remarked that the right, under Chapter 22.2 of the Civil Procedure Code of the Russian Federation, to apply for the return of a child who was wrongfully removed to the Russian Federation or retained in Russia, arises for one of the parents only on the basis of the 1980 Convention and on the condition that there are contractual relations between the Russian Federation and the State from which the child had been removed. Pursuant to Article 38 of the Convention, the accession of a State

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Oblast dated 30 December 2014, n. 105-03, "On the Procedure and Conditions of Licensing a Marriage for Persons under the Age of Sixteen Years", *Ryazanskije Vedomosty*, 31 December 2014; Law of Chelyabinskaya Oblast dated 10 September 1999 n. 83-30, "On the Conditions and Procedure of Issuing by Way of Exception a Marriage Licence on the Territory of the Chelyabinskaya Oblast for a Person under the Age of Sixteen Years", *The Vedomosty of the Legislative Assembly of the Chelyabinskaya Oblast*, 1999, n. 3.

[10] <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.

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only comes into force between the acceding State and those States that acknowledge the accession. Hence, having established that the border was crossed before the Federal Republic of Germany acknowledged the Russian accession to the Convention on 1 April 2016, the court concluded that the provisions of the Convention could not be applied in this case.[11]

Certain problems regarding the return of children were, in some measure, resolved by the 1980 Convention, according to which court decisions within the scope of the Convention and taken after its entry into force, should be recognised and executed. The Neyschtadt case was the first in which the 1980 Convention was applied in Russia. Russia had to recognise and enforce an order of the High Court of England and Wales regarding the return, to the mother, of two children wrongfully retained in Russia. In this case, Russia had to demonstrate the readiness and capability of the Russian courts to implement the provisions of the 1980 Convention in terms of recognition of the foreign court's decisions with respect to family relations and the return of the children to one of the parents.[12]

III. The Right of Custody and the Right of Access

From an administrative point-of-view, special attention should be given to the balance between legal terms used in the Conventions and the terminology accepted in the Russian legislation. "Custody rights" and "access rights" are important in order to understand the wrongful removal or retention of a child. It is obvious that the first, defined as the right to take care of a child, including the right to choose the child's residence, has a wider scope than the notion of custody used in the Russian legislation, which refers solely to a form of a family placement for minor citizens (those under the age of fourteen years) and citizens adjudicated as legally incompetent. The Russian notion means that the citizens, certified by the custody and trusteeship agencies as guardians, are legal representatives of the children under their care (жительства), and provide all the legally significant acts on their behalf and in their interests.[13] Thus, under Russian law, the institutions of custody and trusteeship over minors are meant to protect the rights and interests of the children left without parental care.[14] This includes children left temporarily by their parents on the basis of a written application by the parents, who – for a valid reason – cannot fulfill their parental duties (Art. 13 of the Federal Law dated 24 April 2008, N 48-FZ "On Custody and Trusteeship"). There is no linguistic

[11] See Decision of the Kanavinskiy District Court in Nizhniy Novgorod on 26 October 2017, case n. 2-4633/17.

[12] M. ZAKHAVINA/ Y. IVANOVA, The Neyschtadt Case in Russia is Finished, but its Lessons Call for Reflection and Thorough Analysis, *The Advocat* 2015, n. 3, p. 8.

[13] See Federal Law dated 24 April 2008 N 48-FZ, "On the Custody and Trusteeship", Art. 2, Official Gazette of the RF, 2008, n. 17, Art. 1755.

[14] N. ROSTOVTSEVA, On the Russian Application of The Hague Convention on the Civil Aspects of International Child Abduction, *The Judge*, 2014, n. 8, p. 45-50.

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contradiction, as custody means "provision of care".[15] As such, the Russian legislation provides similar rights to lawful representatives of a minor. Under Russian law, this right will also be valid for children who are subject to custody rights or a trusteeship. But one should remember that the Family Code of the RF provides a slightly different definition of parental rights for parents care for their children. Parental rights and obligations under Russian law are analogous to joint parental custody in the context of the 1980 Convention.[16] Notably, reduced parental rights do not necessarily follow a divorce, and it is only in case of disagreement regarding the upbringing and education of the children that parents (or one of them) may apply to custody and trusteeship agencies or to the court for a solution.

A. The Right of Custody

For the purposes of the Convention, it is very important to provide efficient execution of custody rights. Where the law lacks the criteria set by regulators for custody rights, custody is assessed in terms of the level of care provided by the parent. Therefore, the courts recognise as acceptable the provision of custody even where a person with custody rights has, for some good reason (illness, education, *etc.*), lived separately from the child but remained concerned about the child's health and well-being: thus, the actual exercise of custody rights does not necessarily require the physical presence of a parent. Only total negligence of the obligation to care for a child should be interpreted as an actual failure to provide custody, and only a court is entitled to take a decision as to whether custody had actually been provided at the time of the child's removal (retention). The court makes the best judgment in the course of legal proceedings on a certain case. That a parent is entitled to custody by law cannot be assessed by the court as evidence of the parent's actual, comprehensive provision of custody rights and obligations.[17]

Courts pay attention to what is applicable for the efficient provision of custody rights. The Convention contains a presumption that the parent entitled to parental rights, who is left without the child, was effective in his or her duties. In accordance with Cl. "a" par. 1 Article 13 of the Convention, an actual failure to fulfill the custody obligations is an exception to the general rule. The burden of proving that the parent left without the child was not *de facto* exercising custody rights is imposed on the parent who has abducted or is retaining the child. An attempt to shift this burden of proof on to the person petitioning for the child's return is a wilful violation of Art. 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[18]

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[15] S. KUZNETSOV (ed.), *The Big Explanatory Dictionary of the Russian Language*, Saint Petersburg, Norint, 2000, p. 715.

[16] N. TRIGUBOVICH, T. SYOMINA, The 1980 Convention on the Civil Aspects of International Child Abduction in the Russian Legal System of Family Relations Regulation, *Family and Real Estate Law* 2012, p. 41-44.

[17] See Decision of the Central District Court of Novosibirsk, n. 2-4444/2017 dated 18 September 2017 for the case n. 2-4444/2017, <http://sudact.ru/regular/doc/bsYYnXuJAY58>.

[18] *Ibidem*.

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B. The Right of Access

The right of access is, on the contrary, an expression of a model of reduced parental rights, which is unknown in Russian legislation, as the termination or limitation of parental rights is only possible in case of culpable parental behavior or if leaving a child in the custody of his/her parents is dangerous due to circumstances beyond the their control, for example where a parent suffers from a psychological disorder or chronic disease, a confluence of reduced circumstances, *etc.* (Art. 73 of the FC of the RF).

C. The Correlation between Custody and Access Rights within the Legal Categories of the Family Code of the Russian Federation

The courts must define the balance of all of these legal categories with the norms of the FC of the RF, taking into account that the ratification of the 1980 Convention has not involved any amendments to the relevant Russian legislation. This has created a controversy: the norms of the Civil Procedure Code of the RF actually do not have a solid basis in the Russian legislation. Chapter 22.2 of the Civil Procedure Code of the RF contains special rules for proceedings regarding applications for the return of a child or access to the child, and refers to the international treaty signed by the RF. But it seems to us that such legal constructs contradict the fundamental nature of the court's protection, which is derived from the substantive right. There is a good reason why Roman lawyers did not delineate the limits of substantive and procedural law, which suggests that each law should be provided with its own protection mechanism. Here, the legislator started from the contrary view, creating a mechanism to protect a right which does not have a clear definition in the national legislation. The recognition of the 1980 Convention as a part of the national system in the context of Article 15 of the Russian Constitution does not make any advancements as the problem does not lie in a different rule but in a different understanding of the parents-child relationship, which had not been balanced with the existing legal context.

Specialists insist it is necessary to define the right to access a child, wherever he/she is, in the FC of the RF as a standalone term, taking into consideration the requirements of specific circumstances. But in the interpretation, it is suggested that emphasis be placed on the direct meaning of this notion, instead of interpreting it as a similar term used in the Russian translation of the 1980 Convention. In the view of T. Krasnova, the *de lege ferenda* norm of the parental right to access a child will correlate with the provisions of Cl. 2 Article 55 of the FC of the RF (on the right of a child to communicate in case of emergency). But now it will have a broader scope and will not be limited to emergency situations.[19] However, this approach will again contradict with the representation envisaged by the 1980 Convention where the scope of the access right is limited to the right to

[19] T. KRASNOVA, The Content of Parental Rights: Perspectives to Strengthen Legal Position of Parents in Russia, *The Russian Laws: Experience, Analysis, Practice*, 2017, n. 8, p. 102-106.

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take a child for a limited period of time to a place other than his/her habitual residence.

In our opinion, access rights correspond to the parental right, envisaged in Article 66 of the FC of the RF, for a parent living separately from the child to communicate with him/her or to take part in his/her upbringing, which might include removing a child from his/her habitual residence. What is important here is that the exercise of this right corresponds to the obligation of the parent, living with a child, to avoid impediments to access rights, if communication does not harm the child's physical or mental health (Важно, что реализации этого права корреспондирует обязанность родителя) or moral development. Taking this into consideration, access rights should be seen as a form in which to exercise the right of communication. It would make sense to codify this as a law in Article 66 of the FC of the RF for the purposes of international cooperation in the framework of the 1980 Convention.

IV. Wrongful Removal and Retention

The notions of wrongful removal and retention also need to be legally treated as they reveal the civil aspects of child abduction.

A. Removal

Removal in the context of a situation aggravated with a foreign element means that a child has been removed from the country of permanent residence. The 1980 and the 1996 Conventions differ in their approach to the children whose interests are protected by their provisions. The former can be applied to any child who has his/her habitual residence in any of the Contracting States directly prior to the violation of the custody or access rights, but its application is terminated when the child reaches the age of sixteen years. The 1996 Convention resolves this differently, stipulating that it applies to children from the moment of their birth until they reach the age of eighteen years (Art. 2), which is dictated by the Convention's wider goals. Obviously, both Conventions deal with children already born, though in the 1980 Convention this idea is not very explicit. Thus, the problem of how to protect the rights of the father, where the mother leaves the country with an unborn child, remains unresolved. But it is impossible to widen the scope of the Convention to cover this situation given the specificity of its provisions as an effective exercice of custody rights cannot take place over unborn children.

In terms of the possibility of applying the Convention, there remains the issue of the moment of removal, which is defined as the date the border is crossed. This might have a significant impact on the result of the court proceedings. In some cases, this allows the simulation of evidence of a child's habitual residence (if registration at the place of residence and in a medical facility, *etc.* were

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provided after this date).[20] In other cases, this allows for a decision to apply the provisions of the Convention (if the border had been crossed before the State acknowledged Russian accession to the Convention, its provisions are inapplicable).[21] One of the criteria for determining the wrongfulness of a child's removal from the State of his/her habitual residence, is that the removal is carried out in violation of custody rights. If this is found in court, the main question is whether the corresponding decision is enforced. Thus, the Saint Petersburg Municipal Court refused to acknowledge the removal of a child from Finland as a wrongful act.[22]

B. Retention

The retention of a child is more complex and it suggests that the child's removal from the country was legal at an earlier stage. It is important to consider that, in accordance with Article 20 of the Federal Law dated 15 August 1996 n. 114-FZ "On the Procedure of Exit from the Russian Federation and Entry into the Russian Federation",[23] if an underage child is exiting the country with only one parent (adoptive parent, guardian or trustee), the general rule is that the second parent needs not provide consent if, in accordance with Article 21, this second parent has not filed an objection. The consent of the other parent or a document proving the impossibility of filing such consent or authorisation might be required in the country of destination, including at the visa processing stage. In particular, such practice is usual for Bulgaria, Canada, the UK, the USA, and for the majority of the Schengen countries. Consequently, a virtually unhampered removal is possible in the CIS countries and some other States where visas or stamps are provided in the airport of entry (Thailand, Cyprus, *etc.*). The other parent's authorisation is not needed if there is proof of single parent rights, such as: a certificate by the Civil Status Registration Office proving that the record of the father's data was written "according to the mother's words", a court decision on the termination of the parental rights, a death certificate for the other parent, a single mother certificate, a police certificate proving that the father is on the wanted list or that his location is unknown.[24]

Comparing the notions of "removal" and "retention" demonstrates that a legal removal can turn into a wrongful retention while a wrongful removal cannot

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[20] Decision of the Central District Court of Novosibirsk, n. 2-4444/2017, dated 18 September 2017 <http://sudact.ru/regular/doc/bsYYnXuJAY58>.

[21] Decision of the Kanavinskiy District Court in Novosibirsk dated 26 October 2017 for the case n. 2-4633/17 <URL: https://rospravosudie.com/court-kanavinskij-rajonnyj-sud-g-nizhnij-novgorod-nizhegorodskaya-oblast-s/act-560194394>.

[22] Appeal Order of the Saint Petersburg Municipal Court, n. 2, 33-2893/2016, dated 3 February 2016, < https://kmkrasnova.pravorub.ru/personal/73849.html>.

[23] Official Gazette of the RF, 1996, n. 34, p. 4029.

[24] A. CHRISTAPHOROVA, The Parental Authorization to Exit the Country and Minors Escort in Notarial Practice: the Essentials a Notary Should be Aware of, *The Notary*, 2015, n. 2, p. 41-45.

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under any circumstances turn into an illegal retention. Retention, within the terms of the Convention, should not be seen as a continuous action, which is the general interpretation of this notion in legal spheres, but as a single act, which as a rule, is committed on the day when the other parent was supposed to receive his/her child.[25]

C. Presupposed Non-Return (Presupposed Violation)

A "presupposed non-return" or a "presupposed violation" is a more complicated case in which the parent with whom the child legally left the country announces, before the agreed time of the child's return, his/her intention not to return the child, or suggests this idea in some other way. In the majority of cases the courts refuses to acknowledge the fact of the child's retention by one of the parents until the return date. Exceptions to this rule apply where the behavior of the abducting parent makes it clear that he/she has no intent to return the child to the State of his/her habitual residence, but plans to change the child's residency and strongly opposes any compromise or negotiation.[26]

D. The Wrongfulness of Removal and Retention

To recognise child removal or retention as wrongful, it is critically important to hear the position of the other parent, though lack of parental authorisation is, under the 1980 Convention, only a reason to refuse to make a decision to return the child. In accordance with Article 13, a court or administrative body of the requested State is not obliged to order the child's return if a person, institution or other organisation opposing it will prove that the person, institution or other organisation providing care for the child, has consented to the child's removal or retention, or has failed to voice an objection to such removal or retention. Such declarations of intention certainly have a lot of similarities as, in both cases, there is no dispute on the location of the child and his/her possible removal to the territory of another State. The courts suggest that the consent should be expressed before the removal or retention of the child with a potential risk of its being withdrawal, except for cases where a court decision allowed the child's move and the lack of the objections may be established only after the time of the decision, which makes it impossible to recede from the previous position.

Since consent and the lack of objections are *quaestiones facti*, defining legally valid criteria for establishing consent or objections is a matter of principle. In this sense, the position of the UK Court of Appeal in *Re P.-J. (Children) (Abduction: Habitual Residence: Consent)*[27] is noteworthy. The court has identified

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[25] O. KHAZOVA, Some Aspects of Interpretation of the Notions of Wrongful Removal and Illegal Retention of a Child in the Context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, *The Law,* 2016, n. 10, p. 175-186.

[26] Re S (Minors) (Child Abduction: Wrongful Retention) [1994] Fam 70.

[27] Re P.-J. (Children) (Abduction: Habitual Residence: Consent), [2009] EWCA Civ. 588.

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a number of principles to assess the presence or absence of consent: 1) the consent should be clear and unambiguous; 2) it may be provided at a later point in time; 3) it should be valid at the moment of actual removal; 4) it should be associated with a defined event in the future; 5) consent, or lack of consent, should be considered in the context of a family unit breakdown; 6) consent may be withdrawn at any time prior to the actual removal and in this case an ensuing dispute should be resolved in an orderly manner by the court of the State of habitual residence before the child is removed; 7) the burden to prove the existence of consent is on the person referring to it; 8) the court's assessment of consent is based on the factual circumstances associated with the consent; 9) the main issue is to establish whether the other parent had provided clear and unambiguous consent to remove the child. It has been noted removal, carried out secretly points, as a rule, to a lack of a valid consent.

Consent should be expressed orally or in a written statement; however, as practice shows, a lot depends on the circumstances under which this statement is provided. O. Khazova highlights the courts' view that it is necessary to establish whether such a statement is a first, emotional reaction regarding the child's removal or retention, or whether it is provided in the course of negotiations or attempts at reconciliation.[28]

A more complex situation arises where the behavior analysis of the abandoned parent leads to the conclusion as to whether or not there has been consent or a lack of objections. Showing care about the child's well-being during this period does not necessarily prove that the parent gives up on his/her claim to child's return. In trying to establish the position of the abandoned parent, the courts pay attention to the circumstances which may, to a certain extent, explain his/her failure to act or delay action to return the child. Thus, the Pyatigorsk Municipal Court rejected a claim to return children and noted *inter alia* that the parent who had been left without the children could have initiated custody proceedings during the divorce envisaged by the Israeli legislation. Consequently, there was no decision granting custody to either parent. The evidence introduced proved total negligence of the father's duty to take care of his children.[29] On the contrary, an immediate action filed by the parent left behind before the authorized Court of England and Wales for an urgent return of his daughter and before the Central Body to return the child was assessed as an obvious lack of father's consent to retain the child in Russia and to leave the child here for permanent residency.[30] The absence of clear rules regarding the period of time required to interpret a failure to act as silent consent creates greater challenges.

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[28] O. KHAZOVA (note 25), p. 180.

[29] Decision of the Pyatigorsk Municipal Court (the Stavropol Territory) n. 2-360/2017 2-360/2017(2-5815/2016), dated 27 February 2017 <http://sudact.ru/regular/doc/ntjO4flMd6J9>.

[30] Decision of the Dzerjinsky District Court of Saint Petersburg <https://russian-divorce.ru/articles/a352>.

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E. The Reasons to Reject the Return

Unlike the presence of consent for, or the lack of objections against removal or retention, which precludes characterisation of these actions as "wrongful", the 1980 Convention lists a number of reasons to reject the demand for the return of a child to his/her habitual residence regardless of the assessment of the "abductor's" behavior. They include: adaptation of the child in the new environment on the condition that more than one year has passed from the moment of the wrongful removal or retention (par. 2 Art. 12 of the Convention); a grave risk that his/her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (par. 1 Cl. "b" Art. 13 of the Convention); objections from the child, who has attained an age and degree of maturity such that it is appropriate to take account of his/her views (par. 2 Cl. "b" Art. 13 of the Convention); non-conformity of the decision on the return with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Art. 20 of the Convention). Each of these reasons has been applied by the Russian courts. In each case there was a clear understanding that the above-mentioned provisions of the Convention, which allow for the rejection of an appeal against the return of a child, should in no case be applied automatically and do not mean that in the above-mentioned cases the return of the child would necessarily be rejected. The very nature of these exceptions provides the courts with a certain degree of discretion for rejecting the return of the child in certain circumstances, but in no way does it place the judge under such duty.[31]

1. The Time Limit

A formal criterion which might be viewed as a kind of reference point for taking decisions is established at Article 12 of the 1980 Convention. Article 12 sets a one-year period and makes the return of the child depended on his or her adaptation in the new environment. In assessing the child's adaptation, various aspects of the child's social and family life, integration into the education system, and age are taken into account. It is important to make an objective assessment of all the aspects (whether the child is truly settled in the new place), and not subjectively – whether the child feels that he/she has adapted, whether he/she would like to return.[32] However, strict construction of the Convention provisions brings the courts to a definite conclusion that the question of the child's integration should

[31] Decision of the Central District Court of Novosibirsk, n. 2-4444/2017, dated 18 September 2017 for the case <http://sudact.ru/regular/doc/bsYYnXuJAY58>.

[32] N. KRAVCHUK, Enactment on Immediate Return of a Child into the State of Habitual Residency and Exceptions from it in the Right of The Hague Convention of International Child Abduction and the Practice of the European Court of Human Rights, *Bulletin of the European Court of Human Rights*, *The Russian Edition*, 2016, n. 1, p. 139-144.

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not be discussed at all until the one-year period between the date of the wrongful retention and the first day of the court proceedings has lapsed.[33]

2. The Threat of Physical Harm

The potential threat of physical or psychological harm to a child is assessed based on factual circumstances, investigated in each specific case. As noted by one of the Russian courts, the return of a child to his/her permanent (habitual) residence may be a threat to the child in a few situations: if an immediate danger of harming the child existed prior to the court decision on custody (*e.g.* if the child was to be returned to a military zone or a State of famine or epidemic); if the child must return to an environment of abuse, neglect or deep emotional submission; or, if the court of the State of the child's habitual residence is, for some reason, incapable of providing the child with an adequate level of protection.[34] The Central District Court of Khabarovsk, thus, found that the return of a child to a military operations zone in Ukraine was insufficient to reject the child's return. The court decided that "the periodic military operations in various Ukrainian settlements [was] not an exception creating a grave risk of harm to the child, but rather one that was a consequence of general conditions of living within the conflict zone". Here, the court paid attention to the fact that the defendant had removed the child from the territory of Ukraine only in January 2016, whereas military operations had been conducted there since April 2014. Moreover, the defendant had neither provided the court with evidence, from the authorised agencies in the State of the child's permanent residence (Ukraine), of the impossibility to avoid this risk, nor had she provided evidence that the removal was the only possible way to protect the child in this situation.[35]

3. The Threat of Psychological Harm

In addressing the issue of psychological harm to the child associated with separation from the parent in case of a return, the courts pay attention to the child's relationship with each of the parents. Thus, the Dzerjinsky District Court of Saint Petersburg came to the conclusion that since the child is equally attached to both parents, this challenge would occur at her removal from either of them. Here, the court noted that the exception envisaged in the Convention for the grave risk of harming the child is not tied to the question as to where the child would be happier,

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[33] See Decision of the Dzerjinsky District Court of Saint Petersburg <https://russian-divorce.ru/articles/a352>.

[34] *Ibidem*.

[35] See Decision of the Central District Court of Khabarovsk, in case 2-5968/2016, <https://rospravosudie.com>.

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as the former is an issue of custody rights, and in this case, it was an issue within the jurisdiction of the UK courts where the underage girl was habitually resident.[36]

4. The Age of the Child and the Child's Opposition

Since some legally valid criteria remain undefined, a number of challenges may arise where open-ended formula, such as "grave risk", as mentioned in Cl. b Article13 of the 1980 Convention, are used. The European Court of Human Rights had to provide their own interpretation, with the caveat that this notion cannot be interpreted, within the meaning of Article 8 of the Convention, as including all the inconveniences which might be associated with the necessity to return the child: the envisaged exception can only be applied in situations beyond the framework of what a child could reasonably withstand.[37]

Certain challenges might arise with the assessment of the child's opinion on whether he/she should return to the previous residence, as the Convention does not provide an age as a reference point for the court to judge the child's refusal to return. This is why this decision is placed on an authorised State agency. Thus, the Pyatigorsk District Court, taking into consideration the age of the child, came to the conclusion that the child's opinion should be heard and recognised by the court.[38] The Central District of Khabarovsk, on the contrary, decided that the arguments of the defendant that the child would not like to return to Ukraine cannot be accepted as "this objection is based on the fact that the girl likes to live with her mother, she has made friends at the new residence and she does not want to return to her father who used to scold her quite often".[39]

5. The Unresolved Issues

In accordance with the requirements of Article 3 of the 1989 UN Convention on the Rights of the Child "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". However, neither the international documents, nor those of the UN Committee on the Rights of the Child actually define these interests. As such, a court must decide each case based on its own assessment of each specific situation.

[36] Decision of the Dzerjinsky District Court of Saint Petersburg <https://russian-divorce.ru/articles/a352>.

[37] Information on the Resolution of the European Court of Human Rights dated 1 March 2016 for the case "K.J. (K.J.) versus Poland" (complaint N 30813/14), *The Bulletin of the European Court of Human Rights*, 2016, n. 8 (170).

[38] Decision of the Pyatigorsk Municipal Court (the Stavropol Territory), n. 2-360/2017 dated 27 February 2017 <http://sudact.ru/regular/doc/ntj04flMd6J9>.

[39] Decision of the Central District Court of Khabarovsk for the case 2-5968/2016 M-4821/2016, <https://rospravosudie.com/court-centralnyj-rajonnyj-sud-g-xabarovska-xaba rovskij-kraj-s/act-533187326>.

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Defendants sometimes argue that the return of a child is contrary to the fundamental principles of the requested State in terms of protection of human rights and fundamental freedoms (Art. 20 of the Convention). It should be noted that Russian courts take a very critical position towards such arguments, which have been raised in a number of cases. The Dzerjinsky District Court, for instance, found inconsistencies in the defendant's argument that the child's return was like an extradition or expulsion and therefore contrary to the fundamental principles of the Russian Federation. This case, however, was not about an extradition to a foreign state; rather, an under aged girl had obtained Russian citizenship after her mother had wrongfully detained her on the Russian territory and after the procedure to return her had been launched. As such, the case was about restitution of the status quo and an immediate return of the child to her permanent (habitual) residence, and the court found that this did not contradict the Constitution of the Russian Federation, as, by acceding to the 1980 Convention, the Russian Federation had assumed the obligation to effectively implement the Convention and to comprehensively comply with its provisions.[40]

V. The Determination of the Child's Residence

The special nature of these cases calls for special attention to the jurisdiction of court or administrative agencies, as well as to the law applicable. Article 5 of the 1996 Convention with regard to the measures taken to protect of the identity of the child or to defend his/her property, recognises the jurisdiction of State authorities at the place of habitual residence of the child. It is stipulated that, in exercising their jurisdiction, State authorities should apply the legislation of their country. But as far as needed in order to protect the identity or the property of the child, they might, by exception, take into consideration the legislation of another State with which their case is most closely connected (Art. 15). In decisions regarding parental responsibility, the Convention is more dogmatic and requires the exclusive application of the law of the State of the child's habitual residence (Art. 16-17).

There is a clear trend in favour of the habitual residence criterion in the international agreements signed under the auspices of The Hague Conference on the Private International Law to regulate the relationships of parents and children. However, specialists point to a serious problem in the interpretation, in different jurisdictions, of such a criterion, taking into account that the international documents do not provide any guidance. An analysis of court decisions demonstrates the absence of a shared vison as to where the emphasis should be placed when identifying the habitual residence: on the interests of the child even if the intentions of his/her caregivers are taken into account, or exclusively on the desires of the latter. Any interpretation is further complicated with the diversity of real-life situations.

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[40] Decision of the Dzerjinsky District Court of Saint Petersburg <https://russian-divorce.ru/articles/a352>.

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It is assumed that unlike the criterion of "domicile", that of habitual residence is based on previous experience as opposed to a person's intention to live on the territory of a certain State. Consequently, in the majority of cases, the courts limit themselves with the objective evidence of a long-term physical presence on a certain territory. In any case, in each specific situation, an individual approach is *de facto* applied. Thus, the Supreme Court of Austria has determined that a country of residence is characterised as a habitual residence if the stay has been longer than six months even if this happens against the will of the child's guardian.[41] The Federal Constitution Court of the Russian Federation takes a similar position, recognising the child's integration into the new environment as a stronger argument than the six-month minimum.[42] The greatest range of opinions is represented in the US courts which have found that "a parent cannot create a new permanent/habitual residence by wrongful removal and isolation of the child".[43] Some US courts also give priority to the intentions of the parents and the older children.[44]

A. The Determination of the Child's Residence by the Russian Courts

The position of the Russian courts on the issue of residence is based on the provisions of Article 65 of the Family Code of the Russian Federation, which places priority on the interests of the child. According to it, if the parents cannot come to a mutual agreement regarding the child's residence, it should be established by the court with the consideration of the child's level of attachment to each of the parents and siblings; the age of the child; the moral and other personal qualities of the parents; the relationship between each of the parents and the child; the possibility of creating all the necessary conditions for the child's upbringing and development; and, the opinion of the child. Thus, the Dzerjinsky District Court of Saint Petersburg, having considered a civil case on a claim to return a child to the State of his permanent residence, came to the conclusion that there were no grounds for the claim, as the small child needed, among other things, the mother's care.[45]

In some cases, the court formulates a very clear theoretical position on the issue of residence. In particular, one of the district courts in Saint Petersburg came to the conclusion that the concept of "habitual residence" suggests a place where the child is integrated in the social and family space. The court took the view that a person may have only one habitual residence and the residence of the child should not be defined by the citizenship of the parents. In the court's view, a parent cannot create a new habitual residence by wrongfully removing and isolating a child.

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[41] Oberster Gerichtshof 8Ob121/03g, <https://www.incadat.com/en/case/548>.

[42] Bundesverfassungsgericht, *2 BvR 1206/98,* 29.11.1998 <https://www.incadat.com/en/case/233>.

[43] *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001).

[44] *Baxter v. Baxter,* 423 F. 3d 363 (3d Cir. 2005), <https://www.incadat.com/en/case/ 808>.

[45] Decision on the case n. 2-2471/2014 <http://www.gcourts.ru/case/32492660>.

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Consequently, the defendant's argument, that the Russian Federation was also a permanent residence of the child, was found to be inconsistent with the documents provided for the underage boy with respect to his registration at his place of residence, at his school, and at a medical facility. All of these documents were dated after October 2016, *i.e.* after the child's removal from the territory of the Republic of Kazakhstan.[46]

In another case, the question of a child's habitual residence was resolved on the basis of the body of evidence proving that the child had permanently lived in the UK from birth; attended school in the UK since 2003; received medical care in the UK; mastered English as her language of communication at home, in school and with friends; and only went to Russia during school vacations for the purpose of resting and visiting her mother's relatives.[47]

The court's interpretation of habitual residence should not be seen as overwhelmingly incoherent: international disputes involving Russian citizens are common and Russian courts are not alone in their varying interpretation of "habitual residence". The Convention's flexibility allows for the possibility of applying the law of the State with which the situation is most closely connected (Cl.2 Art.15 of the 1980 Convention). The closest connection principle is codified in the Russian legislation; for example, at Cl. 2 Article1186 of the Civil Code of the Russian Federation. Pursuant to Article 1186, if it is impossible to decide which law should be applied, the court should apply the law of the State with which the civil case is most closely connected. A similar approach may be taken with respect to family relations as, in accordance with Articles 4 and 5 of the Family Code of the Russian Federation, these relations may be regulated by analogy according to the civil law.

B. The Child's Permanent Residence in a Complex Russian Territorial System

In States with a complex territorial system, the definition of permanent residence is sometimes blurred, as two or more legal systems may be used to determine issues of custody, parental responsibility and measures for child protection. Both the 1980 and 1996 Conventions provide mechanisms to resolve these issues.

In relation to such States permanent residence shall be construed as referring to habitual residence in a territorial unit of that State and any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides (Article 31 of the 1980 Convention). On the other hand, according to the 1996 Convention, if there are valid rules pointing to the applicable law as that of a particular territorial unit, then the law of that territorial unit is applied. If there are no such rules, then the law of the corresponding territorial unit (based on connecting factors

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[46] Decision of the Central District Court of Novosibirsk n. 2-4444/2017 dated 18 September 2017 <http://sudact.ru/regular/doc/bsYYnXuJAY58>.

[47] Appellate Decision of the Saint Petersburg Municipal Court dated 4 April 2017 <https://russian-divorce.ru/articles/a353>.

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enumerated at Article 47 of the 1996 Convention) is applied. In particular, any reference to the right or proceeding or a state agency in which some measure is taken is understood as associated with the right or the proceedings or the agency of the territorial unit in which it is taken. This provision is practically significant, as the territorial unit with jurisdiction under the Family Code of the Russian Federation may be different in in cases of removal from custody and immediate danger to a child's life or health, depending on whether or not the territorial unit has granted local agencies with authority over custody matters.

VI. Authorised Bodies under the Conventions

The 1980 Convention defines the list of bodies authorised to act under the Convention and clearly splits them into administrative and judicial bodies. The effectiveness of the implementation of the Convention's provisions is associated with the definition of the Central Body authorised under Article 7. Under Article 7, the Central Body has the following obligations:

> "a) to discover the whereabouts of a child who has been wrongfully removed or retained; b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; d) to exchange, where desirable, information relating to the social background of the child; e) to provide information of a general character as to the law of their State in connection with the application of the Convention; f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access; g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application".

A. Administrative Bodies

In accordance with the international obligations assumed by the Russian Federation under the 1980 and 1996 Conventions, the Government of the Russian Federation issued an order n. 1097 dated 22 December 2011, which gives the Ministry of Education and Science of the Russian Federation the authority to implement the obligations of the Central Body under the Conventions through its Department of State Policy in the Protection of the Rights of the Child. Thus, the

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Russian Federation has not exercised the option to appoint more than one Central Authority and to establish territorial limits to their powers.

B. Court Bodies

It is worth noting that proceedings, based on the Conventions, for the return of the child or for access rights have been given special procedure status (Ch. 22.2 of the Civil Procedure Code of the RF), as they are very complex and specific. This ensures prompt and effective proceedings in accordance with the Convention. A majority of the States Parties followed the recommendations of The Hague Conference on Private International Law, in favour of the specialisation of judges, in order to improve the quality of court proceedings for this category of cases: the Civil Procedure Code of the Russian Federation, thus, established the so-called centralised jurisdiction. These particular cases are now concentrated in the district courts listed in Part 2 of Article 244.11 of the Civil Procedure Code of the RF (one court per one federal district: the Tverskoj District Court of Moscow – for the Central Federal District, the Dzerjinsky District Court of Saint Petersburg – for the North-West Federal District, the Pervomajsky District Court of Rostov-on-the-Don – for the Southern Federal District, the Pyatigorsky Municipal Court – for the North-Caucasian Federal District, the Kanavinsky District Court of Nizhnij Novgorod – for the Privolzhsky Federal District, the Zheleznodorozhny District Court – for the Ural Federal District, the Central District Court of Novosibirsk – for the Siberian Federal District, and the Central District Court of Khabarovsk – for the Far-East Federal District). The special rules regarding exclusive jurisdiction are complemented with specific rules regarding territorial jurisdiction and directed toward the child's location or to the last known location of the child in the Russian Federation. As an alternative, there is a possibility of applying to the court at the last known address of the defendant in one or another federal district (Part 3 Art. 244.11 of the Civil Procedure Code of the Russian Federation). That no legalisation or similar formality is required in the context of this Convention (Art. 23) substantially simplifies access to justice by the abandoned parent, who need not prove the genuineness of signatures, the status of the persons who signed any relevant documents or the authenticity of the stamps or seals.

VII. The Procedural Aspects of Implementation

To comply with the Convention's requirements and to provide prompt court proceedings, the law has established shortened timelines for the proceedings and the re-hearing of the decision. Pursuant to Article 244.15 of the Civil Procedure Code of the Russian Federation, the claim for the child's return or for access rights should be decided by the court no more than forty-two days after the date at which the claim is accepted by the court. This includes preparation time and time for writing a reasoned decision. A notice of appeal, or submission against the court's decision must be filed within ten days of the decision since the decision is adopted

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in its final form. Cases on appeal must be heard no more than one month after the date on which the appeal is accepted by the Court of Appeal (Art. 244.17 of the Civil Procedure of the Russian Federation). To ensure that the Central Authority performs its obligations and acts within the scope of its authority, the court must send copies of its decisions and inform the Central Authority of proceedings.

A. Provisional Measures

Provisional measures for this category of cases warrant particular attention. To prevent the defendant from taking unilateral decisions regarding the child after the child's removal, or from doing activities with the child that are not authorised by the claimant, the court may prohibit the defendant from changing the child's location and to this end temporarily limit exit from the Russian Federation. If the location of the defendant and (or) the child is unknown, the court should initiate a search for them (Art. 120 of the Civil Procedure Code of the RF) by law enforcement officers and private detectives hired on a contractual basis (Cl. 8 p. 2 Art. 3 of the Law of the RF dated 11 March 1992 N 2487-1 "On Private Detective and Security Activity in the Russian Federation")[48]. It should be noted that the search may also be initiated on application by the Central Authority. This application is given the weight of a writ of enforcement. Unlike in other cases, law enforcement officers may use (investigative) information obtained by a private detective and mass media facilities to conduct their search (p.11 Art. 65 of the Federal Law dated 2 October 2007 N 229-FZ "On Enforcement Proceeding").[49]

B. Mediation and Reconciliation of the Parties

In considering an application for the return of child who has been wrongfully removed or detained in the Russian Federation, the court – in accordance with the litigation rules and the requirements of Article 7 of the 1980 Convention – will take measures to promote reconciliation between the parties. First of all, the court will implement a mediation procedure, the legal basis for which was created after the acceptance of the Federal Law dated 27 July 2010 N 193-FZ "On the Alternative Procedure of Dispute Settlement with the Participant of a Mediator (the Mediation Procedure)" (hereinafter – the Mediation Law).[50] It is believed that mediation between the abandoned parent and the parent who has taken the child might take the heat off the conflict and create a favourable environment, thereby simplifying contact between all interested parties and creating conditions for the voluntary return of the child and the establishment of a mutually acceptable agreement on all other controversial points. Mediation might also provide

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[48] Vedomosti of the Congress of Peoples' Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, n. 17, p. 888.

[49] Official Gazette of the RF, 2007, n. 41, p. 4849.

[50] Official Gazette of the RF, 2010, n. 31, p. 4162.

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guarantees that the child will be returned safely and in the shortest time limit.[51] As compared with other methods of making concerted decisions in family disputes, this procedure has a number of advantages: it creates conditions for the communication between both sides in a comfortable, informal environment, facilitating the cooperation of the disputants and allowing them to elaborate their own strategies of getting out of the conflict situation. Mediation is a structured, but flexible process which can be easily adapted to the needs of a certain case. Mediation allows for a simultaneously discussion of legal and non-legal issues and for the informal participation of third parties who may not be involved in the case.

Given the specific character of these conflicts, a mediator should have exposure to the necessary social-psychology and legal knowledge. In particular, he should be able to perceive indications of a psychological disorder and language handicaps as well as signs of domestic violence and child abuse in order to draw relevant conclusions (Cl. 100 of the Guide). It is true that the effectiveness of mediation is often dubious in family disputes associated with domestic violence. Some experts believe that it is inadmissible, as mediation is a means of peaceful dispute settlement based on co-operation, and often envisages personal and sincere contact. Mediation of such disputes is, according to some, quite acceptable if the procedure is provided by well-trained and experienced professionals who are able to protect and support the affected party, for whom a controlled mediation process may have a positive effect. To assess the feasibility of mediation in a given case, the following factors should be taken into consideration: the level and frequency of domestic violence; the target of the domestic violence; the character of the violence; the physical and psychological health of the parties; the anticipated reaction of the aggressor regarding the suggestion to take part in the mediation; the availability of the mediation tailored for domestic violence; the availability of the adequate safety measures; and, the representation of the parties' issues (Cl. 276 of the Guide). The possibility of mediating such conflicts is codified in the legislation of different countries. In some legal systems there are norms which either directly prohibit mediation for the resolution of family disputes involving children and domestic violence, or envisage special conditions to apply to mediation in such cases. The Russian legislation does not establish such limitations, though the norm of Cl. 5 Article 1 of the Law on Mediation provides all the necessary formal grounds for mediation. The law envisages a prohibition to mediate disputes which touch upon or may touch upon the rights and legal interests of non-participting third parties. O. Velichkova aptly notes that children are not regarded as third parties, as they are connected to each of the parties and do not have any claims of their own, as they are the subject of the dispute.[52]

The effectiveness of mediation is limited by its nature. There is always a risk that an agreed solution, achieved in the process of mediation, but not supported by legal force, will not protect the rights of the parties in case the

[51] Practical Guide on the use of The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation, Scientific Methodology Center of Mediation and Right 2013, p. 22.

[52] O. VELICHKOVA, Improving Family Legislation in Terms of Mediation, *The Pressing Challenges of the Russian Legislation*, 2017, n. 5, p. 50-55.

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conflict persists. There may be a lot of reasons for this: it is not excluded that such a mediated agreement (in whole or in part) contradicts applicable legislation, is not legally binding or viable, and has not been registered, approved by the court and/or included by judicial decree (where such measures should be taken). Moreover, some legal systems limit the freedom of the parties in some aspects of the family rights (Cl. 41 of the Guide).

For all of the foregoing reasons, specialists conclude that in these cases, mediation should be controlled by the court and finalised by a judicial act.[53]

VIII. Legal Assistance

Adequate legal support and compensation for associated expenses are key issues arising from the existing differences in national legislation. Under Part 1 Article 48 of the Constitution of the RF, everyone, including Russian citizens, foreign citizens and people without citizenship, is entitled to receive expert legal advice. The conditions and procedure for the allocation of legal assistance are codified in the Federal Law dated 31 May 2002 n. 63- FZ “On the Legal Profession and the Practice of Law in the Russian Federation”.[54] This law defines *inter alia* the possibility of legal support provided by foreign lawyers, which is especially important for foreign applicants who petition Russian courts with legal claims to return a child to his/her habitual residence. In accordance with Cl. 5 and 6 Article 2 of the above-mentioned law, foreign lawyers may, if registered with the Ministry of Justice of the Russian Federation in a special registry, provide legal services on the territory of the Russian Federation regarding issues foreign law.

It should be noted that Russia has made use of the possibility envisaged at Article 26 of the Convention, and in accordance with Article 42 of the Convention, it does not consider itself obliged to pay for the lawyers’ costs besides those that may be reimbursed by its system of legal aid and advice. The Federal Law dated 21 November 2011 N 324-FZ “On Free Legal Assistance in the Russian Federation” does not provide clarification as to how lawyers’ costs may be reimbursed in civil cases regarding international child abduction. In addition, the law only guarantees the right of free legal assistance to Russian citizens and contains a reservation that free legal assistance may only be provided to foreign citizens and people without citizenship in cases envisaged by the federal laws and international treaties signed by the Russian Federation (Art. 2). The 1993 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases and a number of bilateral treaties on legal assistance in civil cases are among those international treaties signed by the Russian Federation; however, none contain special provisions on legal assistance.

[53] A. SUKIYAJNEN, The Mediation in the International Family Conflicts: the Russian Aspect, *The Family and Real Estate Law,* 2014, n. 2, p. 27-30.

[54] Official Gazette of the RF, 2002, n. 23, Art. 2102.

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Practice does not contradict the constitutional norm of free legal assistance in cases envisaged by the law (part 1 Art. 48 of the Constitution). However, this provision cannot automatically be extended to everyone, and only applies to situations envisaged by the law.

It should be noted that Article 2 of the Federal Law dated 21 November 2011, N 324-FZ "On Free Legal Assistance in the Russian Federation" does not prevent the constituent entities of the Russian Federation from adopting corresponding laws. However, this would not significantly change the current situation, because, as the analysis demonstrates, the existing regulatory acts[55] largely reproduce the provisions of the federal law, and provide a number of additional guarantees, but they do not extend them to foreign citizens for the category of cases in question.

In light of the above, we can conclude that regardless of the right to free legal assistance from a foreign lawyer, legal expenses will be incurred by the applicant in cases regarding civil aspects of international abduction since, in Russia, free legal assistance is only provided where this is envisaged by the law. Nevertheless, when the case is finished, the foreign court or administrative agencies will be entitled to impose necessary costs, for the services of Russian and/or foreign lawyers, on the party who removed or retained the child or hindered access to the child.

In a case on the civil aspects of international child abduction brought in Russia in accordance with the Convention, the Ministry of Education and Science of Russia (its territorial subdivisions) and the Central Authority of a foreign State Party to the Convention will be involved. The Russian lawyers involved should, in particular, find out the extent to which the foreign State believes it is responsible for its own lawyers' expenses; whether such expenses can be reimbursed by the foreign State's legal assistance system; and, if so, who is entitled to reimbursement and how it can be obtained.[56]

IX. Recognition and Enforcement of the Measures Adopted by Authorised Bodies

Since the implementation of international treaties is impossible without effective co-operation among participants, the focus of the 1996 Convention is on recognition and implementation of measures taken by States Parties' agencies. It is

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[55] See for example the Law of Saint Petersburg dated 11 October 2012, n. 474-80 "On a Free Legal Assistance in Saint Petersburg", *The Vestnik of the Legislative Assembly of Saint Petersburg* 2012, n. 31; The Law of the Ryazan Oblast dated 19 March 2013, n. 8-03, "On Regulation of Certain Relationship Involved in Rendering Free Legal Assistance", *The Ryazanskije Vedomosti*, 20 March 2013.

[56] Methodological Recommendations to Apply The Hague Conventions on the Private International and International Civil Process: Approved by the Expert Commission of the Council of the Federal Chamber of Lawyers on 14 July 2012, *The Vestnik of the Federal Chamber of Lawyers of the Russian Federation* 2012, n. 3.

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assumed that in pursuit of justice, States will limit their reservations to the 1996 Convention. There is a good reason why Article 17 of the 1980 Convention envisages that decisions on custody taken or entitled to recognition in the requested state do not provide grounds for refusing to return a child under the Convention. However, court or administrative agencies of the requested State may take into account the reasons for that decision in applying Convention. An analysis of Russian court practice demonstrates that Russian courts always take foreign court decisions on the child's upbringing and his/her residence with one of the parents into account. Thus, the court making a decision on the satisfaction of an application to return a child, took into consideration the decision of the Budyonovsky District Court. The court had rejected the application of the parent who subsequently removed the child based on the notion of the residence of an underage daughter. In accordance with the actual evidence established by the court, from the point of view of the little child's best interest, it was better for her to stay with her father.[57]

It should be noted that the 1996 Convention established a number of specific reasons to refuse recognition and enforcement of measures taken by administrative and court agencies of Contracting States. The provisions of Article 412 of the Civil Procedure Code of the RF set out these measures for all categories of civil cases. Under Article 23 of the Convention, recognition and enforcement may be denied if: such measures were taken by an authority whose jurisdiction was not based on any of the grounds envisaged in Chapter II of the Convention (*i.e.* it is not an authority whose jurisdiction covers the habitual residence of the child or the place of his/her location, or if the case is about the removal of child refugees and displaced children, *etc.*); if the measure, except for urgent cases, was taken in the course of a court or an administrative process, and, in violation of the fundamental principles of procedure of the requested state, the child was not given the chance to be heard; if the measure, except for the urgent cases, was taken in the course of a court or an administrative process, but a third interested party was not given the chance to be heard; if such recognition is obviously contrary to the public policy of the requested State, taking into consideration the best interests of the child; if such recognition is inconsistent with a later measure taken in the non-Contracting State of the child's habitual residence, and this later measure fulfils the requirements for recognition in the requested State; and, if the procedure regarding the child's placement into a foster family or an institution does not comply with Article 33 of the Convention.

X. Conclusions

The acceptance of a number of legislative initiatives have created conditions for implementing the provisions of international conventions signed to protect children

[57] Decision of the Central District Court of Khabarovsk in case <https://rospravosudie.com/court-centralnyj-rajonnyj-sud-g-xabarovska-xabarovskij-krajs/act-533187326>.

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against wrongful removal or retention. They have allowed Russian courts to fully carry out the obligations of the Russian Federation under the 1980 and 1996 Conventions. A specialised procedure has been created and solutions have been provided regarding access issues, as well as applications for the return of children wrongfully removed to the Russian Federation or retained in the Russian Federation. This specialised procedure envisages specific jurisdictional rules, reduced delays, appeals, and compulsory reporting procedures, *etc*.

Court practice proves that the courts are highly attentive to the investigation of all the significant circumstances of the case providing a comprehensive and objective survey of the evidence, and the decisions made by the courts demonstrate their ability to make a thorough analysis of the regulations envisaged in the international treaties which creates the conditions for the correct application of their provisions to ensure the protection of the best interests of the children. Besides terminological issues, a comparative analysis of the decisions taken after Russia's accession to the 1980 and 1996 Conventions demonstrates that a more serious barrier for the implementation of these Conventions on the territory of the Russian Federation has been the longtime failure by the US and a majority of the Western European countries to recognise this accession.

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NEWS FROM THE HAGUE

THE DRAFT JUDGMENTS CONVENTION AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

María Blanca Noodt Taquela[*]/ Verónica Ruiz Abou-Nigm[**]

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 449-474
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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B. Public Policy
X. Conclusion

I. Introduction

The "Judgments Project" refers to the work done, since 1992, by The Hague Conference on Private International Law (hereinafter, "The Hague Conference"), the international organisation for cross-border cooperation in civil and commercial matters. The Hague Conference has long pursued the ambitious goal of producing a potentially worldwide convention that could provide, on a much larger scale, the benefits of systematic recognition and enforcement of foreign judgments presently found in the European Union. Initially, the Hague Conference sought to develop a "double convention"[1] on international jurisdiction *and* the recognition and enforcement of foreign judgments. However, lack of consensus between the Hague Conference Members,[2] mostly on the appropriate approach to issues of jurisdiction, ultimately required the original project to be scaled down, and led to the conclusion of the Convention on Choice of Court Agreements of 30 June 2005.[3] In 2012, the Council on General Affairs and Policy of The Hague Conference decided to relaunch the work on the Judgments Project[4] and relatively soon, in this second attempt at the project,[5] the idea of a "double convention" was abandoned. The

[1] For the concept of single, double and mixed conventions see A. T. VON MEHREN, Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference?, 57 *Law & Contemporary Problems* 1994, 271; ID., 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*, vol 295, 2002, 9-432.

[2] The Hague Conference currently has 83 Members: 82 States and 1 Regional Economic Integration Organisation, the European Union. For an overview of the Membership evolution see https://www.hcch.net/en/states/hcch-members, last accessed on 28 March 2018.

[3] The Convention on Choice of Court Agreements adopted on June 30th 2005 entered into force on October 1st 2015 and at the time of writing Mexico, the European Union (except Denmark) and Singapore are parties to the Convention. Available on: https://www.hcch.net.

[4] Hague Conference on Private International Law, Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (17 to 20 April 2012); Conclusion and Recommendation No 16, and Conclusions and Recommendations of the Experts' Group on Possible Future Work on Cross-border Litigation in Civil and Commercial Matters, Work. Doc. No 2 of April 2012 for the attention of the Council on General Affairs and Policy of the Conference.

[5] Between 2012 and 2015, a Working Group was constituted. It met five times and completed its work on a proposed draft text in November 2015 (first phase). Afterwards, the Council decided to convene a Special Commission, where all the Members could be represented, and where international organisations and stakeholders could also participate as observers, to prepare a draft Convention (second phase). Four Special Commission meetings

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focus since then has been on the adoption of a convention on the recognition and enforcement of foreign judgments including jurisdictional filters.[6]

As recognised by the *co-Rapporteurs* in the Preliminary Explanatory Report, the relationship of the prospective new instrument with other international instruments "is one of the most difficult questions dealt with in the draft Convention."[7] Against this background, there is no need to emphasise the significance that compatibility or coordination clauses have in relation to the application of the prospective new Convention, bearing in mind that there are several international instruments with overlapping scopes of application in this field, along with the ever-increasing sophistication of the overall global legal landscape.

The principles and rules to be applied by the courts and juridical operators in relation to the interface between the draft Convention and other international instruments is provided for in Article 24 of the May 2018 draft Convention. On the other hand, the relationship between the draft Convention and national laws is provided for in Article 16. Drawing from the extensive research conducted by the authors in the context of the PILIM project,[8] and their participation in the Special Commission meetings as representatives of the American Association of Private International Law (ASADIP),[9] the authors in this contribution focus on the relationship of the prospective new convention with existing instruments in the field of recognition and enforcement of foreign judgments in Latin America.

First, this contribution analyses conceptually the necessary coordination of normative frameworks in private international law in this field. Secondly, the platform where that coordination takes place is examined, including reference to the general principles of international law codified in the Vienna Convention on the Law of Treaties. Furthermore, the concept of coordination/ compatibility clauses adhered to is explained and a taxonomy of coordination clauses is provided, before critically analysing the coordination provisions of the draft Convention. Against that frame of reference, the prospective "dialogue" of the draft Convention with the MERCOSUR legal landscape is subsequently outlined. Overall, this contribution argues that the maximum effectiveness principle,

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took place at The Hague in June 2016, February 2017, November 2017 and May 2018. The resulting draft Convention ('the May 2018 draft Convention') will be presented to the HCCH Council at its March 2019 meeting with a view to the adoption of the Convention at a Diplomatic Conference in mid 2019.

[6] Jurisdiction filters are provided for in article 5 of the Draft Convention under the heading of "Basis for Recognition and Enforcement".

[7] See G. SAUMIER/ F. GARCIMARTIN, Judgments Convention: Revised Preliminary Explanatory Report, Prel. Doc. No. 10 of May 2018, para 373. Note that this preliminary document was prepared based on the November 2017 draft Convention; nonetheless, the relevant provisions analysed in this contribution, i.e. arts. 24 (in the May 2018 draft) and 16 remain with the same wording as in the previous draft. A further revised version of the preliminary explanatory report is expected for December 2018.

[8] See further http://www.pilim.law.ed.ac.uk. See also V. RUIZ ABOU-NIGM/ M.B. NOODT TAQUELA, *Diversity and Integration in Private International Law* (EUP forthcoming).

[9] The authors have represented the American Association of Private International Law (ASADIP) at the last three meetings of the Special Commission.

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currently not explicit in the text of the draft Convention, if clearly provided for could facilitate the day-to-day role of judges and courts in applying the provisions of the convention against a sophisticated network of international and regional instruments on international judicial co-operation. Ultimately, a specific means of including such a principle in the new prospective instrument is suggested.

II. "The Dialogue of the Sources"[10]

The prospective new instrument is being designed with the potential to be adopted globally. Nevertheless, instruments of this kind are by definition "inchoate and selective".[11] Coordination between international instruments, and between them and national law in this field, is undoubtedly crucial, as the potential conflict between different and overlapping instruments is a perennial feature of private international law more generally, and of special importance in the field of recognition and enforcement of foreign judgments. As explained in the Preliminary Explanatory Report,[12] the conflict between treaties arises only if there is incompatibility between two treaties that are applicable in the requested court, *i.e.* the application of the two treaties must lead to different results in a concrete situation.[13] Where there is no incompatibility, both treaties can be applied.

Examples of coordination provisions to pre-empt and to solve these potential conflicts appear in many international treaties adopted under the auspices of The Hague Conference,[14] as well as many other international instruments. These "coordination clauses" or "compatibility clauses" – both expressions are used

[10] The expression was coined by Erik JAYME in "Identité culturelle et intégration: Le droit international privé postmoderne", *Recueil des cours*, Vol. 251, 1995, 9 *et seq*., paras. 60 and 259.

[11] See the long list of matters excluded from the scope of application in art. 2 of the draft Convention. See further D. FRENCH/ V. RUIZ ABOU-NIGM, Jurisdiction: Betwixt Unilateralism and Global Coordination, in V. RUIZ ABOU-NIGM *et al.*, *Linkages and Boundaries in Private and Public International Law*, Hart Publishing, 2018, 75-104.

[12] G. SAUMIER/ F. GARCIMARTIN, Judgments Convention: Revised Preliminary Explanatory Report, Prel. Doc. No. 10 of May 2018, para 374. An explanation on the same lines is also provided in T. HARTLEY/ M. DOGAUCHI, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, Permanent Bureau of The Hague Conference, 2013.

[13] HARTLEY/ DOGAUCHI (note 12), 849, para 267.

[14] On compatibility clauses in HCCH conventions more generally see P. VOLKEN, Conflicts between Private International Law Treaties, in W.P. HEERE (ed), *International Law and the Hague's 75th Anniversary*, The Hague, TMC Asser Press, 1999, 149 and S. ÁLVAREZ GONZÁLEZ, Cláusulas de compatibilidad en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado, XLV *Revista Española de Derecho Internacional* 1993, 1, 39.

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indistinctively throughout this contribution – provide the setting for the "dialogue of the sources" as theorised in the well-known work of Erik Jayme.[15]

Jayme's reference to a "dialogue" points to the reciprocal influences between the different sources, enabling the application of several sources at the same time, concurrently or alternatively; authorizing the choice of the parties between instruments; or even providing for an opt-out mechanism in favor of an alternative, more suitable, solution.[16] For Jayme there are two main ways to resolve the possible conflicts generated by postmodern pluralism: the first is to give prominence to one source, discarding the other. That is, granting a certain hierarchy amongst them; the second involves seeking the co-ordination of sources.

The latter methodology, *i.e.* the "dialogue of the sources", allows for different normative ensembles and accommodation. Since this expression was coined over twenty years ago, much more sophistication in compatibility clauses has been introduced into modern international treaties and other instruments with international scopes of application, to allow further interaction between potentially overlapping normative layers. Nevertheless, the theory of the dialogue of the sources as a methodology of normative accommodation has been considered part of a "new general theory of law",[17] offering flexible mechanisms allowing an open interpretation of international treaties. Its role in facilitating the application of the most favourable rule to weaker parties, or the most favourable rule to enable international judicial cooperation, is recognised by leading scholarship.[18]

In the case of several international treaties, the general framework within which this normative accommodation takes place is provided for in the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention sets the international law parameters within which "coordination" or "compatibility" clauses included in international treaties can operate.[19]

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[15] E. JAYME, (note 10), paras 9 *et seq.*, 60 and 259.

[16] See, C. LIMA MARQUES, Procédure civile internationale et MERCOSUR: pour un dialogue des règles universelles et régionales, *Uniform Law Review* 2003-1/2, 465 *et seq.*, 468.

[17] C. LIMA MARQUES, O "Diálogo das Fontes" como método da nova teoria geral do direito: um tributo a Erik Jayme, in C. LIMA MARQUES (coord.), *Diálogo das Fontes. Do conflito à coordenação de normas do direito brasileiro*, São Paulo, Editora Revista Dos Tribunais, 2012, 17, 21 and 28.

[18] See further M.B. NOODT TAQUELA, Applying the most favourable treaty or domestic rules to facilitate private international law co-operation, *Recueil des Cours*, vol. 377, 2016, 121-318.

[19] "Coordination clause" is the term used by A. MALAN, *La concurrence des conventions d'unification des règles de conflit de lois*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, PUAM, 2002.

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III. The Vienna Convention on the Law of Treaties

> Article 30 - Application of successive treaties relating to the same subject-matter
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

The Vienna Convention provides the general international law framework for the interpretation and application of international treaties irrespective of their substantive content.[20] This Convention codifies the outer limits of interaction with regard to successive treaties relating to the same subject matter. Indeed, article 30 is generally regarded as stating the rules of customary international law on the point;[21] hence its authority extends beyond the States parties to the Vienna Convention.

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[20] J. BASEDOW, Uniform Private Law Conventions and the Law of Treaties, (2006) *Uniform Law Review* 731, 736.

[21] See, *inter alia*, A. REMIRO BROTÓNS, *Derecho internacional*, València, Tirant lo Blanch, 2007, 598, para. 324, who cites the case of the International Court of Justice of 17 December 2002, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), at 645, para. 37. See further M.G. MONROY CABRA, Interpretación de los tratados internacionales, in *Liber Amicorum en homenaje al profesor Dr. Didier Opertti Badán*,

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The purpose of compatibility clauses is therefore to provide, in accordance with the provision of 30.2 of the Vienna Convention, that in certain scenarios the "dialogue" should take a specific direction.[22] The ever-increasing sophistication of these provisions[23] tries to anticipate the many possible clashes between different provisions in practice. In the following paragraphs, conceptual remarks as well as a taxonomy of compatibility clauses are offered with a view to deepening the understanding of the full range of possibilities when it comes to drafting these "coordinates". Moreover, provisions 30.3 and 30.4 of the Vienna Convention establish the priority of the *lex posterior* as a supplementary rule of last resource;[24] 30.3 applies only to the extent that the parties to both instruments are the same, and 30.4 reinforces the principle of *pacta sunt servanda* in this context, *i.e.* the general principle of international law that underlies the entire system of treaty-based relations between sovereign States.

IV. "Coordination Clauses" or "Compatibility Clauses"

As Noodt Taquela explains, "the simplest and most effective method to resolve conflicts between treaties is to prevent conflicts from happening. Compatibility rules are generally perceived as a way of avoiding conflicts between international treaties."[25] However, the interaction of sources is rarely that simple. And the many instances of interface, "dialogue" and coordination between sources demand craftsmanship to achieve the underlying objectives of the instruments under

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Montevideo, Fundación de Cultura Universitaria, 2005, 685 *et seq*., 694 and footnote 19; A. AUST, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007, 227 *et seq*; M.E. VILLIGER, The 1969 Vienna Convention on the Law of Treaties – 40 Years after, *Recueil des cours*, Vol. 344, 2010, 9 *et seq.* See also O. CORTEN, *Méthodologie du droit international public*, Brussels, Editions de l'Université de Bruxelles, 2009, 138.

[22] In the HARTLEY/ DOGAUCHI report (note 12) the visualisation used is that of signposting, hence the reference there to "give-way" rules. We prefer the "dialogue" visualisation, not only because of the theorisation provided by Erik Jayme and his disciples (see the work of Claudia Lima Marques on this point) but also because the interaction between the sources may well go beyond any expected paths.

[23] See *e.g.* art 26 of The Hague Conference 2005 Convention on Choice of Court Agreements.

[24] See further A. SCHULZ, *The Relationship between the Judgments Project and Other International Instruments*, HCCH, Preliminary Document No. 24 of December 2003, prepared for the Special Commission of December 2003 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, at 10, para. 24, available at: www.hcch.net.

[25] M.B. NOODT TAQUELA (note 18), para. 162, p. 208.

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consideration. A compatibility clause, according to Weckel,[26] is any provision by which the parties make explicit the content and scope of the obligations arising from the agreement with respect to other treaties already existing or that may be concluded in the future.

For the purposes of this analysis a broad notion of "coordination clause" or "compatibility clause" is adopted, *i.e.* encompassing clauses not limited to the relations between treaties, and not limited to instruments referring to the same subject but considering the broader interaction between an international treaty and the legal landscape where it is expected to make an impact. In fact, a substantial number of conflicts in the application of treaties are due to the overlap of certain provisions between treaties on different subjects. For example, a treaty on recognition of foreign judgments may conflict with a convention on human rights, or provisions contained in investment treaties, or provisions included in international judicial cooperation instruments in general. Terminologically, "compatibility clauses" is the most commonly used term to refer to these clauses, though Roucounas[27] and López Martín[28] prefer the expression "relation clauses" and yet others, such as Malan, use "coordination clauses".[29] In this instance, the latter as well as "compatibility clauses" are adopted to signal the broadest relational conception. Such provisions are standard in The Hague Conference conventions of this century.

Noodt Taquela offers elsewhere a comprehensive taxonomy of these kind of clauses[30]. It goes beyond the scope of this article to engage fully with that classification, but for the purposes of this analysis it is useful to take recourse to some of the categories therein identified, *i.e.* the most relevant in relation to the impact of the prospective new Judgments Convention *vis à vis* the legal landscape in MERCOSUR countries.

V. Different Types of Coordination Clauses

A. Maximum Effectiveness Clauses

These are clauses providing for the application of the most favourable regime; in other words, they are intended to prevent any interpretation of a treaty that restricts the advantages and preferences granted by national law or other international agreements. These clauses aim to ensure the priority application of the norm that is

[26] P. WECKEL, *La concurrence des traités internationaux*, thèse, Université Robert Schuman de Strasbourg, 1989, 334.

[27] E. ROUCOUNAS, Engagements parallèles et contradictoires, *Recueil des cours,* Vol. 206, 1987, 9 *et seq.*; 86 *et seq.*

[28] A.G. LÓPEZ MARTÍN, *Tratados sucesivos en conflicto: criterios de aplicación*, Madrid, Universidad Complutense, Servicio de publicaciones, 2002, 133 *et seq.*

[29] A. MALAN (note 19), 32.

[30] M.B. NOODT TAQUELA (note 18), para. 162, p. 208.

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most suitable to achieve the purpose of a treaty; hence, they are referred to as rules of maximum effectiveness.[31] Legal interpretation (or construction) becomes paramount in this context as the means to reconcile conflicting instruments.[32]

One of the most well-known examples of a maximum efficiency clause is that provided for in Article VII.1 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[33] allowing the application of other existing conventions between States parties, or even the domestic legislation of the country where the award is relied upon, to establish more favourable conditions for the recognition of the award.[34]

> Article VII
>
> 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

This kind of compatibility clause is common in international judicial cooperation treaties. In some of them, the most favourable rule appears explicitly.[35]

A recent international convention that contains very detailed provisions on the relationship with other international instruments is the 2005 Hague Convention on Choice of Court Agreements[36]. The maximum efficiency principle is reflected in Article 26 (4):

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[31] P. WECKEL (note 26), 361.

[32] *Ibid.*, 362.

[33] The New York Convention of 1958 has 159 States parties as of June 1st 2018. Information available at: http://www.uncitral.org.

[34] See further A.J. VAN DEN BERG, Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note, in A.J. VAN DEN BERG (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series 2009, Vol. 14, Dublin, Kluwer Law International, 2009, 649 *et seq.,* and its Annex I: "Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", 667 *et seq.*

[35] See, *e.g.* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded in The Hague, on 5 October 1961, art. 8: "When a treaty, convention or agreement between two or more Contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4."

[36] On the relationship between the prospective new instrument with the 2005 Choice of Court Agreements Convention see the Preliminary Explanatory Report (note 12), paras 380-386.

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> Article 26 Relationship with Other International Instruments […]
>
> (4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

Most Inter-American Conventions on international judicial cooperation of application in MERCOSUR countries include a compatibility clause whereby the principle of maximum effectiveness extends beyond the relationship with other international treaties and allows for the adoption of more favourable State practices, in formulas such as "This Convention shall not limit any provisions regarding […] in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favourable practices in this regard that may be followed by these States."[37]

However, it is interesting to note that the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[38] does not contain an explicit provision to that effect. Yet, the posterior 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments,[39] adopted in La Paz on 24 May 1984 within the framework of the CIDIP-III, does contain this kind of coordination clause:

> Article 8
>
> The rules contained in this Convention shall not limit any broader provisions contained in bilateral or multilateral conventions among the States Parties regarding jurisdiction in the international sphere or more favorable practices in regard to the extraterritorial validity of foreign judgments.

This provision is of particular relevance to our analysis, paving the way for the greatest possible impact of the prospective new Judgments Convention. This kind of provision is also included in the Amendment to the Protocol on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative

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[37] See, *e.g.* Inter-American Convention on Letters Rogatory, concluded in Panama, on 30 January 1975, within the framework of the CIDIP-I (Article 15); Inter-American Convention on the Taking of Evidence Abroad, also adopted in Panama, on 30 January 1975 (Article 14), and the Inter-American Convention on Execution of Preventive Measures, signed in Montevideo, on 8 May 1979, within the framework of the CIDIP-II (Article 18).

[38] Adopted in Montevideo on 8 May 1979 (CIDIP-II).

[39] Adopted in La Paz on 24 May 1984 (CIDIP-III).

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Matters, amongst MERCOSUR Member States, signed in Las Leñas, Argentina, on 27 June, 1992.[40]

> Article 35
>
> The present Agreement does not restrict provisions of conventions on the same subject matter concluded earlier by the States Parties as far as those provisions are more favourable to the cooperation.

The application of the most favourable treaty rule also appears in conventions related to other subjects, for example, human rights. This is the case of Article 29 *(b)* of the American Convention on Human Rights, adopted in San José, Costa Rica, on 22 November 1969.[41]

B. "Neutral" Provisions

Just as there are compatibility clauses expressly aimed at achieving maximum effectiveness of the instrument where they are embedded, there are other provisions that declare the co-existence of treaties in the absence of conflict between their provisions.[42] This kind of provisions use formulations such as "is compatible with", "it is not against", "is without prejudice to", "do not abrogate", "shall not derogate from", or "do not affect". Some commentators call them "neutral clauses",[43] others talk of "pure compatibility clauses" and Noodt Taquela refers to them in her previous work as "clauses not expressly oriented in the direction of maximum effectiveness".[44] The draft Convention as well as the 2005 Hague Convention on Choice of Court Agreement formulate this as a rule of interpretation.[45] There are examples of this kind of provision in the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in

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[40] The Amendment to the Protocol of Las Leñas was adopted by the Common Market Council (CMC) by Decision 7/02, but to date is not in force, since it requires the ratification of the four States parties to the Protocol and Uruguay has not ratified it as of June 1st 2018. Information available at: http://www.mercosur.int.

[41] The American Convention on Human Rights is in force in 23 of the 35 American States of the Organisation of American States; United States of America and Canada are not party, and two States denounced the Convention: Trinidad & Tobago and Venezuela. Information available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. Art. 29 *(b)* provides: "No provision of this Convention shall be interpreted as: […] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

[42] S. ÁLVAREZ GONZÁLEZ (note 14), 49.

[43] A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, 226 *et seq*.

[44] M.B. NOODT TAQUELA (note 18), 218, para. 187.

[45] See the Preliminary Explanatory Report (note 12), para 377.

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Civil or Commercial Matters (article 25),[46] as well as in the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (article 32).[47]

This kind of provision in a treaty requires following the general rules of interpretation and the supplementary means of interpretation stated in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.[48] The 2005 Hague Convention on Choice of Court Agreements provides in this regard:

> Article 26. Relationship with Other International Instruments
>
> This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

These provisions are typically not so neutral in practice, since they ultimately favour the realisation of the common objectives of the different international instruments that may be overlapping, hence, in a more nuanced manner they contribute to the realisation of the maximum efficiency principle.

C. Subordination Clauses

A different kind of coordination is provided by "subordination clauses", *i.e.* those giving priority to another previous or posterior instrument. This kind of provision is explicitly allowed for in Article 30 (2) of the 1969 Vienna Convention on the Law of Treaties. Examples of international treaties providing for this sort of subordination clause include the 1979 Inter-American Convention on the Extra-territorial Validity of Foreign Judgments and Arbitral Awards.[49] This international convention gives priority to the 1975 Inter-American Convention on International Commercial Arbitration,[50] priority based on the subject-specific character of the latter. As argued by Noodt Taquela, this kind of priority of the special convention over a general one when the subject matter is within the remit of the special convention is a general principle in the "conversation" between international instruments, even if there is not an express rule requiring the subordination of the general treaty to the special one.[51] Subordination clauses are the most common in international treaties.[52]

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[46] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed on 15 November 1965: 73 States parties as of June 1st 2018.

[47] Adopted on 18 March 1970: 61 States parties as of June 1st 2018.

[48] ÁLVAREZ GONZALEZ (note 14), p. 50; F. MAJOROS, *Les conventions internationales en matière de droit privé. Abrégé théorique et traité pratique,* Paris, Éditions A. Pedone, 1980, 66 *et seq*., 75 *et seq*.; D. BUREAU, Les conflits de conventions, *Travaux du Comité Français de Droit International Privé,* 1998-2000, 201 *et seq*., 208.

[49] Adopted in Montevideo on 8 May 1979 (CIDIP-II).

[50] Adopted in Panama on 30 January 1975 (CIDIP-I).

[51] M.B. NOODT TAQUELA (note 18), para 207.

[52] P. WECKEL (note 26), 343.

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The 2005 Hague Convention on Choice of Court Agreements includes a subordination clause in:

> Article 26. Relationship with Other International Instruments
>
> […]
>
> (3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
>
> […]
>
> (5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

D. Priority Clauses

There are coordination provisions that work in the exact opposite manner to that of subordination clauses; these are the clauses that declare the priority of the instrument where they are inserted. Several Inter-American Conventions that deal with matters regulated by similar Hague Conventions contain compatibility clauses that state the priority of the former, based on the principle of regionalism (over universalism). One example is Article 29 of the 1989 Inter-American Convention on Support Obligations:[53]

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[53] Adopted in Montevideo on 15 July 1989. The Inter-American Convention on Support Obligations has 13 States parties as of March 15, 2018: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru and Uruguay. Status available on the website of the Organization of American States: http://www.oas.org/juridico/english/sigs/b-54.html. We would like to mention that none of the States parties to the Inter-American Convention had signed either the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, which is in force in 24 States, nor the 1973 Hague Convention on the Law

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Article 29

Among Member States of the Organization of American States that are parties to this Convention and to the Hague Conventions of October 2, 1973 on the recognition and enforcement of decisions relating to maintenance obligations and on the law applicable to maintenance obligations, this Convention shall prevail. However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Conventions of October 2, 1973.

A particularly interesting example is that of Article 34 of the 1989 Inter-American Convention on the International Return of Children:[54]

Article 34

Among the Member States of the Organization of American States that are parties to this Convention and to the Hague Convention of October 25, 1980 on the civil aspects of international child abduction, this Convention shall prevail. However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention.[55]

Applicable to Maintenance Obligations, which is in force in 15 States, mostly from Europe. Status of both Hague Conventions on the website of the Hague Conference: http://www.hcch.net.

[54] Adopted in Montevideo, on 15 July 1989. The Inter-American Convention on the International Return of Children has 14 Contracting States: Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela. Status as to March 15, 2018, available at the CIDIP-IV website: http:// http:// www.oas.org/juridico/english/sigs/b-53.html. All the States parties to the Inter-American Convention – with the exception of Antigua and Barbuda – are also parties to both treaties.

[55] In spite of this subordination provision, court practice in some South-American States such as Argentina and Uruguay has given priority to the Hague Convention on Matters of Child Abduction over the Inter-American Convention. The Supreme Court of Argentina ruled in 2013 in a case with Mexico, – that is party to both treaties, as well as Argentina –, to return the child to Mexico applying the general criteria set up in relation to the Hague Convention where applicable to the case, despite Article 34 of the Inter-American Convention (*Corte Suprema de Justicia de la Nación* (Supreme Court of Argentina), 21 May 2013, *F., C. del C. el G., R. T. V.D.L. s/ reintegro de hijo,* available only in Spanish on the website of the Supreme Court of Justice of the Argentine Republic: http://www.csjn.gov.ar. In Uruguay, the judges and the Central Authority apply the Hague Convention and not the Inter-American Convention, in spite of the fact that there is no bilateral treaty in force that gives priority to the Hague Convention. Interestingly, this practice is not based on the provision of the treaties themselves, as the compatibility clauses of these instruments do not mention State practice, as other Inter-American Conventions do (E. Tellechea Bergman, Report, 16 May 2006).

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E. Complementarity Clauses

As explained by Noodt Taquela some treaties are constructed in such a way as to complement another treaty; if this is the case, a compatibility clause may indicate the complementary nature of the instrument.[56] In general, the complementary convention is called an Additional Protocol or another similar denomination that demonstrates the nature of the later convention.

F. Incompatibility/Denunciation Clauses

For the sake of the adoption of new international instruments, States parties may need to compromise in relation to the adoption of future treaties. It is also possible that a clause requires that the States parties denounce previous treaties incompatible with the present treaty or request the revision of incompatible existing agreements.[57]

G. Disconnection Clauses: Regionalism v Universalism

Finally, in so far as relevant for the analysis in this article, there are coordination clauses that particularly recognise the specificity of regional arrangements in certain circumstances. The 2005 Hague Convention on Choice of Court Agreements provides a disconnection clause in the last paragraph of Article 26:

> Article 26 [....]
>
> (6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention
>
> (a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
>
> (b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

The 1979 Inter-American Convention on Execution of Preventive Measures[58] also has a rule that governs its relationship with other regional integration treaties:

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[56] M.B. NOODT TAQUELA (note 18), para 266.

[57] P. WECKEL (note 26), 349 *et seq.*

[58] The Inter-American Convention on Execution of Preventive Measures is in force in 7 States: Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru and Uruguay; status as of March 15, 2018.

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> Article 17
>
> States Parties belonging to economic integration systems or having common borders may agree directly among themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

An example of the provisions mentioned in Article 17 is the one followed by three of the States parties of the Inter-American Convention – Argentina, Paraguay and Uruguay – when these States and Brazil signed the Protocol for Provisional Measures of Ouro Preto, in December 1994, in the frame of MERCOSUR.[59]

This outline has provided insight into the many possibilities and considerations that must be taken into account when considering prospectively the relation of the Judgments convention with other instruments in the MERCOSUR countries.

VI. The Developing Coordination Provisions in the Draft Convention?

The following paragraphs critically analyse the coordination provisions of the draft Convention and a new provision is suggested to furthering the overall objectives of the new prospective international instrument.

A. Possibility of Application of National Law (Article 16)

The possibility of applying national law when its rules are more favourable to the recognition or enforcement of foreign judgments is a principle generally accepted in treaties on international judicial cooperation, including recognition and enforcement of foreign arbitral awards.

The draft Convention currently provides:

> Article 16. Recognition or enforcement under national law
>
> Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

This provision is essential to understand the objective of the new prospective instrument, i.e. that the "draft Convention sets out a minimum standard for mutual recognition or enforcement of judgments, but States may go further than that standard."[60] It is based on the *favor recognitionis* principle.[61] Subject to the limits

[59] MERCOSUR developed after the Treaty of Asunción of 1991 establishing a common market between Argentina, Brazil, Uruguay and Paraguay.

[60] See the Preliminary Explanatory Report (note12), paras 14, 113 and 328.

[61] *Ibid*, para 328.

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imposed by the exclusive bases of jurisdiction provided for in article 6, the interaction between the draft Convention and national law can be customised for the benefit of the judgment-creditor.[62]

It is submitted that this provision could be better placed in Chapter III of the draft Convention dealing with "General Clauses" together with article 24 (relationship with other international instruments, analysed below), taking into consideration that both provisions relate to the interface of the prospective Convention with other layers of the legal framework with which the Convention is expected to interact.

B. "Dialogue of the Sources" (Article 24)

The underlying general principle is to favour compatibility:

> Article 24. Relationship with other international instruments
>
> 1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

The first indent of article 24 sets the general tone of the conversation and clearly establishes the general aim of the "dialogue" between the sources: that of compatibility. That is, where a provision in the Convention is reasonably capable of more than one meaning, the meaning that is most compatible with the other treaties should be preferred.[63]

This formulation has often been used in international instruments of this kind. The first indent of Article 26 of the 2005 Hague Convention on Choice of Court Agreements, as mentioned above, is the latest example.

C. Relation with Prior Instruments

> 24.2. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].

The wording of the second indent is awaiting further discussion. The square brackets show where there is no consensus yet[64]. With this provisional wording it is hard to see what this first "give-way" rule, in the terms of the Preliminary Explanatory Report, aims to achieve. As explained in the Hartley/Dogauchi report in the context of the 2005 Choice of Court Agreements Convention, the question of determining when one treaty is prior to another raises considerable difficulties

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[62] *Ibid*, para 329.

[63] *Ibid* (note 12), para 377. See also HARTLEY/ DOGAUCHI (note 12), 849, 270.

[64] See further the Report from the Chair of the Informal Working Group of 22 May 2018.

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in international law.[65] The general view is that the time of conclusion of the treaties in question is decisive and not their date of entry into force. Following the model of the 2005 Choice of Court Agreements Convention, this provision, however, provides a different "direction" indicating that the rule is applicable if the other treaty was *concluded* before the Convention *entered into force* for the State in question. Moreover, in the view of Hartley and Dogauchi, "if the other treaty complies with this rule, this rule will also apply to a new treaty that revises or replaces it, except to the extent that the revision or replacement creates new inconsistencies with the Convention".[66]

In its current version, with or without the wording in brackets, this "give-way" rule, rather than furthering understanding of the "dialogue" between the sources, adds unnecessary complexity to Article 24 as a whole, and it is submitted that a simpler, clearer, and more succinct formulation, may better serve the interest of a private international law instrument of this kind.

D. Relation with Posterior Instruments

> 24.3. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

This second "give-way" rule is narrower than the previous one,[67] i.e. the posterior treaty may prevail only if it deals with the recognition and enforcement of judgments. Although the rules provided for in article 24.2 and 24.3 in the draft Convention seem to establish neutral coordination clauses in relation to prior or posterior instruments, it is submitted that a systemic interpretation of these rules could allow for the realisation of the maximum effectiveness principle, if necessary. The Preliminary Explanatory Report seems to confirm that in the commentary of article 24, "the procedure under one instrument could be more favourable than the procedure under the other instrument. The applicant seeking recognition and enforcement would then be entitled to use the more favourable process for recognition and enforcement."[68] To this effect, the Vienna Convention on the Law of Treaties enables the utilisation of the principle of "systemic integration",[69] establishing that international obligations are interpreted by

[65] HARTLEY/ DOGAUCHI (note 12), 853, 283.

[66] *Ibid*.

[67] See Preliminary Explanatory Report (note 12) para 387.

[68] *Ibid*, para 385. Note that the Preliminary Explanatory Report further recognises in this context that it might be necessary to further clarify this point.

[69] See Vienna Convention on the Law of Treaties, article 31 (3)(c).

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reference to their normative environment, that is, the "system" in the words of Koskenniemi.[70]

Notwithstanding the above, it is submitted that a simpler[71] and clearer provision could provide for that objective explicitly, and in this way contribute to attaining the overall goals of the Convention with much greater efficiency[72].

E. Disconnection Clause (with EU Regulations)

> 24.4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

F. Priorities Enabled by Declarations?

> 24.[5. A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

Finally, there is no agreement to date regarding the inclusion of a further fifth indent allowing Contracting States to accord priority also to other international instruments by means of a declaration at the time of the adoption of the Convention. In general, declarations of this kind are less than ideal, as they detract from the harmonised level playing field in terms of minimum standards that the draft Convention aims to achieve.

Yet, as is well known, many of the provisions of a multilateral instrument of this sort are the result of compromises necessary to achieve consensus as to the desirability of the international instrument as a whole. Article 26 of the Choice of Court Agreements Convention, on which various of the provisions of Article 24

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[70] M. KOSKENNIEMI, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 25, para. 37. He refers to CH. ROUSSEAU's words related to the duties of a judge in his classical article on Treaty Conflict published in 1932 (De la compatibilité des normes juridiques contradictoires dans l'ordre international, *Revue générale de droit international public,* Vol. 39 (1932), 133,153): "lorsqu'il est en présence de deux accords de volontés divergentes, il doit être tout naturellement porté à rechercher leur coordination plutôt qu'à consacrer leur antagonisme".

[71] It cannot be overemphasized how important simplicity is for the final wording of these provisions. Simplicity and accessibility of the rule are of the essence for provisions dealing with issues that are inherently and technically complex. The instrument should be able to facilitate normative accommodation and effectiveness of the respective instruments rather than adding an extra layer of difficulty.

[72] Efficiency is key to a successful system for the recognition and enforcement of foreign judgments in civil and commercial matters (see Preliminary Explanatory report (note 12) para 14).

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have been modeled, provide the possibility of "give-way" rules by means of a declaration in relation to specific matters. Nevertheless, from a purely technical perspective the proposed fifth indent, still in square brackets, should rather be avoided.

VII. What is Missing in the Draft Convention?

It is submitted that the explicit inclusion of a provision indicating the maximum efficiency principle explained above would be a welcome addition. The maximum effectiveness principle is paramount in relation to the recognition and enforcement of foreign judgments. Ferenc Majoros defined the principle of maximum effectiveness as the rule of conflict of conventions according to which between two or more conflicting provisions, taking into account the matters governed, the one that allows for the most effective way to meet the objectives of the conventions in conflict should prevail.[73] Majoros explained that one of the subject matters which must follow the principle of maximum effectiveness is recognition of foreign judgments, because it is fair and logical that once a judgment seeks recognition and/or enforcement in a country that is bound to the terms of several treaties in relation to the country of origin of the judgment, recognition and enforcement should follow the most favourable conditions and the simplest and most efficient procedures.[74]

This issue has been analysed in relation to the recognition of foreign arbitral awards, applying the following provision of the New York Convention of 1958.

> "Article VII. 1:
>
> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

According to Fouchard, Gaillard and Goldman, this provision allows for the concurrent application of provisions included in different normative instruments, provided that the ensemble between them is most favourable to the recognition of the foreign arbitral award.[75]

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[73] B. Dutoit/ F. Majoros, Le lacis des conflits de conventions en droit privé et leurs solutions possibles, *Rev. crit. dr. int. pr.* 1984, 565 *et seq*. and 577 *et seq*.

[74] *Ibid.*, 565 *et seq*. and 577 *et seq*.

[75] E. Gaillard/ J. Savage (eds.), *Fouchard, Gaillard B. Goldman, On International Commercial Arbitration,* The Hague, Kluwer Law, 1999, para 271, 137; see also J.D.M. Lew/ L.A. Mistelis/ S.M. Kröll, *Comparative International Commercial Arbitration*, Kluwer, 2003, Chapter 26, 697, para. 34.

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Normative accommodation processes, *i.e.*, the "dialogue of the sources", require adaptability and are, by definition, dynamic and at times open-ended. Hence, general principles of interpretation, such as the first paragraph of Article 24 of the draft Convention, go much further in facilitating this "dialogue" than the "give-way" rules as presently drafted. Along the same lines, a more explicit enunciation of the maximum effectiveness principle can further the objectives of international treaties in the field of recognition and enforcement considered as a whole, *i.e.* to favour the freer circulation of judgments across national frontiers. In other words, to accommodate the discrepancies of rule-based systems, the craftsmanship of the judiciary is necessary, and their role is facilitated by clear guidelines that can be given by means of principles that emphasise the treaty's overall objectives. Priority rules may not be the most appropriate to accommodate overlapping and inconsistent rules; the malleability of principles may prove more appropriate to soften the edges, to fill the gaps, and ultimately to realise the objectives of international recognition and enforcement as much as possible in the required scenario. [76]

It is submitted, therefore, that two core guiding principles can go a long way in facilitating normative accommodation in this field: "systemic coordination" and "maximum effectiveness", being possible to reduce these two to one formula: *in pursuit of systemic coordination towards maximum effectiveness of the foreign judgment in the country of recognition and enforcement.*

Furthermore, it is suggested that the *favor recognitionis* principle could be expressly stated in the context of the relationship with other Conventions on the following lines:

> This Convention shall not affect the application by a Contracting State of a treaty or other international instrument, whether concluded before or after this Convention, that provides for more favourable rules for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.

In any case, it is understood that the facilitation of the recognition and enforcement of foreign judgments favors the judgment-creditor, yet there is a risk of affecting the interests of the judgment-debtor if due process is not respected.[77] Hence, the principles of interpretation in favour of compatibility and maximum effectiveness should always be coupled with the necessary safeguards to guarantee the rights of access to justice and to a fair trial.

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[76] Ruiz Abou-Nigm discusses the suitability of general principles in the field of jurisdiction to achieve desired results in terms of "justice" and "systemic coherence" elsewhere (See D. French/ V. Ruiz Abou-Nigm (note 11), 75-104).

[77] M.B. Noodt Taquela (note 18), 302, para. 363.

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VIII. Prospective "Dialogue" of the Draft Convention with the MERCOSUR Legal Landscape

There are several multilateral treaties on recognition and enforcement of foreign judgments in force in the MERCOSUR States and in other Latin-American countries. The 1992 Protocol of Las Leñas on Co-operation and Jurisdictional Assistance in Civil, Commercial and Administrative Matters was adopted within the framework of MERCOSUR and it is in force between Argentina, Brazil, Paraguay and Uruguay.[78] The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[79] is in force in ten Latin-American countries, included the four original States of the MERCOSUR Agreement. In addition, the 1940 Montevideo Treaty on International Civil Procedure Law, which also governs recognition and enforcement of foreign judgments, applies between Argentina, Paraguay and Uruguay. The latter provides, in addition to the traditional conflicts rule to govern the procedure, a material provision that provides for a more favourable procedure for recognition and enforcement of foreign judgments (article 7).[80]

In relation to the interaction between these overlapping international treaties, the established practice followed by Uruguayan courts allows the judgment creditor to seek enforcement under the Inter-American Convention or the Las Leñas Protocol provisions, combining them with the most favourable procedure provided for in the 1940 Montevideo Treaty. Uruguayan scholars and courts have established the "survival" of Article 7 of the 1940 Montevideo Treaty that provides for a specific (more expeditious) proceeding for enforcement before local judges or lower tribunals. In Uruguay, that practice is used instead of taking recourse to the jurisdiction of the Supreme Court, the otherwise designated tribunal for seeking recognition and enforcement of foreign judgments[81]. This interesting

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[78] S.J. BATTELLO, Reconocimiento de sentencias extranjeras en el derecho brasileño: los cambios producidos por el MERCOSUR, *Revista del Derecho del Comercio Internacional Temas y Actualidades DeCITA,* 04.2005, 496 *et seq*.; M.B. NOODT TAQUELA/ G. ARGERICH, Dimensiones institucional y convencional de los sistemas de reconocimiento de los Estados mercosureños, in D.P. FERNÁNDEZ ARROYO (coord.), *Derecho Internacional Privado de los Estados del Mercosur*, Buenos Aires, Zavalía, 2003, paras. 406 *et seq*, 441 *et seq*.

[79] Signed in Montevideo on 8 May 1979 (CIDIP-II).

[80] Article 7 provides: "*La ejecución de las sentencias y de los fallos arbitrales, así como la de las sentencias de tribunales internacionales, contempladas en el último inciso del art. 5, deberá pedirse a los jueces o tribunales competentes, los cuales, con audiencia del Ministerio Público, y previa comprobación que aquéllos se ajustan a lo dispuesto en dicho artículo, ordenarán su cumplimiento por la vía que corresponda, de acuerdo con lo que a ese respecto disponga la ley de procedimiento local.*" […]

[81] As provided for in the relevant provisions of the national law in Uruguay, that is, the Uruguayan General Code of Procedure of 1988 (Ley No. 15.982/1988), article 541. The text with amendments is available – only in Spanish – on the website of the Uruguayan Parliament: http//www.parlamento.gub.uy/htmlstat/pl/codigos/EstudiosLegislativos/CodigoGeneraldeProceso2014-03.pdf.

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normative accommodation gives the chance to request recognition of judgments rendered in Argentina or Paraguay, both States parties to the 1940 Montevideo Treaty, directly in the lower courts.[82]

The possibility of having recourse to this more favourable rule and interpreting the interface of overlapping international treaties as compatible, with a view to further more efficient enforceability, should not be affected by the new prospective Judgments Convention. The legal basis for this interpretation in favor of compatibility is aligned with the principle provided for in article 24.1 of the draft Convention as already discussed above. In fact, the draft Convention states that the procedure for recognition and enforcement of the foreign judgment is governed by the law of the requested State unless the Convention provides otherwise.[83] Hence, there is no reason why the specific procedure for enforcement before local judges or lower tribunals in Uruguay provided for by article 7 of the 1940 Montevideo Treaty should not continue to "survive".

Another example of the coordination of different sources on the lines of the interpretation provision provided for in article 24.1 of the draft Convention is a decision rendered by the Uruguayan courts when the Brazilian Court of Passo Fundo*,* Rio Grande do Sul, requested provisional measures in relation to property located in Uruguay. The Uruguayan court of first instance granted the attachment of property (the provisional measure) but denied the final enforcement of the foreign judgment, on the grounds that the requirements for recognition and enforcement of foreign judgments had not been completely fulfilled. The Uruguayan Court of Appeal confirmed the decision based on the joint application to the case of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, the 1992 Protocol of Las Leñas, and the bilateral treaty between Brazil and Uruguay on Judicial Co-operation in Civil, Commercial, Labour and Administrative Matters, signed in Montevideo on 28 December 1992, as well as the General Code on Procedure of Uruguay.[84]

IX. Operating in Realistic Contexts

Practitioners claim that for private international law to play a meaningful role in the resolution of modern transnational disputes, it must "stop worrying about mechanical methods and grammatical texts and rather begin operating in realistic contexts."[85]

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[82] See E. Vescovi, *Derecho Procesal Civil Internacional. Uruguay, el Mercosur y América*, Montevideo, Ediciones Idea, 2000, 181.

[83] Art 14 Draft Convention.

[84] *Tribunal de Apelaciones en lo Civil de Segundo Turno* (Uruguay), 19 April 2006, No. 9999-3-2004. See further M.B. Noodt Taquela (note 18), 205-206, para. 159.

[85] C.T. Kotuby Jr, General Principles of Law, International Due Process and the Modern Role of Private International Law, 23 *Duke Journal of Comparative and International Law* 2013, 411 at 412.

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From this more practical perspective, there are undoubtedly several other issues that would affect the impact of the prospective new convention. This contribution is mainly focused on the interaction with other instruments, but this is one aspect, and by no means the only important one considering the eventual impact of the future convention. For the sake of providing a broader picture, the analysis that follows very briefly addresses two additional issues, one procedural, and one substantive: both must be regarded as central to an impact assessment of the future convention. These are, first, the requirement or not of legalisation; and second, the dramatic importance of the extent of the public policy exception as a ground for refusal of recognition and enforcement of foreign judgments. The legal landscape of the MERCOSUR countries offers interesting angles in relation to both these issues.

A. Legalisation

Legalisation describes the procedures by which the signature and the seal on a public document are certified as authentic by a series of public officials along a "chain", to a point where the ultimate authentication is readily recognised by an official of the State of destination and can be given legal effect there. This official is the Consul of the State of destination accredited to the State of origin who is ideally situated to facilitate this process.[86] Some States require a further authentication by the Foreign Ministry of State of destination, to verify the signature of the Consul.

Abolishment of the requisite of legalisation was contemplated under a previous draft (Draft Convention of February 2017),[87] but this proposal was abandoned due to the opposition of several Members to this procedural simplification during the November 2017 meeting of the Special Commission. Hence, the draft Convention of May 2018 does not provide for an exemption in relation to the general requirement of legalisation. However, looking at the interface of the draft Convention with the legal landscape in the MERCOSUR countries, the exemption from legalisation provided for in many regional and bilateral instruments of the latter may apply under the principle of the most favourable rule. Exemption from legalisation is provided for in the 1992 Las Leñas Protocol: under article 26 of the Protocol, the documents transmitted through Central Authorities are exempt from authentication or similar formality.[88]

[86] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Permanent Bureau, *A Handbook on the Practical Operation of the Apostille Convention*, 2013.

[87] The February 2017 draft included article 19, in the following terms: "All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille". This provision is no longer part of the draft Convention.

[88] Las Leñas Protocol is in force in the four original States of the MERCOSUR: Argentina, Brazil, Paraguay and Uruguay. The text of the Protocol in Portuguese and Spanish, as well as its status, is available on the MERCOSUR website: http://www.mercosur.int.

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B. Public Policy

The draft Convention mentions public policy as a ground for refusal of recognition or enforcement under article 7.1(c)

> Article 7. Refusal of recognition or enforcement
>
> 1. Recognition or enforcement may be refused if […]– (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State.

The provision reflects the exceptional and narrow concept of public policy, including procedural infringements of due process. This narrow concept of public policy is in line with the established concept of "international public policy" as defined in the Uruguayan Declaration to the 1979 Inter-American Convention on General Rules of Private International Law[89] as "an exceptional authorisation to the various States Parties to declare in a non-discretionary and well-founded manner" whenever the foreign judgment "manifestly offend the standards and principles essential to the international public order on which each individual State bases its legal individuality".[90]

It is regrettable that the draft Convention provision includes *in fine* "situations involving infringements of security or sovereignty of that State". It is submitted that this wording unnecessarily broadens the concept of the public policy exception, contrary to the overall Convention's objectives. This wording was between brackets in the preliminary draft of the working group and also in the draft Convention of February 2017, but the brackets were deleted during the third meeting of the Special Commission.

X. Conclusions

This contribution reflects on the latest draft of The Hague Conference Judgments Convention, that of May 2018. The Convention is envisaged as a mechanism providing for the free circulation of judgments globally. The greater or lesser success of this prospective new Convention does not depend only on the intrinsic technical and political value of the new international instrument itself. Of great importance is how the prospective instrument will fit into any given legal

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[89] 1979 Inter-American Convention on General Rules of Private International Law (CIDIP-II).

[90] Uruguay Declaration to the Inter-American Convention on General Rules of Private International Law of 1979. Available on: www.oas.org/juridico/english/sigs/b-45.html. See generally, C. Fresnedo de Aguirre, Public Policy: Common Principles in the American States, *Recueil des Cours,* vol. 379, 2016, 73.

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landscape in order to provide maximum efficiency when it comes to the recognition of foreign judgments in the jurisdiction where recognition and/or enforcement is sought.

This analysis has sought to provide an assessment of the coordination provisions in the draft Convention. "Coordination clauses" or "compatibility clauses" are the simplest and most effective method to resolve conflicts between treaties. This contribution adopted the broadest conception of this notion, encompassing clauses not limited to the relations between treaties, and not limited to instruments referring to the same subject, but considering the broader interaction between an international treaty and the legal landscape where it is expected to make an impact. Among the different types of coordination clauses, the "maximum effectiveness clauses" and the so-called "neutral clauses" – not so neutral in practice – are of great importance in the analysis of the draft Convention. It is submitted that a systemic interpretation of these rules may lead to the application of the maximum effectiveness principle examined in this contribution, but that it would be more conducive to achieving the overall effects of the Convention to adopt a simpler and clearer provision to that effect in article 24, as suggested above[91], and explicitly provide for the principle of maximum effectiveness.

The new prospective instrument is sought as a minimum basis to allow for the recognition and enforcement of judgments between the Contracting Parties in line with instruments of this kind in analogous fields, such as the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, as well as the 2005 Hague Convention on Choice of Courts Agreements. Therefore, a clearer wording for article 24 could enhance the understanding of its intended effects and possibly contribute to a more expeditious path to approval, adoption and subsequent ratification of the new prospective instrument, in time, facilitating the day-to-day role of judges and courts in applying the provisions of the Convention against an over-increasingly sophisticated network of international instruments on international judicial co-operation.

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[91] See *supra,* p. 465 *et seq*.

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THE EXCLUSION OF DEFAMATION AND PRIVACY FROM THE SCOPE OF THE HAGUE DRAFT CONVENTION ON JUDGMENTS

Cristina M. MARIOTTINI*

I. Introduction
II. Historical Background and Grounds for the Exclusion of Defamation and Privacy
III. The Constitutional Dimension of Privacy
IV. Conceptual Quandaries and the Characterisation of "Defamation" and "Privacy"
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V. Efforts of the Special Commission towards Facilitating a Common Understanding of the Term "Privacy"

I. Introduction

In November 2017, the Special Commission on the Judgments Project met for the third time to continue its work towards drawing up a draft Convention on the recognition and enforcement of judgments in civil or commercial matters.[1] Initiated in 1992 and resumed in 2011-2012 per the mandate of the Council on General Affairs and Policy of the Hague Conference on Private International Law,[2] the Judgments Project designates the consultations undertaken in the framework of the Hague Conference on Private International Law on the questions of jurisdiction and recognition and enforcement of judgments in cross-border litigation in civil and commercial matters. After initially aiming at a "mixed" Convention on both

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[1] For a critical analysis of the Judgments Project and the future Convention of the recognition and enforcement of judgments in civil or commercial matters see, in particular, A. BONOMI, Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments, this *Yearbook* 2015-2016, p. 1 *et seq*. An overview of the history and salient information regarding the Judgments Project is available on the website of the Hague Conference at <www.hcch.net> under "Judgments".

[2] See, in particular, the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference of 17-20 April 2012, paras 16-19.

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 475-486
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Printed in Germany

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the questions of jurisdiction and recognition and enforcement of judgments,[3] the scope of the Judgments Project was downsized to target prorogation of jurisdiction in cross-border commercial transactions: this led to the conclusion of the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention).[4] The future Convention, which is the object of the current discussions at the Special Commission, tackles the recognition and enforcement of judgments in civil or commercial matters and is designed to sit alongside and complement the 2005 Choice of Court Convention. A fourth and final Special Commission meeting was scheduled for May 2018. Following the conclusion of the Diplomatic Session scheduled for mid-2019, it is expected that consultations be resumed on matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens*/declining jurisdiction), with a view to preparing a Convention that would complement the one on recognition and enforcement.

In the course of its November 2017 meeting (the most recent, at the time this paper was submitted), the Special Commission reviewed and discussed the text of the February 2017 draft Convention.[5] It tackled in particular those matters that, during the previous discussions, were deemed to need further examination and were therefore included in the text in square brackets. Such discussion led to a revised text of the draft Convention ("the November 2017 draft Convention").[6] Among the outstanding matters that were the object of the consideration at the November 2017 meeting was the exclusion of defamation and privacy from the scope of the February 2017 draft Convention (Article 2(1)(k)). In the November 2017 draft Convention this exclusion has been retained and further articulated at Article 2(1)(k)-(l).

After contextualising the provision, by offering an overview of the relevant steps that led to the drafting of Article 2(1)(k)-(l) as it is currently worded (part II), and exploring the constitutional dimension of privacy (part III), as well as the varied understanding of privacy in the different jurisdictions (part IV), this paper

[3] See Proceedings of the Twentieth Session (2005), Tome II, "Judgments", Intersentia/Cambridge, 2013. In this context, two draft instruments were prepared, notably: *(i)* the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 with a Report by P. NYGH/ F. POCAR (Preliminary Document No. 11 of August 2000), at, respectively, 191 and 207, and *(ii)* the Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 – Interim text, *ibidem*, at 621.

[4] The 2005 Choice of Court Convention entered into force on 1 October 2015. It is in force between 30 Contracting Parties including a REIO, namely the European Union (except Denmark) (2015), Mexico (2015), and Singapore (2016). The Convention has also been signed by the United States of America (2009), Ukraine (2016), the People's Republic of China and Montenegro (2017). The status table of the Convention is available on the website of the Hague Conference at <www.hcch.net> under "Choice of Court Section". Claims for an invasion of privacy or for defamation do not fall within the scope of the 2005 Choice of Court Convention. See Explanatory Report by T. HARTLEY/ M. DOGAUCHI, available at <https://assets.hcch.net/upload/expl37final.pdf >, para. 65.

[5] Available on the website of the Hague Conference at <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission>.

[6] *Ibidem*.

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addresses the underlying rationale for the exclusion of defamation and privacy from the scope of the draft Convention and puts forth some explanations and remarks on the current drafting (part V).

II. Historical Background and Grounds for the Exclusion of Defamation and Privacy

The provision at Article 1 of the November 2017 draft Convention – which deals with the scope of the draft Convention and states that the draft Convention shall apply to the recognition and enforcement in a Contracting State of judgments "relating to civil or commercial matters" rendered by the court of another Contracting State – is complemented by the provision at Article 2 which excludes from scope, certain matters, regardless of their civil or commercial nature. Such exclusion is either grounded on the fact that these matters are governed by other instruments, which are often designed to tackle specific matters, or motivated by the fact that they are perceived as sensitive matters that, on this ground, hardly form the object of accord at the multilateral level.[7]

The exclusion, in particular, of defamation from the scope of the draft Convention falls within the latter category of exclusions and may be traced back to the preliminary work carried out by the Working Group on the Judgments Project (which met five times, from 2013 to 2015). In 2015 the Working Group produced a Proposed Draft Text, which provided at Article 2(k) that defamation be excluded from the scope of the draft Convention.[8] At the June 2016 meeting of the Special Commission, the exclusion was retained as such in the text of the 2016 preliminary draft Convention. In the course of the February 2017 meeting, the Special Commission elected to extend the category of excluded matters and tentatively include in the provision the terms "and privacy" in square brackets. Following the discussions held at the November 2017 Special Commission meeting, the provision was amended to retain defamation at Article 2(1)(k) and to introduce the exclusion of "privacy/unauthorised public disclosure of information relating to private life" at Article 2(1)(l) as a separate category of exclusions. This latter segment of the proposal, however, was retained in square brackets to indicate that further consultation was needed.

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[7] See Judgments Convention: Preliminary Explanatory Report, drafted by F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Preliminary Document No. 7 of October 2017 for the attention of the Special Commission of November 2017, at para. 32. See also the Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues, drawn up by the Permanent Bureau, Preliminary Document No. 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, para. 38.

[8] Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments, drawn up by the Working Group on the Judgments Project, Preliminary Document No. 1 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments.

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III. The Constitutional Dimension of Privacy

In establishing the constitutional dimension of privacy (which is meant to affect the chances of eligibility for recognition and enforcement of a foreign judgment as a result of the public policy exception), courts maintain a remarkably relevant role, in particular – but not only – in those legal systems where the Constitution does not expressly mandate protection for privacy rights.[9] Notably, courts have often performed the delicate task of both establishing a right to privacy, in the first place, then balancing this right with possible competing interests, such as the right to free speech and information.[10] By way of illustration, the French *Conseil Constitutionnel* recognised privacy as a corollary or a component of individual freedom when it held, in 1995, that that the violation of the right to respect for one's private life may constitute an attack on individual freedom[11] and, in 1999, that the freedom proclaimed by Article 2 of the 1789 Declaration of Rights implies the respect of private life.[12] In the same line, as seen more in detail *infra*, courts in Germany developed a "general personality right" and established a core area of private life that benefits from protection against any infringement and against any competing interest.[13] By the same token, in Italy – where the constitutional dimension of privacy law is inferred from Articles 2, 3, 13, and 15 of the Constitution – the *Corte di Cassazione* ruled that the so called "mobile hierarchy" principle shall apply when trying to strike the balance between competing rights with Constitutional rank.[14] The Court indicated that the prevailing right has to be

[9] Brazil, Croatia, and Spain are among the States that expressly provide for the protection of privacy in their Constitutions. For instance, Article 10 of the Spanish Constitution states that human dignity, the inviolable and inherent rights, and the free development of the personality are the foundation of political order and social peace. Similarly, Article 35 of the Croatian Constitution guarantees respect and legal protection to personal and family life, reputation, honour and dignity. Possibly influenced by the European continental approach and adopting a very similar terminology, Article 5, X of the Federal Constitution in Brazil recognises private life, intimacy, honour and image as fundamental rights.

[10] In this context, a valuable contribution towards a common understanding of privacy and its balancing against competing values is provided by the uniform interpretation given by the European Court of Human Rights of Article 8 of the European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) to which all Council of Europe Member States are parties. The Convention was opened for signature in Rome on 4 November 1950 and came into force in 1953. The text of the Convention, as amended by Protocols Nos 11 and 14 and supplemented by Protocols Nos 1, 4, 6, 7, 12 and 13 is available at <https://www.echr.coe.int/Documents/Convention_ENG.pdf>. At the European Union level, see also Article 7 of the Charter of Fundamental Rights of the European Union, OJ C 326/391, 26.10.2012.

[11] *Conseil constitutionnel*, judgment No. 94-352 DC of 18 January 1995.

[12] *Conseil constitutionnel*, judgment No. 99-416 DC of 23 July 1999.

[13] *Bundesgerichtshof*, 13, 334 = 7 NJW 1404 (1954).

[14] *Corte di Cassazione*, judgment No. 18279 of 5 August 2010.

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identified on a case-by-case basis, by compressing the countervailing right without limiting or compromising its intrinsic value.

In the United States, the Constitution does not include a provision mandating the protection of privacy. In this framework, the right to privacy and remedies for violations of privacy rights have always been balanced against, and often curtailed by, a competing interest in upholding the First Amendment right to free speech. The U.S. Supreme Court has given a constant reading of the First Amendment as providing restrictions to tort liability for the disclosure of information and invasion of privacy and has interpreted the First Amendment as requiring strict scrutiny, the most stringent standard of judicial review, for any constraints of information of public interest.[15]

With respect, notably, to the question of recognition and enforcement of foreign defamation judgments, for the purposes of defying the phenomenon of "libel tourism", the U.S. Congress unanimously passed in 2010 the first federal legislative act on the recognition and enforcement of foreign judgments in the United States: the "Securing the Protection of our Enduring and Established Constitutional Heritage Act (the SPEECH Act)".[16] This legislation reiterates and unifies the "public policy" effect of the First Amendment against the recognition and enforcement of foreign defamation judgments decided in accordance with a law that failed to afford the defendant a level of protection equivalent to the one warranted under the First Amendment to the U.S. Constitution. Notably, the SPEECH Act mandates that foreign defamation judgments may not be enforced in U.S. courts unless (i) the law applied in the foreign judgment offers at least as much protection as the First Amendment to the U.S. Constitution and § 230 of the Communications Act of 1934, or (ii) the defendant would have been found liable also under U.S. law.[17]

Overall, it appears that, in spite of the differences between legal systems, constitutional values play a significant role in the legal treatment of defamation and privacy. In particular, substantial layers of public law enter into the equation of private enforcement of defamation and privacy claims. The ascertainment of defamation and privacy violations entails a balancing of the right to one's private life with (often constitutionally mandated) countervailing rights and interests. The different balancing of such competing values renders the matters of defamation and privacy claims sensitive for national legislators and bears an impact not only

[15] See L.A. BYGRAVE, *Data Privacy Law: An International Perspective*, Oxford 2014, p. 108. See also F.H. CATE/ R. LITAN, Constitutional Issues in Information Privacy, *Michigan Telecommunications and Technology Law Review*, 2002, p. 40-57.

[16] 28 U.S.C. §§ 4101-4105.

[17] L.E. LITTLE, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States, this *Yearbook* 2012, p. 181 *et seq.*; C.M. MARIOTTINI, Freedom of Speech and Foreign Defamation Judgments: From New York Times v Sullivan via Ehrenfeld to the 2010 SPEECH Act, in B. HESS/ C.M. MARIOTTINI (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments*, Nomos-Ashgate 2015, p. 115-168; C.M. MARIOTTINI, The 2010 Speech Act and Judicial Comity in the Recognition and Enforcement of Foreign Defamation Judgments in the United States, *Anuario Español de Derecho Internacional Privado* 2017.

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on the applicable substantive law, but also – as a result of the public policy exception against recognition and enforcement (provided at Article 7(1)(c) the November draft Convention) – on the eligibility of a judgment on these matters for recognition and enforcement abroad.

Accordingly, the express exclusion from scope of both defamation and privacy contributes to avoiding a systematic recourse to the public policy exception for such matters, it enhances the chances of garnering consensus on the text of the draft Convention, and it facilitates a uniform and uncontroversial interpretation of the provision. While "the draft Convention is designed to provide an efficient system for the recognition and enforcement of foreign judgments in civil or commercial matters", the caveat that it shall "provide for the circulation of judgments *in circumstances that are largely uncontroversial*" suggests that constructive efforts aiming at reducing controversy should be pursued.[18]

IV. Conceptual Quandaries and the Characterisation of "Defamation" and "Privacy"

The proposal to include "privacy" in the scope of the exclusion under Article 2 is grounded – in addition to the constitutional dimension in the legal treatment of defamation and privacy and its impact on the circulation of judgments – on the awareness that the demarcation of the boundaries of the terms, "defamation" and "privacy" in different legal systems, is often unclear. This makes it impossible to unambiguously capture the meaning of such terms.[19]

Defamation and privacy claims differ in that defamation deals with the dissemination of information, which is tainted by a certain degree of falsehood, whereas a violation of privacy relates to the dissemination of truthful information. Both claims, however, address the allegedly unlawful dissemination of personal information. And while some legal systems construe defamation as part of privacy, others make of it a wholly separate and distinct claim. Consequently, limiting the exclusion from the scope of the draft Convention to defamation only, could have introduced controversy and uncertainties as to the scope of the exclusion itself. In fact, such limited exclusion would have entailed that courts from different legal systems potentially assign a different scope to the provision, to the detriment of the uniform interpretation and application of the provision and the Convention.

Generally speaking, the right to privacy assigns, to the individual, the ability to choose which aspects of his or her "private life" – broadly identifiable in one's image, home, body, property, thoughts, feelings, personal experiences, and

[18] Judgments Convention: Preliminary Explanatory Report (note 7), at 10 (emphasis added).

[19] See Note on the possible exclusion of privacy matters from the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention, prepared by C. NORTH, with the assistance of the Permanent Bureau, Preliminary Document No. 8 of November 2017 for the attention of the Special Commission of November 2017, at paras 1-3.

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identity – others may access, and to control the extent, fashion, and timing of the use of those parts that the individual has elected to disclose and share.[20] However, the scope warranted to the right to privacy and the underlying rationale of the right itself vary considerably.

Without any claim to be exhaustive, the complexity of the term "privacy" and the composite and nuanced understanding of the term in different legal systems may be concisely summarised with the observation (further elaborated below) that while in continental European countries the underlying rationale of privacy rights is, in broad terms, to safeguard individuals from intrusions carried out against their dignity (including defamation) and to preserve the right to free development of the personality, in the U.S. the understanding of privacy is oriented towards values of liberty, and especially liberty from the State.[21]

A. Privacy as an Expression of Dignity and Personhood

The "general right of personality", established and developed by courts as a means to guarantee the protection of human dignity and the right to free development of the personality, is at the core of the German understanding of the protection of privacy. In the *Marlene Dietrich* case, the *Bundesgerichtshof* (BGH) was particularly effective in portraying the idea that the "general right of personality" guarantees human worth and dignity. The Court in fact recalled that such right was recognised in the case law of the BGH since 1954 both as a basic right constitutionally guaranteed by Articles 1 and 2 of the Basic Law and as an "other right" protected in civil law under § 823(1) of the German Civil Code.[22] As the Court ruled, such provision guarantees the protection of human dignity and the right to free development of the personality.[23] Overall, according to the BGH the "general right of personality" encompasses the rights to one's image, name, reputation, and more broadly what in Germany is defined as the right to "informational self-determination", *i.e.* the right of the individual to having his or her dignity as a human being respected and to freely develop his or her individual personality and to control one's image before the eyes of others in society.

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[20] Y. ONN *et al.*, *Privacy in the Digital Environment*, The Haifa Center of Law & Technology 2005, p. 1-12.

[21] J.Q. WHITMAN, The Two Western Cultures of Privacy: Dignity versus Liberty, *Yale Law Journal* 2004; see also R. POST, Three Concepts of Privacy, *Georgetown Law Journal* 2001.

[22] This jurisprudence has been constantly and consistently upheld since *BGHZ* 13, 334, 338. With respect to the case law cited in this and the following part of this article, the author wishes to acknowledge the contribution of the national reporters of the ILA Committee on the Protection of Privacy in Private International and Procedural Law. Information about the Committee and its activity is available at <http://www.ila-hq.org> under "Committees".

[23] *Marlene Dietrich*, BGH 1 ZR 49/97 (1 December 1999). The Court is referring to BGHZ 13, 334 = 7 NJW 1404 (1954).

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The approach to privacy as an expression of personhood and dignity is not limited to Germany and, rather, it is shared by other continental European countries. For instance, in the *Dumas* case,[24] the *Cour d'appel de Paris* focused on the aspect of one's dignity as expression of privacy and control of one's image when it ruled that, even if a person tacitly consented to the publication of embarrassing photos, that person must retain the right to withdraw his or her consent.[25] Privacy must sometimes be allowed to outdo property, at least where a too revealing and eloquent image is involved. In the Court of Appeal's view, one's privacy is not a market commodity; rather, it is an expression of one's personhood: accordingly, any sale by a person who has momentarily forgone his or her dignity has to remain effectively voidable.

Although this ruling dates back to 1867, the rule of the revocable character of consent given to disclosure of private details or the publication of one's image has been reaffirmed since, both by courts[26] and doctrine,[27] and is still considered to be unanimously accepted today. Consent may be withdrawn, provided that the contracting party is indemnified. Similarly, in its interpretation of the fundamental rights to a private life, embedded in Article 18 of the Spanish Constitution, the *Tribunal Constitucional* (STC) underscored the relationship of such rights with personal dignity.[28]

B. Privacy as an Expression of Liberty from Government Intrusion

On the other hand – in accordance with the Fourth Amendment to the U.S. Constitution, which mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" – in the U.S. the right to privacy focuses on the protection of one's personal and bodily autonomy against unreasonable "searches and seizures" by governmental authorities and on the inviolability of one's home as expression of personal space. Accordingly, the U.S. understanding of privacy focuses on liberty from government intrusion rather than on dignity as expression of personhood and self-determination.[29]

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[24] See *Dumas c. Lifbert*, CA Paris, 25 May 1867, 13 *Annales de la Propriété Industrielle Artistique et Littéraire* (*A.P.I.A.L.*) 1867, 247.

[25] *Ibidem.*

[26] See *e.g.* CA Paris 8.7.1887, *A.P.I.A.L.* 1888, 287; TGI Seine (réf.) 2.11.1966, *JCP – La Semaine juridique* 1966, II, 14875; CA Paris 7.6.1988, *Dalloz* 1988, (inf. rap.) 224.

[27] For literature in this area, see the references provided in H. BEVERLEY-SMITH *et al., Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation*, Cambridge University Press 2005, at fn. 223. However, for a critique of this rule see *idem*, at 196 *et seq*.

[28] See *STC* 53/1985.

[29] See, e.g., *Katz v United States* 389 U.S. 347 (1967); *United States v Miller* 425 U.S. 435 (1976); *United States v Jones* 565 U.S. 400 (2012). Cf. J.Q. WHITMAN (note 21).

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In this context, freedom of the press, freedom of the market and the right to property bear a different impact on the right to one's privacy in private relationships (*i.e.*, also beyond the individual's relationship with the government) compared to the impact that they have in continental European countries. For instance, according to the "right of publicity" in the U.S., privacy in private relationships is construed as a commodity: as such, it is governed by the (state law) provisions on private property, rather than as a matter of inalienable personhood.[30]

The doctrine of the "right of publicity" is in fact intended to protect an individual's right to control the commercial use of his or her identity: it implies that the alienation by individuals of their image is valid regardless of how demeaning the subsequent use of that image may be. Consequently, in the U.S. – in stark contrast, for instance, with the jurisprudence of the *Cour d'appel de Paris* in the *Dumas* case[31] – a contract having, as its object, the commercial exploitation of the seller's identity may not be voided on the grounds that it negatively affects the seller's dignity since the underlying interest in the "right of publicity" is not an interest in one's self-respect and identity but, rather, an interest in one's property.

Furthermore, it flows from the boundaries of the Fourth Amendment that the demeanour that an individual chooses to adopt beyond the protected boundaries of his own private space (namely, his or her home) is generally not construed as benefitting from the protection accorded by the Fourth Amendment: for instance, consent for disseminating the portrait of one or more identifiable individuals taken in a public space is not necessary (provided that the image is not used for commercial purposes, in accordance with one's right to publicity) on the grounds that an individual that leaves the protected space of his or her own home implicitly accepts the fact that his or her image is not protected by the Fourth Amendment.[32]

To the contrary, in Germany the diffusion of an individual's picture taken in a public space requires consent, provided the individual does not qualify as a public figure.[33] Similarly, in Spain Article 7(5) of *Ley Organica* No 1/1982 proscribes, as an illegal intrusion into private life, the taking, reproducing or publishing of one's image in places or moments of private life or outside these, absent a public interest in the publication or consent.[34] The Supreme Court of Japan

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[30] On the right to publicity in general, see J.T. MCCARTHY, *The Rights of Publicity & Privacy*, 2nd ed., Thomson Reuters 2015. Cf., also, A. BECKERMAN-RODAU, Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law, *Fordham Intellectual Property, Media & Entertainment Law Journal* 2012, p. 132 *et seq*. See, further, *Carson v. Here's Johnny Portable Toilets, Inc*., 698 F.2d 831, 834-35 (6th Cir. 1983); *Finger v. Omni Publ'ns Int'l, Ltd*., 566 N.E.2d 141 (N.Y. 1990).

[31] See *Dumas c. Lifbert*, CA Paris, 25 May 1867, 13 *A.P.I.A.L.* 247 (1867).

[32] For instance, the use of a person's image in a work of art has been held to be a constitutionally protected form of free speech exempt from the proscription of Civil Rights Law § 51 in *Hoepker v. Kruger*, 200 F.Supp.2d 340 (S.D.N.Y. 2002); *Simeonov v. Tiegs*, 159 Misc 2d 54 (N.Y. Civ Ct 1993); *Nussenzweig v. DiCorcia,* 11 Misc.3d 1051 (N.Y. Misc. 2006).

[33] Sections 22-23 of the *Kunsturhebergesetz* (KUG), the German Art Copyright Act.

[34] *Ley Orgánica* No. 1 of 5 May 1982, *Boletín Oficial del Estado* (BOE) No. 115, of 5 May 1982, 12546.

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has interpreted Article XIII of the Constitution of Japan[35] along the very same lines.

C. The Progressive Shaping of Privacy Violation as a Tort in the United Kingdom

To add further variety to the treatment of privacy in the different legal systems, until recently in English law there was no general tort of violation of privacy.[36] Accordingly, protection of the interests falling within the continental scope of "privacy" had to be sought through a variety of channels and legal doctrines, such as the fictitious recourse to the equitable wrong of breach of confidence.[37] However, further to the coming into force in October 2000 of the Human Rights Act 1998, which incorporated into English law the European Convention on Human Rights, English courts had to tackle the problem of how to afford appropriate protection to "privacy rights" under Article 8 of the Convention in the absence of a common law tort of invasion of privacy.

To bridge the gap, courts initially developed and adapted the law of confidentiality (regardless of whether, in any given case, confidential information had actually been shared by the alleged victim with the alleged perpetrator) to protect one aspect of invasion of privacy.[38] This led to the progressive shaping of a novel cause of action in equity, *i.e.* the misuse of private information.[39] In an innovative ruling, which takes a further step towards characterising privacy as a tort under English law, the Court of Appeal of England and Wales recently ruled, specifically with respect to the rules on service of process outside the jurisdiction, that the misuse of private information is a civil wrong without any equitable characteristics. As the Court remarked, leaving aside the circumstances of its "birth", nothing in the nature of the claim itself suggests that the classification of misuse of private information as a tort for jurisdictional purposes is incorrect.[40]

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[35] *Kyoto Fugakuren Incident*, *Keishu Vol. 23, No. 125 at 1625 (Supreme Court of Japan Grand Bench 1969).*

[36] See, *e.g.*, *Wainwright v. Home Office* [2004] 2 AC 406; *Kaye v. Robertson* [1991] FSR 62.

[37] *Campbell v. MGN Limited* [2004] UKHL 22.

[38] On the "shoehorning" of the jurisprudence of Articles 8 and 10 ECHR into the tort of breach of confidence, see esp. *Douglas v. Hello!* (No. 3) [2006] QB 125, at para. 53.

[39] *A v. B plc* [2003] QB 195 at para. 4.

[40] *Google Inc. v. Judith Vidal-Hall* [2015] EWCA Civ 311, esp. para. 43.

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V. Efforts of the Special Commission towards Facilitating a Common Understanding of the Term "Privacy"

In an effort to facilitate a common understanding of the term "privacy" for the purposes of the draft Convention and bypass the implications that stem from the use of such term, at the last meeting of the Special Commission the proposal was put forth to extend the scope of the exclusion to "unauthorised public disclosure of information relating to private life" as an alternative to "privacy" (Article 2(1)(l) of the November 2017 draft Convention).

This attempt to bypass the rigidity of a term such as "privacy" – which, as illustrated, is prone to conflicting legal definitions that would affect characterization for the purposes of the draft Convention – could prove valuable in pursuing the objective of uniform interpretation and application of the future Convention.

While the draft Convention pursues "mobility through enhanced judicial co-operation", uncertainties with regard to its scope of application (including the matters excluded therefrom) would diminish the predictability of the law. On the one hand, plaintiffs would not be in a position to make informed decisions as to where to commence proceedings on privacy and defamation matters, relying on the eligibility of the ensuing judgment to circulate. On the other hand, the prevailing party would not be in a position to readily identify whether a judgment rendered by the court of a Contracting State will circulate among the Contracting States.[41]

In this regard, however, it may be observed that the use of the term "public" to define the scope of the exclusion appears to place an emphasis on the character of the unauthorised disclosure of the information, and may be construed as entailing an additional – and vague as to its contents – inquiry by the requested court of whether the claim brought before the court of origin actually involved a "public" disclosure. Since it appears that the term "disclosure" already conveys, in and of itself, the understanding that given information is disseminated, the use of the term "public" may be considered as redundant and opens up the possibility of inconsistent interpretations of the provision.

Furthermore, assuming that the Special Commission intends to include violations of personal data in the exclusion, pursuant to Article 2(1) of the draft Convention,[42] it may be desirable to expressly state that exclusion in the

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[41] Judgments Convention: Preliminary Explanatory Report (note 7), at paras 2-7, esp. 5-7.

[42] Preliminary Document No. 8 of November 2017 (note 19), at para. 51 submits that the Special Commission may wish to consider "defining the privacy exclusion such that it excludes one or more of the following types of privacy claims –

(i) claims to prevent disclosure of information relating to the private life of an individual or claims for the compensation of an individual for the consequences of an unauthorised disclosure of private information, including breach of confidence claims arising out of such violations of privacy;

(ii) claims for the unauthorised intrusion into one's personal life (*i.e.*, by means of surveillance or otherwise), regardless of the subsequent use of the material obtained;

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provision – rather than to leave it to be reflected in the Explanatory Report or to the interpreter – to ensure the uniform and consistent interpretation and application of the future Convention. In fact, the two concepts of privacy and personal data, while closely related, are not synonymous: while data protection commonly refers to the specific area of the law that regulates "the processing of data associated with an identifiable individual", privacy is identified with "the notion of an individual's space".[43] In this framework, the provision may benefit from additional clarity if the term "access to" is added to the wording of the provision.

On these premises – and taking to a certain degree inspiration from the provision at Article 1(2)(g) of the Rome II Regulation[44] – an alternative to the wording currently placed in square brackets at Article 2(1)(l) of the November 2017 draft Convention could be as follows: "This Convention shall not apply to the following matters – […] (l) non-contractual claims arising out of unauthorised disclosure of, or access to, information relating to private life, including the processing of personal data".

(iii) claims concerning personality rights or compensation for the violation of personality rights; and

(iv) claims concerning the protection of personal data".

[43] D. COOPER/ C. KUNER, Data Protection Law and International Dispute Resolution, *Recueil des cours* 2017, vol. 382, at 25.

[44] Regulation (EU) 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 L199/40, 31.7.2007.

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COURT DECISIONS

RECOGNITION OF INTERNATIONAL SURROGACY IN FRANCE

THE BYPASS STRATEGY

Guillaume KESSLER*

I. Introduction
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I. Introduction

Over the past decade or so, the question of the recognition of parentage resulting from the undertaking of a surrogate motherhood agreement has given rise to a passionate debate in France, which sometimes led to visceral and even melodramatic reactions.[1] Each decision, whether from a Court of Appeal, the *Cour de Cassation* (*High Court*), or the European Court of Human Rights, is scrutinised, analysed and dissected: few subjects have given rise to such an extent of legal literature. A veritable avalanche of comments is expected following the four judgments made by the first Civil Chamber of the *Cour de Cassation* on 5 July

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[1] I. THÉRY/ A.-M. LEROYER, *Filiation, origines, parentalité. Le droit face aux nouvelles valeurs de responsabilité générationnelle*, Odile Jacob, 2014, p. 214 *et seq*.

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 487-507
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Printed in Germany

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2017.[2] In the first two cases, a French couple had unsuccessfully requested enrolment in the French civil register of a birth certificate drawn up abroad of a child born to a surrogate mother, in the first case in the United States, and in the second in the Ukraine. In the third, although the French consulate in Bombay had drawn up a birth certificate for a child born to a married couple of French nationality, the public prosecutor decided to bring an action for annulment because of a suspicion of the involvment of a surrogate mother. Since the application was granted by the Court of Appeal of Rennes, which held that the certificate had been drawn up with false documents, the couple decided to appeal to the *Cour de cassation*. In the fourth case, it was a question of deciding the fate of a child born in California to a woman who had signed a surrogate motherhood agreement with a man who had in turn agreed a *pacte civil de solidarité*[3] with another man. The two men subsequently married and the father's spouse decided to apply for the child's simple adoption, which was denied by the Dijon Court of Appeal, which held that the birth of the child resulted from a violation of Article 16-7 of the Civil Code, which provides for the annulment of any agreement relating to surrogate procreation or pregnancy.[4]

In the first three cases, the question before the *Cour de cassation* was whether the couple who had used a surrogate mother could obtain the civil registration of a foreign birth certificate in a situation where the woman who had been designated as the mother had not in fact given birth to the child. Unsurprisingly, the Court considered that the act should be registered in so far as it concerned the father, but not in so far as it concerned the non-birth mother. This confirms the judgments delivered by the Plenary Assembly on 3 July 2015[5] and renders France compliant with the requirements affirmed by the European Court of Human Rights in the famous cases *Mennesson* and *Labassée,*[6] to the extent that the

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[2] Cass. civ. 1, 5 juillet 2017, n° 15-28.597, n° 16-16.901, n° 16-16.455, n° 16-16.495.

[3] *Registered partnership*.

[4] "*Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle"*.

[5] Cass., ass. plén., 3 juill. 2015, n° 14-21.323, *Dalloz (D.)* 2015. Actu. P. 1819, obs. I. GALLMEISTER, Chron. p. 1819, H. FULCHIRON/ C. BIDAUD-GARON, Édito, p. 1481, S. BOLLÉE, Point de vue p. 1773, D. SINDRES, Pan. P. 1919, obs. P. BONFILS/ A. GOUTTENOIRE, 2016. Pan. P. 674, obs. M. DOUCHY-OUDOT, Pan. p. 857, obs. F. GRANET-LAMBRECHTS, Pan. p. 1045, obs. H. GAUDEMET-TALLON.

[6] CEDH 26 juin 2014, n° 65192/ 11 et 65941/ 11, *Mennesson et Labassée c/ France*, *D.* 2014. P. 1797, note F. CHÉNEDÉ; *ibid*. p. 1773, chron. H. FULCHIRON/ C. BIDAUD-GARON; *ibid*. p. 1787, obs. P. BONFILS/ A. GOUTTENOIRE; *ibid*. p. 1806, note L. D'AVOUT; *D.* 2015, p. 702, obs. F. GRANET-LAMBRECHTS; p. 755, obs. J.-C. GALLOUX et H. GAUMONT-PRAT; p. 1056, obs. H. GAUDEMET-TALLON/ F. JAULT-SESEKE; *Actualité juridique famille* 2014, p. 499, obs. B. HAFTEL; p. 396, obs. A. DIONISI-PEYRUSSE; *Rev. crit. dr. int. pr.* 2015, p. 1, note H. FULCHIRON/ C. BIDAUD-GARON, p. 144, note S. BOLLÉE; *Revue trimestrielle de droit civil* (*RTD civ.*) 2014, p. 616, obs. J. HAUSER, p. 835, obs. J.-P. MARGUÉNAUD; *La semaine juridique, édition générale* 2014. p. 832. obs. F. SUDRE, p. 877 note A. GOUTTENOIRE; *Revue Lamy de droit civil* sept. 2014, p. 42, note H. GRATADOUR; CEDH 27 janv. 2015, n° 25358/ 12, *Paradiso et Campanelli c/ Italie, D.*

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question of the reference to the civil status of the mother was not raised in the above-mentioned cases. It is now clear that the designation of the father must be registered if the foreign certificate is not falsified and the biological reality of paternity is not disputed, but it is not possible to register a document mentioning as mother a woman who is not the one who gave birth. The resolution was expected, and it therefore cannot be said that the decisions rendered on 5 July 2017 changed the *status quo*, at least from this point of view. Since French law requires that civil status documents reflect the truth, article 47 of the Civil Code would have to be reformed in order to consider such a scenario. Such a refusal does not pose any major problem from the point of view of respect for the right to privacy and family life guaranteed by Article 8 of the European Convention on Human Rights, in so far as it does not significantly change the situation of the child. In fact, the Court was careful to specify that the French authorities will not prevent the child from living with a family, and that a certificate of French nationality will be issued to him/her. The noteworthy point comes rather from the continuation of the ruling, since the judges indicate that there was always a possibility of adoption by the spouse of the father. The *Cour de cassation* thus gives, to a certain extent, a way to circumvent the rule the application of which it is supposed to guarantee.

The solution may also be implemented in the fourth case, since the Court, through a dramatic change in jurisprudence, considers that surrogate motherhood carried out abroad does not in itself prevent adoption of the child by the father's spouse.[7] Once the legal conditions for adoption have been met, and given that this is in the best interests of the child, the circumstances of the birth need not be taken into account. This is a major break with the principle laid down by the Plenary Assembly in a very famous judgment of 31 May 1991, in which it was stated that adoption was only the last stage of a whole process which was intended to enable a couple to welcome a child to their home, devised to fulfil a contract based on the relinquishing at birth by the mother, and that this process constituted a misuse of the institution of child adoption insofar as it violated the principles of the inalienability of the human body and of civil status.[8] Following that judgment, the legislature decided to consolidate jurisprudence by introducing the aforementioned article 16-7 in the Civil Code. One can only then question the continuity of the ruling. If, as the Court affirms, the use of a surrogate mother does not in itself prevent the adoption of the child born to the surrogate by the spouse of the father, what is left of the prohibitive ruling? The time when the same Court was opposed

2015, p. 702, obs. F. GRANET-LAMBRECHTS, p. 755, obs. J.-C. GALLOUX/ H. GAUMONT-PRAT; *Actualité juridique famille* 2015, p. 165, obs. E. VIGANOTTI; p. 77, obs. A. DIONISI-PEYRUSSE; *Rev. crit. dr. int. pr.* 2015, p. 1, note H. FULCHIRON/ C. BIDAUD-GARON; *RTD civ.* 2015, p. 325, obs. J.-P. MARGUÉNAUD.

[7] Adoption by the spouse in a same-sex marriage context is allowed in France since the law n° 2013-404 of 17 May 2013 "*ouvrant le mariage aux couples de même sexe*" (opening marriage to same-sex couples).

[8] Cass., ass. plén., 31 mai 1991, *La semaine juridique édition générale* 1991.II. 21752, obs. F. TERRÉ; *D.* 1991, p. 417, rapp. Y. CHARTIER, note D. THOUVENIN, Somm, 318, obs. J.-L. AUBERT; *D.* 1992. Somm. 59, obs. F. DEKEUWER-DÉFOSSEZ; *RTD civ.* 1991, p. 517, obs. D. HUET-WEILLER; *RTD civ.* 1992, p. 88, obs. J. MESTRE.

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to the establishment of parentage in the name of international public order[9] or by fraudulent evasion[10] seems far away. Despite the level of caution that the European Court has exercised in the cases it has had to deal with, such as the aforementioned *Mennesson* and *Labassée*, the case of *Foulon,*[11] or more recently the case of *Paradiso*[12] which led to the legal doctrine questioning whether to put a *stop* to this because of its severity with regard to the intended parents, national courts are now obliged to move towards recognising established ties. Even if the solution is (at least for the time being) limited to the hypothesis in which a parent's gametes have been used for fertilisation, it will be increasingly difficult to oppose recognition irrespective of the particular circumstances. Social pressure is indeed getting stronger and stronger. Surrogate motherhood has experienced an exponential growth of around 1000% in the 5 years between 2006 and 2010, according to a report produced by the Hague Conference on International Law,[13] even bearing in mind that we are only aware of the tip of the iceberg.[14]

The factors affecting development of this phenomenon, which seems to be impossible to contain, are numerous. The desire to be involved from the beginning of pregnancy, to have a child genetically related to at least one of the members of the couple, and the fear of adopting a child tormented by a difficult past, are often

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[9] Civ. 1re, 6 avr. 2011, nos 09-66.486 et 10-19.053; *D.* 2011. Pan. 1995, obs. P. Bonfils/ A. Gouttenoire; *D.* 2011, p. 1064, note X. Labbée; *D.* 2011. Pan. 1585, obs. F. Granet-Lambrechts; D. 2012. Pan. 1228; *La semaine juridique edition notariale* 2011, n° 16, obs. E. Fongaro; *Droit de la famille* 2011. Étude 14, obs. C. Neirinck; *Rev. crit. dr. int. pr.* 2011, p. 722, note P. Hammje.

[10] Civ. 1re, 13 sept. 2013, n° 12-30.138, *D.* 2013, p. 2349, chron. H. Fulchiron/ C. Bidaud-Garon, p. 2377, avis C. Petit, p. 2384, note M. Fabre-Magnan; *D.* 2014, p. 689, obs. M. Douchy-Oudot, p. 1059, obs. H. Gaudemet-Tallon/ F. Jault-Seseke, p. 1171, obs. F. Granet-Lambrechts, p. 1787, obs. P. Bonfils/ A. Gouttenoire; *Actualité juridique famille* 2013, p. 532, obs. A. Dionisi-Peyrusse, p. 600, obs. C. Richard/ F. Berdeaux-Gacogne; *Rev. crit. dr. int. pr.* 2013, p. 909, note P. Hammje; *RTD civ.* 2013, p. 816, obs. J. Hauser; *Clunet* 2014. comm. 1, note J. Guillaumé; Civ. 1re, 19 mars 2014, n° 13-50.005, *D.* 2014, p. 905, note H. Fulchiron/ C. Bidaud-Garon, p. 901, avis J.-P. Jean, p. 1059, obs. H. Gaudemet-Tallon/ F. Jault-Seseke, p. 1171, obs. F. Granet-Lambrechts, p. 1787, obs. P. Bonfils/ A. Gouttenoire; *D.* 2015, p. 649, obs. M. Douchy-Oudot; p. 755, obs. J.-C. Galloux/ H. Gaumont-Prat; *Actualité juridique famille* 2014. p. 244, obs. F. Chénedé, p. 211, obs. A. Dionisi-Peyrusse; *Rev. crit. dr. int. pr.* 2014, p. 619, note S. Bollée; *RTD civ.* 2014, p. 330, obs. J. Hauser.

[11] CEDH, 21 juill. 2016, n° 9063/ 14 et n° 10410/ 14, *Foulon et Bouvet c/ France*, *Droit de la famille* 2016, comm. 201, note H. Fulchiron.

[12] CEDH, gde ch., 24 janv. 2017, *Paradiso*, n° 25358/ 12, *D.* 2017. 215, obs. P. Le Maigat, p. 897, note L. de Saint-Pern, p. 663, chron. F. Chénedé, p. 729, obs. F. Granet-Lambrechts, p. 781, obs. J.-C. Galloux; p. 1011, obs. H. Gaudemet-Tallon; *Actualité juridique famille* 2017, p. 301, obs. C. Clavin, p.93, obs. A. Dionisi-Peyrusse; *RTD civ.* 2017, p. 335, obs. J.-P. Marguénaud; p. 367, obs. J. Hauser.

[13] Conférence de La Haye de droit international privé, *Rapport préliminaire sur les problèmes découlant des conventions de maternité de substitution à caractère international*, note établie par le bureau permanent, 2012, p. 8.

[14] S. Bollée, La gestation pour autrui en droit international privé, *Travaux du comité français de droit international privé* 2012-2014, p. 215.

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cited. The most important problem, however, seems to be the difficulties that infertile parents may encounter during the adoption process. The number of adoptable children has decreased steadily whilst infertile couples are increasingly numerous.[15] Heterosexual couples are typically waiting longer to have children, which inevitably alters their fertility, while it is now acceptable for LGBT couples to adopt jointly, without necessarily being able to do so in practice because of the reluctance of provider States. As supply is no longer sufficient to meet demand, it is unsurprising that couples have sought to find another way to access parenthood, knowing that the adoption process is also very long and encumbered with discouraging administrative complexity, and is barred to some because of their marital status or their age.[16] Despite its cost, surrogate motherhood offers a freedom that international adoption does not allow. Moreover, the development of new methods of communication has considerably enabled the development of the market: it only takes a simple click online to find dozens of organisations or associations that provide the connection between intended parents and surrogate mothers.

The development of procreative tourism[17] being inevitable, the problem cannot be ignored today. Confronted with a sort of legal "no man's land",[18] engaged in what an American writer has called "odyssey",[19] children may end up in unacceptable situations. The lack of consensus has notably led in the past to situations of statelessness for children born by way of surrogacy.[20] The issue is very delicate because "it features children who are not responsible for the conditions in which they came into the world, and parents who defied the highest laws of their country without being highwaymen".[21] Even if the intended parents had circumvented the legislation of their country of residence, it is extremely difficult to refuse recognition of the situation that has been established: "the child has no responsibility in the violation of the law committed by the intended parents".[22] Nevertheless, the opposition is vehement, emanating from legal doctrine or from political parties, which almost unanimously condemn this practice. Unfortunately,

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[15] M. WELSTEAD, International Surrogacy: Arduous Journey to Parenthood, *Journal of Comparative Law* 2014, p. 331.

[16] S. N. KIRSHNER, Selling a Miracle: Surrogacy through International Borders: Exploration of Ukrainian Surrogacy, *The Journal of International Business and Law* 2015, p. 81.

[17] J.-J. LEMOULAND, Le tourisme procréatif, *Les petites affiches*, 28 mars 2001, p. 24; H. BOSSE-PLATIÈRE, Le tourisme procréatif. L'enfant hors la loi française, *Informations sociales*, 2006/ 3 no 131, p. 88-99.

[18] I. CÔTÉ/ J.-S. SAUVÉ, Homopaternité, gestation pour autrui: *no man's land*?, *Revue générale de droit* 2016, p. 26.

[19] I. CURRY-SUMNER/ M. VONK, National and International: Surrogacy: an Odyssey, *The International Survey of Family Law* 2011, p. 259.

[20] T. LIN, Born Lost: Stateless Children in International Surrogacy Arrangements, *Cardozo Journal of International and Comparative Law 2013*, p. 546.

[21] J.-P. MARGUÉNAUD, Variations européennes sur le thème de la gestation pour autrui, *RTD civ.* 2017, p. 336.

[22] S. BOLLÉE (note 13), p. 222.

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surrogate motherhood has been raised as a symbol of a break in civilisation as a result of the law of marriage for all,[23] which hinders measured debate. It is thus necessary to seek the "least bad" solution[24], which explains why jurisprudence proceeds "by adjustments and by trial and error"[25], at risk of confusing a situation that is already very complex. Without resolving all the problems, the judgments handed down by the *Cour de cassation* on 5 July 2017 have the merit of providing a timely clarification by resorting to the strategy of circumvention: if the prohibition on surrogate motherhood is maintained in the law, adoption makes it possible to escape its consequences. Heavily criticised since they consecrate a solution *contra-legem* (II), guided by European imperatives which reduce the scope of States (III), these decisions could therefore easily be interpreted as an appeal to the legislator for fundamental reform (IV).

II. The *De Facto* Repeal of Article 16-7 of the Civil Code

The condemnation of France because of its policy of refusing to register birth certificates in cases of surrogate motherhood carried out abroad, as demonstrated in the Mennesson and Labassée judgments, led to a change in jurisprudence: following the rulings by the Plenary Assembly of 3 July 2015 it was well established that the international public order exception can no longer be used to oppose registration if the document is neither irregular nor falsified. This could have been sufficient to prevent new criticism, but the *Cour de Cassation* has chosen the path of prevention by consecrating what is probably the best possible solution in the absence of legislative intervention: the admission of adoption (A). The intended parents will thus benefit from a way to circumvent the legal prohibition laid down by Article 16-7 of the Civil Code, which inevitibly leads to the question of the remaining scope of rule (B).

A. Ending the Invasion of Privacy and Family Life through the Ploy of Adoption

The conclusions of the Advocate General are very enlightening as to the reasons which led the Court to choose to validate adoption, notwithstanding the infringement of French law. After recalling that such an appeal could legitimately have been disqualified from the outset and that it would be entirely possible to see the institution being misused in the process leading to the consolidation of an illegal fait accompli, he then states that it would be preferable to rather admit its validity since it leads to a strengthening of family ties and ensuring a reinforced and secure

[23] I. THÉRY/ A.-M. LEROYER (note 1), p. 211.

[24] S. BOLLÉE (note 13), p. 215.

[25] J.-P. MARGUÉNAUD (note 20), p. 336.

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family life for the child, through the creation of a lawful and perennial link with the spouse of the first biological parent.[26] The interest of the child thus justifies the circumvention of the legal rule. Mr Fulchiron and Mrs Bidaud-Garon had already spoken of this in the aftermath of the 2015 Plenary Court' s judgments, claiming that this solution, described as a path to reconstruction, would enable a balance to be found between the reaffirmation of the prohibitions in domestic law and the protection of the rights of the child.[27] This opinion is widely shared abroad. The justification lies in the best interests of the child, which also has the advantage of preserving the rights of the parents[28] and is considered the best way to avoid unsatisfactory situations.[29] In 2014, the Quebec Court of Appeal considered that thinking had evolved sufficiently to allow the request for adoption by the intended parents of a child born of an illicit surrogate motherhood.[30] The solution chosen as the "least unsatisfactory solution" leads to the adoption of a procedure for correcting the civil register in order to recognise the maternity or the paternity of the intended parents in the absence of a relevant administrative procedure. According to judge Morissette, it is a question of separating the nullity of the contract, involving the intended parents and the surrogate mother, from the parentage of a third party: the child.[31] The decision is justified by the interest of the latter, and is in line with article 522 of the Civil Code of Quebec, which stipulates that all children will all enjoy the same rights, regardless of the circumstances of their birth. The solution adopted by the *Cour de cassation* is in line with this standpoint. The interest of the child and the risk of infringement of its rights to privacy and family life, as guaranteed by Article 8 of the European Convention on Human Rights, justify the breach of the legislative framework. This idea has also convinced judges in Japan, who authorised the adoption on an exceptional basis in a similar case,[32] as did their Dutch[33] and Greek[34] counterparts. In Spain, the

[26] PH. INGALL-MONTAGNIER, Gestation pour autrui: les avis du premier avocat général, *Droit de la famille* 2017, Etude 14.

[27] H. FULCHIRON/ CH. BIDAUD-GARON, Gestation pour autrui internationale: changement de cap à la Cour de cassation, *D*. 2015, p. 1819.

[28] S. N. KIRSHNER (note 15), p. 92.

[29] D. GRUENBAUM, Foreign Surrogate Motherhood: *mater semper certa erat*, *The American Journal of Comparative Law* 2012, p. 475.

[30] Adoption 1445, 2014 QCCA 1162.

[31] L. LANGEVIN, La Cour d'appel du Québec et la maternité de substitution dans la décision Adoption-1445: quelques lumières sur les zones d'ombre et les conséquences d'une solution la moins insatisfaisante, *Revue juridique Thémis de l'Université de Montréal* 2016, 49-2, p. 463. A.-M. SAVARD, L'établissement de la filiation a la suite d'une gestation pour autrui: le recours a l'adoption par consentement spécial en droit québécois constitue-t-il le moyen le plus approprié?, in CH. LANDHEER-CIESLACK (dir.), *Mélanges en l'honneur d'Édith Deleury*, Cowansville, Yvon Blais, 2015, p. 589.

[32] 2006 (Kyo) n° 47, 23 mars 2007 (Japan/ Nevada), quoted in CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, *Questions de droit international privé concernant le statut des enfants, notamment celles résultant des accords de maternité de substitution à caractère international*, note établie par le bureau permanent, 2011, p. 10.

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Supreme Court considered for its part that Spanish international public order could legitimately oppose the registration of parenthood established abroad on the Spanish civil registers, without however prejudicing the rights of the child when the relationship with the biological father can be established, and where the adoption by the intended parent allows the subsequent integration of the child into his family *de facto*.[35] This solution is also favoured by the German legal doctrine,[36] which regrets that the *Bundesgerichtshof* rejected this logic in favour of recognition.[37]

Notwithstanding that it has already been accepted by foreign countries, the admission of adoption by the French *Cour de cassation* is nevertheless surprising as it intervenes in a context less favourable for the recognition of the ties resulting from surrogate motherhood. The *Paradiso* judgement already cited seemed to indicate a desire of the European Court of Human Rights to be less invasive. In their concurring opinion, Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov emphasised that the law should not provide protection for situations of "*fait accompli*" that have originated from a violation of legal rules or fundamental principles, and that it should not be possible to brandish the adverse consequences of one's own illegal actions as a shield against interference by the State.[38] A certain margin thus appeared to be left to the individual States, and the *Cour de cassation* could have taken advantage of this to uphold the ban established in 1991. However, if it has nevertheless chosen the reversal, it is undoubtedly because it decided it would be preferable to clarify the situation once and for all. The solution chosen has the merit of simplicity: in keeping with the interests of the child, adoption makes it possible to integrate the child into his/her *de facto* and partially biological family, to ensure the stability of his/her protection, and to guarantee the exercise of his/her rights, in particular that of succession.[39] All the problems will not be solved, however, since intended parents having no biological connection

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[33] Rechtbank's-Gravenhage, 10 décembre 2007, no 269480, FA RK 06-4380, LJN: BC5651 quoted by M. AUDIT, Bioéthique et droit international privé, *Recueil des Cours* 2014, vol. 373, p. 437.

[34] K. ROKAS, National Regulation and Cross-border Surrogacy in European Union Countries and Possible Solutions for Problematic Situations, this *Yearbook* vol. XIV, 2015, p. 289. CH. PANOU, Panorama critique de la jurisprudence hellénique de droit international privé, *Revue hellénique de droit international* 2009, p.297 et s.

[35] H. FULCHIRON/ C. GUILARTE MARTIN-CALERO, L'ordre public international à l'épreuve des droits de l'enfant: non à la GPA internationale, oui à l'intégration de l'enfant dans sa famille, *Rev. crit. dr. int. pr.* 2014, p. 531; H. FULCHIRON/ GUILARTE MARTIN-CALERO, Gestation pour autrui (statut des enfants): position du *Tribunal supremo* espagnol, Dalloz 2015, p. 62.

[36] CH. THOMALE, *Mietmutterschaft Eine internationalprivatrechtliche Kritik*, Tübingen, Mohr Siebeck, 2015.

[37] BGH 10 December 2014, XII ZB 463/13.

[38] CEDH, gde ch., 24 janv. 2017, *Paradiso*, (note 11).

[39] H. FULCHIRON/ CH. BIDAUD-GARON, Ne punissez pas les enfants des fautes de leurs pères. Regard prospectif sur les arrêts Labassée et Mennesson de la CEDH du 26 juin 2014, *D.* 2014, p. 1773.

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with the child are left aside, but this suggests a favourable development, which could lead, *de lege ferenda*, to an authorisation of adoption in all situations.

B. A Solution Perceived as a Dispossession of the French State

As reasonable as it may seem, the admission of the adoption of the spouse's child by the *Cour de cassation* has been strongly criticised by the legal doctrine, which regards it as an intolerable violation of French public order. According to Chénedé, there was thus nothing left of the legal prohibition of maternity since the measures taken by those who violated it could be judicially vindicated.[40] Binet is of the same opinion. According to him, the admission of adoption marks the failure of the logic used in France to combat the use of surrogate mothers: henceforth, despite the mandatory character of the prohibition prescribed by the Civil Code, agreements reached abroad will take effect, and no legal considerations will deter the use of this practice in the future.[41] Article 16-7 of the Civil Code, derived from the bio-ethical laws of 1994 was not modified by the reforms of 2004 and 2011 and seemed untouchable. Based on the principle of the unavailability of the human body and of personal status, and relating to public order,[42] this provision was invoked by opponents of same-sex marriage before the Constitutional Council, which had been careful to clarify that the law referred to was not intended to have the object or effect of amending the text,[43] suggesting that this could have been an obstacle to its validation if not. The *Mennesson* and *Labassee* judgements had already destabilised the situation to the point that Hauser had wondered whether Article 16-7 had not been effectively repealed by obsolescence.[44] With the judgments of 5 July 2017, this has been confirmed. The legal doctrine which had seen in *Paradiso*, a "divine surprise"[45] is today totally superseded.

In order to justify its decision to refuse the registration of the document designating the intended mother as the mother of the child, the Court could have contented itself with the first elements set out in the meantime, being the absence of obstacles to the establishment of paternal affiliation, and the absence of any objection to the reception of the children within the family home. The reference to adoption in cases where it was not thus revindicated sounds like a form of incentive: intended parents wishing to secure the legal custodianship of the child are offered an option which nevertheless violates a principle established by French law. Article 16-7 would thereby be effectively repealed by the refusal of

[40] F. Chénedé, De l'abrogation par refus d'application de l'article 16-7 du Code civil, *Actualité juridique famille* 2017, p. 375.

[41] J.-R. Binet, Gestation pour autrui: le droit français à la croisée des chemins, *Droit de la famille* 2017, étude 13.

[42] Civil Code, art. 16-9: "*Les dispositions du présent chapitre sont d'ordre public*".

[43] Conseil constitutionnel, décision n° 2013-669 DC, 17 mai 2013, *Les grandes décisions du Conseil constitutionnel*, 18e édition, Dalloz, 2016.

[44] J. Hauser, Etat civil: après l'enfant conventionnel, un autre nouveau-né: l'enfant fait accompli!, *RTD civ.* 2014, p. 616.

[45] J.-P. Marguénaud (note 20), p. 335.

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application[46] by the *Cour de cassation*, which would have yielded to the *fait accompli*[47] needlessly going beyond European provisions.[48] The reversal would be complete, except to take seriously the clarification that the pregnancy took place abroad, which would amount to reserving this option to individuals who have the means to go abroad and consequently to avail themselves of a kind of "law of the richest".[49] This argument is in line with the criticisms of Lequette, who saw in this distinction a hypocrisy, since the French legal order cannot tolerate indefinitely the fact that only the most favoured classes can resort to this by leaving the French borders.[50] The order of French society would thus be threatened to its very foundations by the notion of the child's interest invoked in an incantatory fashion to justify the unjustifiable.[51] Promoting the child's interest in recognising a surrogate motherhood carried out abroad may set a dangerous precedent, which could allow the validation of adoptions in cases where children were bought or stolen.[52]

Should we therefore have a punitive policy? We might legitimately doubt it. The comprehensive policy of the *Cour de cassation* is part of a compromise between the interests of the child and the protection of family law and order. If intended parentage cannot be recognised in civil status insofar as, under French law, the act must correspond to the biological truth, there is nothing to prevent a bond of discretional parentage. We cannot fight against such a fundamental movement. It is no more possible to stem the development of surrogate motherhood than to curb the digitisation of society or the uberisation of labour. As long as it does not call into question the freedom of individuals or their physical integrity, it is always preferable to follow sociological evolution in order to regulate it and to limit its perverse effects rather than to persist in bringing it to an end. The abuses that have been denounced, linked to the risk of forced motherhood or the exploitation of poverty by rich Westerners, largely relate to fantasy[53] and it is not certain that the carrying out of surrogate motherhood in a somewhat clandestine fashion is the best way to combat these. The surrogacy process requires motivation and perserverance.[54] The baby is the fruit of a carefully thought-out process and not of

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[46] F. CHÉNEDÉ (note 41).

[47] J.-R. BINET (note 42).

[48] F. CHÉNEDÉ (note 41).

[49] *Ibid*.

[50] Y. LEQUETTE, De la proximité au fait accompli, *Mélanges en l'honneur du professeur Pierre Mayer*, LGDJ, 2015, p. 504.

[51] M. FABRE-MAGNAN, Les trois niveaux de l'appréciation de l'enfant, *D.* 2015, p. 224.

[52] S. BOLLÉE (note 13), p. 225.

[53] I. KIARI/ A. VALONGA, International Issues regarding Surrogacy, *The Italian Law Journal* 2016, p. 333.

[54] J. CARBONE/ N. CAHN, Jane the Virgin and Other Stories of Unintentional Parenthood, *UC Irvine Law Review* 2017, p. 511

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a mere whim.[55] Instead of focusing on establishing a link, the focus should be on the problems of maltreatment, abandonment or non-payment of maintenance obligations, which are the real scourges to be eradicated. The judgments handed down by the *Cour de cassation* on 5 July 2017 must therefore be approved even if they may be perceived as an encouragement to circumvent French law. While this effectively characterises a certain dispossession of the French State, which seems gradually to be losing control over its own public order, this development is inevitable owing to the development of private international law.

III. A Jurisprudence Revealing the Evolution of the Appreciation of International Public Order

Even if none of the judgments handed down by the *Cour de cassation* deal directly with the question, the modulation of public order implied by the admission of the adoption resulting from the process carried out abroad in violation of French law says a lot about how the exception is evolving. The development of the method of recognition (A) leads to harmonising the demands of western States on family law, thus paving the way for a sort of exception to transnational public order (B).

A. Application of the Method of Recognition of Surrogate Motherhood

The emergence of the method of recognition constitutes an upheaval whose consequences in private international family law have yet to be measured. The goal here is not to revisit this trend which has given rise to a literature so rich and abundant that it would be vain to attempt to summarise it here.[56] We will only recall

[55] WELSTEAD (note 14), p. 298, points out that parents do not enter into international surrogacy lightly; it is not a frivolous amusing vacation from which they return with a souvenir, purchased from a surrogate mother during their travels - a baby. Rather, they embark with a passionate determination on an arduous journey because they have an overwhelming and instinctive desire to become parents of a child to whom at least one of them is genetically related.

[56] P. LAGARDE, La méthode de la reconnaissance est-elle l'avenir du droit international privé?, *Recueil des Cours* 2014, t. 371, p. 9 *et seq*.; ID., La reconnaissance mode d'emploi in *Vers de nouveaux équilibres entre ordres juridiques*, *Liber amicorum Hélène Gaudemet-Tallon*, Dalloz, 2008, p. 481 *et seq*.; P. LAGARDE (dir.), *La reconnaissance des situations en droit international privé*, *Actes du colloque international de La Haye du 18 janvier 2013*, Pedone, 2013; S. BOLLÉE, L'extension du domaine de la méthode de reconnaissance unilatérale, *Rev. crit. dr. int. pr.*, 2007, p. 307 *et seq.*; D. BUREAU/ H. MUIR WATT, *Droit international privé*, 3e éd., PUF, 2014, p. 671 *et seq.*; P. MAYER, Les méthodes de la reconnaissance en droit international privé, *Le droit international privé: esprit et méthodes*, *Mélanges en l'honneur de Paul Lagarde*, 2005, p. 547 *et seq*.; ID., Le phénomène de la coordination des ordres juridiques étatiques en droit privé, *Recueil des Cours* 2007, t. 327, n° 337 et s.; C. PAMBOUKIS, La renaissance-métamorphose de la méthode de la reconnaissance, *Recueil des Cours* 2008, p. 513 et s.;

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that, in particular, following the judgements of *Konstantinidis*[57] or *Garcia Avello,*[58] by the Court of Justice on the transcription of the name within the framework of the European Union, and the judgements of *Wagner*[59] and *Negrepontis,*[60] made by the European Court of Human Rights in relation to a refusal to recognise foreign adoptions, it is becoming increasingly difficult to oppose the recognition of a status or of a family situation validly created abroad. The right to respect for private or family life and the necessary respect for freedom of movement of persons within the European Union leads to the establishment of a kind of right of the individual to respect for his or her identity,[61] which limits the possibility of invoking the public order exception. The evolution of the *Cour de cassation*'s position on surrogate motherhood is indicative of this trend. A traditional reasoning of private international law would indeed have excluded the registration of the birth certificate and avoided the potential recourse to adoption. Article 311-14 of the Civil Code designating the non-biological mother's personal rights on the day of the birth of the child, it would be appropriate to determine the validity of the process by applying the law of the uterine mother, since it is she who is considered the true mother in French law applying the rule *mater semper certa est*. Unless the biological mother does not have the nationality of the State where the pregnancy takes place, which will be rare in practice, she will be validated unless the existence of a fraudulent evasion or of an infringement of international public order is confirmed. Both methods of over-ruling foreign law have been used in the past by jurisprudence. The High Court of Versailles thereby opposed the adoption of a child illegally conceived because of a fraudulent evasion of French law committed by the applicants, who had gone abroad in order to receive reproductive medical assistance forbidden in France.[62] This reasoning was also used to oppose the

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G.-P. ROMANO, La bilatéralité éclipsée par l'autorité. Développements récents en matière d'état des personnes, *Rev. crit. dr. int. pr.* 2006, p. 457 et s.

[57] CJCE, 30 mars 1993, *Konstantinidis*, *Rec.* 1993, I, p. 1191.

[58] CJCE, 2 oct. 2003, aff. C-148/ 02, *Garcia Avello*: *Rec. CJCE* 2003, I, p. 11613; *D.* 2004, p. 1476, note B. AUDIT; *Rev. crit. dr. int. pr.* 2004, p. 184, note P. LAGARDE; *RTD civ.* 2004, p. 62, obs. J. HAUSER; *Clunet* 2004, p. 1225, note S. POILLOT-PERUZZETTO; *La semaine juridique édition générale* 2004, I, 111, n°15, S. POILLOT-PERUZZETTO; *Europe* 2003, comm. 374, obs. P.-Y. GAUTIER. V. ég. CJCE 14 oct. 2008, aff. C-353/ 06, *Grunkin-Paul*, Dalloz 2009. 845, note F. BOULANGER; *Actualité juridique famille* 2008. 481, obs. A. BOICHÉ; *Rev. crit. dr. int. pr.* 2009. 80, note P. LAGARDE; *Clunet* 2009, comm. 7, p. 203, note L. D'AVOUT.

[59] CEDH 28 juin 2007, no 76240/ 01, *Wagner*, *Rev. crit. dr. int. pr.*, 2007, p. 807, note. P KINSCH, *Clunet* 2008, p. 183, note L. D'AVOUT.

[60] CEDH 3 mai 2011, no 56759/ 08, *Negrepontis*, *Rev. crit. dr. int. pr.*, 2011, p. 889, chron. P. KINSCH.

[61] A. BUCHER, De la reconnaissance mutuelle au droit à l'identité, *Groupe européen de droit international privé*, réunion de Padoue, 2009, p. 12, La famille en droit international privé, *Recueil des cours* 2000, t. 283, p. 98 et La dimension sociale du droit international privé, *Recueil des cours* 2009, t. 330, p. 381 et s.

[62] TGI Versailles, 29 avr. 2014, n° 13/ 00168, D. 2014. 1787, obs. P. BONFILS/ A. GOUTTENOIRE; *Actualité juridique famille* 2014, p. 368, obs. C. MÉCARY; *ibid.* 267, obs. A. DIONISI-PEYRUSSE; *RTD civ.* 2014, p. 637, obs. J. HAUSER.

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recognition of the biological connection between father and child, leading eventually to the condemnation of France by the European Court of Human Rights. Despite the favourable opinion of some authors, who saw it as the best tool to oppose recognition,[63] this reasoning could not prosper as it explicitly resulted in depriving the child of any parenthood in France.[64] The use of *fraudulent evasion* could, moreover, be challenged without regard to any consideration related to the child's interest in so far as it concerned rather what Fadlallah had called "fraud with the attenuated effect of public order",[65] no manipulation of the principle of attachment being indicated.

The "most obvious"[66] grounds, being the international public order exception, may be applied without technical difficulties, but has the disadvantage of leading to the establishment of an unsatisfactory status, since the child is recognised as having different parents in the respective national States.[67] Initially raised by the *Cour de cassation* in its 2011 judgments, the exception however does not constitute a convincing obstacle. Since the situation is by definition constituted abroad, the theory of attenuated effect should be applied, unless there exists an "*Inlandsbeziehung*" which would have to be more rigorous when the situation was closely linked to the *forum*. The decisions of 2015 and 2017 show that this reasoning cannot in fact prosper. If Article 16-7 falls within the auspices of internal public order, it is much more difficult to accept that it falls within the nucleus of international public order. We are thus gradually moving towards recognition *de plano* of parentage resulting from surrogate motherhood. The circumvention by the adoption proposed by the *Cour de cassation* merely saves a little time: it is undoubtedly still too early to fully commit to a process that has not yet reached maturity. Nevertheless, the issues encourage it to be used and its influence is already exerted. The absence of any reference to the conflict between laws, as well as the curbing of public order, all seem to contribute to the fact that this method will be imposed in the matter of surrogate motherhood.[68]

B. Progressive Establishment of Transnational Public Order

As the sole safeguard of national ordinance within the framework of the application of the method of recognition, the public order exception must be carefully handled by the judge so as to avoid infringing on fundamental rights or freedom of

[63] S. Godechot-Patris, L'enfant venu d'ailleurs face à l'interdit. Perspective de droit international privé, *Mélanges en hommage à Marie-Stéphane Payet*, Dalloz, 2012, p. 294 *et seq*.

[64] S. Bollée, Nullité d'ordre public de la convention de mère porteuse, *Rev. crit. dr. int. pr.* 2014, p. 619, n° 10.

[65] I. Fadlallah, Cass., Civ. 1re, 3 novembre 1983, *Rev. crit. dr. int. pr.* 1984, p. 336.

[66] M. Audit (note 32), p. 426.

[67] A. Büchler et L. Maranta, Surrogacy and International Private Law in Switzerland, *International Survey of Family Law* 2015, p. 340.

[68] I. Kiari & A. Valonga (note 53), p. 342.

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movement. In the words of the *Sayn-Wittgenstein* judgment, issued by the Court of Justice of the European Union on 22 December 2010, "public order may be invoked only in the case of a genuine and sufficiently serious threat affecting a fundamental interest of society".[69] Within the framework of the Union, Member States therefore no longer have complete discretion. The jurisprudence on surrogate motherhood is indicative of this tendency: even though public order was opposed to the recognition of the link resulting from such a practice in 2011, the *Cour de cassation* considers, six years later, that it is necessary, in order to justify refusal of registration of the birth certificate, that it does not disproportionately affect the right to respect for the private and family life of children with regard to the legitimate aim pursued. The court points out that, in view of the best interests of children already born, the use of surrogate motherhood no longer prevents the registration of a foreign birth certificate or the establishment of paternal afffiliation by finally adding that the adoption, if the legal conditions are satisfied and if it is in the best interests of the child, makes it possible to create a parentage link between the children and the spouse of their father. That makes for a lot of caveats! The logic followed by the *Cour de cassation* is confined to funambulism. It is now clear, to use the words of Pfeiff, that international public order is no longer entirely "national" since it is affected by the fundamental rights and substantive law of the Union and thus transforms itself into a regional public order, or, truly international. The national court is therefore no longer entirely free when it is called upon to assess the compatibility of a foreign situation with its fundamental values.[70] The European Court of Human Rights perfectly synthesised this idea in the first judgment *Paradiso c. Campanelli* in 2015: "the reference to public order cannot be regarded as a *carte blanche* justifying any measure".[71]

Whereas European public order once seemed to be in addition to internal public order by imposing compliance with a number of rules considered fundamental, today we have the impression that it is a logic of substitution which is gradually emerging: the conception of transversal European international public order would thus replace the national approach which had prevailed up to that point.[72] If the refusal to recognise personal status is conditional on the verification that the latter pursues a legitimate objective and is proportionate, it is because the

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[69] ECJ 22 déc. 2010, aff. C-208/ 09, *Sayn-Wittgenstein c/ Autriche*, *Constitutions* 2011. 332, obs. A. LEVADE; *RTD civ.* 2011, p. 98, obs. J. HAUSER; *Revue trimestrielle de droit européen* 2011, p. 571, obs. E. PATAUT.

[70] S. PFEIFF, *La portabilité du statut personnel dans l'espace européen*, BRUYLANT, 2017, n° 198. *Comp.* on the need to find a balance, on a case by case basis, between the needs of the individual and those of society, and between those of the inferior legal order and those of the superior one, I. PRETELLI, Les défis posés au droit international privé par la reproduction technologiquement assistée, *Rev. crit. dr. int. pr.* 2015, p. 559 *et suiv*.

[71] CEDH 27 janv. 2015, n° 25358/ 12, D. 2015, p. 702, obs. F. GRANET-LAMBRECHTS, p. 755, obs. J.-C. GALLOUX; AJ fam. 2015, p. 165, obs. E. VIGANOTTI, p. 77, obs. A. DIONISI-PEYRUSSE; *Rev. crit. dr. int. pr*. 2015, p. 1, note H. FULCHIRON et C. BIDAUD-GARON; *RTD civ.* 2015, p. 325, obs. J.-P. MARGUÉNAUD.

[72] R. BARATTA, La reconnaissance internationale des situations juridiques personnelles et familiales, *Recueil des Cours* 2011, t. 348, p. 459.

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European states are no longer masters of their own public order. This is evidenced by the fact that the *Cour de cassation* felt compelled to make a reversal, even though the prohibition of adoption in case of surrogate motherhood seemed so firmly anchored in French law. European pressure will have overcome the jurisprudential opposition in a very short time. The disadvantage of this approach is that it leads to a form of *dumping*. In the European context, it is enough for a State to choose to legalise a practice in order for it to spread to all other States. It is becoming increasingly difficult to oppose the recognition of a registered partnership, homosexual marriage or parentage arising from a surrogate motherhood or from an insemination prohibited in the host State. The rise of a kind of fundamental right to the permanence of personal status[73] leads to an unprecedented reflux of public order which can no longer be opposed to the application of a foreign law or to the recognition of a foreign decision unless a common value is attained. It is still of course possible, in the area of family law, to oppose the recognition of a repudiation or the application of an inheritance law that differentiates according to sex or religion. European public order, egalitarian, secular and laic could therefore only be called upon against religious, ideological or discriminatory rights.

The *Cour de cassation* is thus confined, in order to safeguard appearances, to making a very clear distinction between the instrumentum and the *status* which it is supposed to prove. The Court's assertion that "refusal of registration of intended maternal parenthood, where the child was born abroad at the conclusion of a surrogate motherhood agreement, is the result of the law and persues a legitimate aim to protect the child and the surrogate mother, and seeks to discourage this practice which is prohibited by Articles 16-7 and 16-9 of the Civil Code" is justified only to the extent that the principle is immediately counterbalanced by a kind of instruction manual given to intended parents, who are encouraged to resort to adoption to prevent any infringement of private and family life, or of freedom of movement. Respect for article 47 of the Civil Code, which requires that the facts declared in the civil status document are in conformity with reality, is conditioned by the requirement of a process for securing the status of the child, the denial of maternal parentage being obviously contrary to the above-mentioned principles. Again, the jurisprudence of the *Cour de cassation* will not go without criticism. If we can admit, together with d'Avout, that the detour by the foreigner cannot be the occasion of an anaesthesia, a disqualification of the internal law imperatively applicable[74] or with Struycken, that the differences in the identity of the Member States should not be crushed under the european steamroller[75] and if, like Gruenbaum, one can think that the recognition of situations of surrogate motherhood created abroad will necessarily lead to an erosion of internal prohibi-

[73] S. PFEIFF (note 69), n° 143.

[74] "*Le détour par l'étranger ne peut être l'occasion d'une anesthésie, d'une disqualification du droit interne impérativement applicable*": L. D'AVOUT, *La semaine juridique édition générale* 2009. II. 10021, p. 39.

[75] "*Sous le rouleau compresseur communautaire*": T. STRUYCKEN, L'ordre public de la communauté européenne, *Vers de nouveaux équilibres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, Dalloz, 2008, p. 625.

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tion,[76] the revolution is underway. To date, public order inspired by fundamental rights has had an essentially negative mode of operation, manifested in the ousting of rules and family institutions inspired by a different model of society than Western societies.[77] It seems that we are now moving towards a more positive conception of "the affirmation of a European line".[78] Perhaps it would be time to accept and reflect, at least as far as surrogate motherhood is concerned, on a solution that would avoid the uncertainties, trial and error and tinkering that have characterised the jurisprudence to date.

IV. Solutions to Contemplate for the Future

The judgments of 5 July 2017 result in a sense of futility in opposing the recognition of surrogate motherhood and therefore invite us to think about new, more innovative solutions that would allow us to regain some order and predictability in an area characterised by confusion. Even though the admission of adoption is an important step that could slow down legal proceedings in the short term, all is not settled. Since surrogate motherhood does not necessarily imply the existence of a biological tie, intended parents may, as the *Paradiso* case has shown, be deprived of the possibility of adoption, and the child may then be placed in care without any opposition from the European Court of Human Rights. Two avenues are worth exploring in order to remedy the problem. At the international level, an international convention could be drafted in order to develop cooperation between the States concerned (A). At the internal level, it would no doubt be time to rethink the law of parentage as a whole in order to adapt it to the requirements of new family models (B).

A. The Creation of an International Convention

A global phenomenon requires a global solution.[79] A reflection was therefore initiated in The Hague by the Permanent Bureau of the Conference on Private International Law. Having noted that the individual action of a State could not resolve the difficulties resulting from substitute maternity agreements,[80] the Bureau considered that a system of cooperation should be established along the lines of the

[76] D. GRUENBAUM (note 28), p. 503.

[77] P. KINSCH, Les contours d'un ordre public européen: l'apport de la Convention européenne des droits de l'homme, in H. FULCHIRON/ CH. BIDEAUD-GARON, *Vers un statut européen de la famille*, Dalloz, 2014, p. 152.

[78] S. POILLOT-PERUZZETTO, Les contours d'un ordre public européen: l'apport du droit de l'Union européenne, in H. FULCHIRON/ CH. BIDEAUD-GARON (note 77), p. 163.

[79] E. FARNOS AMOROS, Surrogacy arrangements in a global world: the case of Spain *International Family Law* 2013, p. 71.

[80] CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, (note 12), p. 25.

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system established under the 1993 Adoption Convention,[81] and to prevent abuses while eliminating uncertain legal parentage of the child.[82] This idea was also defended in France in the report on parentage, origins and parenthood, drafted under the aegis of Madams Théry and Leroyer, who proposed that international ethical principles should be laid down in order to set out a framework for recognition and to avoid violations of the fundamental rights of women.[83] From a much more restrictive viewpoint, Binet proposes that a new protocol be added to the Oviedo Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Applications of Biology and Medicine of 4 April 1997 in order to prohibit this practice, as had been done for human cloning.[84]

The idea of a foreign international framework is found in the writings of many authors. The creation of such a text would fulfil an increasingly urgent need[85] and would be the only real means of settling the issue of the status[86] of children and effectively combatting the risks of trafficking and of the black market.[87] Without invoking the model of the 1993 text, Mrs. Trimmings and Mr. Beaumont nevertheless drew inspiration from the idea of establishing administrative authorities *ad hoc* in the States which are a party to this. The authority of the State in which the pregnancy took place could be required to verify the consent of the different parties and the criteria that may be determined (age, marital status, previous pregnancy requirement or reimbursement of medical expenses, for example), while that of the host State could set out the requirements for intended parents (age, good character, requirement or not for a genetic link with the child), which could possibly be by way of a survey on the model of the framework of the agreement procedure for an adoption.[88] In a more unique approach, Brugger said that the text should be drafted under the auspices of the International Labour Organisation as it is indeed a real labour.[89] The idea is obviously appealing, but one can still doubt its feasibility in the short or medium term.[90] Such an approach would, without doubt,

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[81] CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, *Questions de droit international privé concernant le statut des enfants, notamment celles résultant des accords de maternité de substitution à caractère international*, note établie par le bureau permanent, 2011, p. 21.

[82] CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ (note 12), p. 30.

[83] I. THÉRY/ A.-M. LEROYER (note 1), p. 226. B. BOURDELOIS, La famille du XXIe siècle et les problématiques de conflit de lois, *Mélanges en l'honneur du professeur Pierre Mayer*, LGDJ, 2015, p. 88.

[84] J.-R. BINET (note 42).

[85] E. DAVIS, The Rise of Gestational Surrogacy and the Pressing Need for International Regulation, *Minnesota Journal of International Law* 2012, p. 120.

[86] K. TRIMMINGS/ P. BEAUMONT, International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level, *Journal of Private International Law* 2011, p. 627 *et seq*.

[87] *Ibid*., p. 632.

[88] *Ibid*., p. 643.

[89] K. BRUGGER, International Law in the Gestational Surrogacy Debate, *Fordham International Law Journal* 2012, p. 693 *et seq*.

[90] M. WELSTEAD (note 14), p. 338.

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be premature.[91] The stakes are too great and the problems too complex for a consensus to be found. The judgments of the *Cour de cassation* of 5 July 2017 clearly show that the four cases dealt with each had their specific characteristics. Depending on whether or not a fraud has been detected, whether the intended father or mother has donated gametes, whether external donors have been used, whether or not there has been remuneration, whether the birth certificate mentions the intended mother or the uterine mother, judicial solutions and opinions will not be the same for each State. It would obviously be ideal to have a comprehensive approach to the problem, but this would require a substantial development of rights beforehand. Before considering the drafting of an international convention, it would perhaps therefore be necessary to initiate a substantive reflection on parentage in domestic law.

B. Towards Legalisation of Surrogate Motherhood?

The turnaround by the *Cour de cassation* concerning the admission of the spouse in the case of a child born of a surrogate mother appears to be an appeal to the legislator. The problem cannot continue to be regulated on a piecemeal basis, as suggested by the criticisms of France by the European jurisdictions. The shift of international public order under the pressure of fundamental rights could thus, through a domino effect, lead to a modification of the substantive law. Although this idea is largely held by a minority, some French authors begin to question the appropriateness of legalising surrogate motherhood. According to Le Gac-Pech, the unambiguous condemnation of this practice would be anachronistic and would tend to favour a drift towards it, rather than stemming the phenomenon. In order to discourage reproductive tourism and the correlative exploitation of the vulnerability of women from disadvantaged backgrounds, it would be advisable to take the heat out of the debate by giving legitimacy to donations of gametes.[92] This observation is shared in Quebec by the Advisory Committee chaired by Mr. Roy, who deplores the difference that exists on this point with the English-speaking provinces.[93] The upholding of the prohibition of surrogate motherhood agreements and the necessary deviation through adoption that results from it would be all the more paradoxical since the legislation of Quebec is one of the most favourable to same-sex parents.[94] On the basis of the fact that the desire for a child is so powerful that the absence of legal recognition of the arrangements made or the existence of

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[91] C. FENTON-GLYNN, Human Rights and Private International Law: Regulating International Surrogacy, *Journal of Private International Law* 2014, p. 162.

[92] S. LE GAC-PECH, Pour une indispensable légalisation des conventions de mère porteuse, *Actualité juridique famille* 2016, p. 486.

[93] *Comité consultatif sur le droit de la famille* (prés. A. ROY), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, Ministère de la Justice du Québec, Thémis, 2015, p. 169.

[94] I. CÔTÉ/ J.-S. SAUVÉ, Homopaternité, gestation pour autrui: *no man's land*?, *Revue générale de droit* 2016, p. 30.

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penalties attached thereto will be powerless to dissuade the intended parents,[95] the Québec experts proposed the establishment of a legal framework respecting the principle of the interest of the child and the right of women to their dignity and to the free disposition of their bodies.[96] The way of adoption, chosen by Quebec jurisprudence yesterday and the French jurisprudence today, seems to be a transitional solution.

The inaction of the legislator having lasted too long,[97] it is more than time to reflect on the regulation of a practice that is going to exist anyway. The evolution of French and European jurisprudence shows that any repressive policy is doomed to failure. Several pitfalls could be avoided if the law allowed at least the altruistic model in which the surrogate mother is not paid, even if the intended parents take care of the medical expenses incurred as a result of the pregnancy. Perhaps more realistically, given that such an effort might still be too dissuasive for the surrogate mother, two Scottish authors proposed the creation of a qualified model of *"generous altruism"* which would mean that the mother's income would be supplemented for one year.[98] Conditions should also be established to ensure that the rights of the surrogate mother are respected. Beyond the obvious requirement of conscientious consent, the eligibility of the surrogate mother could be limited to women who have already given birth to a child since they are aware of the implications of pregnancy both physically and morally.[99] The monitoring of the conditions set out could be undertaken by approved or certified agencies to avoid abuse. In southern Australia, a register was created to enable women volunteers to enrol and then be assigned to couples wishing to use surrogate motherhood after verification of the criteria laid down by law by an administrative authority.[100] Bringing surrogate motherhood out of hiding would thus make it possible to combat the risks of exploitation[101] while ensuring that surrogate mothers have better medical supervision.[102] The creation of a local market would ultimately be the best way to limit reproductive tourism. One could of course continue to insist that this will not solve the question of the inequality of parents in the face of the cost of such a procedure. However, as Mrs. Zalesne stated, it is only an incidental effect: "income inequality is the culprit to be addressed on its' own".[103]

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[95] *Comité consultatif* (note 92), p. 251.

[96] *Ibid.*, p. 171.

[97] I. CÔTÉ/ J.-S. SAUVÉ (note 93), p. 69.

[98] K. TRIMMINGS/ P. BEAUMONT (note 85).

[99] A. LOMBARD, La filiation pour les couples de même sexe sous l'angle du bien de l'enfant – les exemples néerlandais, californien et suisse, *Fampra.ch* 2017, p. 750.

[100] S. LLEWELLYN, Surrogacy Law Reform in South Australia: Are Surrogacy Registers a New Way Forward in Australia, *University of Tasmania Law Review* 2015, p. 130.

[101] K. BRUGGER, (note 88), p. 671.

[102] M. WELSTEAD (note 14), p. 335.

[103] D. ZALESNE, The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art, *University of Richmond Law Review* 2017, p. 428.

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However, one could question the extent to which it would be preferable to have a more comprehensive approach to the issue. The emergence of surrogate motherhood, as well as the increasing development of medical assistance for procreation or the admission of homoparentality, invites us to rethink globally the right of parentage that today faces an unprecedented challenge. Technological and sociological evolution has rendered the traditional model obsolete. The voluntary interruption of pregnancy, contraception and the development of medical techniques to assist procreation have totally disrupted the original paradigm. The myth of the will has imposed itself in the face of the myth of procreation [104]and parentage has gradually disconnected from biological ties. More than any other practice, surrogate motherhood implies a reconceptualization of the very idea of parentage,[105] which will be further undermined with the development of techniques such as ectogenesis[106] or the creation of artificial spermatozoa.[107] The contemporary biological truths which led the *Cour de cassation* to refuse the registration of the birth certificate mentioning the intended mother as the mother of the child may then disappear. These prospects cannot be ignored. It is necessary to ' maintain composure and to reflect on what is ultimately the essence of parentage, namely love, affection and attention which must benefit the child: whether adopted, born to a surrogate mother, or through medical assistance for pregnancy, or from the physical relationships of the individuals who raise it, the child has the same needs and the same rights. If it now appears to be established, in the light of jurisprudence relating to surrogate motherhood, that the refusal to establish legal parentage to each of the intended parents is contrary to the right to respect for private life,[108] then it is good that social parentage has imposed itself against biological parentage. The model of adoption proposed by the *Cour de cassation* in its judgments of 5 January 2017, may well be an acceptable substitute, but French legislature will not be able to avoid a much more fundamental reflection on the subject in the years to come. This could involve the dissociation between the quality of the progenitor, which would obviously continue to be based on biological truth, and the quality of the parent, which would be based on will and social reality.[109]

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[104] D. FENOUILLET, Du mythe de l'engendrement au mythe de la volonté, *Archives de philosophie du droit* 2014, 57, p. 37.

[105] C. FENTON-GLYNN (note 90), p. 162; B. STARK, Transnational Surrogacy and International Human Rights Law, *International Law Students Association Journal of International and Comparative Law* 2012, p. 370.

[106] Development of an embryo outside the body, in an artificial environment.

[107] J. Y NAUD, Spermatozoïdes artificiels: prochaine étape de la procréation médicale assistée, *Revue médicale suisse* 2015, p. 1155.

[108] J.-P. MARGUÉNAUD (note 20), p. 336.

[109] G. KESSLER, L'avenir de la présomption de paternité: comparaisons franco-québécoises, *Revue internationale de droit comparé* 2017-1, p. 119 *et seq*.

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V. Conclusion

With progress, often comes fear of the dark side of technological advancement – fear of the unknown or fear of deviation from tradition. Since new technologies can reshape society (in this case, by redefining reproductive and family possibilities), public concerns tend to have a strong moral or ethical element.[110] These fears, however legitimate they may be, must not lose sight of the essential point: although the ordinance of family law is affected by the recognition of situations of surrogate motherhood, the concrete harm to society is merely negligible. Although the majority of the legal doctrine has strongly opposed it, the reversal made by the *Cour de cassation* in its judgments of 5 July 2017 deserves to be applauded. The admission of adoption by the spouse of the biological parent is a pragmatic solution which, while not addressing all the problems, will help the lives of a large number of families until the legislature decides finally reform of the law of parentage.

[110] D. ZALESNE (note 102), p. 428.

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PUNITIVE DAMAGES AND PUBLIC POLICY IN THE EU

Michael KOMUCZKY*

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I. Introduction

Recognizing and enforcing US judgments and arbitral awards that oblige the defendant to pay so-called punitive damages[1] is controversial in many Continental

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[1] The terminology for such damages awards differs, amongst others they are known as exemplary or vindictive damages. For reasons of simplicity, the term "punitive damages"

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 509-529
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Printed in Germany

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European states. The majority of legal orders in Europe consider enforcing penalties against an individual as a prerogative of the State, while civil liability is seen as purely compensatory.[2] For this reason, it is widely accepted in the German-speaking legal literature[3] and beyond[4] that awarding punitive damages is contrary to the basic notions of justice in many European jurisdictions. While some scholars detect an erosion of this opinion,[5] the majority maintain that a foreign decision,

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will be used and shall be understood as including all forms of damages that go beyond the compensation for material harm, see generally EDITOR'S NOTE, Exemplary Damages in the Law of Torts, *Harvard Law Review* 1957, p. 517.

[2] P.S. CODERCH, Punitive Damages and Continental Law, *Zeitschrift für Europäisches Privatrecht* 2001, p. 604; C. THIELE, Der Ersatz von *punitive damages* in den USA – aktuelle Entwicklungen, *Zeitschrift für Rechtsvergleichung* 1997, p. 200 *et seq*.

[3] See e.g. A. JUNKER in J. V. HEIN (ed), *Münchener Kommentar zum BGB* Vol. XII, 7th ed., Munich 2018, Art. 26 Rom II-VO marginal number ("mn.") 21 *et seq*.; A. SPICKHOFF in H.G. BAMBERGER/ H. ROTH/ W. HAU/ R. POSECK (eds), *Beck'scher Online-Kommentar BGB*, 43rd ed., Munich 2017, Art. 7 Rom I-VO mn. 23 and Art. 26 Rom II-VO mn. 1; H. DÖRNER in R. SCHULZE (ed), *Bürgerliches Gesetzbuch – Handkommentar*, 9th ed., 2017, Rome II-Regulation mn. 2; P. GOTTWALD in T. RAUSCHER/W. KRÜGER (ed), *Münchener Kommentar zur ZPO* Vol. I, 5th ed., Munich 2016, § 328 ZPO mn. 123; D. SCHRAMM/ A. BUHR in A. FURRER/ D. GIRSBERGER/ M. MÜLLER-CHEN (eds), *Handkommentar zum Schweizer Internationalen Privatrecht*, 3rd ed., Zürich 2016, Art. 27 IPRG mn. 19; P. MANKOWSKI in P.W. HEERMANN/ J. SCHLINGLOFF (eds), *Münchener Kommentar zum Lauterkeitsrecht* Vol. I, 2nd ed., Munich 2014, Teil II mn. 370; G. KODEK in D. CZERNICH/ G. KODEK/ P. MAYR (eds), *Europäisches Gerichtsstands- und Vollstreckungsrecht*, 4th ed., Innsbruck/Vienna/Zurich 2014, Art. 45 EuGVVO mn. 19; H. HEISS/ L. LOACKER, Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II, *Juristische Blätter* 2007, p. 645; A. SPICKHOFF, Die Restkodifikation des Internationalen Privatrechts: Außervertragliches Schuld- und Sachenrecht, *Neue Juristische Wochenschrift* 1999, p. 2213; J. MÖRSDORF-SCHULTE, *Funktion und Dogmatik US-amerikanischer punitive damages*, Tübingen 1999, p. 26 *et seq*.; C. THIELE, Der Ersatz von punitive damages in den USA – aktuelle Entwicklungen, *Zeitschrift für Rechtsvergleichung* 1997, p. 200 *et seq*.; J. DROLSHAMMER/ H. SCHÄRER, Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages-Urteils", *Schweizer Juristen-Zeitung* 1986, p. 309; see also Recital 32 sentence 2 Reg (EG) 864/2007 of the European Parliament and of the Council of 11.7.2007 on the law applicable to non-contractual obligations (Rome II), OJ L 2007/199/40; cf. Art. 24 of the Commission Proposal for the Rome II-Regulation, COM(2003) 427 final, with reference to the former German law on p. 29; to this provision J. MÖRSDORF-SCHULTE, Spezielle Vorbehaltsklausel im Europäischen Internationalen Deliktsrecht?, *Zeitschrift für Vergleichende Rechtswissenschaft* 2005, 192.

[4] G. BORN, *International Arbitration: Law and Practice*, 2nd ed., London 2015, § 15.05.C., para. 40; N.P. CASTAGNO, International Commercial Arbitration and Punitive Damages, *Revista de Arbitraje Comercial y de Inversiones* 2011, p. 747 *et seq*.; J.Y. GOTANDA, Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc., *Harvard International Law Journal* 1997, p. 100 *et seq*.

[5] J.Y. GOTANDA, Charting Developments Concerning Punitive Damages: Is the Tide Changing?, *Columbia Journal of Transnational Law* 2007, 507; cf. C. VAN DAM, *European Tort Law*, 2nd ed., 2013, para. 1201-3; see also critical, but with further references, H. KOZIOL, Punitive Damages: Admission into the Seventh Legal Heaven or Eternal

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which allows a claim for punitive damages, is contrary to the respective forum's public policy and, hence, not enforceable.[6] This has been affirmed by the jurisprudence in various European States, including France,[7] Germany,[8] Poland,[9] Greece,[10] Italy,[11] and Switzerland.[12] The Austrian *Oberster Gerichtshof* has also indicated that the punitive nature of a damages claim could be argued as a ground for refusing recognition and enforcement.[13]

Damnation?, in H. KOZIOL/ V. WILCOX (eds), *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna 2009, p. 284 *et seq*.

[6] The principle that recognizing and enforcing foreign decisions may be denied, if the decision contravenes the most fundamental values of the forum State – usually referred to as "public policy", "public order" or "*ordre public*" – is enshrined in many domestic and EU legislative acts as well as international treaties on the recognition and enforcement of judgments and arbitral awards, cf. Art. 9 point e Hague Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention"), Art. V para. 2 point b New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("NYC"), Art. 45 para. 1 point a Reg (EU) 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 2012/351, 1 ("Brussels Ia-Regulation"); Art. 34 nr. 1 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 2007/339, 3 ("Lugano Convention"); § 328 para. 1 nr. 4 German *Zivilprozessordnung*; § 408 nr. 3 Austrian *Exekutionsordnung*; Art. 64 para. 1 point g Italian *Legge 31 maggio 1995, n. 218*; see also the French *Cour de Cassation, 1ère Chambre Civile*, 20.2.2007, Nr. 05-14.082 on the interpretation of Art. 509 of the French *Code de procédure civile*. In the following, the term "public policy" will be used to refer to these fundamental values of a State.

[7] *Cour de Cassation, 1ère Chambre Civile*, 1.12.2010, Nr. 09-13303, available in French at https://www.legifrance.gouv.fr/initRechJuriJudi.do (25.5.2018), *Dalloz* 2011. 423, obs. I. GALLMEISTER, note F.-X. LICARI ; *Revue Trimestrielle de Droit civil* 2011. 122, obs. B. FAGES, *Rev. crit. dr. int. pr.* 2011 p. 93, note H. GAUDEMET-TALLON, De la conformité des dommages-intérêts punitifs à l'ordre public.

[8] *Bundesgerichtshof*, 4.6.1992, IX ZR 149/91, *Neue Juristische Wochenschrift* 1992, p. 3096.

[9] *Sąd Najwyższy*, 11.10.2013, I CSK 697/12, as cited in P. MACHNIKOWSKI, Anerkennung von punitive damages- und actual damages-Urteilen in Polen, *IPRax* 2015, p. 453.

[10] *Areopag,* as cited in C.D. TRIADAFILLIDIS, Anerkennung und Vollstreckung von "punitive damages"-Urteilen nach kontinentalem und insbesondere nach griechischem Recht, *IPRax* 2002, 236.

[11] *Corte Suprema di Cassazione*, 19.1.2007, Nr. 1183/2007, *Giurisprudenza italiana* 2008, p. 395 con nota di A. GIUSSANI, Resistenze al riconoscimento delle condanne al pagamento dei *punitive damages*: antichi dogmi e nuove realtà; and 8.2.2012, Nr. 1781/2012, *Foro italiano*, fasc. 5, 2012, pag. 1454, con osservazioni di R. DE HIPPOLYTIS, Condanne (straniere) al risarcimento dei danni punitivi: sono davvero insormontabili gli ostacoli al riconoscimento?.

[12] *Bezirksgerichtspräsidium von Sargans*, 1982, as cited in J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 309.

[13] *Oberster Gerichtshof*, 22.3.2011, 3 Ob 38/11a, available in German at <www.ris.bka.gv.at/Judikatur/> (15.2.2018).

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However, in a recent decision, the united civil sections (*sezioni unite civili*) of the Italian *Corte Suprema di Cassazione* held that punitive damages did not *per se* violate Italian public policy (any more).[14] Much earlier, the Spanish *Tribunal Supremo* held that, while Spanish tort law primarily focused on compensating the injured party, the idea of a punitive element was not entirely foreign to it, hence, a US punitive damages judgment was not considered to infringe Spanish public policy.[15] The French *Cour de Cassation*[16] and the Greek *Areopag*[17] have also rejected the notion that punitive damages in general were against public policy.

The German *Bundesgerichtshof*[18] and the Polish *Sąd Najwyższy*[19] at least considered the possibility that a decision on punitive damages might be recognized to the extent that the awarded sum substitutes the lack of reimbursement of procedural costs in US law. Similarly, the Austrian *Oberster Gerichtshof* mentions the concept of punitive damages as a possible substitute for cost reimbursement before US courts.[20] Also, Art. 11 of the Hague Convention – to which the EU and its Member States are contracting parties[21] – allows the contracting States to deny recognition and enforcement of damages claims that do not compensate a party for actual loss or harm suffered, while urging the enforcing court to consider the extent to which such damages awards serve to cover litigation costs.

These developments warrant a re-assessment of the above-mentioned prevailing opinion that decisions on punitive damages always constitute a violation of public policy in Europe.

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[14] *Corte Suprema di Cassazione*, 5.7.2017, Nr. 16601/2017, see G. ALPA, Le funzioni della responsabilità civile e i danni "punitivi": un dibattito sulle recenti sentenze della Suprema Corte di Cassazione, *Contratto e Impresa*, 2017, 4, 1084; this decision was kindly provided to me by Dr. Ilaria Pretelli, to whom I am very grateful.

[15] *Tribunal Supremo*, Sala de lo Civil, 13.11.2001, *No. de Recurso* 2039/1999, under II.9., available in Spanish at <www.poderjudicial.es> (15.2.2018).

[16] See reasoning number 1 of the judgment in note 7.

[17] See C.D. TRIADAFILLIDIS (note 10), p. 238.

[18] See *Bundesgerichtshof* (note 8), p. 3103.

[19] See P. MACHNIKOWSKI (note 9), p. 456.

[20] *Oberster Gerichtshof*, 5.5.2015, 4 Nc 7/15i.

[21] Cf. <www.hcch.net/en/instruments/conventions/status-table/> (15.2.2018). The US have already signed, but not ratified it, while Switzerland (at the date of submission of this contribution) has not even signed it.

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II. Recognizing Punitive Damages Decisions in Europe?

The aim of this contribution is not to argue for or against the concept of punitive damages in tort law.[22] Rather, the focus is to discuss whether recognition and enforcement of US decisions that award punitive damages may be denied in European jurisdictions by invoking public policy. While each European state certainly has a different legal order and is free to determine its public policy, it will be shown that both the principle idea of public policy as a ground for refusing recognition and enforcement of judgments, and the basic notions of procedural and tort law of many Continental European jurisdictions, share great similarities. This allows discussing the topic at hand from a comparative point of view.

The jurisprudence of the above-mentioned European courts raises several grounds which could be argued against a public policy violation of punitive damages. First, it may be the case that the punitive damages award – despite its name – compensates the injured party for actual losses or expenses (A.). Second, it will be discussed whether the concept of punitive damages as such is (still) sufficiently offensive to violate the strict requirements of public policy (B.).

A. Punitive Damages as a Means for Compensation

The main argument against enforcing punitive damages in Europe seems to be the purposes of deterrence and punishment, which go beyond the principle of compensation. In order to assess this properly, the differences in substantive and procedural law in the US and Europe have to be discussed first (1.). The basic ideas of public policy can then be established and assessed in light of punitive damages awards (2.).

1. The Differences in Substantive and Procedural Law in the USA and European Legal Orders

a) The European Perspective

As the EU has harmonized substantive tort law and procedural law to only a limited extent,[23] these matters remain largely within the domain of domestic law of

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[22] Instead of many, see as an example for this discussion H. KOZIOL, Comparative Conclusions, in H. KOZIOL (ed), *Basic Questions of Tort Law from a Comparative Perspective*, Vienna 2015, mn. 8/37 *et seq.*, with further references.

[23] Yet, the EU has been active in harmonising specific areas in regard to damages claims, *e.g.* for the infringement of competition law, cf. Dir 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 2014/349, p. 1 ("Cartel damages-Directive"), or IP-rights, cf. Dir 2004/48/EC of the European Parliament and of the Council of 29.4.2004 on

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the Member States. Still, some general tendencies within Continental European States, both within and outside the EU, can be noted.

In European academic discussion, the compensatory purpose of tort law is prominently mentioned, while the idea of a punitive purpose of tort law is generally rejected.[24] Only in selected fields, including IP-law and the protection of personality rights, some European authors do argue that damages claims serve the purposes of punishment and deterrence.[25] The existing EU legislation emphasizes the idea of restitution in civil claims,[26] and does not demand,[27] but neither prohibit,[28] damages claims that go beyond compensation.

This can be seen in the context of the procedural rules on costs. In Europe, the losing party in adversary court proceedings will normally be obliged to reimburse the winning party for their legal costs.[29] The same principle generally

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the enforcement of intellectual property rights, OJ L 2004/195, p. 16 ("Enforcement-Directive"). Directly applicable damages claims in EU law are to be found in the Reg (EC) 261/2004 of the European Parliament and of the Council of 11.2.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ L 2004/46, p. 1 ("Flight-Regulation"), and Art. 11 Reg (EU) 1286/2014 of the European Parliament and of the Council of 26.11.2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 2014/352, p. 1 ("PRIIP-Regulation"). Also, access to justice is a concern of the EU, but European legislation is limited to legal aid, see Council Dir 2002/8/EC of 27.1.2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 2003/26, p. 41 ("Legal aid-Directive").

[24] See, for instance and all with further references, H. KOZIOL, Comparative Conclusions (note 22), mn. 8/37 *et seq*.; H. KOZIOL, Abschreckung als primäres Ziel des Schadenersatzrechts?, in R. GAMAUF (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart*, Vienna 2017, p. 110 *et seq*.; C. VAN DAM (note 5), para. 1201-1; H. KOZIOL, Punitive Damages (note 5), p. 282 *et seq*.

[25] C. VAN DAM (note 5), para. 1201-3; see also the national reports in H. KOZIOL/ V. WILCOX (note 5), each with further references, especially: J.-S. BORGHETTI, Punitive Damages in France, p. 56 *et seq*.; N. JANSEN/ L. RADEMACHER, Punitive Damages in Germany, p. 76 *et seq*.; A.P. SCARSO, Punitive Damages in Italy, p. 111 *et seq*.; P. DEL OLMO, Punitive Damages in Spain, p. 140 *et seq*.; see *e.g.* in Austria § 87 para. 3 Copyright Act (*Urheberrechtsgesetz*) as amended and promulgated in the Austrian Federal Gazette (*österreichisches Bundesgesetzblatt*) I 2015, Nr. 99, J. GUGGENBICHLER in G. KUCSKO/ C. HANDIG, *urheber.recht*, 2nd ed., Vienna 2017, § 87 mn. 28 *et seq*.; in regard to the jurisprudence on financial satisfaction for violations of personality rights of the German *Bundesgerichtshof*, see M. PRINZ, Geldentschädigung bei Persönlichkeitsrechtsverletzungen durch Medien, *Neue Juristische Wochenschrift* 1996, 954 *et seq*.

[26] Recital 12 Cartel damages-Directive; Recital 26 Enforcement-Directive.

[27] Recital 26 Enforcement-Directive; ECJ, 25.1.2017, C-367/15, *Stowarzyszenie OTK*, para. 28.

[28] Recital 12 and Art. 3 para. 3 Cartel damages-Directive.

[29] See the chapters on various European jurisdictions in P. TAELMAN, *International Encyclopedia for Civil Procedure*, especially: W.H. RECHBERGER, Austria, 86th Suppl., 2016, para. 155; P. TAELMAN/ C. VAN SEVEREN, Belgium, 97th Suppl., 2018, para. 435; P. YESSIOU-FALTSI, Greece, 59th Suppl., 2011, para. 331a; I. SZABÓ, Hungary, 84th Suppl.,

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applies in arbitration in Europe,[30] or for proceedings before the European Court of Justice[31] and the European Court of Human Rights.[32]

While EU law leaves it to the Member States whether allocation of procedural costs is to be based on the success of the claim or not,[33] specific directives address this issue: For example, in IP-rights infringement cases, Art. 14 Enforcement-Directive provides for reimbursement of procedural costs. The Cartel damages-Directive does not mention costs explicitly, but provides in Art. 3 para. 2 that the injured party has to be placed in the same position as without the violation of cartel law. In general, enforcing rights under EU law must not be rendered practically impossible or excessively difficult.[34] Arguably, this also comprises a certain relief of the financial burdens of pursuing the claim, as individuals may otherwise be deterred from enforcing their rights under EU law.

b) *The US Perspective*

In the USA, substantive tort law and procedural law are generally within the competence of the States, while there are also specific tort provisions at the federal level with a complementary federal court system.[35] Yet, here we equally find similarities.

Punitive damages are permissible in most State laws and US federal law and in most instances they serve dual purposes of deterrence and punishment.[36] Only under one system are punitive damages meant as a form of compensation for

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2016, para. 351; M.A. LUPOI, Italy, 98th Suppl., 2018, para. 305; B. LINDELL, Sweden, 69th Suppl., 2013, para. 549; for Germany, see § 91 German Code of Civil Procedure (*deutsche Zivilprozessordnung*) as amended and promulgated in the German Federal Gazette (*deutsche Bundesgesetzblatt*) I 2007, p. 358; for Switzerland, see Art. 106 Swiss Code of Civil Procedure (*Schweizer Zivilprozessordnung*) as promulgated in the Swiss Official Collection (*Amtliche Sammlung*) 2010, p. 1739.

[30] For a general analysis, with references to European and non-European jurisdictions, G. BORN, *International Commercial Arbitration*, 2nd ed., 2014, p. 3094 *et seq*.

[31] Art. 138 of the Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 2012/265, p. 1.

[32] Practice direction on Just Satisfaction Claims, issued by the President of the ECtHR in accordance with Rule 32 of the Rules of Court on 28.3.2007, <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> (15.2.2018). While these proceedings are of a public law nature, both courts have the power to award damages.

[33] Recital 12 and Art. 3 para. 2 subpara. 2 Legal aid-Directive.

[34] ECJ, 13.3.2007, C-432/05, *Unibet*, para. 43 with further references; cf. now Art. 4 para. 3 Treaty on European Union.

[35] M.D. GREEN/ W.J. CARDI, Basic Questions of Tort Law from the Perspective of the USA, in H. KOZIOL (ed), Basic Questions (note 22), mn. 6/10; J.B. OAKLEY/ V.D. AMAR, United States of America, 50th Suppl., 2009, para. 13 *et seq*., in P. TAELMAN (note 29).

[36] A.J. SEBOK, Punitive Damages in the United States, in H. KOZIOL/ V. WILCOX (note 5), p. 155 *et seq*., as well as the Annex on p. 309 *et seq*.

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procedural costs,[37] while this notion is explicitly rejected by other jurisdictions.[38] One jurisdiction awards punitive damages as compensation for insults,[39] while a comparable form of damages is known as moral damages[40] or enhanced compensatory damages[41] in other jurisdictions. Under federal competition law, for instance, which provides for treble (i.e. triple) damages, it is also stipulated that the winning party should additionally be granted as compensation for litigation costs (*e.g.* "[…] and the cost of the suit, including a reasonable attorney's fee.").[42] So here, compensating for costs cannot be argued as a purpose of such damages. In general, the additional possibility of an award for attorney fees is said to often occur alongside punitive damages.[43]

In regard to procedural costs, the classic "American Rule of costs"[44] provides that each party has to bear their own attorney fees.[45] The argument against cost reimbursement in the US is mainly that it would make it impossible to calculate the litigation risk, as the prospective costs of the other party are considered unpredictable. This uncertainty would, according to the argument in US literature, prevent parties from pursuing legitimate claims and thus would be an obstacle to access to justice.[46] To balance the prospect of having to bear all the

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[37] Supreme Court of Connecticut, 20.12.1983, *Venturi v. Savitt, Inc.*, 191 Conn. 588 (1983); cf. A. J. SEBOK (note 36), p. 173.

[38] US Supreme Court, December 1851, *Day v. Woodworth*, 54 U.S. 363 and December 1872, *Oelrichs v. Spain*, 82 U.S. 211; Supreme Court of Wisconsin, June 1864, *Fairbanks v. Witter*, 18 Wis. 287; Supreme Court of Vermont, Franklin County, January 1873, *Earl v. Tupper*, 45 Vt. 275; Supreme Court of Minnesota, 16.12.1874, *Kelly v. Rogers*, 21 Minn. 146; Supreme Court of California, July 1874, *Howell v. Scoggins*, 48 Cal. 355 and October 1874, *Falk v. Waterman*, 49 Cal. 224.

[39] Supreme Court of Michigan, 5.8.1980, *Kewin v. Massachusetts Mutual Life Insurance Company*, 409 Mich. 401.

[40] US District Court for the District of Puerto Rico, 11.9.1968, *Cooperativa de Seguros Multiples de Puerto Rico v. Manuel San Juan*, 289 F. Supp. 858.

[41] Cf. Supreme Court of New Hampshire, 6.1.2005, *Figlioli v. R.J. Moreau Companies, Inc.*, Nr. 2003-676; before punitive damages were outlawed by statute in New Hampshire, see New Hampshire Revised Statutes § 507:16 (2013), their purpose was seen as compensatory as well, as the state constitution prohibited damages claims that go beyond compensation, Superior Court of Judicature of New Hampshire, December 1972, *Fay v. Parker*, 53. N.H. 342 (1872).

[42] U.S. Code Title 15 Sec. 15 point a.

[43] H.B. BAEZ, United States of America, 30th Suppl. (2013), para. 383, in B. WEYTS, *International Encyclopedia for Tort Law*.

[44] Which is frequently contrasted with the "English Rule" that provides for shifting of attorney fees based on the success principle, see J.B. OAKLEY/ V.D. AMAR (note 35), para. 218, with further references.

[45] C. HAZARD/ C.C. TAIT *et al.*, Pleading and Procedure – State and Federal, 10th ed., 2009, p. 124; while other "costs" are usually shifted based on success, *ibid*, p. 123, the vast amount of litigation costs usually consists of attorney fees, *ibid*, p. 121; due to this, the term "costs" will in the following be used exchangeable with attorney fees.

[46] *Ibid*; see also J.F. VARGO, The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, *The American University Law Review* 1993, p. 1634,

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costs even in case of full success, the possibility for so-called "contingency fee agreements" is put forward:[47] With such an agreement, the attorney of the party (usually of the plaintiff) promises to advance all litigation costs. Only in case of victory, the attorney will receive remuneration in the form of a percentage of the damages awarded.

It is admitted by US scholars that the American Rule prevents full compensation of an injured party, as the awarded amount will partly (or sometimes entirely) be used to cover the expenses of enforcing the claim.[48] In order to mitigate this result, it is said to be not uncommon that juries award higher sums as compensatory damages.[49] Another problem is said to be the fact that attorneys have an incentive to reach a settlement, which might not always be in the best interest of their client, and to spread the risk between their cases, even if they are unrelated.[50]

2. *Public Policy and the Tort Law Principle of Compensation*

First, the concept of public policy will be discussed in an abstract manner (a). An elaboration of the principle of compensation as European public policy will then follow (b).

a) General Considerations on Public Policy

i) Purpose and Function of Public Policy

A prohibition on enforcing a foreign decision that contravenes the public policy of the forum can be found in many legal acts.[51] Despite the differing sources, the underlying ideas are similar:[52] It is not the purpose to reject recognition and

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citing US Supreme Court, 8.5.1967, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, p. 718.

[47] J.B. OAKLEY/ V.D. AMAR (note 35), para. 219; C. HAZARD/ C.C. TAIT *et al.* (note 45), p. 121 *et seq*.

[48] J.B. OAKLEY/ V.D. AMAR (note 35), para. 218.

[49] See EDITOR'S NOTE (note 1), p. 521, especially the cases in foot note 35, where the same set of facts was tried before three different juries, twice with the possibility to award punitive damages and once without, and the total sum awarded of each verdict stayed the same, even in the case were only compensatory damages were awarded. See also the discussion of the German *Bundesgerichtshof* (note 8), p. 3103.

[50] J.B. OAKLEY/ V.D. AMAR (note 35), para. 219.

[51] See the cited legal sources in note 6 *supra*.

[52] For instance, see INTERNATIONAL LAW ASSOCIATION, Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, *Arbitration International* 2003, p. 213; P. GOTTWALD (note 3), § 328 mn. 116 *et seq*.; P. GOTTWALD in T. RAUSCHER/ W. KRÜGER (eds), *Münchener Kommentar zur ZPO* Vol. III, 5th ed., Munich 2017, Art. 45 VO (EU) 1215/2012 mn. 12 *et seq*.; F. WALTHER in F. DASSER/ P. OBERHAMMER (eds), *Handkommentar Lugano-Übereinkommen*, 2nd ed., Bern 2011, Art. 34 mn. 26 *et seq*.; P. VOLKEN in D. GIRSBERGER/ A. HEINI *et al.* (eds), *Zürcher*

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enforcement of all decisions that would have been decided differently in the enforcement State. It is not even sufficient that the decisions to enforce cannot be reconciled with a mandatory rule of the forum. The public policy reservation should only protect the most fundamental principles of the forum's legal order. It may only be invoked in exceptional circumstances and must never lead to a reassessment of the case (prohibition of the "*révision au fond*"). An important factor is usually the connection between the case and the territory of the forum State, as a more remote connection makes it more palatable to accept differing legal ideas than a close connection. The assessment of a public policy infringement is result-oriented. It is not about whether the legal provisions that were applied in the decision comply with public policy in an abstract manner, but only whether the result of enforcing the specific decision is unbearable for the forum. Of course, this may make it necessary to consider the foreign legal values, but they are not the main determinant. Lastly, if only a distinct and severable part of the decision contravenes public policy, the other part may usually be recognized.[53]

ii) Art. 11 Hague Choice of Court Convention

The Hague Convention contains a specific provision on punitive damages in Art. 11, allowing contracting States to refuse judgments that award damages that go beyond compensation, and mentioning punitive and exemplary damages explicitly, while urging the enforcement court to take into consideration whether the awarded damages serve to compensate for costs. This article was included because some members of the working group found the general public policy exception to be insufficient for punitive damages cases.[54] Yet, the working group stresses that (also) this ground for refusal is to be interpreted as restrictively as possible.[55] The courts of a contracting party are by no means obliged to refuse recognition of a punitive damages award, Art. 11 merely provides the option to do so.[56] In addition, the appeal to the courts to consider whether a punitive damages award should

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Kommentar IPRG, Zürich/Basel/Geneve 2004, Art. 27 mn. 30 *et seq*.; A. HEINI in D. GIRSBERGER/ A. HEINI *et al.* (eds), *Zürcher Kommentar IPRG*, Zürich/Basel/Geneve 2004, Art. 190 mn. 37; J. MÜNCH in T. RAUSCHER/ W. KRÜGER (eds), *Münchener Kommentar zur ZPO* Vol. III, 5th ed., Munich 2017, § 1059 ZPO mn. 40; J. ADOLPHSEN in T. RAUSCHER/ W. KRÜGER (eds), *Münchener Kommentar zur ZPO* Vol. III, 5th ed., Munich 2017, Art. V UNÜ mn. 68; D. CZERNICH in A. BURGSTALLER/ M. NEUMAYR et al. (eds), *Internationales Zivilverfahrensrecht*, 8. Suppl., 2008, Art. V NYÜ mn. 68 *et seq*.; Z. TANG/ Y. XIAO/ Z. HUO, *Conflict of Laws in the People's Republic of China*, 2016, mn. 6.72 *et seq*.; C. OF MAPESBURY et al. (eds.), *Dicey, Morris and Collins on The Conflict of Laws* Vol. I, 15th ed., London 2012, mn. 14-153 *et seq*.

[53] This solution is also favoured by the drafters of the Hague Convention, see T. HARTLEY/ M. DOGAUCHI, Explanatory Report to the Convention of 30 June 2005 on Choice of Court Agreements, The Hague 2005, p. 835 para. g.

[54] T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. b.

[55] *Ibid.*

[56] T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. i.

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cover costs is not be taken as a "hard rule", but to emphasize that full compensation also includes compensation for litigation costs.[57]

When drafting the final version of this article, the working group was careful not to over-regulate the issue, as it would have conferred too much weight to a problem of rather limited scope.[58] European courts, which – after the entry into force of this convention in regard to the USA – may have to consider invoking this ground for refusal against a punitive damages judgment, should be very reluctant to do so. Even though the text of Art. 11 para. 2 Hague Convention addresses the intention of the damages award, it would be more consistent with the prohibition of the *révision au fond*[59] and the explicit mention of litigation costs as part of actual loss[60] to merely view the result of enforcing these damages awards – much like with public policy.

iii) The Public Policy Arguments in the Context of Punitive Damages Awards

With regard to tort law, the constitutional principle of proportionality is frequently raised:[61] It is proscribed that tort law shall have a mere compensatory character, while punishment and deterrence are functions reserved for criminal law. Also without reference to a constitutional principle, this is often seen as a fundamental characteristic of European tort law.[62] Even if, for reasons of simplicity, the European legal orders may tolerate lump sums and estimations to a certain degree, the primary aim must still be compensation.[63] Contractual penalties are subject to re-assessment by the courts in regard to their proportionality.[64] Another frequently mentioned problem is that US courts are seen to excessively assume jurisdiction over foreign defendants.[65] Further, punishing a person is subject to strict guarantees

[57] T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. j.

[58] See T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. i and k.

[59] T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. d.

[60] T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. j.

[61] *Bundesgerichtshof* (note 8), p. 3104; C.D. TRIADAFILLIDIS (note 10), p. 238; *Cour de Cassation* (note 7), reasoning nr. 5; P. MACHNIKOWSKI (note 9), p. 455.

[62] J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 310; H. KOZIOL, Comparative Conclusions (note 22), mn. 8/37 *et seq*.; H. KOZIOL (note 24), p. 110 *et seq*. with further references.

[63] J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 310; *Bundesgerichtshof* (note 8), p. 3104; P. MACHNIKOWSKI (note 9), p. 455.

[64] J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 310; cf. for instance: § 1336 para. 2 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) as amended and promulgated in the Austrian Federal Gazette (*österreichisches Bundesgesetzblatt*) I 2005, Nr. 120; Art. 163 para. 3 Swiss Code of Obligations (*Obligationenrecht*) as promulgated in the Swiss Official Collection (*Amtliche Sammlung*) 1911, p. 317; Art. 1231-5 French Civil Code (*Code Civil*) as amended and promulgated with *Ordonnance* Nr. 2016-131 of 10.2.2016; see also Art. III.-3:712 para. 2 of the Draft Common Frame of Reference.

[65] P. MACHNIKOWSKI (note 9), p. 456 with further references.

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of basic human rights[66] – and also specific human rights, like the freedom of press,[67] where applicable.

b) *Punitive Damages and the European Idea of Compensation*

i) *US Awards of Compensatory Damages*

The award of compensatory damages in a US decision will not usually contradict public policy. An award for damages for immaterial harm, such as pain and suffering, will also be open to recognition and enforcement, as the compensation of such losses is also known in the European legal traditions. An infringement of public policy in regard to compensatory damages will usually only occur, if the awarded amount appears to be excessive compared to the harm suffered.[68] However, international comity and the prohibition of the *revision au fond* require European courts to show great restraint here.

ii) *Punitive Damages Awards*

The enforcement of penalties by private parties can indeed be seen as contrary to fundamental principles on this side of the Atlantic. It also has to be conceded that those functions of punitive damages, which would be in line with European ideas of tort law (such as compensation for costs or immaterial harm) are of minor importance compared to punishment and deterrence – at least in the majority of US States. However, when confronted with a US decision, the European judge will first have to recall that the US is not a single legal order, but comprises fifty States plus a federal level.[69] While punishment and deterrence are the major purposes of punitive damages in most US jurisdictions, this is not the case for all: As already discussed, in some States the concept of punitive damages is intended to either compensate for costs or immaterial harm – legal ideas that are well in line with European notions of tort law. If the punitive damages award was rendered in accordance with one of these laws, then it serves a purely compensatory purpose, despite its name. Such an award cannot be held to be contrary to public policy in Europe, nor could Art. 11 Hague Convention be invoked.

Even if the European judge finds that the purpose of the specific punitive damages award in question was to punish and to deter, focusing only on the abstract purpose of the foreign rule is insufficient for relying on public policy. The argument against punitive damages is that they exceed the amount necessary for compensation and, hence, lead to unjust enrichment of the injured party. However, in this assessment, only the result of enforcing the decision in the specific case is relevant. It is not sufficient to merely compare the substantive tort laws of the US

[66] P. MACHNIKOWSKI (note 9), p. 455; *Cour de Cassation* (note 7).

[67] P. MACHNIKOWSKI (note 9), p. 456.

[68] T. HARTLEY/M. DOGAUCHI (note 53), p. 835 para. d.

[69] See the references in note 35 *supra*.

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and the respective forum: also the procedural rules – specifically the rules on cost allocation – must also be considered. As shown above, European legal orders presuppose that the party will be reimbursed for the expenses that were necessary in order to enforce the claim. Consequently, *over*compensation, from a European vantage point, only occurs if an amount is awarded that also exceeds the necessary litigation costs.[70]

Due to the result-oriented nature of the public policy reservation, the award of punitive damages in question does not need to serve a cost-compensating purpose in order to be recognized. It is irrelevant what the US courts (and legislators) sought to achieve with the awarded punitive damages.[71] One only has to assess whether enforcing the decision in the forum leads to an unbearable result, *i.e.* overcompensation. If the only result of enforcing punitive damages is that an injured party is compensated for procedural costs of enforcing a claim for compensatory damages, then this is not the case. Only the awarded punitive damages in excess of the procedural costs may be considered as contravening the principle of full compensation (whether this also leads to a contravention of public policy will be discussed under B. *infra*).

The German *Bundesgerichtshof* shared these considerations, but in the end refused to enforce the punitive damages award,[72] even though the procedural costs in the US were known. I respectfully disagree with the reasoning of the court here: The *Bundesgerichtshof* argued that US juries "may generally"[73] calculate the award for compensatory damages graciously in order to compensate for the lack of cost reimbursement. Also, recognizing punitive damages even partly would therefore, so the reasoning of the court, lead to double compensation and, hence, be contrary to public policy. In the end, the court stressed that as the US court did not precisely establish which reasoning was behind the punitive damages award, it could not be enforced. In my opinion, the problem with this assessment is that the court relies only on a general assumption rather than the facts of the specific case. As already emphasized, the public policy reservation is to be used only in respect of the result of enforcing the specific decision at hand – and it is to be used very restrictively. So, if it was possible to prove in the case at hand that the awarded amount of compensatory damages was meant to include compensation for costs, then I would concur with the reasoning of the *Bundesgerichtshof*. In lack of such evidence, however, assumptions and general considerations have no place in the assessment of a contravention of public policy. According to the *Bundesgerichtshof*'s own jurisprudence,[74] which is confirmed by academia,[75] the party relying on the

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[70] See 1.a) *supra*; cf. T. HARTLEY/ M. DOGAUCHI (note 53), p. 835 para. j.

[71] Yet, *e.g.* the German *Bundesgerichtshof* focuses on the specific purpose of the damages award, see *Bundesgerichtshof* (note 8), p. 3102, despite the general consensus to the contrary in German literature, see P. GOTTWALD (note 3), § 328 ZPO mn. 119 with further references.

[72] *Bundesgerichtshof* (note 8), p. 3103 *et seq*.

[73] In original German "*kann [...] allgemein*", *Bundesgerichtshof* (note 8), p. 3103.

[74] *Bundesgerichtshof*, 16.9.1993, IX ZB 82/90, *Neue Juristische Wochenschrift* 1993, p. 3269.

[75] P. GOTTWALD (note 52), § 328 mn. 12.

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violation of public policy carries the burden of proof. Consequently, lacking any specific evidence to the contrary, the damages awards have to be accepted at face value, *in casu* reimbursing only for past and future medical damages, pain and suffering and so on. Even in the same judgment, the court criticises certain general assumptions of the lower court and reiterates, first, that the exceptional character of public policy demands German courts in principle to trust in the calculation of damages of the foreign court and, second, that assumptions have no place in the assessment of a public policy contravention.[76]

In light of these considerations, I submit that the *Bundesgerichtshof* should have affirmed the partial enforcement of the punitive damages claim in the amount of the procedural costs. Awarding only the sums for compensatory damages deprives the injured party of full compensation: According to the undisputed facts, he had to give 40% of these sums to his attorney. Only by enforcing the punitive damages claim to the extent necessary to compensate these litigation costs, a result comparable to the European idea of compensation could have been achieved. Therefore, one cannot speak of a contravention of public policy. Whenever, however, the US court has awarded reimbursement for costs to the plaintiff already, as it was the case in the Italian[77] and the French[78] decisions, punitive damages cannot be seen as serving the purpose of cost reimbursement.

iii) The Amount of Costs and Public Policy

According to the view submitted here, a punitive damages award is in line with public policy of most European States, if its enforcement merely serves to cover the costs of pursuing a claim for compensatory damages. It is a different question whether the amount of these litigation costs, which were incurred in the US, is itself subject to an assessment of proportionality in light of European public policy, as was done by a German appellate court.[79] In principle, this question is to be answered in the affirmative, as not only the injured party shall not be overcompensated, but also the attorney at law must not unduly benefit at the expense of the defendant.

However, whether the remuneration of the attorney *in casu* is adequate or not will have to be answered for each case individually. The European courts will have to take into consideration the peculiarities of US procedural law, such as the principle that each party (or their attorney) privately has to appoint and pay expert witness and other trial participants.[80] Further, the percentage of the contingency fee agreement may have been subject to some sort of review already.[81] In such cases,

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[76] *Bundesgerichtshof* (note 8), p. 3103 *et seq*.

[77] *Corte Suprema di Cassazione* (note 14).

[78] *Cour de Cassation* (note 7).

[79] *Oberlandesgericht Düsseldorf*, 28.5.1991, *RIW* 1991, p. 594.

[80] C. HAZARD/ C.C. TAIT *et al.* (note 45), p. 121.

[81] C. HAZARD/ C.C. TAIT *et al.* (note 45), p. 123; in the German case, for instance, the US court gave reasons for the amount of the contingency fee agreement of 40%, emphasizing the case's complexity, *Bundesgerichtshof* (note 8), p. 3101.

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European courts will have to show particular restraint in light of the prohibition of the *revision au fond*.

B. Recognizing Punitive Damages as a Matter of Principle?

Provided that the result of enforcing punitive damages does not lead to overcompensation, as seen in Europe, it cannot be said that recognition of such awards contravenes European public policy, regardless of what the US judge wanted to achieve with the punitive damages award. Yet, even to the extent that enforcement of such an award results in overcompensation, an infringement of public policy cannot generally be assumed as a matter of principle either. As shown by some European courts,[82] it is necessary to carefully assess whether the legal order of the forum indeed rejects a penal element in tort to such an extent that enforcing this legal concept would amount to a violation of the most basic principles of this legal order (1.). Even if this is the case, it needs to be assessed – as some courts have done[83] – whether a contractual submission to punitive damages by the defendant would lead to a different conclusion (2.).

1. Punitive Elements in European Tort Law

This is not the place to assess this question for each State individually. The topic of this contribution is merely whether foreign decisions awarding punitive damages can be recognized and enforced. These foreign decisions are not required to share the same legal traditions and values as the European forum State, it is only necessary that their underlying legal ideas are not entirely contrary to the most fundamental principles of law in the forum (see A.2.a.i. *supra*). This cannot be argued to be the case if the forum's tort law also knows certain punitive functions of tort law. After discussing EU law provisions on tort law (a), examples of punitive elements in selected European jurisdictions will be given (b), followed by an assessment of the consequences of such punitive elements from a public policy perspective (c).

a) Punitive Damages in EU Law

EU law provides for tort law in specific legal areas: In connection to discrimination on grounds of gender, the ECJ frequently held that – if the member States opted for some sort of financial compensation in order to achieve the aims of the directive[84] – the victims must be in the position to effectively claim damages for

[82] *Corte Suprema di Cassazione* (note 14); *Tribunal Supremo* (note 15).

[83] See to this *Cour de Cassation* (note 7); *Bundesgerichtshof* (note 8), p. 3104; J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 310 *et seq*.

[84] Dir 2006/54/EC of the European Parliament and of the Council of 5.7.2006 on the implementation of the principle of equal opportunities and equal treatment of men and

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the harm they actually suffered.[85] According to the court, Art. 25 Equal treatment-Directive now provides for the possibility of punitive damages, but does not oblige the Member States to implement it.[86] In the context of enforcing IP-rights, the ECJ held that the last sentence of Recital 26 Enforcement-Directive cannot be construed as prohibiting punitive damages,[87] while Art. 94 Plant variety-Regulation[88] must not be interpreted as providing for a damages claim beyond compensation of harm suffered.[89] In regard to enforcing competition law infringements, the Member States are obliged to enable an injured party to claim damages for actual loss, loss of profits and interests,[90] while they only need to provide for punitive damages if comparable infringements of national law would also be sanctioned in this manner.[91] The same holds true in the context of liability claims in the context of the capital market.[92] The EU legislator, however, chose to explicitly prohibit punitive damages beyond compensation in the Cartel damages-directive.[93]

The scope of civil liability under the PRIIP-Regulation is limited to damages that were suffered by a retail investor,[94] while further damages claims under national law are explicitly not excluded.[95] Yet, the regulation singularly focuses on public law sanctions by the Member States,[96] while not even the possibility of punitive damages is mentioned. Similarly, the Flight-Regulation also focuses on compensation for actually incurred losses or inconvenience,[97] while not precluding further civil law remedies under the applicable domestic law.[98] Still, rules on sanctions are addressed to the Member States,[99] while private enforcement beyond compensation is not discussed.

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women in matters of employment and occupation, OJ L 2006/204, p. 23 ("Equal treatment-Directive").

[85] ECJ, 17.12.2015, C-407/14, *Arjona Camacho*, para. 29 *et seq*.; 11.10.2007, C-460/06, *Paquay*, para. 43 *et seq*.; 2.8.1993, C-271/91, *Marshall*, para. 24 *et seq*.

[86] ECJ, 17.12.2015, C-407/14, *Arjona Camacho*, para. 40; cf. M. SZPUNAR, Opinion of the AG, 26.10.2017, C-494/16, *Santoro*, para. 59.

[87] ECJ, *Stowarzyszenie OTK* (note 27), para. 28; 9.6.2016, C-481/14, *Hansson*, para. 38.

[88] Reg (EC) 2100/94 of 27.7.1994 on Community plant variety rights, OJ L 1994/227, p. 1.

[89] ECJ, *Hansson* (note 87), para. 40.

[90] ECJ, 6.6.2013, C-536/11, *Donau Chemie*, para. 24.

[91] ECJ, 13.7.2006, C-295-298/04, *Manfredi*, para. 93.

[92] ECJ, 19.12.2013, C-174/12, *Hirmann*, para. 40.

[93] Art. 3 para. 2 Cartel damages-Directive.

[94] Recital 22 last sentence PRIIP-Regulation.

[95] Art. 11 para. 4 PRIIP-Regulation.

[96] Art. 15 *et seq*. PRIIP Regulation.

[97] Recitals 9 *et seq*. and Art. 7 *et seq*. Flight-Regulation.

[98] Art. 12 Flight-Regulation.

[99] Recitals 21 *et seq*. and Art. 16 Flight-Regulation.

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In summary, it can be said that the EU legislator is reluctant towards the concept of punitive damages and does not oblige the member States to introduce it. In recent legislative acts, it has even been explicitly rejected. The ECJ, by contrast, holds that punitive damages do not conflict with EU law, though a clear position is lacking – probably on purpose.[100] At least, the notion that the ECJ would oppose recognition and enforcement of punitive damages as a whole cannot be maintained in light of this jurisprudence.[101]

b) *Punitive Elements in Domestic European Tort Law Regimes*

The EU Member States are free to define their public policy. Additionally, not all European States are members of the EU. Therefore, the aforementioned conclusion does not prevent domestic legal systems in Europe from deeming punitive damages to be contrary to public policy. Still, from a methodical point of view, it is to be welcomed that European courts carefully assess their domestic provisions on tort law. While the general idea of US-style punitive damages seems to meet great scepticism in Europe,[102] a major argument against this kind of damages appears to be the excessiveness of the amounts awarded by US courts. If this is the case, however, then an honest assessment must conclude that punitive damages are not in principle contrary to public policy, but that only the amount in question may be subject to partial non-recognition.[103]

Stating that the principle idea of a punitive element in civil law claims is rejected by a European legal order requires that this legal order truly does not provide for any damages claims that go beyond compensation. The Italian *Corte Suprema di Cassazione* already gave an extensive overview of punitive elements in Italian tort law.[104] In Austria[105] and Poland,[106] for example, we also find provisions for damages with a strong penalizing element in provisions for the protection of IP

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[100] B.A. KOCH, Punitive Damages in European Law, in H. KOZIOL/ V. WILCOX (note 5), p. 208.

[101] See to this notion J. MÖRSDORF-SCHULTE, 2005 (note 3), p. 216, though by qualifying punitive damages as public law in nature.

[102] See the references in notes 3 and 4 *supra*.

[103] See the *Cour de Cassation* (note 7), which first affirms that merely the excessiveness of the awarded amounts is problematic, then, however, rejected recognition of the entire punitive damages claim and not only the excessive part, which seems inconsistent to me. The approach of the *Tribunal Supremo* (note 15) is more consistent in my view.

[104] *Corte Suprema di Cassazione* (note 14).

[105] § 87 para. 3 Copyright Act (*Urheberrechtsgesetz*) as amended and promulgated in the Austrian Federal Gazette (*österreichisches Bundesgesetzblatt*) I 2015, Nr. 99, J. GUGGENBICHLER in G. KUCSKO/ C. HANDIG (note 25), § 87 mn. 28 *et seq*.

[106] Art. 79 para. 1 subpara. 3 point b Copyright law (*ustawa o prawie autorskim i prawach pokrewnych*) of 4.2.1994 in the version Dz. U. of 2006, Nr. 90, heading 631; part of this provision, however, appears to have been quashed by the Polish constitutional court, see ECJ, *Stowarzyszenie OTK* (note 27), para. 19; see also P. MACHNIKOWSKI (note 9), p. 455.

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rights. In Germany, the claims for damages for the infringement of personality rights, especially by the press, are frequently mentioned as examples for a punitive element in tort law.[107] The underlying idea is always the same: The public law remedies, which ordinarily should serve the function of punishment and deterrence, are seen as insufficient in these particular circumstances. Therefore, tort law must step up in order to grant an effective remedy to the injured party.

c) Consequences of Punitive Elements in a European Legal Order in Light of Public Policy

If a legal order contains one or more of such provisions for punitive damages, then it cannot be maintained – as a matter of principle – that the idea of a private claim serving the purposes of deterrence and punishment contravenes the most fundamental values of this state.[108] These legal orders seem to accept that in certain cases, public law is not sufficient to protect the general public from wrong-doers, and hence private law claims are needed – and indeed granted by their own law. Therefore, it is submitted here that if a certain legal order provides for damages claims with a punitive element, it would be contrary to the concept of public policy to summarily reject recognition and enforcement of a US punitive damages award on the ground that such a remedy is not known in the forum's legal system.

Even once Art. 11 Hague Convention enters into force between the EU Member States and the US, this will not change. Although Art. 11 para. 1 Hague Convention leaves it to the discretion of the court to deny recognition of punitive damages, it is submitted here that – due to the nature of the Hague Convention as an international treaty – this may only be done in light of general principles of public international law. One of these principles is the prohibition of *venire contra factum proprium* or estoppel.[109] If a State's domestic legal order recognizes the concept of punitive damages in some form, it would be a violation of this principle to rely on Art. 11 Hague Convention.

However, this does not mean that a specific provision on a damages claim with penal elements renders it impossible for a State to deny enforcement of US decisions on punitive damages for reasons of public policy. First, as the French *Cour the Cassation*[110] and the Greek *Areopag*[111] have held, even if punitive

[107] J. MÖRSDORF-SCHULTE, 2005 (note 3), p. 207 with reference to the German *Bundesgerichtshof*, *Neue Juristische Wochenschrift* 1995, p. 865.

[108] Cf. J. MÖRSDORF-SCHULTE, 2005 (note 3), p. 208, arguing that a punitive element in tort law at least cannot be considered to be entirely foreign to the German legal order; C. HANDIG in G. KUCSKO/ C. HANDIG (note 25), Einleitung mn. 341, considering Austrian copyright provisions, see note 105, as being contrary to the public policy of some EU states due to their punitive nature; D. SCHRAMM/ A. BUHR (note 3), Art. 27 mn. 19 IPRG, stating that punitive damages which are not excessive cannot be held to contravene Swiss public policy due to comparable concepts in Swiss law.

[109] A. KACZOROWSKA-IRELAND, *Public International Law*, 5th ed., Oxon/New York 2015, p. 50.

[110] *Cour de Cassation* (note 7).

[111] C.D. TRIADAFILLIDIS (note 10), p. 238.

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damages do not infringe public policy as a matter of principle, the amount that was awarded is also subject to the public policy reservation. If the sum is excessive and disproportionate, public policy can be invoked. In light of this, it is also irrelevant that the trend in the US seems to go in the direction of limiting the amounts awarded as punitive damages,[112] as it is the result of enforcement that has to be acceptable from a European point of view. Yet, it would be consistent to only deny recognition and enforcement in regard to the amount that exceeds the forum's notion of a reasonable damages award.[113]

Second, as European legal orders accept punitive damages only to the extent it is warranted by the insufficiency of public law, and public law is closely connected to a State's territory,[114] it has to be assessed whether the specific facts of the case were sufficiently connected to the State of origin of the decision, *i.e.* the US. If this is the case and the connection between the facts and the US legal order is quite strong, so the object of protection (*i.e.* the general public) is within the territory of the USA, then one may have to leave it to the US legal order to decide when it is necessary to also add punitive elements to civil law claims in order to provide an effective remedy. Still, a review of the amount awarded may be possible in light of public policy. If, by contrast, the case is most closely connected to the forum State and its laws consider public law to be sufficient for serving the purposes of punishment and deterrence, then the result of recognizing a US decision on punitive damages would be an additional punishment of the tortfeasor under a less-connected legal order, which can certainly be seen as being contrary to public policy.

2. *Voluntary Submission by the Tortfeasor to Punitive Damages?*

Many European legal orders know the concept of contractual penalties in some form.[115] Consequently, the French *Cour de Cassation*,[116] the German *Bundesgerichtshof*,[117] and Swiss judiciary[118] discussed the question of whether a US

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[112] Cf. M.N. SCHUBERT, US-Notizen, *PHi Haftpflicht international* 2015, p. 109 *et seq.*

[113] Compare Art. 11 Hague Convention.

[114] A. KACZOROWSKA-IRELAND (note 109), p. 356 *et seq.*; however, certain fields of public law, like competition law, are applied in accordance to the market principle (effects doctrine), rather than only the territoriality principle, Art. 6 Rome II-Regulation, to this also A. KACZOROWSKA-IRELAND (note 109), p. 382 *et seq.*

[115] § 1336 para. 1 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) as amended and promulgated in the Austrian Federal Gazette (*österreichisches Bundesgesetzblatt*) I 2005, Nr. 120; Art. 163 para. 1 Swiss Code of Obligations (*Obligationenrecht*) as promulgated in the Swiss Official Collection (*Amtliche Sammlung*) 1911, p. 317; Art. 1231-5 French Civil Code (*Code Civil*) as amended and promulgated with *Ordonnance* Nr. 2016-131 of 10.2.2016; see also Art. III.-3:712 para. 1 of the Draft Common Frame of Reference.

[116] *Cour de Cassation* (note 7).

[117] *Bundesgerichtshof* (note 8), p. 3103.

[118] J. DROLSHAMMER/ H. SCHÄRER (note 3), p. 310.

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decision on punitive damages could be recognized if the obliged party voluntarily submitted to this legal concept. While the *Cour de Cassation* held that mere knowledge of the local law, even in combination with a valid choice of law clause, did not suffice to contractually consent to punitive damages, the *Bundesgerichtshof* held that *in casu* the decision concerned a non-contractual relationship, but left the possibility of justifying punitive damages via consent for future cases. The Swiss judge emphasized that even contractual penalties are subject to court review as to their proportionality under Swiss law,[119] hence, the parties' freedom was restricted anyway.

These decisions are in line with the understanding of public policy that is submitted here. A choice of law clause in favour of a legal order that provides for punitive damages cannot in itself justify the assumption that the defendant, against whom a punitive damages award was rendered, voluntarily submitted to this remedy. First, public policy is a concept that is not open to party autonomy. If the courts of the forum find that the idea of a punitive civil remedy contravenes their public policy, it is of no concern whether the parties wanted to be submitted to such a legal concept or not. Second, even if the principle idea of punitive damages is not in contravention of the forum's public policy, the mere fact that the parties abstractly submitted to this institute when concluding the contract is no guarantee that the circumstances and the amount of the decision in question is line with the forum's most basic values, particularly the principle of proportionality.

Even if the parties specifically provide for punitive damages in their contract, the amount that is ultimately awarded could still be reviewed in light of the forum's public policy. The direct contractual basis of the award could be argued against the assumption that these punitive damages would lead to unjustified enrichment,[120] as a valid contract serves as legal justification. Yet, in light of the parties' limits to their contractual freedom, as enshrined by the courts right to review contractual penalties,[121] and the principle of proportionality,[122] an excessive damages award may be rejected on public policy grounds. However, European courts will have to be careful here not to infringe the prohibition of the *révision au fond*.

III. Conclusion

Whether US decisions on punitive damages may be denied enforcement in Europe under the public policy reservations has to be answered for each case individually. First, in some US States the term punitive damages is used for a claim with compensatory character, which does not contravene any European notion. Even if

[119] Art. 163 para. 3 Swiss Code of Obligations (*Obligationenrecht*) as promulgated in the Swiss Official Collection (*Amtliche Sammlung*) 1911, p. 317.

[120] Cf. the *Cour de Cassation* (note 7).

[121] See the references and legal provisions in note 64.

[122] See the references in note 61.

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the purpose of the punitive damages award in question is penal, the result-oriented nature of a public policy assessment requires the European judge to assess whether enforcing at least some part of the punitive damages award will effectively lead to merely compensating the claimant for his procedural costs, which is perfectly in line with European public policy. Further, in respect of the part of the award which exceeds compensation, the judge will have to honestly and carefully assess whether the legal order of the forum truly has no punitive element in tort law. If such elements can be found, it will be difficult to establish that a punitive purpose of civil law claims contravenes the most basic values of the legal order. Depending on the closeness of the link of the case to the forum's territory and the interplay of the forum's public and private law, enforcement of punitive damages awards may be granted. However, the amount of the punitive damages claim may also be subject to a public policy review, if it is excessive. Contractual consent does not justify recognition of a punitive damages award, as public policy is not open to party autonomy.

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FORUM

THE ROLE OF INTERNATIONAL SOCIAL SERVICES IN PRIVATE INTERNATIONAL LAW

Seema PANNAIKADAVIL-THOMAS* / Vito BUMBACA**

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 531-553
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Printed in Germany

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I. Brief Introduction and Fields of Intervention

The purpose of this article is to showcase the current socio-legal family practices taking place in a cross-border dimension and requiring the international protection of children's and vulnerable adults' rights under Private International Law (hereinafter PIL). The International Social Service (ISS) has developed important co-operation mechanisms aimed at solving international family disputes, considering children's fundamental rights as primary and giving children primacy as legal individual rights' holders. The ISSs mechanisms prove efficient and effective in filling in the socio-legal vacuum present in the international legal framework, notably concerning private international treaties competent to solve cross-border individuals' relationships. In a multicultural and globalised context whereby mono-national legislations appear conflicting, PIL remains pivotal in providing harmonised legal systems of coordination towards international protection of individuals. However the social perspective of individuals' relationships must be taken into consideration in order to fully ensure international protection. In absence of worldwide instruments, PIL may leave unregulated grey areas[1] although its intervention is more than ever advocated for to face current socio-legal issues affecting the world population.[2]

In this regard, ISSs provide valuable and practical support in dealing with complex cross-border socio-legal cases, whereby it is essential that judicial and

[1] ADVOCATE GENERAL OPINION, *Neli Valcheva v. Georgios Babanarakis* case of 12 April 2018, ECLI:EU:C:2018:359, § 31: "However, despite the efforts of the EU legislature to adapt the legislation in matters of parental responsibility to developments in society, those developments are proceeding at a much faster pace than the process of legislative adaptation and it is clear that there remain some "grey areas", for which the legislation does not provide an explicit response. The case in the main proceedings is an illustration of those grey areas created by developments in society, in particular with regard to a child's contact with other persons to whom the child has "family" ties based on law or on fact (such as the former spouse of one of the parents, the child's siblings, grandparents or the partner of a parent who is the holder of parental responsibility). Those grey areas may give rise to, sometimes paradoxical, uncertainties concerning the existence of rights of access by persons other than the parents, in this case grandparents".

[2] *Ibid*. § 29: "On the other hand, at the sociocultural level, equally profound transformations are affecting the way of life of citizens. The phenomenon of families whose members (parents and children) have dual or different nationalities (which is closely linked to the free movement of persons and, more generally, to globalisation), the diversity of forms of union and cohabitation, besides marriage, in particular the civil partnership ("Pacs"), new forms of family structures, including single-parent families, reconstituted families or families with same-sex parents, and new forms of parenthood as regards children born of an earlier union, born through medically assisted reproduction or adopted, are just a few examples. The diversification of family structures is therefore a reality of contemporary society. Some of those phenomena are not truly new but, since the 1960s, the transformations have intensified and developed exponentially. Those economic and sociocultural changes, whose multiple effects on the lives of citizens are being felt at a steady pace, require in some cases a reconsideration of the assumptions underlying legal systems and the substance of their rules, and necessitate an adaptation of the law and in particular EU law (including European PIL)".

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administrative authorities, such as courts and central authorities,[3] and other bodies, such as local child and adult protection authorities (*i.e.* "*Service de protection des mineurs* – SPMI" in Geneva; "Children and Family Court Advisory and Support Service – Cafcass" in England) receive accurate, professional and trustworthy reports on each vulnerable individual's situation in the State of their presence, and on that of his/her family, or part of it, often living in another State. This is crucial to ensure comprehensive as well as efficient and effective cross-border decision making focused on the child's best interests as well as vulnerable adults, hence, ensuring them international protection.

For the last 94 years, ISSs have been providing multidisciplinary and socio-legal services, upholding the best interests of children, individuals and their families. The idea of an international social service was first discussed at an international conference in 1914, when delegates from seventeen countries concluded that international action was necessary to help migrant women. It was only after the First World War that the Young Women's Christian Association (YWCA), recognising the void in international protection of families and children, decided to take action. Because no organisation existed to respond to the needs of these migrating families, YWCA leaders realised that a new type of social services for separated families and children was needed. In 1921, this association undertook a survey about the needs of migrating people. In 1924, and realising the need to create a new organisation dedicated to migration, representatives from the United States, United Kingdom, Czechoslovakia, France, Greece, Poland and Switzerland founded the International Migration Service (IMS) in Geneva. In 1946 the IMS was renamed the *International Social Service* (ISS) to better reflect its global mandate. To fulfil this mission, ISSs interventions include:

– Studying from an international standpoint the conditions and consequences of migration in relation to individual and family life, and as a result of these studies making recommendations or undertaking any other appropriate action.
– Contributing to the prevention of social problems linked to migration or intercountry mobility through continuous advocacy.
– Informing social work professionals and the public on the needs of migrant individuals and families through socio-legal training.
– Developing and maintaining an international network of social work and legal services able to meet the needs of children, families and individuals who require cross-border casework services.[4]

[3] A. Dyer, The Internationalization of Family Law, *US Davis Law Review*, (1996-1997) p. 642.

[4] S. Auerbach, International Social Service Crossborder casework in 1996 Hague Convention matters, available at <www.iss-ssi.org> (Accessed 2018-05-23).

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II. Social Perspective of Private International Law

PIL refers to those rules determining competence, applicable law, recognition and enforcement of judicial decisions, including protective measures, and international co-operation. These are the so called legal rules forming the legal scope of PIL. Beyond their legal scope, the purpose of PIL rules is to allow access to justice and provide certainty as well as continuity of the legal order across borders, by preserving and ensuring international protection for those individuals, beneficiaries of cross-border proceedings. These rules refer to the social scope of PIL – sociology of law.[5] This proves particularly important when the beneficiaries are children or vulnerable adults; therefore the degree of international protection has to be the most accentuated possible.

To this end, important child centred tools and Alternative Dispute Resolution mechanisms have been implemented over the past years towards preserving and protecting children and vulnerable adults, particularly to ensure their fundamental freedoms and rights such as the child-parent relationship and their harmonious development in a family environment. These aim to solve cross-border family proceedings in a more efficient and effective manner in terms of the individuals' best interests, especially when vulnerable. Important consequences are also noticed with regards to costs and delays of proceedings which are non-negligible elements vis-à-vis individuals' interests, especially when these may undermine the economic and social development of children and vulnerable adults.

The importance of assessing child welfare in a cross-border custody proceeding or reaching amicable solutions through family mediation in cross-border family disputes remains pivotal to achieving the socio-legal purpose of PIL. ISSs cover a specific and fundamental function in both procedures through their multidisciplinary approach oriented towards comprehensive anamnesis of those special needs for which international protection is required by children and vulnerable families.

The ISSs multidisciplinary approach refers to a legal, social, psychosocial perspective analysis which aims to evaluate which administrative and judicial decision would be the most appropriate for the beneficiary concerned. To reach such anamnesis, ISSs carry out important intercountry child assessment, also applicable to vulnerable adults, in order to collect important information and draft a final report to be submitted to those competent authorities involved in the cross-border proceeding, such as governmental institutions and courts, in support of their decision.

International protection and international jurisdiction thus work hand in hand to ensure the efficiency and effectiveness of PIL. ISSs allow for such a clear cut link between legal and social mechanisms, being therefore an important socio-legal actor serving the best interests of children and families across borders.

This all becomes truer in today's world where important modern issues take place in the cross-border context such as international mobility, international

[5] See *e.g.* E. Friis, Social Workers Linking Together Family Norms and Child Protection Norms, in M. Baier (ed.), *Social and Legal Norms. Towards a Socio-legal Understanding of Normativity* (2013) at 159.

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migration and increasing cross-cultural marriages. In order to face them, individuals call for modern global socio-legal responses so that their international protection is assured. This need may occur in cases of international child abduction, unaccompanied minors, cross-border surrogacy arrangements and simply intercountry divorces over which mono-national legal rules appear insufficient.[6]

In this context, through international co-operation processes oriented towards the respect of the best interests of individuals, ISSs allow for a more realistic approach vis-à-vis rights and freedoms by working in a bi-national dimension, or better called cross-border when comprising more than two States, ensuring that individuals feel safe and free to move from one State to another without their freedom being limited by mono-national legal frameworks. Thus, in absence of PIL treaties, the applicability of PIL rules is ensured by the international activity of ISSs operating in more than 140 States in the fullest respect of those PIL instruments that ISSs aim to serve (*i.e.* Hague Conventions 1980, 1993, 1996, 2000).[7]

A. Intersection of Socio-Legal Mechanisms

The mechanisms of private dispute resolution and protection of individuals furnished by PIL embrace both social and legal perspectives. This is particularly noticeable in child assessment that aims to determine children's needs and the way to ensure their protection. In order to guarantee such protection of child welfare, International Social Services orient their analysis towards a "child centred approach", meaning that the principle based on the best interests of the child is pivotal to achieving full comprehensive anamnesis of the child's well-being. The ISS team in charge of the assessment is a multidisciplinary one composed of legal, social, mediation experts who represent the variety of professionals involved in cases regulated by PIL rules. The assessment takes into consideration the future economic and social parental plans (*i.e.* house, schooling, financial and professional stability) to evaluate the ability to guarantee the right and special care and support for their children. If the child's parents are separated, the assessment takes place at the habitual residence of the child determined by his/her *enracinement* and *entourage* as well as that of the parent having sole legal custody over the child and responsible for his/her upbringing.

Such assessment is located in a cross-border dimension regulated by PIL rules – international or national, depending on the implementation or not of multilateral and/or regional agreements such as the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter HC-1996) – which can therefore be considered as a PIL mechanism of protection, notably of those children involved in cross-border custody proceedings.

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[6] European Parliament, Children on the move: a Private International Law perspective (June 2017) at 8. doi:10.2861/19741.

[7] International Social Service, The activities of International Social Service and their legal bases, available upon request at <www.iss-ssi.org> (2007) at 3.

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The 1996 Hague Convention provides a solid co-operation system where International Social Services cover a fundamental role in assessing the best interests of children as well as the parental capability to guarantee a stable life for their children. Article 32 (a) of the said Convention is a clear basis for such assessment which is due under the form of a *"report on the child situation"*. ISSs are included in the category *"other bodies"* mentioned in the said provision.

Let us imagine that Marco and Claudia are two children living in Italy with their parents, mother of Swiss nationality, father of Italian nationality. After some years, the couple wishes to divorce but it does not agree on the children's residence. Briefly, the mother moves to Switzerland with the two children without any agreement concluded with the father. A decision confirming abduction is issued in Italy under petition filed by the father which intends to seek return of the children to Italy. However the mother does not facilitate the return which may entail *enracinement* and *entourage* of the children in Switzerland; meanwhile she sadly commits suicide and the Swiss competent authority retain jurisdictional competence by implementing a child protective measure placing the two children in alternative care. In this case ISSs, the Swiss member, may be mandated by the Swiss authorities, notably the Central Authority competent under HC-1996, to provide an assessment in cooperation with the ISS Italian member in order to evaluate whether the father may be capable to guarantee stability in Italy for the two children. This refers to the "*report on the child situation"* mentioned above.

ISSs provide an important added value to the implementation of PIL, especially where international instruments are not available. If the context in question, instead of being Swiss-Italian, were Swiss-Algerian, ISSs may be the only potential bodies to be competent for the implementation, implicitly harmonisation, of PIL rules by adopting the same assessment mechanism even in absence of any international instrument ratified between the two States. The fields of ISS intervention find their legal basis in international instruments but their applicability also falls outside of such multilateral agreements which means that their use is not limited to ratification. Thus, PIL activity is ensured beyond the boundaries of legal mechanisms through the support of social instruments.

The report named above is important for those authorities that are vested with decisional power, notably for administrative procedures, such as central authorities, or for judicial procedures, typically judges, and wish to base their decision on the best interests of children involved in cross-border conflicts. However such a report is not binding, which leaves some grey areas where the discretional power of the authority may limit the usefulness of the said report. The intersection of socio-legal mechanisms hence finds a clear limitation to its multidisciplinary applicability.

1. Child Centred Approach and Vulnerable Adults

ISSs refer to direct protection of children and vulnerable families, therefore adults, by assessing their needs and the actual protection of their rights and freedoms. ISSs do not only aim at implementing PIL rules but their activity goes beyond, towards matching the compatibility between international protection and

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jurisdiction. This may be very helpful to strengthening the *socio-legal nexus* according to which those PIL rules determining jurisdiction have to comply. In the context of international mobility, important legal evolutions have taken place relating to jurisdictional competence, with particular regards to connecting factors (*i.e.* habitual residence, domicile, nationality) according to which international jurisdiction is determined.

Important reference should be made to habitual residence pertaining to the *socio-legal nexus* established between the individual, *beneficiary*, and the State administrative and judicial authorities, *guardian*, of international justice within the cross-border family proceedings which is determined through a factual anamnesis based on social and family environment elements such as *duration, regularity, conditions and reasons for the stay within the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.*[8]

ISSs role is indeed oriented towards the assessment of such elements which appear fundamental to determine international competence in the fullest respect of the legal order. Such assessment, which is called in the ISSs practice intercountry child assessment, represents a modern *"evidence tool"* which should reflect the efficient and effective impact of PIL by evaluating whether the State in which the child is present corresponds to the most familiar and appropriate jurisdiction for the child and vulnerable adult concerned.

The socio-legal support given by ISSs is therefore "child centred" or "adult centred" in respect of their needs but also "PIL centred" when it comes to making sure that the beneficiary of the cross-border proceeding is situated in the right jurisdiction to claim international protection.

a) Cross-Border Casework

ISSs cross-border intervention is also referred to as *intercountry individual casework*. According to ISS rules and procedures, all requests submitted before ISSs have to be referred to the national ISS partner. This means that vulnerable individuals seeking assistance have to contact the national ISS office, who will act as *primary contact point*. The request will then be handled according to ISSs methodology in collaboration with the ISS office where the service is requested. In countries where the ISS partner has no expertise to provide assistance on family tracing and reunification matters, they should be able to refer further or advise the enquirer. Furthermore, in countries where ISSs are not represented, the General Secretariat, located in Geneva, Switzerland, refers the request to the competent authorities or reliable organisations to obtain further support and advice. It should be noted that ISS methodology is developed in its *internal casework manual* currently under revision. Furthermore, each national member's intercountry casework service capacity and expertise vary according to the context and the child

[8] ECJ, 2 April 2009, *A.*, ECLI:EU:C:2009:225.

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protection issues handled by the ISS partners. In other words, not all ISSs partners have the same resources and expertise in handling intercountry casework.

In recent years, ISSs have noticed an increase in the number of cases concerning children deprived of their family or involved in international family conflicts. In these cases, ISSs might for instance provide social reports on the situation of children and/or their family environment, trace family members or offer mediation services related to international family conflicts. Family tracing and reunification are part of the main fields of intervention provided under the activities of family welfare/custody and access, unaccompanied children, surrogacy/donor-conceived persons, adoption and post-adoption. They refer to the assistance ISSs provide in tracing family members when the whereabouts of the family are unknown. The ISS General Secretariat estimated that the total number of cases including phone and e-mail enquiries handled by the ISSs network in 2016 could be estimated at 20,000 family tracing cases and 14,000 family reunification cases.

b) Intercountry Assessment

The *intercountry casework intervention* is based on the main international human rights standards such as the UNCRC[9] as well as the Hague Conventions on family matters. This service can be divided into seven core activities: 1) Child Protection, 2) Child Abduction, 3) Family Welfare/Custody and Access, 4) Adult Protection, 5) Unaccompanied Minors, 6) Surrogacy/Donor- Conceived Persons (DCP), 7) Adoption and Post Adoption.

The following general principles lead ISS intercountry casework:

- ISSs promote and protect the rights of children, families and individuals according to human rights conventions, including the United Nations Convention on the Rights of the Child. Inherent in this latter scope, ISSs prioritise the best interests of the child by treating them in an inclusive manner – notably through the child-centred approach.
- As ISSs celebrate diversity, they continually strive for respecting and promoting the understanding and acceptance of all cultures worldwide.
- The principles of neutrality, confidentiality, independence, transparency and impartiality are at the heart of ISSs work.
- ISSs have a shared commitment to families, children and individuals that unites its global network.

Intercountry assessment is located in the above context towards ensuring the general principles set forth in the ISSs statutes.[10] It refers to the monitoring of those vulnerable individuals' needs and fundamental rights by assuring them

[9] Convention on the Rights of the Child of 1989.

[10] INTERNATIONAL SOCIAL SERVICE, Statutes adopted at the Melbourne International Council, 2016, available at <www.iss-ssi.org> (Accessed 2018-05-23).

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international protection as provided by international standards (*i.e.* UNCRC preamble).[11]

2. *Jurisdictional Competence*

The issue of competence is peremptory in PIL in order to ensure continuity and certainty of law. Individuals should be able to count on predictable and clear cross-border provisions determining such competence in order to be ensured effective and smooth access to justice. International rules determining competence are particularly important for administrative and judicial authorities in order for them to exercise jurisdiction and allow commencement of proceedings.

In child custody proceedings, but also in disputes involving cross-border family relationships with a wider scope, jurisdictional competence is based on the habitual residence of the child referring to the place where their *enracinement* and *entourage* are established, notably by reason of their family environment (*i.e.* parents, parent holding parental responsibility, ascendants and siblings) and social integration (*i.e.* school and languages). However the legislative rules to determine competence in one State, notably the one of habitual residence, may not be sufficient to solve a dispute arising in a cross-border dimension, particularly because a) the anamnesis of habitual residence may be difficult in absence of harmonised rules of determination across borders; b) third States in which international conventions are not applicable will apply their own rules of PIL which may entail conflicts of laws.

This legal disorder[12] may be monitored, possibly solved, by the intervention of ISSs whose mandate falls outside international instruments and activity takes place in a cross-border dimension through international co-operation mechanisms. The competence of the State of habitual residence would be in this case extended beyond national borders and give rise to international jurisdictional competence in co-operation with the authorities of the State where the child is present. In the Swiss-Italian case mentioned above, jurisdictional competence is exercised across national borders by reason of the transnational axis established by ISSs during their assessment activity. This assessment activity takes place in the respect of PIL

[11] UNCRC, Preamble: "[...] Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, [...] Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, [...] the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

[12] G.P. Romano, Conflicts between parents and between legal orders in respect of parental responsibility, this *Yearbook*, Vol. 16, 2015, at 144.

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rules and aims to guarantee the applicability of such rules in a cross-border dimension in the name of justice for those individuals involved, particularly children as most vulnerable.

In the absence of clear determination of habitual residence and/or ratification, ISSs remain an available actor for PIL in order to ensure legal certainty. In the Swiss-Algerian case mentioned above, PIL rules are ensured through a) the assessment of ISSs, useful for the mono-national courts and central authority competent in the State of habitual residence in order to issue an appropriate and impartial decision; b) the coordination of legal systems in absence of internationally harmonised rules; c) the determination of habitual residence, therefore jurisdictional competence, in a cross-border context not governed by international instruments where the rules of competence would be mono-national, hence fragmented and conflicting.

The cross-border dimension reflecting the dispute is fulfilled by the socio-legal activity of ISSs which does not encounter limits in the legal framework of international treaties, in favour of the noble purpose to guarantee a cross-border solution focused on a *child centred approach*. The assessment, however, as seen above, finds its legal basis in PIL rules, notably the HC-1996 legal framework, which are then advocated and applied beyond contracting States. The latter finds its importance in a society affected by international mobility and migration where PIL must ensure modern mechanisms of dispute resolution aiming to fill potential grey areas of fragmented international regulation, non-harmonisation, and where reference to ISSs may be appropriate to fill the PIL vacuum.

a) Legal Framework (i.e. UN, Hague System and EU)

The International Social Services place their activity between public and PIL. The Convention on the Rights of the Child of 1989 (UNCRC) is a fundamental legislative reference within which the ISSs mandate is located and focused on the protection of child well-being. The umbrella principle while carrying out their *child centred approach* is the "best interests of the child" as a corollary of the UNCRC, mentioned in article 3.[13]

The intersection of public and PIL is strongly recalled in other PIL multilateral agreements such as the HC-1996 where the preamble provides that: "confirming that the best interests of the child are to be a primary consideration [...] Desiring to establish common provisions to this effect, taking into account the United Nations Convention on the Rights of the Child of 20 November 1989". While ISSs are mandated to assess the family situation in order to determine whether a protective measure (i.e. guardianship, placement, return) should apply to

[13] UNCRC, art. 3: "[1.] In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of laws, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration". "[2.] Sates Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".

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the child, the *child centred approach* requires that any measure is taken in the sole interests of those children concerned.

The UN system provides useful provisions in which the ISSs fields of intervention are located. The International Covenant on Civil and Political Rights of 1966, art. 24 says: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". The International Covenant on Economic, Social and Cultural Rights of 1966, article 10.3 says: "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions".

The Hague system implements the UN principles through PIL instruments, notably intercountry adoption[14] and child protection measures,[15] which are applied only if in the best interests of the child concerned. In relation to Intercountry adoption, ISSs allow access to relevant information relating to adoption procedures and laws (domestic and international). ISSs are able to draft important reports vis-à-vis the child situation and prospective adoptive parents, towards suitable and matching adoptions. The added value is particularly noticed in adoption processes taking place between States Parties to the Convention of 29 May 1993 on protection of children and co-operation in respect of Intercountry adoption (hereinafter HC-1993) and non-Contracting States, where accredited bodies or other competent authorities are not established, during which ISSs can provide valid support in promoting and applying the standards and safeguards mentioned in the Convention.

The HC-1996 provides clear reference about the activity of the International Social Services,[16] particularly in those provisions related to international co-operation mechanisms where *"communications, mediation and localization"* (art. 31) are required in order to better solve child custody proceedings across borders. The ISSs activity, mentioned as *"other bodies"* in the framework of article 31, refers to a) the facilitation of communication and assistance in procedures relating to transfer of competence (HC-1996, arts. 8 and 9) towards a more appropriate jurisdiction for the child; b) promotion and recourse to mediation processes; c) obtaining information about the child's whereabouts. Other activities may relate to child assessment (art. 32) and cross-border placement (art. 33). Importantly, in relation to placement, ISSs provide important statistics being a fundamental source of data to which other institutions such as the European Union refer.[17]

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[14] Convention on protection of children and co-operation in respect of Intercountry adoption, Preamble: "Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children".

[15] HC-1996, Preamble, "Confirming that the best interests of the child are to be a primary consideration".

[16] P. LAGARDE, Explanatory Report (article 31) § 140, at 591: "Of course, rejection of this proposal does not exclude the possibility that the Central Authority would have recourse to bodies of such uncontested competence as that of International Social Service".

[17] EUROPEAN PARLIAMENT, Cross-border placement of children in the European Union (2016) at 51. doi:10.2861/759018.

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The origins of ISSs are particularly strong in Europe in matters relating to migration. The intervention of ISSs is therefore very accentuated in the European region, and co-operation programs and agreements are concluded with the European Union and the Council of Europe in order to advocate and implement concrete protection on behalf of vulnerable children and unaccompanied minors. Within the framework of the EU, ISSs carry out important projects, together with other institutions, funded by the European Commission. The purpose of these project activities is to implement better and more efficient legislation towards access to justice for children through coordinated international seminars and hubs. ISSs help in the drafting of important recommendations and conventions in the framework of the COE. Within the legislative framework of the Dublin III Regulation[18], ISSs provide important information and assistance in relation to family reunification, including residence permits and change of residence.

b) Beyond National Borders: Cross-Border Dimension

ISSs activity operates at the transnational level through direct means of cooperation and communication between entities of the international network, counting more than 140 members in the four corners of the world. The legal PIL instrument barriers such as the international conventions implemented within the Hague system and relevant for the ISSs mandate (i.e. HC-1993, 1980, 1996, 2000) do not limit the beneficial horizons of the ISSs assessment whose purpose is to protect children and families across national borders. However it is to be noticed that such socio-legal activity which takes place through a multidisciplinary approach works entirely in the fullest respect of the Hague Conventions and similarly related international instrument principles such as those mentioned in the UNCRC and the ECHR.

Let us imagine an Australian/Chinese couple, father Australian, mother Chinese, living together in Australia for six years. The marriage was celebrated in China where they spent the first years of their marriage during which a child was conceived. Straight after the pregnancy, the couple decides to leave China and settle in Australia for professional reasons where their son, Joseph Sasa, is born and two years later their daughter, Mary Ruilin, is born. After six years living in Australia, the mother is dissatisfied with her marital relationship and about the current situation relating to their children who do not wish to embrace Chinese culture. The two children both speak Chinese and Australian English but they preferred living in Australia at that moment. The mother receives an interesting job offer from the newspaper "China Today" to become a reporter in China. She takes advantage of this to invite her husband to agree verbally on her relocation with their children to China for six months in order to allow them to improve their language and cultural skills in relation to their half Chinese origins. According to their parental verbal agreement, the relocation will last for six months, after which

[18] Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

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their children's living conditions, whether staying in China or returning to Australia, should be re-discussed during a potential short return to Australia. After six months the father, awaiting the return of their children to Australia, receives instead an email from his wife saying that she has filed a petition for divorce in China, where the marriage was celebrated, and lodged an application of custody over the two children. The father files petition for return to Australia by reason of child abduction.

In such a case, in absence of international and/or bilateral conventions between the two States, ISS Australia may be mandated by the High Court of Australia to carry out an intercountry child assessment in cooperation with ISS Hong Kong, responsible for China, in order to evaluate whether the habitual residence of the two children has changed in accordance with specific elements, such as *entourage*, school conditions, family environment conditions and plans for the two children, in order therefore to support the judicial decision to retain or decline international jurisdiction over the case.

B. Towards Practice

The impact of the social perspective of PIL is extended to the instruments concluded and implemented in respect of PIL principles and scope, notably predictable and just rules determining the regulations governing international competence, applicable law, recognition and enforcement of judicial decisions as well as protective measures, including rules governing international co-operation mechanisms.

The determination of international competence is represented by a direct link between international protection and international jurisdiction whereby the individual on one side – *beneficiary of the cross-border proceeding* – and the State administrative and judicial authorities on the other – *guardians of the cross-border proceeding* – have respectively the fundamental right and obligation to ensure international justice in a given State, notably either the one where the child was present prior to relocation or where the child is present following relocation. Such competence is determined through the reference of international instruments to connecting factors (*i.e.* habitual residence, domicile and nationality). The question remains in practice of how to assess and identify the connecting factor? The response given by PIL to such a question is to avoid any reference to legal definitions in the multilateral agreements, therefore referring to a factual judicial analysis based on the circumstances of the case – this is truer particularly for habitual residence which has today become one of the most prevalent and predominant connecting factors in PIL cross-border family proceedings.[19]

The circumstantial analysis to which PIL refers comprises social elements such as *parental intent, best interests of the child, family environment, language skills, entourage and enracinement of the child*. These elements are definitely part

[19] This analysis refers to the presentation made by Vito Bumbaca entitled *"The Habitual Residence in International Family Law"* at the Suzhou Conference of May 19th 2018, "*Civil Codification in China and Europe"*.

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of the social perspective of PIL whereby the authorities have fundamental legal and moral obligations to consider the following in respect of such elements: a) retain or decline competence; b) implement protective provisional and/or urgent measures; c) recognise and enforce or not judicial decisions; d) initiate international co-operation with foreign authorities in order to gather information on the child's situation as foundations for their decisions.

The importance of understanding the social implementation of PIL rules, particularly with regards to the international protection of needs, fundamental rights and freedoms of individuals, who are also considered the beneficiaries of the cross-border proceeding, remains crucial in order to predict the effects and impacts arising from the PIL legal order. Thus, being able to conclude whether the judicial and administrative decisions and related judicial and administrative procedures are concretely taken or not in the interests of the individuals concerned – including the social elements mentioned in supra – and, therefore, in respect of predictability and justice.

1. Hague Conventions on the Protection of Children and Adults

ISSs are actively involved in the implementation of the HC-1996, particularly with regards to the determination of international competence (arts. 5 and 6), including transfer of jurisdiction (arts. 8 and 9), as well as in the implementation of judicial and administrative decisions, including child protective measures (arts. 11 and 12); in the recognition and enforcement of judicial decisions (art. 23), and lastly in the international co-operation mechanisms (arts. 29 ff.).

ISSs are equally involved in the implementation of the Convention of 13 January 2000 on the International Protection of Adults (hereinafter HC-2000) with regards to the same headings mentioned for the HC-1996 as the structure of the legal framework is the same for the two conventions.

2. International Child Abduction

ISSs have a vast experience in matters relating to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter HC-1980), particularly with regards to the return of children (arts. 8, 11, 13) and rights of access (art. 21). International Family Mediation[20] should not be forgotten as one of the most important activities promoted and carried out by ISSs – the principal conciliatory activity of ISSs is about allowing parents to conclude amicable agreements with regards to their separation, particularly focused on the implementing modalities related to rights of custody and visitation over their children. The approach founded on the primary needs to protect the child from being separated from one of the parents, therefore ensuring the continuity of the child-parent

[20] INTERNATIONAL SOCIAL SERVICE, <http://www.iss-ssi.org/index.php/en/what-we-do-en/mediation-en> (Accessed 2018-05-23).

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relationship (UNCRC, art. 10.2), is topical in the ISSs mediation activities aimed at preventing child abduction.[21]

3. Intercountry Adoption and Alternative Care

The HC-1993 is one of the first conventions in which ISSs have been involved in various ways.[22] Firstly, ISS was involved in the Hague ratification process, therefore supporting the drafting of the Convention. Secondly, ISSs comprise among their departments a special unit focused entirely on issues relating to intercountry adoptions – the primary activity of such a unit is to allow full legislative national access to Governments, accredited bodies (AABs) and professionals. The purpose is to raise awareness among professionals as well as individuals in order to allow full respect and clarity of the principles and procedures envisaged by the Convention.

ISSs have strongly participated[23] in the co-drafting of the guidelines for the Alternative Care of Children endorsed by the UN General Assembly (UNGA) in 2009.[24] These guidelines are strictly related to the implementation of the UNCRC with regards to preventing children from unnecessary alternative care and that where needed this will apply in accordance with and fullest respect of those standards and safeguards provided by the UNCRC such as child well-being and their best interests.[25]

III. International Co-operation

Team activity at the transnational level is fundamental for the ISSs, particularly in order to gather information and assess child well-being in the context of a cross-border dispute which takes place in a bi-national perspective. The more dissimilar the two States involved in the dispute are in terms of cultural and social traditions, the more important is the use of international co-operation mechanisms between the ISSs members present in the two States.

In a Russian-French case where a Russian mother has relocated to Russia with her two children without the agreement and consent of her French husband,

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[21] N. GONZALEZ MARTIN, International Parental Child Abduction and Mediation, in: *Annuario Mexicano de Derecho Internacional*, vol. XV (2015) at 357.

[22] G. PARRA-ARANGUREN, Explanatory Report on The Convention on Protection of Children and Co-operation in Respect of Intercountry adoption (1994) at note 11.

[23] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, The Implementation and Operation of the 1993 Hague Intercountry adoption Convention: Guide to Good Practice No.1 (2008) at 69.

[24] UNITED NATIONS, <https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf> (Accessed 2018-05-24).

[25] INTERNATIONAL SOCIAL SERVICE, <http://www.iss-ssi.org/index.php/en/advocacy#4-1-guidelines-for-the-alternative-care-of-children> (Accessed 2018-05-24).

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the French lawyer, on behalf of the French father, submits to the General Secretariat of the International Social Service a request pertaining to the return of the two children to France, being this country their previous habitual residence prior to the relocation, to obtain information in relation to the PIL legal framework between the two countries; the right of the father to file a return application and whether this should comprise the commencement of administrative proceedings through the involvement of the Russian-French Central Authorities. In such a bi-national context, ISSs will a) provide the French lawyer with comprehensive information vis-à-vis legislation and procedural rules, particularly in order to determine international competence and applicable law, thus allowing the speed-up of proceedings; b) inform the lawyer that a mandate vis-à-vis ISSs French member is a possible option to carry out an intercountry child assessment which will possibly be done in co-operation with the ISSs Russian member in order to determine the children's habitual residence and, therefore, whether they should return to France or continue to stay in Russia; c) transfer the request directly to the ISSs Russian member in order to gather information about the children's situation, particularly their family environment and well-being with their mother in Russia.

The above highlights the peremptory importance of the use of efficient and effective intercountry co-operation mechanisms among the ISSs network which is implicitly extended in support of all the other actors involved, judicial and administrative, towards the child's best interests. ISSs may, therefore, be considered as an *intercountry hub* being able to centralise international socio-legal requests and ensure fundamental PIL anamnesis vis-à-vis family legislation and children's needs, finally in support of the legal order across borders. Such a cooperation system may therefore be composed of two axes: a national one and an international one. This is also called *two-track model*[26] and it refers to a) vertical (national) cooperation between ISSs-Central Authority-Judicial Courts in a given State; b) horizontal (transnational) cooperation between ISSs members or between ISSs present in one State (*i.e.* the country of the child's habitual residence prior to relocation) and Central Authorities-Judicial Courts in another State (*i.e.* the country of the child's relocation).

A. Direct Communication

Direct communication represents the basis for efficient and effective international co-operation. In a modern globalised context where international mobility increases, administrative and judicial authorities have the fundamental obligation to exchange information directly in the most expeditious manner. For instance, the HC-1996, article 32, provides that the Central Authority in the State where the child is present following relocation has the duty to provide, also with the support of other competent bodies such as ISSs, a report on the situation of the child so as to allow the State of the previous habitual residence to assess whether the child

[26] ISS CASEWORK COORDINATORS GROUP, ISS Cooperation under the 1996 Hague Child Protection Convention – Executive Summary (May 2015), available upon request at <www.iss-ssi.org>, at 2.

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may encounter any potential dangers. In the case of urgent provisional measures, the State where the child is present shall promptly inform the State of the child's habitual residence about the implementation of such measures (HC-1996, articles 11-12).

Intercountry activity of the ISSs in order to facilitate direct communication, hence international cooperation, among all actors involved in child custody proceedings appears fundamental in two case scenarios: a) it happens in practice that judicial and administrative authorities present in Contracting States party to the Hague PIL family instruments may not be familiar with such collaborative mechanisms, therefore not willing to commence coordination processes across borders – ISSs act as a facilitator in order to allow direct contacts, via their national members, among the authorities involved and, thus, ensure smooth cross-border proceedings towards the utmost protection of children; b) in cases involving authorities in non-Contracting States that are therefore no party to the Hague family system – ISSs will apply, independently of PIL, although always in the fullest respect of its peremptory principles and scope of predictability and justice, the *child centred approach* by asking the intervention of its members in that given State in order to gather information and sensitise the local authorities so that child well-being will primarily be taken into account.

The *child centred approach* applies uniformly among all the ISSs members beyond the boundaries of PIL instruments, but the Hague Convention safeguards and standards are constantly promoted. Such approach facilitates cross-border harmonisation in support of PIL independently of the ratification system which may be complex in some of the geographical contexts given the socio-cultural diversities.

1. ISSs Network

Today, ISS is an international federation of 140 interconnected non-governmental organisations and child protection authorities that have the capacity to assist children and families facing complex cross-border socio-legal situations. In some countries, there may be more than one ISS partner such as in Germany, where there are two representations. One is in Frankfurt and handles tracing, search for roots and adoption cases only. The other one is in Berlin and handles all the other ISS cases. The type of organisation representing ISS varies according to the context and can be governmental entities like in South Africa as well as NGOs and federations that have the capacity to handle intercountry cases.

ISSs are composed of three organs and two advisory bodies:

An International Council (IC), the equivalent of a General assembly is the highest decision making body of the Network and meets every two years. It operates as the guardian to the well-functioning and legal order of ISS in accordance with the Statutes – particularly by establishing guidelines and policies, deciding on the membership, electing candidates such as the International President.

A Governing Board (GB), which is composed of eleven members and the chief executive officer, governs the network in between General assemblies,

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ensures that all decisions are implemented and exercises oversight for operations as wells monitors the work of the SG CEO. The GB meets four times a year, in person or by teleconference.

A Secretary General (SG), who is the chief executive officer of the ISS, is based in Geneva, Switzerland. The General Secretariat, which is the team of the Secretary General, coordinates the members' activities, consolidates and expands the ISS network as well as represents the whole Network in international fora. The General Secretariat promotes and facilitates international co-operation including by developing and pursuing advocacy campaigns and implementing worldwide projects.

Regarding the two advisory bodies, a Professional Advisory Committee (PAC) provides expert knowledge to the Governing Board and the Secretary General on the ISS mission and operations and is composed of executive directors of ISS members. The PAC's chair has a seat on the Governing Board to ensure smooth connectivity.

A Casework Coordinators Group (CC), in charge of developing the social work manual of ISS, proposing training material and providing technical information on ISS social work as needed, is composed of all members' casework coordinators.

a) Beyond Legal Framework

As we have seen, ISS expertise goes beyond providing legal responses. PIL cannot offer tailor made solutions to all cross-border individual cases, as they require careful considerations often through individual care plans, with specific socio-legal expertise. The importance of ISSs is specifically relevant in cross-border family cases falling outside the international legal framework either in the absence of Treaties signed between the States involved in the dispute or in the absence of international regulation as for cross-border surrogacy arrangements. The intervention of ISSs fills in such socio-legal vacuum extending at the same time the harmonisation and promotion of PIL principles – this is the intersection of law and social casework.[27]

b) Practical Cases

In an International Family conflict case a father from Tunisia and a mother from Czech Republic are divorcing. The father lives with the child in Tunisia. The Czech Court requests the intervention of the State Central Authority in order to obtain a social report on the child situation in Tunisia, thus, to issue a decision on child custody. The Czech Central Authority (ISS Partner and responsible for the HC-1996 cases), requests assistance from the authorities in Tunisia in order to obtain a social report about the concerned minor, born in 2008. Since Tunisia has

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[27] J.G. ROSICKY/ F.S. NORTHCOTT, The Role of Social Workers in International Legal Cooperation: working together to serve the best interests of the child, *Persona y Familia: Revista del Instituto de la Familia* (2016) no. 5, at 101ff.

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not ratified the HC-1996, no cooperation mechanisms exist between Czech Republic and Tunisia in matters relating to children custody proceedings, the Czech Republic CA submits a request for intervention before the ISS General Secretariat to advise whether there is an ISS correspondent available for cooperation.

A relocation case taking place between Seychelles and Nigeria involves a Malian father and a Seychellois mother whose child was born and raised in Seychelles. The child was placed under a protective care measure following the depression and addiction problems faced by the mother. The mother and father were separated. The father has requested child custody which has been granted. He is now planning to leave Seychelles and settle in Nigeria with his Malian family living there. Before allowing him to leave Seychelles with the child, the Family Tribunal in Seychelles needs to ensure that the child will be in a safe and appropriate environment in Nigeria and that the mother's rights to visit will be ensured in the future. The Seychelles family tribunal requests ISSs intervention in order to determine the father's family environment in Nigeria, employment status, home situation; whether the stay is permanent or temporary in Nigeria; easy access to school and transportation as well as medical services.

A child lives in Kenya with her mother and stepfather. The latter would like to adopt her. The biological father is a Seychellois and lives in Seychelles. To proceed with the adoption in Kenya, the mother and stepfather need to gather all elements for their file to show their suitability to adopt. Seychelles child protection authority competent for the adoption wants to ensure that the adoption is in the child's interests. The Seychelles competent authorities request ISS Seychelles (Ministry of Family Affairs) to provide an intercountry assessment in Kenya in order to define suitability for adoption.

2. Central, Local Authorities and Inter-Governmental Institutions

International co-operation processes refer to both judicial and administrative procedures whereby various actors may be involved – central and/or local authorities depending on the national legal framework (*i.e.* Switzerland, UK, Germany, Italy and Australia); courts and tribunals; and all other bodies (*i.e.* ISSs and Mediators).

Central Authorities (hereinafter CAs) are the first authorities to be in charge of the administrative procedures through which child assessment or any other cross-border family requests (*i.e.* information exchange, child protective measure, parental responsibility measure) require their acceptance and approval in order to commence custody or cross-border family proceedings in that given State, in principle being this the State of the child's presence.

Once their competence is accepted, CAs may decide to transfer the request to local authorities (*i.e.* Cantonal Authorities in Switzerland, Regional Authorities in Germany) closer to the child's situation. CAs may also decide to mandate ISSs directly in order to carry out an intercountry child assessment or facilitate the implementation of a child protective measure across borders such as placement.

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This transnational process takes place a long time before the judicial one. The role of the CAs is to determine whether the State jurisdiction is competent over the case in order to submit the request to other national authorities including Courts and ISSs as well as to implement child protective measures within the territory – *administrative procedures*. The role of ISSs is to assess child needs and interests located in a socio-legal perspective thus ensuring international protection – *multidisciplinary approach*.

a) Impact of ISSs Intervention

ISSs work hand in hand and in support of PIL worldwide. The wide network of ISSs composed of 140 members allows for harmonisation of PIL in these countries by advocating for and implementing the principles of those instruments governing the rules of competence, applicable law and recognition of decisions as well as international co-operation not applicable in absence of ratification. In absence of ratification, ISSs act anyway in the fullest respect of such instruments through those multidisciplinary teams present in its Network Members.

The impact of ISSs is thus twofold a) it facilitates the promotion and sensitisation of PIL across 140 international borders; b) the socio-legal perspective of ISSs allows for the human and social development of PIL by transposing the legal framework into social practice and therefore closer to the real needs faced by individuals.

b) Practical Cases

The HC-1980, articles 11 and 12 refer to the prompt return of the child following relocation which quickly becomes illicit retention and therefore potential abduction. Practice shows that the threshold between a lawful relocation and illicit abduction is very subtle because the relocation may have taken place based on a temporary parental agreement – a verbal agreement according to which one of the two parents relocate with the children for a period of six months to be re-discussed in terms of the living conditions of the children whether to return or not to the State of their previous habitual residence at the end of such period – and the parental intent to relocate may be considered as a primary element to determine a change in the child's habitual residence, not to mention the six month period could be sufficient to settle a new habitual residence.

In a case involving a UK/Hong Kong couple living for eight years in Hong Kong, the mother originally from UK decides to relocate to London with their three children under a written parental relocation agreement without mentioning the return deadline. The intent to relocate is due to marital contrasts and the wish for better education of their children in the UK. The father submits return application before the Hong Kong Central Authority under HC-1980, article 8. ISS Hong Kong is mandated to carry out an intercountry child assessment in the UK in collaboration with ISS UK to assess the whereabouts of the children and exchange relevant information related to the social background of the children in accordance with HC-1980, article 7. ISS Hong Kong will first have a call with their UK

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colleagues and then request a report or travel to the UK to carry out the assessment. In the case of transfer of mandate, ISS Hong Kong will indicate the questions that they would like to submit before the relocated parent and children in order to evaluate the degree of integration of the two children in the UK, their school environment, their family environment and the future life plans for the children.

In a case related to a search of origins concerning an adopted child living in Hong Kong, ISS is asked to trace the biological parents living in Vietnam, Country of origin of the child. ISS Hong Kong will carry out a tracing enquiry in order to find out about the whereabouts of the biological parents; possibly establish a first link with them in the respect of their private life, and lastly organise a meeting between the child and the biological parents. During the whole process, ISS will make sure that the best interests of the child are preserved.[28]

A further case concerns an unaccompanied Senegalese minor, 15 years, who wished to go to Italy, crossing West Africa, and who is stuck in Mali, Bamako, for working reasons. ISS Mali, partner of SSI-AO – Service Social International Afrique de l'Ouest – comprising the 15 Member States of CEDEAO,[29] after identification, has applied temporary care measures (*i.e.* temporary reintegration and quality care arrangements) with the purpose to facilitate the reintegration of the minor in a family environment if compatible with his interests. ISSs apply the *"eight steps model"*[30] to ensure a gradual long-term care plan for the social reintegration of unaccompanied minors, acting in accordance with the UNCRC, articles 3 and 12.

In a case concerning a Cameroon adult living and habitually resident in the UK, temporarily placed in a Care Institution because of drug addiction reasons, ISS Switzerland – habitual residence of the brother – has been mandated by the brother to carry out a report assessment in order to allow the establishing of contacts between them. The reason is due to a serious illness affecting their mother in Cameroon who wished to meet her children once again before her death. ISS Switzerland asked ISS UK to make direct contact with the care institution in the UK in order to assess the whereabouts of the placed adult as well as the adult's situation in the institution. This communication process took place in accordance with HC-2000, article 30.

IV. Where Do We Stand Now?

In absence of global PIL instruments ratified by all the worldwide Contracting States party to the UNCRC (196), ISSs allows for better harmonisation of socio-

[28] INTERNATIONAL REFERENCE CENTRE FOR THE RIGHTS OF CHILDREN DEPRIVED OF THEIR FAMILY (ISS/IRC), Adoption - The Search of Origins (2007) fact sheet N° 32.

[29] CEDEAO, Member States <http://www.ecowas.int/etats-membres/?lang=fr>, (Accessed 2018-05-22).

[30] INTERNATIONAL SOCIAL SERVICE, Children on the move: from protection towards a quality sustainable solution (2017) available upon request at <www.iss-ssi.org>.

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legal protection in the fullest respect of PIL instruments safeguards and standards. However, ISSs activity is not mandatory, furthermore the intercountry child or adult assessment reports envisaged by HC-1996 and 2000 may not be taken into account by the jurisdictional competent authorities. This causes important socio-legal uncertainties vis-à-vis international protection whereby the best interests of the child may not be considered in non-Contracting States. ISSs will always act via international co-operation mechanisms through the *two-track model* mentioned in this article, although the effects of such fundamental activity for the child may remain unconsidered by judicial and State administrative authorities.

A. Efficiency and Effectiveness of ISSs

The direct intersection of PIL and social work is topical and pivotal in order to preserve the direct socio-legal nexus between international protection and international jurisdiction. The ISSs activity proves useful for a) determining child habitual residence, therefore international competence; b) ensuring and tracing the needs, fundamental rights and freedoms of the child and individuals concerned by allowing the right implementation of protective measures; c) allowing for the speed-up of legal procedures as well as reducing their costs.

The *child centred approach* applies a uniform manner across 140 Member States which advocates for harmonisation, uniformity and unification of the PIL principles mentioned in the Hague Conventions, as well as in regional instruments such as the EU Regulations. Prior to the implementation of the latter instruments, ISSs act within the framework of the UN Child Rights Convention towards the preservation of the child-parent relationship with both parents. The clear cut bond between PIL and social work remains crucial in solving cross-border family disputes.

B. New Horizons

The intercountry child and individual assessment, typical of the ISSs activity to which administrative and judicial authorities often refer, should be considered as an important *"evidence tool"* to verify and monitor whether child welfare is protected and ensured as well as whether protective measures and judicial decisions are taken in their best interests. The multidisciplinary team composing ISSs expertise should work closely with State authorities in order to avoid socio-legal gaps in the communication between the actors involved – the *two track model* is fundamentally important to achieve fullest communication.

Non-Contacting States may consider ratifying the Hague Conventions, particularly HC-1996, in order to allow a) streamlined and direct international judicial and administrative co-operation among the four corners of the world; b) recognition and enforcement of judicial decisions as well as child protective measures without causing conflicting judgments and heavy procedural exequatur proceedings.

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V. Conclusion

As demonstrated in practice, since 1924 Private International Law has significantly filled in some of the void in international protection of families and children facing international mobility, international migration and cross-cultural marriages. However, in an increasingly globalised world, where the level of voluntary migration for work or family reasons, and forcibly displaced people is reaching high records, displaced children and their families might still end up separated by national borders. As shown in this article, *intercountry assessments* try to face a high level of cases involving huge complexities, comprising moral, ethical and practical considerations as well as multicultural and multifaceted contexts. Requests involving such issues reach regularly ISS offices by requiring specific multidisciplinary and socio-legal expertise often falling outside the international legal framework, notably the Hague Conventions, especially when involving non-Contracting States. Nevertheless, the ISS current challenge to strengthen its network by identifying and training new partners to better support the vulnerable individuals concerned as well as to find resources to provide free services or at least at a minimal cost, relying on its vast experience in establishing links between different countries, is more than ever relevant. ISSs interventions remain therefore a clear proof of evidence referring to the efficiency of international co-operation mechanisms, which is a solid pillar of Private International Law in solving cross-border family disputes in accordance with international safeguards and standards "*taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries*".[31]

[31] UNCRC, Preamble.

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RETHINKING EU JURISDICTION IN CROSS-BORDER FAMILY AND SUCCESSION CASES CONNECTED WITH NON-MEMBER STATES

Ioannis K. SOMARAKIS*

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The primary focus in the development of EU private international law has thus far been on "internal" matters and policy goals. The main principle was to enhance the efficient functioning of the internal market. Nevertheless, because of the recent EU Regulations, the question regarding the potential "external" dimension of EU private international law arises not only in general, but in particular, especially in the field of family and succession law. In this respect, it is possible that even EU jurisdictional rules for non-Member State defendants may serve external policy objectives, using private international law as a means to "project" EU values or interests outside the EU in disputes which have connections going beyond the internal market. In family and succession matters, the EU seems to have adopted unilateral rules designed to achieve external policy goals. These rules could identify and give effect to a conception of how jurisdiction should be "appopri-ately" allocated in particular cases. In this sense, it is possible that the forum of necessity rule could aim to ensure that claimants against non-Member defendants have access to an EU court to pursue a remedy, if their rights have been breached in a foreign State without a functional or effective legal system. Additionally, the

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Yearbook of Private International Law, Volume 19 (2017/2018), pp. 555-584
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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choice of forum rule (professio fori) seems to belong to the same category. The question that arises is whether the EU would be willing – and if so, for what reasons – to regulate the reverse scenario in issues of international jurisdiction.

I. Introduction

Since 2000, the European Union has slowly built up a common body of private international law. More than 15 Regulations are now in force in various fields of law. They gradually pave the way for considering the systematic structures of a future European private international law.[1] However, the specific nature of EU private international law has been under intense doctrinal scrutiny for the past few decades.[2] One of the issues regularly raised is about the comparison between a set of conflict rules designed for relations between the Member States and another one, "tailored" for relations with non-Member States.

When judicial cooperation in civil matters was still in its early stage of development within the EU legal system some expressed the view that EU private international law was meant to improve solely the coordination between the legal systems of the various Member States.[3] Thus, situations linked with a non-Member State were considered as lying, in principle, outside the scope of EU law. They were left, accordingly, to the domestic rules of private international law of the Member States, or to the uniform rules to be agreed upon between individual Member States, on the one hand, and the non-Member States concerned, on the other. Today, it is accepted that EU legislation in the field of private international law can address, in principle, both intra-European and extra-European situations.[4]

[1] See P. LAGARDE, Embryon de règlement portant Code européen de droit international privé, *RabelsZ* 75 2011, p. 673-676; S. LEIBLE/ M. MÜLLER, The Idea of a "Rome 0 Regulation", this *Yearbook* 2012/2013, p. 137; J. BASEDOW, 15 Years of European Private International Law- Achievements, Conceptualization and Outlook, in J. FORNER DELAYGUA/ C. GONZÁLEZ BEILFUSS/ R. VIÑAS FARRÉ (coords), *Entre Bruselas y La Haya, Liber Amicorum Alegría Borrás*, Marcial Pons, Madrid/ Barcelona/ Buenos Aires/ São Paolo 2013, p. 175, 183. Further, with regard to the creation of a European private law see E. VAN SCHLAGEN, *The Development of European Private Law in a Multilevel Legal Order*, Intersentia, Cambridge 2016, p. 491 *et seq.*, 533 *et seq.*, 601 *et seq.*; V. MIGNON, *Le droit privé suisse à l'épreuve du droit privé communautaire*, Stämpfli Editions, Berne 2010, p. 32 *et seq.*, 56 *et seq.*

[2] See R. WAGNER, Das Europäische Kollisionsrecht im Spiegel der Rechtpolitik, in S. ARNOLD (ed.), *Grundfragen des Europäischen Kollisionsrecht*, Mohr Siebeck, Tübingen 2016, p. 105, 113 *et seq.*, 130 *et seq.*

[3] See J. HEYMANN, *Le droit international privé à l'épreuve du fédéralisme européen,* Economica, Paris 2010, p. 86 *et seq.* Cf. B. MARKESINIS/ J. FEDTKE, *Engaging with Foreign Law*, Hart Publishing, Oxford/ Portland 2009, p. 333 *et seq.*

[4] See Opinion 1/2003, ECJ, 7 February 2006, EU:C:2006:81 para. 143; infra III.A. p. 234 *et seq.* and note 84. The ECJ acknowledged in this case that EU measures relating to judicial cooperation are not intended only "for intra-Community" disputes, but are concerned, more generally, with situations featuring "an international element";

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The question of whether there *should* be such a distinction becomes more intense in the field of cross-border family and succession relationships. In this area of private international law, several relative EU legal acts have, at least in some respects, a "global" reach.[5]

As far as choice of law rules are concerned, the relevant EU rules purport to solve both these two types of conflicts. Certainly, they aim at interstate conflicts within the EU. Alongside, though, they regulate international conflicts of laws between Member States and third countries. The EU conflict rules are thus deemed to be universal, meaning that they have a "dual" capacity. They are not confined to selecting the applicable law within the European territory. They also extend to the designation of the law governing legal relations in conflicts involving the law of third States.[6] The territorial scope of the EU conflict rules is thus important mainly for deciding whether the courts of the forum are obliged to apply them.

The model is to be found in Article 2 of Regulation No. 593/2008 on contracts (Rome I)[7] which states that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State."[8] The same model is followed in all the other Regulations dealing with the choice of law: in torts (Regulation No. 864/2007,[9] Article 3), in maintenance (Regulation No. 4/2009,[10] which refers to the Hague Protocol of 2007, which in Art. 2 gives universal effect to the choice of law rule), in divorce (Regulation No. 1259/2010, Article 4), in

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Cf. P. FRANZINA, The Interplay of EU Legislation and International Developments in Private International Law, in P. FRANZINA (ed.), *The External Dimension of EU Private International Law After Opinion 1/13*, Intersentia, Cambridge/Antwerp/Portland 2017, p. 183 *et seq.*, p. 184 fn. 3

[5] For example, Member States' courts must refer to Regulation No. 4/2009 on maintenance obligations whenever they assess their jurisdiction over claims for family maintenance involving a foreign element. This occurs no matter whether the claimant or the defendant possesses the nationality of, or habitually resides in a Member State rather than a non-Member State, and regardless of whether a particular objective link exists between the subject matter of the dispute and one or more Member States. With regard to this issue see in detail infra II.

[6] With regard to Regulations Rome I and II for example, see S. FRANCQ, The External Dimension of Rome I and Rome II. Neutrality or Schizophrenia?, in M. CREMONA/ H.-W. MICKLITZ (eds), *Private Law in the External Relations of the EU*, Oxford University Press, Oxford/New York 2016, p. 71 *et seq.*, 73 *et seq.*

[7] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

[8] See M. BOGDAN, *Concise Introduction to EU Private International Law*, 3rd ed., Europa Law Publishing, Groningen/Amsterdam 2016, p. 115.

[9] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007, p. 40-49.

[10] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.01.2009, p. 1-79.

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successions (Regulation No. 650/2012,[11] Article 20), in matrimonial property regimes (Regulation No. 2016/1103,[12] Article 20) and in property consequences of registered partnerships (Regulation No. 2016/1104,[13] Article 20).

The distinction between situations found inside the EU and situations partly or totally found outside the EU is important also for matters of procedural cooperation, which involve two States: the State from which emanate the documents, evidence, judgment ("outgoing State") and the State of the judge seised ("incoming State"). In order for the EU rules of cooperation to apply, it is necessary that both States are EU Member States.[14] Non-Member States are thus excluded. This is reasonable, since, in terms of policy making, cooperation between Member States should be closer than that between them and the non-Member States. The pattern is followed in various areas regulated by EU instruments, such as proof collecting (Regulation No. 1206/2001, Art. 1), service of documents (Regulation No. 1393/2007, Art. 1), recognition and enforcement of judgments (Brussels I, Art. 33; Brussels Ibis, Art. 36; Brussels IIbis 2201/03, Art. 21 and Regulation No. 805/2004 Art. 1). In all these cases, cooperation is possible only if it involves two Member States.[15]

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[11] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.07.2012, p. 107–134.

[12] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 08.07.2016, p. 1-29.

[13] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 08.07.2016, p. 30-65.

[14] The reason is that the fundamental European principle of mutual trust and the grid of the European Judicial Network call for a close cooperation between authorities, for the sake of European citizens. See E. PATAUT, The External Dimension of Private International Family Law, in M. CREMONA/ H.-W. MICKLITZ (eds) (note 6), at 107 *et seq.*, 118.

[15] The most striking example is found in Articles 10 and 11 of the Brussels IIbis Regulation, which deal with child abduction. They lay down rules of cooperation for Member States but fall within the scope of the 1980 Hague Child Abduction Convention. EU Member States have organised closer cooperation between them; yet, they try to insert this cooperation with the laws set up within the framework of the 1980 Convention.

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II. The EU Bases of Jurisdiction in Family and Succession Relationships Connected with Non-Member States

Distinguishing between "intra-EU" and "outside-EU" situations or disputes becomes much more complicated in the field of international jurisdiction, where several models exist.[16] All of them have been tested in the EU instruments.

Traditionally, the EU legislator adopted the *inter partes* approach in measures concerning jurisdiction.[17] Thus, additional requirements were set out to govern the applicability *ratione loci* or *ratione personae* of the provisions. This approach reflected the experience previously developed by Member States by means of international conventions, most notably the Brussels Convention of 27 September 1968 which promoted the idea of reciprocity with regard to jurisdiction, recognition and enforcement of judgments, and judicial assistance.[18] The same approach also inspired conventions adopted outside the framework of the EU.[19]

Following Articles 2 and 4 of the Brussels Convention, the applicability of the rules of jurisdiction, subject to a few exceptions,[20] was based on the fact that

[16] See E. PATAUT, Qu'est-ce qu'un litige intracommunautaire? Réflexions autour de l'art. 4 du règlement Bruxelles I, in M. BANDRAC *et al.* (eds), *Justice et droits fondamentaux, Etudes offertes à Jacques Normand*, Litec, Paris 2003, p. 365; N. JÄÄSKINEN/ A. WARD, The External Reach of EU Private Law in the Light of L'Oréal versus eBay and Google and Google Spain, in M. CREMONA/ H.-W. MICKLITZ (eds) (note 6), at 125 *et seq.*, 133 *et seq.*; L. MARI/ I. PRETELLI, Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes – *Excerpta* of the Study PE 493.024 by the Swiss Institute of Comparative Law, this *Yearbook* 2013/2014, p. 211 *et seq.*

[17] Provisions *erga omnes* cover all cases falling within their material scope, whereas *inter partes* provisions set out additional requirements for their applicability. See for this criterion: F.M. BUONAIUTI, Jurisdiction under the EU Succession Regulation and Relationships with Third Countries, in P. FRANZINA (ed.) (note 4), at 211.

[18] See among others B. AUDIT/ G.A. BERMANN, The Application of Private International Norms to "Third Countries": The Jurisdiction and Judgments Example, in A. NYUTS/ N. WATTÉ (eds), *International Civil Litigation in Europe and Relations with Third States,* Bruyant, Bruxelles 2005, p. 63-80; T. KRUGER, *Civil Jurisdiction Rules of the EU and Their Impact on Third States*, Oxford University Press Oxford 2008, p. 30 *et seq.*, 81 *et seq.*

[19] See *e.g.* the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (Articles 5 and 23), and the Hague Convention of 30 June 2005 on choice of court agreements (Article 3).

[20] See Articles 16 and 17 of the Brussels Convention. Moreover, according to the Brussels Convention, a person domiciled in a Member State may be sued in another Member State. For example, where a person who is habitually resident in Greece commits a tort in Italy, the claimant has a choice whether to bring proceedings in Greece or in France (pursuant to Article 2 and 5 para. 3 of the Brussels Convention); where a French company and a German company agree to refer a dispute to the jurisdiction of the German courts, the German company may sue the French company in Germany (pursuant to Article 17 of the Brussels Convention).

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the defendant was domiciled in a Member State. It also contained provisions that were applicable only if additional requirements *ratione loci*[21] or *ratione personae*[22] were met. More specifically, a distinction was drawn. If litigation involved a defendant domiciled in a non-Member State, jurisdiction had to be decided by national rules, with the exception of exclusive grounds of jurisdiction.[23] If, though, litigation involved a defendant domiciled in a Member State, jurisdiction had to be decided upon by the rules of the Convention. This solution remained the same in the provisions of its following EU legal act, the Brussels I Regulation[24] (save for some exceptions).[25] It was, however, partly abandoned during the recast of the Brussels I Regulation.[26] Thus, EU legislation most often aimed at limiting the applicability of the provisions to only such situations which presented a particular connection with one or more Member States.

In the field of family and succession matters, the "Brussels I" model was originally followed in Regulation No. 2201/03 (although with some significant variations).[27] Its jurisdiction rules are applicable within the territory of Member States, without any limitation by connecting factors drawing a specific territorial scope of application. According to the Regulation, if the relevant connecting factor is located in a Member State, the courts of that State have jurisdiction, regardless of other connecting factors which may exist according to the national law. In divorce cases, for instance, a court of a Member State may have jurisdiction pursuant to Article 3 of the Regulation (because of habitual residence or nationality of the spouses). That court, then, has jurisdiction regardless of all the other connecting factors. In other words, Member State national rules are completely inapplicable.[28]

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[21] See for example Articles 5 and 9 of the Brussels Convention.

[22] See for example Article 6 of the Brussels Convention.

[23] See Articles 2, 3 and 16 of the Brussels Convention, combined.

[24] See Article 4 para. 1 of Regulation No. 44/2001.

[25] See Articles 16, 17, 22 and 23 of Regulation No. 44/2001. Cf. P. STONE, *EU Private International Law*, 3rd ed., Elgar European Law, Cheltenham/ Northampton 2014, p. 26 *et seq.*, 200 *et seq.*; G. VAN CALSTER, *European Private International Law*, Hart Publishing, Oxford/Portland 2013, p. 22 *et seq.*, 44 *et seq*. With regard to the Commission's Proposal for a Recast of the Brussels I Regulation [COM (2010) 748 final] cf. D. BIDELL, *Die Erstreckung der Zuständigkeiten der EuGVO auf Drittstaatensachverhalte,* Peter Lang, Frankfurt am Main 2014, *passim*.

[26] See Article 4 of Regulation No. 1215/2012. On the contrary, the European Commission was in favour of such a possibility. See the proposal of a new Art. 4 in European Commission, in Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2010) 748 final; cf. the Report on the Application of Council Regulation 44/2001, COM (2009) 174 final, para. 3-2.

[27] Cf. Articles 3 and 7, 8 and 14 of Regulation No. 2201/2003.

[28] At the time when the Regulation was adopted, such a solution was deemed innovative. It could appear, though, somewhat puzzling for judges. See for example the relevant case law of the French *Cour de cassation*, Civ. 1, 28 March 2006 *JCP*.2006.II.10133 note by A. DEVERS/ E. PATAUT, p. 119. Later, the meaning of Article 3 of the Brussels II Regulation was clarified by the ECJ in its famous ruling *Sundelind* [ECJ,

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On the contrary, the Brussels IIbis Regulation does not apply when no head of jurisdiction empowers the courts of a Member State.[29] With regard to divorces, for example, Articles 6 and 7 establish a regime, in which national rules of jurisdiction can be used only when there is no connecting factor with a Member State according to the basic jurisdiction rule (Article 3). The Regulation points, then, towards the national procedural law to solve issues of overlapping jurisdiction.

Moreover, EU nationals, who are habitually residents in another Member State can avail themselves of the national rules of jurisdiction of the State of their residence against a respondent who is neither habitually resident in the EU, nor an EU national, nor domiciled in the common law sense in the UK or in Ireland.[30]

Even though the formulation, at least in divorce cases, might seem complicated, the aim is simple: protect the persons having a certain degree of "proximity" with the Union (mainly habitual residents in the territory of the EU and nationals of the Member States).[31] By the wording of the relative EU provisions it is possible to draw a clear line between national and European rules of jurisdiction. The latter are applicable when the former are not, that is, when there is no connecting factor of the case with the courts of a particular Member State.[32]

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29 November 2007, Case C-68/07, *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo*, ECLI:EU:C:2007:740]. As the Court noted (para 28): "…where in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation."

[29] See U. MAGNUS/ P. MANKOWSKI, Introduction, in U. MAGNUS/ P. MANKOWSKI (eds), *Brussels II bis Regulation*, Otto Schmidt, Köln 2017, p. 4, 20. Creating various exclusive rules of allocation of territorial jurisdiction in the presence of particular connections with the territory of a Member States, within the European jurisdiction rules, is not an easy concept. With regard to the Brussels I Regulation, for example, cf. I. PRETELLI *et al.* (eds), Possibility and terms for applying Brussels I Regulation (recast) to extra EU disputes, EP Study PE 493.024, available online at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/studybrusselsi_/studybrusselsi_en.pdf, p. 22-28, esp. 23.

[30] See A. BORRAS, Article 6 and 7, in U. MAGNUS/ P. MANKOWSKI (eds) (note 29), p. 97, 99, at 101 and 105; A. BONOMI, The Opportunity and the Modalities of the Introduction of *Erga Omnes* EC Rules on Jurisdiction, in A. MALATESTA/ S. BARIATTI/ F. POCAR (eds), *The External Dimension of EC Private International Law in Family and Succession Matters*, Cedam, Padova 2008, p. 149 *et seq.*, 153. Nevertheless, things are simpler when it comes to parental responsibility. Article 14 merely provides that "where no court of a Member State has jurisdiction pursuant to Article 8 to 13, jurisdiction shall be determined in each Member State by the laws of that State."

[31] In a more general respect see L. TOMASI, The Application of EC Law to non-Purely-intra-Community Situations, in A. MALATESTA/ S. BARIATTI/ F. POCAR (eds), (note 30), p. 87 *et seq.*, at 94.

[32] *Contra* E. PATAUT (note 14) at 120, who argues that the distinction between "intra-EU" and "extra-EU" cases adds complexity and that there is no theoretical or practical reason to justify it, in order to determine the applicability of European or national jurisdiction rules.

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Nevertheless, the most recent EU instruments regarding family and succession matters have moved away from the Brussels I strictly *inter partes* approach.[33] All the pertinent Regulations addressing jurisdiction and applicable law issues provide, in fact, for grounds of jurisdiction which also operate in cases where none of the parties is personally connected to one or more Member States.[34] As a result, the domestic rules of jurisdiction of the Member States have no residual role with regard to disputes falling within the substantive scope of application of the relevant instruments. This is why some scholars argue that the later Regulations on family and succession matters have embodied a limited *erga omnes* (universal) approach regarding jurisdiction.[35]

If that were true this *erga omnes* approach presents, nonetheless, an inherent limitation: the respective Regulations attempt no substantial coordination of jurisdiction between Member-States' and third-countries' courts, except in *forum necessitatis* rules.[36] Instead, the aforementioned Regulations set out some autonomous subsidiary jurisdictional rules, to be resorted to in cases where the general grounds of jurisdiction do not apply.

More specifically, Article 3, 4 and 5 of the Maintenance Regulation (No. 4/2009) provide the main connecting factors for a court of a Member State to have jurisdiction. They mainly involve habitual residence, choice of court by the parties and the mere appearance of the defendant before a given court. Article 13(2) also grants jurisdiction for related actions.[37] The circumstance where the defendant is habitually resident in a third State no longer entails the non-application of EU rules on jurisdiction (Recital 15). In that circumstance, Article 6 provides for a subsidiary jurisdiction based on the common nationality of the parties, even if no Member State has jurisdiction in a given situation. Lastly, Article 7 provides a *forum necessitatis,* allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist, according to the Regulation (Recital 16) "…when proceedings prove impossible in the third State in question, for example because of civil war, or when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State." Jurisdiction based on the *forum necessitatis* should be exercised, however, only if the dispute has a sufficient connection with the

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[33] See A. BONOMI (note 30), at 153.

[34] See infra, p. 224 *et seq.*

[35] See F.M. BUONAIUTI (note 17), at 217 with regard to EU Regulation No. 650/2012. *Contra* A. DAVÌ/ A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Giappichelli,Torino 2014, p. 198. With regard also to family Regulations, cf. O. FERACI, Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters, this *Yearbook* 2014/2015, p. 105 *et seq.*, 110 *et seq.*

[36] See *infra* and G. ROSSOLILLO, *Forum necessitatis* e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea, 2010 *Cuadernos de derecho transnacional*, p. 403, at 413-415.

[37] E. PATAUT (note 14), at 121.

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Member State of the court seised.[38] As is obvious, it is impossible for an EU Member-State to decline jurisdiction only because a non-Member State might have jurisdiction according to its own national law.

Although the rules are different, the same model has been adopted in the Succession Regulation (No. 650/2012). Chapter II (Articles 4 *et seq*.) organises a completely "closed" jurisdiction system.[39] Basically, the general connecting factor for the purpose of determining jurisdiction (and the applicable law) is the habitual residence of the deceased at the time of death (Article 4). In addition, it is possible, for a court to exercise jurisdiction based on choice of forum, choice of law, or mere appearance of the parties to the proceedings (Articles 5, 6 and 9). If none of these conditions is met, then a court of a Member State could still have specific jurisdiction over the goods of the deceased, which are located in the forum (Article 10(2)).[40] Lastly, if no Member State has jurisdiction pursuant to all these rules, Article 11 also allows a *forum necessitatis* based on the fact that a proceeding cannot be reasonably brought before the courts of a non-Member State. Additionally, the case must have a sufficient connection with the Member State of the court seised. Once again, there is no provision for declining jurisdiction in favour of a third-country court.[41]

The Regulation on matrimonial property (No. 2016/1103)[42] also follows the same pattern. The rules on jurisdiction set out in the Regulation aim to enable citizens to have their various related procedures handled by the courts of the same Member State. Therefore, the Regulation attempts to concentrate the jurisdiction on matrimonial property regime in the Member State whose courts are called upon to handle the succession of a spouse in accordance with Regulation No. 650/2012 (Article 4), or the divorce, legal separation or marriage annulment in accordance with Regulation No. 2201/2003 (Article 5). At the same time, in case these conditions are not met, the Regulation purports to ensure that a genuine connecting factor exists between the spouses or registered partners and the Member State in which jurisdiction is exercised. Therefore, it establishes a scale of connecting

[38] The nationality of one of the parties is deemed by the Regulation as a sufficient link (Recital 16).

[39] See in general A. Bonomi/ P. Wautelet, *Le droit européen des successions. Commentaire du Règlement no 650-2012*, avec la collaboration d'I. Pretelli et A. Öztürk et, 2nd ed., Bruyant, Bruxelles 2016, p. 181 *et seq.*; Ch. Pamboukis in Ch. Pamboukis (ed.), *EU Succession Regulation No. 650/2012, A Commentary*, Nomiki Bibliothiki, Athens 2017, p. 110 *et seq.*

[40] M. Bogdan (note 8), at 106.

[41] On the contrary, for example, Articles 86 *et seq.* of the Swiss Code on Private International Law allow the Swiss court, seised in cases relating to inheritance issues, to decline jurisdiction if another State considers its jurisdiction "exclusive".

[42] The Regulation shall apply from 29 January 2019 in 18 Member States, namely: Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Cyprus, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. These States addressed requests to the Commission indicating that they wished to establish enhanced cooperation between themselves according to Article 328(1) TFEU, in the area of the property regimes of international couples; see Recital 11 of the Regulation and Article 70.

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factors for determining jurisdiction with regard to matrimonial property matters which are not linked to the aforementioned pending proceedings. This scale defines as connecting factors in hierarchical order, the habitual residence of the spouses, their last habitual residence if one of the spouses still resides there, the habitual residence of the respondent and the spouses' common nationality at the time the court is seised (Article 6). Where no court has jurisdiction pursuant to these rules, there is a subsidiary jurisdiction of the Member State where immovable property is located, but only in respect of that property (Article 10). Finally, the Regulation, following the model of the relevant provision in Regulation No. 650/2012, provides for a forum of necessity for cases where the proceedings would be impossible or cannot reasonably be brought or conducted in a third State (Article 11).

The same also apply to the Regulation on property consequences of registered partnerships (No. 2016/1104).[43] Regarding registered partnerships, jurisdiction is granted to the Member State whose courts are called upon to handle the succession of the registered partner in accordance with Regulation No. 650/2012 (Article 4), or the dissolution or annulment of the partnership (Article 5). Other than that, the Regulation establishes an almost identical scale of connecting factors for determining jurisdiction as in Regulation No. 2016/1103. This scale contains in hierarchical order, the habitual residence of the registered partners, their last habitual residence if one of the partners stills resides there, the habitual residence of the respondent and the partners' common nationality at the time the court is seised (Article 6). Moreover, the Member State under whose law the partnership was created is added to this list. Finally, the provisions concerning subsidiary jurisdiction and a forum of necessity (Articles 10 and 11) are almost the same in wording as in Regulation No. 2016/1103.

It is true that the aforementioned EU Regulations regarding family and succession issues, which contain provisions on jurisdiction and applicable law, are innovative. They do not only shift to a more far-reaching approach than that of the Brussels I model; they also contain provisions that at least try to partly resolve the challenging issue of overlapping jurisdiction when it comes to relations with non-Member States.[44] Nevertheless, it should be noted that the issue of regulating jurisdictional overlaps between Member States and non-Member States is much more a political than a purely technical one. Private international law rules often reflect substantive policies.[45] More specifically, whenever EU legislation having a global reach is enacted, the EU institutions may be pursuing a political objective requiring the measure at hand to apply to both European and non-European

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[43] Cf. C. GONZÁLEZ BEILFUSS, The Proposals on Council Regulations in Matters of Matrimonial Property Regimes and on the Property Consequences of Registered Partnerships: Interactions between Private International Law and Substantive Law, in E. LAUROBA LACASA/ M.E. GINEBRA MOLINS (eds), *Régimes matrimoniaux et participation aux acquêts et autres mécanismes participatifs entre époux en Europe*, Société de Législation Comparée, Paris 2016, p. 171 *et seq.*, 175-177.

[44] See on this aspect, further infra II.A. and B.

[45] A. MILLS, EU External Relations and Private International Law: Multilateralism, Plurilateralism, Bilateralism, or Unilateralism?, in P. FRANZINA (ed.) (note 4), at 101 *et seq.*, 110 *et seq.*

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situations.[46] In this light, it is important to examine more closely the jurisdiction of necessity and choice-of-forum rules.

The family and succession Regulations are inspired by the pursuit of "*Gleichlauf*",[47] that is a parallelism between jurisdiction and applicable law as regards disputes falling within their scope of application.[48] The coincidence between *forum* and *ius* simplifies the regulatory framework and produces benefits in terms of legal certainty and predictability of solutions.[49] When it comes to cross-border situations within the EU, such a parallelism achieves the general purpose of all the uniform private international law instruments. These require that all the conflict of laws rules in the Member States designate the same applicable law, irrespective to the State of the *forum*. The general aim is to assure the proper functioning of the internal market. The specific aim is to prevent tension between local and foreign values as introduced in the *forum* by the functioning of the conflicts rules. The objective is usually made evident by using the same connecting factors for the general rule of jurisdiction and the general conflict-of-laws rules of the Regulations.[50]

Nonetheless, the coincidence of *forum* and *ius* as a goal in the system of allocation of jurisdiction embodied in the Regulations (*i.e.* the Maintenance Regulation, the Succession Regulation and the two Regulations on the property of couples), presents an inherent limitation. More precisely, no substantial coordination between competent courts (*forum*) and applicable law (*ius*) is attempted regarding third-country law and jurisdiction, except in the extreme circumstances contemplated by the rules on the *forum necessitatis*, with the exercise of jurisdiction by third-country courts.[51]

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[46] P. FRANZINA (note 4), at 189 *et seq.*

[47] With regard to this principle in German legal doctrine, see P. NEUHAUS, Internationales Zivilprozessrecht und internationales Privatrecht, *RabelsZ* 1955, p. 201 *et seq.*; P. NEUHAUS, *Die Grundbegriffe des internationalen Privatrechts*, 2 Aufl., Tübingen 1976, p. 116 *et seq.*; A. HELDRICH, *Internationale Zuständigkeit und anwendbares Recht*, Berlin-Tübingen, 1969, p. 8 *et seq*. More recently see S. OTHENIN GIRARD, *La réserve d'ordre public en droit international privé suisse*, Zürich 1999, p. 347 *et seq.*; TH. M. DE BOER, Forum Preferences in Contemporary European Conflict of Law: The Myth of a "Neutral Choice", in H.-P. MANSEL/ T. PFEIFFER/ H. KRONKE/ CH. KOHLER/ R. HAUSMANN (eds), *Festschrift für Erik Jayme*, I, Sellier, München 2004, p. 39 *et seq.*, p. 48.

[48] See for example the Preamble of Regulation No. 650/2012, Recitals 23 and 27; P. LAGARDE, Les principes de base du nouveau règlement européen sur les successions, *Rev. crit. dr. int. pr.* 2012, p. 691 *et seq.*, 701 *et seq.*; A. BONOMI, Les propositions de règlement de 2011 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés – Quelques remarques critiques, in A. BONOMI/ C. SCHMID (eds), *Droit international privé de la famille*, Schulthess, Geneva 2013, p. 54 *et seq.*, 57, 62.

[49] See O. FERACI (note 35), at 111.

[50] For example in Regulation No. 650/2012, the habitual residence of the deceased at the time of death is used as a connecting factor in Article 4 as well as in Article 21. See CH. HEINZE, The European Succession Regulation 650/2012 An Overview, in G. ALPA (ed.), *I nuovi confini del diritto privato europeo*, Giuffrè Editore, Milano 2016, p. 41 *et seq.*, 43.

[51] See F.M. BUONAIUTI (note 17), at 216.

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A. The Forum of Necessity Rules in the Family and Succession Regulations

The pertinent Regulations provide for a forum of necessity, for those exceptional cases where proceedings could not be brought or would not be dealt with fairly before the courts of a third country presenting a close connection with the dispute (see respectively Article 7 of 4/2009,[52] 11 of 650/2012, 11 of 2016/1103 and 11 of 2016/1104).[53]

The forum of necessity rules make sense for situations in which no Member-State court can claim jurisdiction pursuant to the relevant provisions of the Regulations. They also apply whenever the court of another Member State is deemed to have jurisdiction according to the Regulations, but cannot exercise it because of natural disasters or political disorder in the Member State.[54] A jurisdiction of necessity covers those exceptional cases where proceedings could not be brought or would not be dealt with fairly in the courts of a third country, which presents a close connection with the dispute, because they are unsuited ("failing state" due to political disorder) to exercise jurisdiction.[55] In this procedure it is important to define with which third country the situation is most closely connected.[56]

There is no doubt that the *forum necessitatis* rules included in each of the four Regulations involve urgent situations.[57] However, due to different approaches regarding the spatial applicability of the relevant rules in the Regulations, a coincidence between jurisdiction and applicable law in cases presenting connection with third countries may frequently prove impossible.[58]

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[52] See B. ANCEL/ H. MUIR-WATT, Aliments sans frontières. Le règlement CE No. 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires, 99 *Rev. crit. dr. int. pr.* 2010, p. 463 *et seq.*; M. ANDRAE, Artikel 6, Artikel 7 in Th. RAUSCHER (Hrsg.), *EuZPR-EuIPR Europäisches Zivilprozess- und Kollisionsrecht*, Band IV, 4 Aufl., Sellier European law Publishers-Otto Schmidt, Köln 2015, p. 555 *et seq.*, 559 *et seq.*

[53] See CH. HELTER, Artikel 10, Artikel 11 in TH. RAUSCHER (Hrsg.) (note 52), p. 259 *et seq.* and 263 *et seq.* ; G. PANOPOULOS, Article 10, Article 11, in CH. PAMBOUKIS (note 40) p. 145 *et seq.* , 154 *et seq.*

[54] See for example Recital 41 of Regulation (EU) No. 2016/1103.

[55] See art. 6 and 7 of Regulation (EU) No. 4/2009; Articles 10 and 11 of Regulation (EU) No. 650/2012; HELTER (note 53), at 264 para 5.

[56] For example, elements such as the habitual residence, the domicile or the citizenship of the deceased are considered close connections with the case; HELTER (note 54), 263-264 para 4; PANOPOULOS (note 53), at 159.

[57] Regarding Regulation (EU) No. 4/2009 see B. AUDIT/ L. D'AVOUT, *Droit international privé*, 7e ed., Economica 2013, p. 719. Regarding Regulation (EU) No. 650/2012, see HELTER (note 53), at 263 para 2.

[58] F.M. BUONAIUTI (note 17), at 217.

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B. The Choice of Forum Rules in the Family and Succession Regulations

Additionally, according to all these Regulations, a choice of court is contemplated only in favour of the Member States' courts.

First of all, Article 4 of Regulation No. 4/2009 admits a choice of court only in favour of a restricted range of alternative courts belonging to Member States presenting a qualified connection with the dispute and excluding it altogether in case of maintenance obligations towards a minor.[59] More specifically, under Article 4 para 4, if the parties have agreed to confer exclusive jurisdiction on the court or the courts of a State party to the Lugano Convention of 30 October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters, and that State is not a Member State, the said Convention shall nevertheless apply other than in relation to disputes relating to a maintenance obligation towards a child under the age of 18, in which case a choice of law is prohibited.

Similarly, Article 5 of Regulation No. 650/2012 admits a restricted *professio fori* (choice of court) only in favour of the courts of the Member State whose law has been chosen by the deceased as applicable to the succession.[60]

Then, Article 5(2) of the Regulation No. 2016/1103 provides for the concentration of jurisdiction in favour of a Member-State court seised under Regulation No. 2201/2003. In particular, the court seised to rule on an application for divorce, legal separation or marriage annulment, under agreement of the parties, is granted jurisdiction to include matters relating to the matrimonial property regimes arising thereof. This is possible only in case the jurisdiction to rule on the divorce, legal separation or marriage annulment is based on specific grounds of jurisdiction.[61] Moreover, Article 7 enables the parties to conclude a choice of court agreement in favour of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage, according to the relevant provisions on choice-of law of the Regulation.[62]

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[59] It must be noted, though, that the Maintenance Regulation also envisages a limited exception with regard to cases governed by the Lugano Convention of 2007. See further O. Feraci (note 35), at 116 *et seq.*

[60] See further F.M. Buonaiuti (note 17), at 216 *et seq.*

[61] According to Article 5(2): "Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the court that is seised to rule on the application for divorce, legal separation or marriage annulment: (a) is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No. 2201/2003; (b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No. 2201/2003; (c) is seised pursuant to Article 5 of Regulation (EC) No. 2201/2003 in cases of conversion of legal separation; or (d) is seised pursuant to Article 7 of Regulation (EC) No. 2201/2003 in cases of residual jurisdiction."

[62] See Articles 22 and 26 (1) points (a) and (b) of Regulation No. 2016/1103.

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Lastly, Article 5(1) of the Regulation No. 2016/1104 allows the parties to agree to confer jurisdiction to the Member-State court which rules on the dissolution or annulment of a registered partnership so that it also rules on the property consequences of the partnership. Moreover, Article 7 envisages an express prorogation, according to which parties may confer exclusive jurisdiction on the courts of the Member State whose law has been chosen as applicable to the property regime or their partnership, according to the relevant provision on choice-of-law of the Regulation.[63]

In our view, these provisions seem problematic. For example, in respect of succession matters, if the deceased is a third country national and has made a *professio iuris* in favour of the law of his nationality, Article 5 of Regulation No. 650/2012 does not allow the parties concerned to opt for the jurisdiction of the courts of the country of the chosen law.[64] This is because the EU has no power to expand or restrict the jurisdictional reach of non-Member States. Nevertheless, as Buonaiuti and Magnus argue, in case of a *professio iuris* in favour of the law of a third country, it would be reasonable to expressly allow the courts of any Member State competent under the general rules, to *decline* their jurisdiction in favour of the courts of the country of the chosen law.[65] The allocation of jurisdiction would be based then on the parties' choice or on the objective circumstances of the dispute.

III. Evaluation of the EU Jurisdiction Rules

In family matters, the necessity for a harmonious solution is of utmost importance. Depriving the courts of non-Member States of their right to hear a case closely connected with their territory affects also the rulings of the Member-States' courts. It jeopardises the recognition of EU judgments abroad in the sensitive field of personal status of EU citizens.[66] Therefore, harmonised jurisdictional rules which deny jurisdiction to the courts of third countries should be used only when strong

[63] See Articles 22 and 26 (1) of Regulation No. 2016/1104.

[64] See Ch. Pamboukis, Article 5, in Ch. Pamboukis (note 39) at 120 *et seq.* , 121.

[65] F.M. Buonaiuti (note 17), at 220; R. Magnus, Gerichtsstandsvereinbarungen im Erbrecht? *IPRax* 2013 p. 393 *et seq.*, 394 *et seq.* In this respect, see for example Articles 86 *et seq.* of the Swiss Code on Private International Law (note 41). Nevertheless, there is also a possibility that the parties bring the proceedings before a third-State court by mutual agreement and the court accepts it. In this case, if the dispute is later brought by one of the parties before a Member-State court, the third State will either uphold the agreement and there will be parallel proceedings, or it will decline its jurisdiction.

[66] It must be noted that Articles 7 and 14 of Regulation No. 2201/2003 provide that in case no Member State has jurisdiction on the dispute pursuant to the general grounds of jurisdiction of the Regulation, jurisdictional matters are determined in every State by its respective domestic procedural rules. Cf. M. Fallon/ T. Kruger, The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments, this *Yearbook* 2012/2013, p. 1 *et seq.*, 22 *et seq.*, 24 *et seq.*

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policy matters favour the attraction of a specific litigation before the courts of a particular Member State. This is because the predictability of forum is considered a cornerstone of the jurisdictional regime of the EU.[67]

The solution eventually adopted in Brussels II bis, even though it is better than the other adopted in Brussels I, could be, nevertheless, criticised. The Brussels II bis rules lead to a differentiation between jurisdictional bases between Member- and non-Member States. The choice that was made, meant to protect an important class of defendants: those who are integrated in the EU, either by habitual residence, domicile (UK or Ireland), or nationality. The pertinent rules challenge the chances of recognition of their decision in third States, which should always be taken into account.[68] Because of this protection offered to EU nationals and EU residents by Article 6, Member States' courts whose jurisdiction is based on Article 7 will only hear cases with almost no connection at all with their territory.

Moreover, it appears questionable why the other Regulations in family and succession matters do not take into consideration the possibility of third-country courts to exercise jurisdiction pursuant to their own domestic rules in cases more closely connected to such courts.[69] A jurisdiction being exercised in third-country related cases with which the respective relationship (e.g. maintenance, succession, matrimonial property or property of the registered partners) presents a substantial connection would then, in principle, also make the law of that country applicable to the cross-border situation itself.[70]

The Regulations cater instead for the reverse scenario in which it would be impossible for several reasons to bring the dispute before the court of the third country with which it is more closely connected. For such cases, they provide for subsidiary rules of jurisdiction in favour of the courts of the Member State with which the case presents a sufficient connection.[71]

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[67] See G. VAN CALSTER (note 25), at 14.

[68] This is because, when such decisions are sought to be recognised outside the EU, the court of the third-State may consider that the Member-State court seised could not have assumed jurisdiction, due to- for example- a choice-of-court agreement in favour of a third-State court, which was not taken into account, although one of the parties referred to it. Cf. FERACI (note 35), at 111 *et seq.* and *infra* IV.B. p. 240.

[69] See E. PATAUT (note 14), at 124. With regard to the Succession Regulation, BUONAIUTI (note 17), at 218; LAGARDE (note 48), at 694, 703 *et seq.* Cf. J. BASEDOW, Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union: Eine einleitende Orientierung, in J. VON HEIN/ G. RÜHL, *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union*, Mohr Siebeck, Tübingen 2016, p. 3 *et seq.*, 16.

[70] A third-State court selected by the parties may be better placed to hear the case, being familiar with the situation and its domestic law, which may be applicable. Then, as it has been argued, the coincidence between *forum* and *ius* could produce benefits in terms of legal certainty and predictability of solutions. See O. FERACI (note 35), at 111.

[71] See P. LAGARDE, Présentation du règlement sur les successions, in G. KHAIRALLAH/ M. REVILLARD (eds), *Droit européen des successions internationales*, Defrénois, Paris 2013, p. 5 *et seq.* , 9.

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Of course the question why are any distinctions necessary between European and non-European litigation regarding jurisdiction, remains.[72] Would we not gain in legal certainty and simplicity, if the whole European territory was to be considered as a single legal order with regard to issues of jurisdiction?

A. EU Jurisdiction Rules as a Tool for External Policy?

At first glance, the distinction between inside-EU and (partly) outside-EU relationships in EU law is easy and self-explanatory. The internal dimension refers to the scope of EU law, which is restricted to the number of Member States who have joined the EU. In that sense, the internal dimension has much in common with the "territory" of the EU. Just like nation States, the EU defines its law through its "territory". The external dimension is, then, outward looking.[73]

It is argued, though, that the spatial application of EU legislative measures relating to judicial cooperation in civil matters *lato sensu* and the development of the external relations of the EU in the same field are connected.[74] This is because in the supranational context, the clear-cut distinction between substance and procedure is vanishing. In this regard, we may observe the overall EU tendency to use internal procedural rules to "impose" internal substantive standards on the outside world. The consequence of setting out unilateral European jurisdiction rules in trans-European litigation is far-reaching. In some areas forming parts of contract law, the laws and regulations of the non-EU Member States, have already been, in EU case law, implicitly or explicitly measured against "European legal standards".[75] This is particularly obvious in the fields of EU insurance law, employment law and consumer law.[76] Now, it could be reasonably argued that the EU by setting out the respective Regulations shields its higher standards also in the

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[72] Cf. E. PATAUT (note 14), at 124.

[73] The attempt to analyse and define the reach and effect of European Private Law and EU Private International Law beyond EU territory is challenging. This is because the scope of application of European Private Law beyond EU borders is "a yet unchartered territory"; see in this respect H.-W. MICKLITZ, The Internal versus the External Dimension of European Private Law, in M. CREMONA/ H.-W. MICKLITZ (eds), *Private Law in the External Relations of the EU*, Oxford University Press, Oxford/ New York 2016, p. 9 *et seq.* , 17; in terms of private international law, see FRANCQ (note 6), at 85 *et seq.*

[74] See H.-W. MICKLITZ, in CREMONA/ MICKLITZ (note 73), 26. Cf. A. BONOMI (note 30) p. 149-160, 153 *et seq.*

[75] The most striking example is the ECJ "Kadi" judgment (ECJ, 3 September 2008, joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461). Usually, it is analysed from a constitutional human rights perspective. However, it should be pointed out that the legal action of Mr Kadi was directed against the claimed illegal seizure of his assets. The ECJ "defended" higher European human rights standards against lower external international human rights standards. See more analytically in this respect, N. JÄÄSKINEN and A. WARD (note 16), at 133 *et seq.* and H.-W. MICKLITZ (note 73), at 27 *et seq.* with further references to the relevant EU case law.

[76] See amongst others, S. FRANCQ (note 6), at 94 *et seq.*

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area of family and succession law. For example, in matters of family and succession law, the EU has enhanced the process of "individualisation" of jurisdiction (already intensified in transnational relationships)[77] by inserting choice-of-court rules, yet only in favour of Member-States courts.[78] Thus, the EU private international law and in particular the EU rules on jurisdiction in the aforementioned fields promote the self-determination of the individual, which may not be provided for in national legislation of third States and which constitutes a corollary of the more general principle of the respect for private and family life as enshrined in Article 8 of the European Convention on Human Rights (ECHR) and in Article 7 of the EU Charter of Fundamental Rights.

Then, the tool to extend EU standards beyond EU territory is no longer the harmonised conflicts rules but the rules on jurisdiction. By means of the latter, the EU avoids any discussion about how to bring together the "higher" EU level of protection with the "lower" international level, or subsequently how to amend international conventions.[79] At the same time, it also avoids the stepping stone of bilateral conventions of Member States with third countries by restricting their external competence on the basis that the international agreements may affect future internal EU instruments. This is clearly stated in ECJ Opinion 1/13, in which the Court holds first that the EU has internal competence in the field covered by the Hague Convention on the civil aspects of International Child Abduction of 1980, second that it has exercised that competence by adopting Regulation No. 2201/2003 (the Brussels IIbis Regulation) and third that "in these circumstances" the EU has external powers.[80]The core of the Opinion is formed by the discussion of exclusivity of EU powers. It is beyond any doubt that the Hague Convention does not fall within a field that is defined as exclusive to the Union *a priori* (under Article 3(1) TFEU), such as the common commercial policy. Nevertheless, as the Court underlines, pursuant to Article 3(2) TFEU, EU competence regarding an international agreement may be exclusive "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".[81]

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[77] This term is used to describe the right of individuals to exercise their freedom through private agreement to elect the forum in which to litigate in order to comply with their private interests.

[78] See supra II.B. Cf. O. FERACI (note 35), at 109.

[79] Cf. to this regard the ECJ Opinion 1/13 on the exclusive competence of the EU to accept the accession of non-Member States to the Hague Convention on the civil aspects of International Child Abduction of 1980, ECJ*,* 14 October 2014, ECLI:EU:C:2014:2303; see A. BEAUMONT, A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13, in P. FRANZINA (ed.) (note 4), p. 43 *et seq.*, 49 *et seq.*

[80] ECJ Opinion 1/13, paras 114-115.

[81] See para 70. This provision is intended to reflect earlier case law of the Court, from which the doctrine of exclusive Union powers is derived. The Court applies this earlier case law to the interpretation of Article 3(2); see Opinion 1/13 paras 71-74. Cf. BEAUMONT (note 79), at 57 who criticises the view of the ECJ in this matter, as expressed in Opinion 1/13.

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The question that rises in this context, though, is whether the EU is going too far with this objective. In family and succession matters, the pertinent Regulations could have ensured a better coordination between the jurisdiction of Member States and the jurisdiction of non-Member States. This could be done by allowing Member States' courts to decline jurisdiction in cases where a third-State court might have jurisdiction according to its own national law, or where the parties have entered into a choice of forum agreement in favour of a third-country court.[82] Moreover, the aforementioned Regulations *intentionally omit* to include rules on *lis pendens* and related actions in third countries, as well as the recognition and enforcement of judgments emanating from courts of third countries. They have followed the route taken by the ECJ with the Owusu judgment[83] and the Lugano opinion,[84] meaning a unilateral prism of universality of EU jurisdiction rules, as previously expressed in the field of torts and contracts.

What public policy, then, lies behind this "unilateral" tendency of the EU? Issues of sovereignty, as some may argue. It is well known that according to the doctrine regarding sources of EU law, Regulations are explicitly unilateral instruments, in contrast to treaties concluded by the Union, which constitute conventional (bilateral) law of the EU.[85] In recent years, though, the EU is extending this (unilateral) approach beyond the boundaries of the internal market also with regard to traditional private international law.

Nevertheless, if EU rules were meant to cover also relationships with third States, then they would be also affected by any jurisdiction rules set on international conventions.[86] Taking that into account, the policy behind the EU instruments seems obvious. At first glance, it shows that private international law and more generally judicial cooperation in civil matters are objectives that the EU considers necessary to attain. Thus, the international dimension and the role of the

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[82] See in this aspect, infra IV.B.

[83] ECJ, 1 March 2005, case C-281/02, *Owusu v N.B. Jackson*, ECLI:EU:C:2005:120. In this judgment, the Court accepted to "apply" the Brussels Convention to a situation connected with a third State and the Advocate General argued that this solution could be compared to the "universal applicability" of the Rome Convention on conflict-of-laws rules [Opinion of Advocate General Léger, ECLI:EU:C:2004:798, para. 185.]. Moreover, it found that the Brussels Convention was mandatory, in the sense that it contained a complete system of rules, even in relationships connected with third countries. See G. VAN CALSTER, To Unity and Beyond? The Boundaries of European Private International Law and the European Ius Commune, in A.-L. VERBEKE *et al.*, *Confronting the Frontiers of Family and Succession Law, Liber Amicorum Walter Pintens* Vol. II, Intersentia, Cambridge/ Antwerp/Portland 2012, p. 1459 *et seq.*, 1475 *et seq.*

[84] Opinion 1/2003, ECJ, 7 February 2006, ECLI:EU:C:2006:81, where the ECJ continued along the route taken in the *Owusu* case. The Court found that even though the Brussels I Regulation did not contain jurisdiction rules for defendants domiciled outside the EU, the reference to domestic law in these circumstances amounted to an incorporation of those domestic rules in the system of EU rules. Here again the ECJ persisted on a unilateral perception of the universality regarding the harmonised EU jurisdiction rules.

[85] M. FALLON/ T. KRUGER (note 66), at 16.

[86] A. MALATESTA, The Lugano Opinion and its Consequences in Family and Succession Matters, in A. MALATESTA/ S. BARIATTI/ F. POCAR (note 30), p. 19 *et seq.*, at 26.

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EU even within its territory will be undoubtedly strengthened. On a second look, though, it seems that there is a tendency of the EU to influence non-Member States and legal orders through unilateral regulatory action also by its participation in bilateral, regional and multilateral agreements and *fora*.[87] The EU would rather leave no room for action by Member States, neither in a multilateral nor in a bilateral dimension, in several fields of the "European area of freedom, security and justice".[88] In other words, the Union aims to enjoy practicing exclusive external powers in this area.[89] This is why the Union made that policy option also in family matters, where family *status* of European citizens calls for a uniform recognition irrespective of their connection with one State or another[90] and are often framed in a human rights dimension.[91]

B. How Can Unilateral EU Jurisdiction Rules Influence Non-Member States?

Like all unilateral acts, instruments of European private international law which contain jurisdiction rules, must respect the objectives of the Union and also safeguard its interests. In this light, European jurisdiction rules should normally be able to unilaterally cover all international proceedings that affect the functioning of the European area. As explained, by using the declared objective of developing a common judicial space, the EU has adopted Regulations with both procedural and conflicts rules, which typically focus on the inner world of the EU,[92] but also implicitly "pursue" a centralisation of external powers in the hands of the EU. This

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[87] This tendency based on Art. 21 (2) (h) TEU, has been named "the Brussels effect" and is obvious in environmental regulation, product safety and human rights. In these fields, the EU has already taken an active international stance. See in more detail M. CREMONA/ H.-W. MICKLITZ, Introduction, in M. CREMONA/ H.-W. MICKLITZ (eds), (note 6), at 5.

[88] Namely the fields regarding jurisdiction, applicable law, recognition and enforcement of decisions, but also cross-border circulation of judicial and extrajudicial acts, taking of evidence and administrative cooperation among authorities involved in international judicial assistance.

[89] See Aspects of Judicial Cooperation in Civil Matters in the Framework of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice, Doc. 8140/06 of 11 April 2006, especially para. II.1.

[90] I. SOMARAKIS, *Η μέθοδος αναγνώρισης νομικών καταστάσεων στο Ιδιωτικό Διεθνές και Ευρωπαϊκό Δίκαιο*, Nomiki Bibliothiki, Athens 2015, p. 432 *et seq.*, 472 et seq.; I. SOMARAKIS, The Method of Recognition in European Private International Law and its Scope of Application, in J.-S. BERGÉ/ S. FRANCQ/ M. GARDENES SANTIAGO (eds), *Boundaries of European Private International Law*, Bruyant, Bruxelles 2015, p. 657 *et seq.*, 664 *et seq.*, 674 *et seq.*

[91] See I. SOMARAKIS, *Η μέθοδος* (note 90), at 523 *et seq.*

[92] They refer to the free movement of judgments in the Area of Freedom, Security and Justice, the European legal order and its constitutional charter. See aforementioned Regulations on jurisdiction, on the applicable law in contract and tort, on family law, and on cross-border enforcement.

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ambitious aim as expressed in the bold Lugano opinion of the ECJ[93] has not yet applied in practice, though.

The procedural rules affect the relationship between EU citizens and the outside world. This is increasingly shown in steadily growing litigation over jurisdiction and applicable law.[94] In theory, procedure (the issue of jurisdiction: the 1968 Brussels Convention and the Regulations Brussels I, Ibis, IIbis, No. 4/2009, No. 650/2012, No. 2016/1103, No. 2016/1104) and substance (the issue of the applicable law: Regulations Rome I, II, III) should be kept separate. In practice, though, and more recently in the EU legislation, as it is the case in family and succession matters, as well as in the case law of the ECJ, there is an ever stronger interplay between procedure and substance,[95] and a tendency to use jurisdiction as a means to "defend" European substantive standards against different and sometimes lower international standards.[96]

There is, however, an important challenge to overcome. It is yet unknown whether and to what extent the EU private international law Regulations will follow this path systematically and coherently.[97] But then again, this question is much more a political than a purely technical one.

As explained, unilaterally adopted EU rules of private international law implicitly aim at achieving external substantive policies of the EU even without the need of international cooperation. There is a great risk, however, that this would undermine the traditional goals and values of private international law (advancing decisional harmony and thus reducing incentives for forum shopping, as well as reducing the risk of conflicting judgments).[98]

It appears that the fundamental premise of the EU Regulations in family and succession matters is in tension with traditional goals of international private law perceived since Savigny, such as the principle of "neutrality" of PIL rules.[99] In the theory of private international law all national legal systems are treated alike. Even the mere fact that the EU has established its own "European international private law rules", which determine the place of jurisdiction and the applicable

[93] See supra, note 86.

[94] See for example N. JÄÄSKINEN/ A. WARD (note 16), at 125 *et seq.*, 133 *et seq.*

[95] M. FALLON/ T. KRUGER (note 66), at 4. Cf. C. GONZÁLEZ BEILFUSS (note 43), at 181 *et seq.*

[96] See in detail supra III. A. especially note 75.

[97] See analytically in this respect H.-W. MICKLITZ (note 73), at 13.

[98] A. MILLS (note 45), at 115. Cf. especially in the field of succession law, M. MEYER, *Die Gerichtsstände der Erbrechtsverordnung unter besonderer Berücksichtigung des Forum Shopping*, Peter Lang, Frankfurt am Main, 2013, p. 166 *et seq.*

[99] Savigny is considered to have set the foundations of bilateralism, the currently dominant theory and practice of private international law. For more detail, see amongst others P. GOTHOT, Simples réflexions à propos de la saga du conflit de lois, in *Le droit international privé: esprit et méthodes- Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 343 *et seq.*, 349-354; D. BUREAU/ H. MUIR WATT, *Droit international privé- T. I Partie générale*, 4e éd., P.U.F., Paris 2017, p. 400-401.

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law, could already demonstrate a tension between a "European" approach and a traditional PIL approach.[100]

In order to solve this potential "conflict" between private international law and European law, one possible solution would be to adopt a European private international law in a broader sense (conflict of laws rules and procedural rules). This would imply that the same rules apply to trans-border conflicts between Member States and trans-border conflicts between Member States and non-Member States.[101]

IV. How to Solve Issues of Overlapping Jurisdiction between EU Member States and Non-Member States?

At present, the main EU rules on jurisdiction and the recognition and enforcement of judgments in civil matters (not only for civil and commercial matters but also for family and succession matters) set out in the respective Regulations do not govern claims against non-Member defendants[102] or the recognition and enforcement of non-Member State judgments. Those matters are left to national laws. They could not, however, be regulated by international agreements between individual Member States and non-Member States. Such an exercise of external competence by Member States could affect, then, the operation of the aforementioned Regulations and potentially contradict the obligations fixed by those Regulations.

The same applies for Regulations that govern both jurisdiction and choice of law issues, insofar as these matters fall within the scope of existing EU Regulations (see for example Regulations Nos 4/2009, 650/2012, 2016/1103 and 2016/1104). It has been argued that these Regulations must be applied by the courts of any Member State not only regardless of whether the governing law is the law of a Member State, but also regardless of whether the dispute is connected with the EU.[103] The question that rises in this context is reasonable: Should the EU instruments then include universal civil jurisdiction rules?

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[100] M. CREMONA/ H.-W. MICKLITZ (note 87), at 5.

[101] In the field of international family law, in particular, see N.A. BAARSMA, *The Europeanization of International Family Law*, T.M.C. Asser Press, The Hague 2011, p. 224 *et seq.*, 263 *et seq.* In respect to the adoption of universal jurisdiction rules in the EU see infra IV.A.

[102] This is generally the case, but with the exception of the rules on exclusive jurisdiction. See for example Articles 24 and 25 of Regulation No. 1215/2012.

[103] A. MILLS (note 45), at 101 *et seq.*

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A. Universal Civil Jurisdiction Rules

A "pure" universal civil jurisdiction for EU Member States (either contained in bilateral or regional agreements between the EU and non-Member States[104] or imposed unilaterally by the EU) would be undesirable in an EU context for a range of reasons. First of all, there could be risks of overlapping and inconsistent exercises of jurisdiction between Member States and non-Member States (although these might be reduced by rules of jurisdictional priority or deference). Moreover, harmonised universal civil jurisdiction rules could create opportunities for forum shopping by the parties especially in favour of third countries with judicial systems which do not meet the European "standards" (such as a lack of judicial independence). More importantly, harmonised EU universal jurisdictional rules may lead to an exercise of jurisdiction by Member-States courts in a form of "neo-colonial" power, which would deny non-Member States the ability to resolve disputes most closely connected to them.[105] However, a subsidiary forum of necessity jurisdiction or a forum chosen by the parties could be recognised in the pertinent EU Regulations, even in a more limited form, based on the subsequent nationality or residence of the claimant in the territory of a third State.

It is highly possible, in this context, that amendments of EU jurisdiction rules may require significant compromises from Member-States and this might come with amendments to bring them more closely in line with any international consensus which is reached. A cost/benefit analysis would then have to be undertaken to determine whether that would be a price worth paying for the benefits of international harmonisation via the conclusion of bilateral or multilateral agreements between the EU and third countries.

B. The "Theory of Reflexive Effect" in Family and Succession Matters

Although jurisdiction rules in several national systems of PIL are traditionally dominated by ideas of territoriality, there is also a strong role for other conceptions of jurisdiction. One of these concepts in the field of private international law, already long ago presented in legal doctrine, suggests that State authority does not end at the national border, but attaches to people and effectively travels with them.[106] Where one State's citizens are in the territory of a foreign State, interna-

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[104] The Hague Conference on Private International Law could offer further opportunities to participate in multilateral harmonisation efforts in the field of choice of law and international jurisdiction. While some of these are not a formal international convention (for example the "Principles on Choice of Law in International Commercial Contracts", approved on 19 March 2015), it is possible that they may prove influential for issues of jurisdiction as a matter of soft law harmonisation. In particular, these soft law techniques may decrease incentives for forum shopping and reduce the risk of conflicting judgments arising in different States.

[105] See further *e.g.* D.F. DONOVAN/ A. ROBERTS, The Emerging Recognition of Universal Civil Jurisdiction, 100 *American Journal of International Law* 2006, p. 142.

[106] See amongst others A. MILLS, Rethinking Jurisdiction in International Law, 84 *British Yearbook of International Law* 2014, 187 *et seq.*, at 235, with further references,

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tional law could recognise and accept the possibility of overlapping jurisdiction and require either a territorial or a nationality basis for the exercise of jurisdiction in order to minimise that possibility.

Such a conception of jurisdiction is embraced in the theory of reflexive effect (*théorie de l'effet réflexe*). The theory was developed by Georges A.L. Droz in the early days of the Brussels Convention on civil and commercial matters.[107] Professor Droz argued that EU courts seised pursuant to non-exclusive criteria of the Brussels regime should be allowed to decline their jurisdiction in favour of a non-contracting State, which would assume its exclusive jurisdiction by virtue of a jurisdictional basis similar to the criteria provided for by the Convention[108] or by virtue of a choice of forum clause.[109] Later, some authors presented other refined versions of the basic theory, also regarding other fields.[110] In our view, this theory could be effectively applied also in family and succession matters, in order to avoid jurisdictional overlaps with third countries.

According to this *version renouvelée* of the theory, the same standards as used for "intra-EU" jurisdiction would have to be applied to jurisdictional bases situated outside the EU.

More specifically, the doctrine suggests a mirror application, in relation to non-Member States, of the grounds upon which declining jurisdiction is requested by the EU Regulations. Then, once admitted the possibility to decline EU jurisdiction, reference will be made to the relevant national law as to the conditions under which jurisdiction can effectively be declined in favour of third States.

It can be argued that the theory seeks to extrapolate the internal hierarchy of the bases of jurisdiction found in the EU instruments (regarding jurisdiction inside the EU) in favour of non-Member States. The reason is simple: if the EU courts systematically refuse to take into account some incontestably close connection of

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who argues that this concept indicates "…a partial acceptance of a 'sovereignty of the individual' in the public and private international law of jurisdiction…"

[107] See G.A.L. DROZ, *Compétence judiciaire et effets des jugements dans le marché commun (Étude de la Convention de Bruxelles du 27 septembre 1968)*, Dalloz Paris 1972, p. 108 *et seq.*; G.A.L. DROZ, Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements, *Rev. crit. dr. int. pr.* 1987 p. 251-303, 260-261. The theory was recalled by P. GOTHOT/ D. HOLLEAUX, *La Convention des Bruxelles du 27 septembre 1968*, Jupiter, Paris 1985, para. 142. More recently, see the analyses of H. GAUDEMET-TALLON, Les frontiers extérieures de l'espace judiciaire européen: quelques repères, in A. BORRAS *et al.* (eds.), *E Pluribus Unum. Liber amicorum G.A.L. DROZ*, M. Nijhof, The Hague 1996, p. 85 *et seq.*; A. NUYTS, La théorie de l'effet réflexe, in G. DE LEVAL/ M. STORME (eds), *Le droit processuel et judiciaire européen*, La Charte, Bruxelles 2003, p. 73 *et seq.*

[108] Articles 16 and 17 of the Brussels Convention and now articles 24 and 25 of Regulation No. 1215/12.

[109] Only to the extent that the court is authorised to do so by its own national law, see further I. PRETELLI *et al.* (eds) (note 29), at 22 *et seq.*

[110] See N. NISI, The European Insolvency Regulation and the External World: The Boundaries of European Jurisdiction, in J.-S. BERGÉ/ S. FRANCQ/ M. GARDENES SANTIAGO (eds), *Boundaries of European Private International Law*, Bruyant, Bruxelles 2015, p. 312 *et seq.*, 322 *et seq.*, 323, note 38.

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disputes with one or several "extra-EU" legal orders and subsequently ignore reasonable jurisdiction rules of third States (which are in accordance with the EU rules themselves), the resulting EU judgments will most probably lack effectiveness outside the EU. In other words, they will not be recognised and enforced in the territory of non-Member States, with which a given situation may be closely connected and where the litigants will most probably seek to have it enforced.[111]

Therefore, as the theory of the reflexive effect suggests, EU courts should decline jurisdiction that they theoretically have under an EU Regulation (Brussels IIbis, Maintenance or Succession Regulation as far as family and succession matters are concerned) in case they observe that a hierarchically higher basis for jurisdiction points to a third State (such as an exclusive or mandatory head of jurisdiction).[112]

It is obvious that the EU instruments on jurisdiction cannot grant jurisdiction to a court in a non-Member State. The national jurisdiction rules of the third State, though, would probably provide a basis for jurisdiction in these cases. In any case, the pertinent EU Regulations acknowledge that some heads of jurisdiction are stronger than others.[113] The fact that a State considers a jurisdictional rule to be exclusive is not always directly visible, but is often found in the refusal to recognise judgments where the State addressed would have had jurisdiction on a basis such as the agreement of the parties (*electio fori*) in family and succession matters, or the location of the immovable property in succession matters. Then, the EU courts should decline jurisdiction in order for the non-Member-State court to exercise its jurisdiction. In that sense, the theory of the reflexive effect does not create a jurisdictional basis, but a rule declining jurisdiction. The theory does not deny the fact that Regulation based jurisdiction is compulsory. It only seeks an equitable exception to it.[114]

As is the case with every theory, the application of the doctrine of reflexive effect in family and succession relationships which present significant connections with non-Member States will have supporting and opposing arguments.

There is no doubt that the EU aims at increasing decisional harmony within its borders, leading to improvements in the efficiency of the internal market. The rule declining jurisdiction of the EU courts in favour of non-Member- State courts will limit the jurisdictional overlaps. This potential, combined with a broader recognition of judgments (between Member States and non-Member States), will reduce the possibility of regulatory conflict, or, in the terminology often favoured by private international lawyers, will increase "decisional harmony".[115] It will also

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[111] See NISI, (note 110), at 313-314.

[112] See for example Article 6 of Regulation No. 2201/2003, Article 4 of Regulation No. 4/2009, Article 5 of Regulation No. 650/2012, Article 7 of Regulation No. 2016/1103, Article 7 of Regulation No. 2016/1104. Cf. Article 24 of Regulation No. 1215/2012.

[113] See in detail supra II. A. and B.

[114] The doctrine of "*forum non conveniens*" could also be applied in this aspect, see T. KRUGER (note 18), at 287 *et seq.* and 305-307.

[115] Of course, the EU could also undertake other forms of action to achieve the objectives of decisional harmony and efficient resolution of cross-border disputes. Participation in multilateral initiatives relating to private international law would be the

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most probably reduce the incentives to forum shopping and thereby increase the efficient resolution of cross-border disputes.[116] The pursuit of these objectives not only within EU territory but also outside its borders could be viewed as a reasonable international extension of this approach. Moreover, the theory of reflexive effect could be used for addressing the concerns of jurisdictional gaps, which may create problems of access to justice and are arguably having an increasing influence in private international law.

On the other hand, there is a growing mobility of citizens as a result of the free movement of persons within and outside the EU. This has led to a consequential rise of the formation and dissolution of international families not only within the EU but also in the world. More and more questions of private international law therefore arise. International family and succession law are areas that were thus far predominantly regulated by national law. Nevertheless, over the last decade the European Union has shown increasing interest in these fields.[117] Currently, the national choice of law and jurisdictional rules of the EU Member States are more and more displaced by common European rules, which will thus entail considerable changes.[118]

It is questionable, though, if denying jurisdiction of EU courts and subsequently granting jurisdiction to non-Member States' courts would contribute to more decisional harmony. On the contrary, it is highly possible that a third-country court hearing the case in family and succession matters would ultimately mean that this court would not necessarily decide a case according to the same substantive rules that a Member-State court would apply. Therefore, a relevant policy option regarding the relations of the EU with non-Member States in matters of family and succession law would come with a price. Obviously, these matters would have implications to be dealt with, in sensitive areas of relationships between individuals.[119]

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most obvious; see in this respect A. MILLS (note 45), at 107. The primary forum in which such initiatives are negotiated is the Hague Conference on Private International Law, an international organisation, in which the EU has become a Member since 3 April 2007. See generally http://www.hcch.net; J.H.A. VAN LOON/ A. SCHUTZ, The European Community and the Hague Conference on Private International Law, in B. MARTENCZUK/ S. VAN THIEL (eds), *Justice, Liberty, Security: New Challenges for EU External Relations*, Brussels University Press, Brussels 2008, p. 257 *et seq.*

[116] See further A. MILLS, The Identities of Private International Law – Lessons from the US and EU Revolutions, 23 *Duke Journal of Comparative and International Law* 2013, p. 445.

[117] This is evident even by the fact that a "European" notion of family is progressively created through EU legislation and case-law; see T. STEIN, The Notion of the Term Family on European Level with a Focus on the Case Law of the European Court of Human Rights and the European Court of Justice, in A.-L. VERBEKE *et al.* (note 83), at 1375 *et seq.*, 1380 *et seq.*

[118] See J.M. SCHERPE (ed.), *European Family Law, Volume II, The Changing Concept of "Family" and Challenges for Domestic Family Law*, Edward Elgar, Cheltenham-Northampton 2016, *passim*.

[119] See for example with regard to religious rules relating to family and succession matters in Islamic countries, M. ROHE, Europäisches Kollisionsrecht und religiöses Recht,

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The above mentioned legal acts of the EU establish "minimum standards" for Member States in the area of family and succession law. They introduce rules on two important areas: First, the forum of necessity rules are essential in order to remedy situations of denial of justice. Second, the choice-of- forum rules point out that, under certain conditions, it is the parties' choice which determines whose jurisdiction prevails – which court gets to hear the case, and which law is applied. Party autonomy is thus defined as a limited choice between those jurisdictional powers recognised by and between states – a position which balances recognition of state sovereignty and individual autonomy.[120]

Yet, there are also different "European standards" regarding the minimum protection for rights and interests of individuals that the Union wants to safeguard while drafting these EU Regulations depending on the relationships at hand. For example, in the ambit of Regulation No. 4 /2009, the EU aims, amongst others, to boost the effectiveness of the means by which maintenance creditors safeguard their rights.[121] In Regulation No. 650/2012, the EU intends to protect the legitimate expectations of persons entitled to a reserved share and the rights of creditors of the estate.[122] Lastly, in Regulations No. 2016/1103 and 2016/1104 on matrimonial property regimes and the property consequences of registered partnerships the Union wishes to respect the different national systems for dealing with matters of the matrimonial property regime as well as the property consequences of registered partnerships, both the daily management of the spouse's or partner's property and its liquidation applied in every situation. Therefore, they provide married couples and registered partners with legal certainty as to their property and offer them a degree of predictability with regard to the applicable rules in their relationship,[123]

The "Principles of European Family Law", drafted by the academic Commission on European Family Law (CEFL) are also becoming influential. These principles are increasingly taken into account in European law, when law reform is debated.[124] The same is true of the growing body of case law in the

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in S. ARNOLD (ed.), *Grundfragen des Europäisches Kollisionsrechts*, Mohr Siebeck, Tübingen 2016, p. 67 *et seq.*, 69 *et seq.*

[120] These two principles are common in the European Regulations on family and succession law (see above II.A. and B.).

[121] See Regulation Preamble Recital 5 and Article 16. Cf. Article 26.

[122] See Regulation Preamble Recitals 38 and 42-46, Articles 23(2) and 27(2).

[123] Therefore, the terms "matrimonial property" and "property consequences of registered partnerships" wherever used in the Regulations include all civil-law aspects of matrimonial property regimes or the property consequences of registered partnerships, both the daily management of the property and its liquidation, in particular as a result of the couple's separation or the death of one of the spouses/partners. See Regulation No. 2016/1103 Preamble Recitals 15, 16 and Articles 20-22 and 27 and Regulation No. 2016/1104 Preamble Recitals 15-17 and Articles 20-22 and 27.

[124] See K. BOELE-WOELKI, The impact of the Commission on European Family Law (CEFL) on European family law, in J.M. SCHERPE (ed.), *The impact of institutions and organizations on European family law*, Vol. I, Elgar Publishing Cheltenham/ Northampton 2016, p. 209 *et seq.*; W. PINTENS, Principles of European Family Law, in J. BASEDOW *et al.* (eds), *Encyclopedia of Private International Law*, Vol. II, Elgar Publishing, Cheltenham/ Northampton 2017, p. 1329 *et seq.*

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European Court of Human Rights and the Court of Justice of the European Union.[125]

Moreover, it is argued that national family and succession laws are too embedded in their own legal culture. They affect the foundations and continuity of the social fabric. Therefore, they are sensitive to changes occurring in the national or cultural communities as regards to consanguinity, solidarity, morals and decency. Subsequently, it is difficult to enable a large and contextualized view on family and succession law even from a comparative law perspective.[126] In this aspect, granting jurisdiction to courts outside the EU, that will apply most probably their national laws, could jeopardise the fundamental values in family and succession law that the EU aims to protect.[127] Thus, the so called "cultural restraints" argument may hold true to a certain extent in an EU context.

Moreover, certain common or emerging trends can be identified within the EU territory.[128] The most characteristic trend of law has been towards replacing restrictive old public norms with new individually-determined personalised standards. In this context the most significant developments in family law within Europe relate to the emergence of constitutional doctrine of privacy, the enactment of unilateral no-fault divorce laws, the legitimation of non-marital sexual relations and childbearing and the conferring of family status on same-sex relationships.[129] In the field of succession law, the principal objective is mainly to transfer and to equally (or fairly) distribute the estate acquired by a testator over the course of his or her life amongst the heirs.[130] Within the context of Regulation No. 650/12, the "unity of the estate" also plays a significant role.[131]

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[125] See indicatively T. STEIN (note 117), at 1380 *et seq.*; For further reference on some important case law of the ECJ and ECtHR regarding family and succession matters see T. HELMS, Neues Europäisches Familienkollisionsrecht, in A. VERBEKE *et al.* (eds), (note 83), at 688 *et seq.*; B. BOURDELOIS, La famille du XXIe siècle et problématiques de conflits de lois, in *Mélanges en l'honneur du Professeur Pierre Mayer*, LGDJ, Paris 2015, p. 77 *et seq.*, 84 *et seq.*, 86 *et seq.*

[126] See M.C. FOBLETS, Legal Anthropology, in C. CASTELEIN/ R. FOQUÉ/ A.-L. VERBEKE (eds), *Imperative Inheritance Law in a Late-Modern Society*, Intersentia, Antwerp/ Oxford/ Portland 2009, p. 39.

[127] J.M. SCHERPE, European family law- Introduction to the book set, in J.M. SCHERPE (ed.), *European Family Law*, Vol. II, Elgar Publishing, Cheltenham/ Northampton 2016, p. xi.

[128] See D. MARTINY, The impact of the EU private international law instruments on European family law, in J.M. SCHERPE (ed.), *The impact of institutions and organizations on European family law*, Vol. I, Elgar Publishing, Cheltenham/ Northampton 2016, p. 261 *et seq.*

[129] The same trends are also evident in American family law, see L.D. WARDLE, Reconciling Private Autonomy and Public Interests in Family Law, in A.-L. VERBEKE *et al.* (note 83) p. 1747 *et seq.*, at 1748.

[130] H. WIEDERMANN, Zum Stand der Vererbungslehre in der Personengesellschaft, in U. HÜBNER *et al.* (eds), *Festschrift für Bernhard Großfeld*, Deutscher Fachverlag, Frankfurt 1999, p. 1309 *et seq.*; S. KALSS, The Interaction Between Company Law and the Law of Succession: A Comparative Perspective, in M. SCHAUER/ B. VERSCHRAEGEN (eds.), *General*

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Will these principles be safeguarded when a third-country court is appointed to hear the case? Could then third countries provide effective judicial protection to EU citizens in cases connected with their territory?

It is highly expected that the EU will not just assert jurisdiction to third countries in family and succession matters if its "reference standards" in the respective fields are not met.[132] This means that the EU will continue to be reluctant in declining jurisdiction in favour of non-Member States, if the European principles of law which lie behind the Regulations are not safeguarded.[133] It must be remembered that within Europe there are primarily civil law countries, which have their own particular characteristics and preferences in both law and procedure. On its borders (but even within European territory) there are common law countries (the UK- for as long as it is an EU Member –State- and Ireland), and also Islamic countries with very different outlooks, laws, policies and procedures.[134] Can it ever be imagined that an Egyptian, Turkish or Russian judge will apply anything other than their own law? And what happens if the appointed jurisdictions are slow, nationalistic, procedural, or with very weak and inadequate disclosure powers and either unable or very unlikely to make fair orders as generally understood in European countries?[135]

These observations in the area of international family and succession law within the EU suggest the necessity of rethinking the concept of jurisdiction in EU law with regard to third countries, in order to reflect the more complex realities of the international society which cannot yet be seen as a whole.

Reports of the XIXth Congress of the International Academy of Comparative Law, Springer, Vienna 2017, p. 383 *et seq.*, 385.

[131] See Regulation No. 650/12, Recital 37: "The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State."

[132] See for example above p. 580. Cf. also standards in European national legislations, p. 581.

[133] With regard to principles of family law in the EU context see K. FRANK, *Eheverträge als effektives Gestaltungsinstrument*, Peter Lang, Frankfurt am Main 2015, p. 229 *et seq.* For a purely private international law perspective see G. SALAMÉ, *Le devenir de la famille en droit international privé*, PUAM, Aix-en-Provence 2006, *passim*.

[134] See D. HODSON, *A Practical Guide to International Family Law*, Jordan Publishing, Bristol 2008, p. 398.

[135] Cf. D. HODSON (note 134), at 392.

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V. Conclusion

Because of new developments in the EU and the international arena, the idea and the EU harmonised rules of jurisdiction especially in the areas of international family and succession law require reconceptualisation. In this respect, three developments should be taken into account. The first is the acknowledgment that unilaterally adopted rules on jurisdiction aim at achieving EU external substantive policies perhaps without the need of international cooperation. These procedural rules do affect the relationship between EU citizens and the outside world. The second is the growing recognition that in exceptional (but possible) circumstances the exercise of national jurisdiction, both under private international law and under international human rights law, may be taken by a third-country court (*forum necessitatis*). The third development is the increased acceptance of party autonomy, a principle under which private parties in civil disputes (amongst which family and succession cases) are given the power not only to choose a third-country law to govern their relationships but also to confer jurisdiction on third countries' courts (*professio fori*). These developments lead to a conscious acceptance of the fact that jurisdiction may, in some circumstances, be allocated not only to EU Member-States but also to third countries with which the situation at hand presents a closer connection, particularly through the emergence and strengthening of the doctrines of "denial of justice" in relation to the treatment of foreign nationals, and of the idea of access to justice in the context of human rights law.

This leaves us with perhaps the most fundamental question – a question beyond the scope of this article – whether or not the transformation in EU jurisdiction described in this paper is desirable. Not all change is progress. Enthusiasm for a more "cosmopolitan" conception of jurisdiction within the EU, which includes non-Member States, must be tempered by the recognition that it comes with a danger. We have to admit that the indirect empowerment of third countries' courts, even if it were possible under EU law under exceptional circumstances as for example due to a choice-of-forum agreement by the parties, could put at risk the rights of EU citizens, or the collective goods and fundamental values in the area of family and succession relationships, protected by the supranational normative authority of the European Union. It must be remembered that the jurisdictional rules of European law were themselves developed with the protection of certain values and interests in mind, that is, among others, to ensure predictability of forum, reduce regulatory conflict between Member States and enhance decisional harmony for the efficiency of the internal market. An increase in the range of jurisdictional grounds in EU law might serve the interests of individuals in achieving access to justice but overlapping jurisdiction between EU Member States and third countries may also give rise to systemic conflict that outweighs the benefits provided to EU citizens or particular claimants. The deeper challenge for the EU legislator is whether the door can be opened to a broader recognition of the judicial authority of non-Member States without losing sight of the other interests and values, national and European, which have been so far protected by the European – private international and substantial family and succession- law, and whose

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protection we may need to preserve. In our view, the theory of reflexive effect applied in family and succession cases could lead to this direction.

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INTERNATIONAL INSOLVENCY IN THE BANKING SECTOR – COORDINATION ISSUES AND PRIVATE INTERNATIONAL LAW METHODS

Giulia VALLAR[*]

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I. Introduction

The starting point of the present study is a factual circumstance, namely an entity with a number of subsidiaries located in different legal orders, most of which operate as banks,[1] which at a certain moment in time are plunged into crisis and either risk insolvency or have become insolvent.

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[1] It is quite common that so-called "banking groups" are composed not only of banks but also of investment, financial or insurance companies, see, in this sense, M. KRIMMINGER, Ending Too Big to Fail: Practical Resolution Alternatives for Financial Conglomerates, in R.M. LASTRA (ed.), *Cross-border bank insolvency*, Oxford 2011,

Yearbook of Private International Law, Volume 19 (2017/2018), pp. 585-609
© Verlag Dr. Otto Schmidt & Swiss Institute of Comparative Law
Printed in Germany

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Principles of insolvency law teach us that the overriding aim when a legal entity (therefore not necessarily a group) is in crisis should be to maximize the value of the assets so as to satisfy creditors to the maximum extent possible. When it comes to banks, a further aim, namely the protection of the public interest in the financial stability of the overall system, is usually pursued as well.

Experience and practice have shown that the best way to deal with the factual circumstances described above, having in mind the need to realize the above-mentioned aims, is to consider the group as a single economic entity. In other words, maximization of assets and protection of the financial stability of the system do not need to be considered with regard to each subsidiary. This is because even if, from a legal point of view, each constituent subsidiary is an independent legal entity, from a factual point of view, groups are often managed and often exercise their activities at a global level and with common funds, as if they were a single economic entity.[2] Considering the group as a single economic entity during a period of crisis means that just one insolvency proceeding should be opened with respect to the whole range of legal entities forming part of the same group in distress. Such a solution, according to the terminology frequently used in insolvency law contributions, can be called "universalist".[3] The proceedings will

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p. 285; E. HÜPKES, *Insolvency – why a special regime for banks?,* in INTERNATIONAL MONETARY FUND (ed.), *Current Developments in Monetary and Financial Law*, Washington 2005, vol. 3, p. 497; INTERNATIONAL MONETARY FUND, *Resolution of Cross-Border Banks - A proposed Framework for Enhanced Coordination*, 11 June 2010, available at <www.imf.org>, § 6.

[2] In this sense see R. PENNISI, *Attività di direzione e poteri della capogruppo nei gruppi bancari*, Torino 1997, p. 26; J. SARRA, Oversight and financing of cross-border business enterprise group insolvency proceedings, 44 *Tex. Int'l L. J.*, 2009, p. 548. See also ID., Corporate Group Insolvencies: Seeing the Forest and the Trees, *Ban. Fin. L. Rev.*, 2008, pp. 63 *et seq.* and ID., Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies, *Int'l Ins. Rev.*, 2008, pp. 73 *et seq.*

[3] On universalism and its opposite approach – territorialism – as well as on middle-ground approaches, to which reference will be made in the following paragraphs, see in general: E. S. ADAMS/ J. FINCKE, Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism, 15 *Col. J. Eur. L.,* 2008-2009, pp. 43 *et seq.*; T. BAXTER/ J. HANSEN/ J. SOMMER, Two cheers for territoriality, an essay on international bank insolvency law, 78 *Am. Bankr. L. J.*, 2004, pp. 57 *et seq.*; L. BEBCHUCK/ A. GUZMAN, An Economic Analysis of Transnational Bankruptcies, *J. Law Econ.,* 1999, pp. 775 *et seq.*; G. BONGIORNO, Universalità e territorialità nel fallimento (Problemi antichi ma sempre più attuali), in *Dir. fall.,* 1991, p. 666 *et seq.*; J. CLIFT, Developing an international regime for transnational corporations: the importance of insolvency law to sustainable recovery and development, *Trans. corp.* (2011), pp. 117 *et seq.*; G. ENRIQUES, Universalità e territorialità del fallimento nel diritto internazionale privato, *Riv. dir. int.,* 1934, pp. 145 *et seq.*, 376 *et seq.* and 503 *et seq.*; A. GUZMAN, International bankruptcy: in defense of universalism, *Mich. L. Rev.*, 2000, pp. 2177 *et seq.*; E. HÜPKES, Cross-Border Complexities in resolving Bank Insolvencies, H. PETER/ N. JEANDIN/ J. KILBORN (eds.), *The challenges of insolvency law reform in the 21st century*, Zurich, Basel, Geneva, 2006, pp. 373 *et seq.*; E. JANGER, Virtual Territoriality, *Col. J. Trans. L.*, 2010, pp. 401 *et seq*.; T. KONO, *Efficiency in Private International Law*, Leiden 2014, in particular pp. 166-189; G. MCCORMACK, Universalism in Insolvency Proceedings and the Common Law, *Ox. J. Leg. Stud.* (2012), pp. 325 *et seq.*; J. POTTOW, A New Role for Secondary Proceedings in International Bankruptcies, *Tex. Int'l*

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only be opened in one State in respect of all institutions in distress, the insolvency law of a single State will be applied, and all the effects stemming from this proceeding will reach all other States concerned.

The present study first investigates whether national private international law provisions on insolvency allow insolvent multinational banking groups to be treated as a single entity under the universalist solution. The difficulties of such an approach will be demonstrated (II) and a different method will be considered which would allow the global nature of the group to be recognized even where such group is in distress. Such a method involves the use of cross-border insolvency protocols (III). The main elements of protocols will then be considered (IV), preparing the ground for a more theoretical analysis dealing with the legal nature of protocols (V) and with issues of applicable law (VI). Against this backdrop, recent developments in EU international bank insolvency law will be briefly addressed (VII), and finally some conclusive remarks will be drawn (VIII).

II. The Private International Law in Front of Insolvent Banking Groups

Coming back to the universalist approach mentioned above, it is important, as an initial step, to understand how this global approach may operate.

A first path to explore consists in considering whether such a global solution could be reached through traditional private international law methods. In other words, do these methods offer a valid tool to overcome obstacles posed by the multiple legal orders to which each subsidiary of the group pertains?

Private international law traditionally looks to regulate questions of jurisdiction, applicable law, and recognition and enforcement of foreign judgments when faced with situations that are not entirely internal to a single legal order, namely situations that have at least one element connecting them to a foreign legal order. A peculiarity of the subject matter at hand arises from the fact that, as already mentioned, multinational groups are not perceived by national legal orders as single legal entities and therefore the parameter to verify whether a specific

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L. J., 2011, p. 579 *et seq.*; R. RASMUSSEN, Resolving Transnational Insolvencies through Private Ordering, *Mich. L. Rev.*, 2000, pp. 2252 *et seq.*; J.L. WESTBROOK, Theory and pragmatism in global insolvencies: choice of law and choice of forum, *Am. Bankr. L. J.*, 1991, pp. 457 *et seq.*; ID., Universal priorities, *Tex. Int'l L. J.,* 1998, pp. 27 *et seq.*; ID., Universalism and choice of law, *Penn S. Int'l L. Rev.*, 2005, pp. 625 *et seq.*; ID., Multinational Financial Distress: The Last Hurrah of Territorialism, *Tex. Int'l L. J.*, 2006, pp. 321 *et seq.*; ID., A comment on universal proceduralism, *Col. J. Trans. L.*, 2010, pp. 503 *et seq.*; N. WOUTERS/ A. RAYKIN, Corporate Group Cross-Border Insolvencies between the United States & European Union: Legal & Economic Developments, *Am. Bankr. Dev. J.,* 2013, p. 387. For an historical perspective on these models, see A. LUPONE, *L'insolvenza transfrontaliera. Procedure concorsuali nello Stato e beni all'estero*, Padova 1995, pp. 55 (fn. 3) and 59 (fn. 7).

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situation has a foreign element cannot be the group in its entirety, but the single entities forming the group considered as such.

The starting point therefore consists in investigating whether private international law provisions on jurisdiction of a given legal order permit insolvency proceedings to be opened in that legal order in respect not only to the local bank, but also to foreign banks that are part of the same multinational group. This result could be achieved whenever the criteria set forth by a given legal order to delimit the jurisdiction of its courts in respect to banks are also able to pull foreign banks under its jurisdiction.

The idea of using private international law methods to achieve better results in an insolvency proceeding is not a new one. A number of national courts, faced with proceedings concerning an insolvent company with its seat in a different State to its own but being part of the same (multinational) group, have tried to interpret the jurisdictional criteria of the center of main interest of the debtor (the "COMI"), set forth at that time by Article 3 of Regulation (EC) 1346/2000, as bypassing national boundaries and bringing all companies of a given group under the jurisdiction of just one State.[4] The COMI of all of the companies forming a given group was in fact localized in the same member State to allow a single proceeding to be opened with respect to all said companies before the same judge. The European Court of Justice then tried to put a stop to these attempts by national courts with the *Eurofood*[5] and *Interedil* judgments.[6]

As for banks, several different jurisdictional criteria might theoretically be used to bring all banks belonging to a multinational group under the competence of the authorities of a given State. For example, courts of a given State might be deemed competent in respect to all banks which are the subsidiaries of a multinational group when the parent company's seat or the center of main interests of the group is in that State. Alternatively, a foreign bank might be deemed to fall under the jurisdiction of the court of a given State when it holds enough shares in an insolvent bank which has its seat in that State as to exercise control over it.[7] A third

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[4] The English Courts have been the first to adopt this approach, followed by those of other States. Among the various cases, the following can be mentioned: *Brac Rent-A-Car international* (English High Court, Chancery Division, 7 February 2003, [2003] EWHC (Ch) 128); *Daisytek* (High Court of Justice of Leeds, 16 May 2003, *Riv. dir. int. priv. proc.*, 2004, pp. 774 *et seq.*; *Cirio del Monte* (Tribunale di Roma, 14 August 2003 and 26 November 2003, *Riv. dir. int. priv. proc.,* 2004, pp. 685 *et seq.* and 691 *et seq.*; *Parmalat* (Tribunale di Parma, 4 and 20 February 2004, *Riv. dir. int. priv. proc.*, 2004, p. 693 *et seq.*); *Ci4Net* (English High Court, Chancery Division, 20 May 2004, [2004] EWHC 1941 (Ch)); *AIM Underwriting* (English High Court, Chancery Division, 2 July 2004, *Int. Lit. Proc.* (2005), pp. 254 *et seq.*; *Collins & Aikman* (English High Court, Chancery Division, 15 July 2005, [2005] EWHC 1754 (Ch).

[5] CJEU, Judgement of 2 May 2006, C-341/04, *Eurofood IFSC Ltd.* See in particular § 30 – 36.

[6] CJEU, Judgement of 20 October 2011, C-396/09, *Interedil Srl c. Fallimento Interedil Srl e Intesa Gestione Crediti Spa*, § 45 *et seq.*

[7] A. LUPONE (note 3), pp. 174 *et seq*.

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option could be that of awarding jurisdiction to the courts of a given State over a foreign bank whenever the latter has a relevant part of its assets in that State.[8]

In practice, jurisdictional criteria set forth by national banking insolvency laws are generally too rigid to be interpreted so as to reach a universalist result. As an example, Article 9 (1) of Directive 2001/24/EC, as transposed into member States legal orders, can be considered. It sets as the relevant jurisdictional criterion for the opening of liquidation proceedings the member State of origin of the credit institution, namely the State in which the credit institution was authorized.[9]

It follows from the above that when applying national private international law provisions to a multinational group of banks which has become insolvent, the court may not take into account the real group structure[10] that, in case of a crisis, would be completely disrupted.[11]

The rigidity of the criteria used by private international banking insolvency laws to delimit jurisdiction arises from the fact that States are particularly interested in maintaining their control over banks, in light of the multiple public interests involved in banks' activities. This, in turn, determines the impossibility for States to reach an agreement by which a universalist approach could be realized.[12]

III. From Traditional Forms of Coordination to Cooperation between Legal Orders

The opposite solution, inspired by the principle "one company, one insolvency, one proceeding"[13] is called "territorialism". Under this model, the assets and liabili-

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[8] On the possibility of adopting these criteria see A. LUPONE (note 3), p. 167 and references therein.

[9] See Article 1, point 6, of Directive 2000/12/CE, referred to by Article 2 of Directive 2001/24/CE.

[10] This situation has been referred to as a "'global in life, national in death' conundrum": v. N. MOLONEY, EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks? *Com. Mkt. L. Rev.,* 2010, p. 1319.

[11] The contrast between State sovereignty – which is, by definition "mono-national" – and relations between private individuals as studied by private international law – which are "multi-territorial" – has been brilliantly described by G.P. ROMANO, Souveraineité "mono-nationale", relations humaines "transterritoriales" et "humanisation" du droit international privé – Libres propos, forthcoming in *Mélanges en l'honneur du Professeur Bertrand Ancel. Le droit à l'épreuve des siècles et des frontiers* (2018).

[12] The universalist model has been adopted in a number of bilateral conventions: see I. QUEIROLO, L'insolvenza transnazionale: il regolamento (CE) n. 1346/2000 e la disciplina italiana, in G. SCHIANO DI PEPE (a cura di), *Il diritto fallimentare riformato. Commento sistematico*, Padova 2007, at 808 and S.M. CARBONE, Una nuova ipotesi di disciplina italiana sull'insolvenza transfrontaliera, *Dir. comm. int.,* 2000, pp. 591 *et seq.*

[13] C. PAULUS, Group insolvencies - Some thoughts about new approaches, *Tex. Int'l L. J.*, 2007, p. 820.

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ties of each company will remain of that company, with no possibility to transfer them from one company to the other, with the aim of favoring the group in its entirety.

If universalist models are not common at all, for the reasons specified above, the same is also true for territorialist ones. In fact, the most favored solution among legislators, institutions and international organizations is of a third kind and lies in between the two: it is therefore called the "middle ground approach".[14] Under this model, the territorial approach is followed in so far as the court takes into account to varying degrees the peculiarities of local insolvency laws, and different proceedings are opened with respect to each of the entities involved. These proceedings are then coordinated or connected to one another as uniformly as possible to achieve the best global-level results.

The mechanism described above currently represents the only means by which the court can to some extent consider a group (in distress) in its entirety. It is a method that manages, even without neglecting private international law provisions, to achieve a sense of cooperation between the different legal orders concerned, and therefore exists on a supranational plane.[15]

The term "cooperation", when applied to private international relations, may be used to designate different kinds of expression. In its first and most common meaning, the term is used to refer to a form of cooperation between States through which treaties dealing with private international law issues are entered into. In a second, less frequent meaning, the term is used to refer to a form a cooperation that takes place in the absence of the first form of cooperation. This latter form of cooperation occurs on a case-by-case basis, through an unstructured initiative of actors, other than States, moved by the desire to reach results that, precisely due to the lack of intergovernmental forms of cooperation, could not be reached otherwise.[16]

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[14] On *middle ground* approaches being those that are most frequently encountered, see A. LUPONE (note 3), p. 51 and L. DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, Padova 1987, pp. 5 *et seq*.

[15] Co-existence of cooperation methods with traditional private international law methods is unavoidable. This has been clearly stated by Bucher: "*Ces principes auxiliaires participent à la pluralité des méthodes. Ils ne représentent pas une méthode autonome au point de dégager par eux-mêmes des règles ou des solutions. En revanche, ils marquent leur présence dans la mise en œuvre des méthodes de solutions consacrées en droit international privé, en y ajoutant un objectif, certes partiel mais néanmoins important, visant à soumettre les sujets de droit exposés à une pluralité de systèmes de droit à des solutions aussi coordonnées que possibles, ce qui peut impliquer, le cas échéant, la coopération des autorités de chaque Etat concerné dans le cas particulier".* A. BUCHER, La dimension sociale du droit international privé, in *Recueil des Cours*, 2009, p. 94.

[16] F. DIALTI, Cooperazione tra curatori e corti in diritto internazionale fallimentare: un'analisi comparata, *Dir. fall. soc. comm.,* 2005, p. 1010. The typical feature of this kind of cooperation, namely that of being an instrument to overcome the lack of a framework agreed by the States is explicitly underlined, *inter alia*, in the introduction to the Cross-Border Insolvency Concordat of the Committee J (COMMITTEE J, SECTION ON BUSINESS LAW, INTERNATIONAL BAR ASSOCIATION, *Cross-Border Insolvency Concordat*, 17 September 1995, available at <www.iiiglobal.org>). It describes the Concordat as an "*interim measure*", applicable until the moment when treaties or other agreements are

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This second form of cooperation is becoming a common reality in an increasing number of legal areas, among which a primary role is played by private international family law.[17] However, it is the field of cross-border insolvency that saw the birth of this form of cooperation,[18] led by cooperation between the United States of America, Canada[19] and the United Kingdom, and where this form of cooperation is still undergoing its most relevant developments.[20]

The instruments through which such cooperation is achieved in the international insolvency area are called "cross-border insolvency protocols".[21] Through these instruments, drafters have sought and achieved coordination in matters of insolvency proceedings opened in different States. Cross-border insolvency protocols have been widely used in commercial insolvencies;[22] a number of protocols can also be mentioned in relation to the field of banking: from the most recent to the oldest, the one made for the *Lehman Brothers* group,[23] the one made for the

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entered into by the States. See also L. M. LoPucki, The case for cooperative territoriality in international bankruptcy, *Mich. L. Rev.*, 2000, p. 2219.

[17] Reference is made, in particular, to cooperation between judicial authorities of different States concerning international child abduction and to the principles drafted in this regard by the Hague Conference on Private International Law. See also for further references, L. Silberman, Co-operative Efforts in Private International Law on Behalf of Children, *Recueil des Cours*, 2006, pp. 267 *et seq.* and the document "*Direct Judicial Communications*" published in 2013 by the Hague Conference, available at <www.hcch.net>.

[18] Even if, to this day, these forms of cooperation are more frequent in common law countries.

[19] Two cases are traditionally mentioned as the earliest ones: Supreme Court of the United States, 3 June 1895, *Hilton et al. v. Guyot et al.*, 159 U.S. 113 (1895) and Supreme Court of the United States, 10 December 1883, *Canadian Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883).

[20] B. Leonard, The developing use of protocols in major cross-border filings, *Am. Bankr. Inst. J.*, 1999, p. 12; E. Warren/ J.L. Westbrook, Court-to-court negotiation, *Am. Bankr. Inst. J.*, 2003, p. 28.

[21] Other terms are sometimes used to refer to these protocols: "*cross-border insolvency agreements*"; "*insolvency administration contracts*"; "*cooperation and compromise agreements*"; "*memoranda of understanding*". Furthermore, depending on the content of the protocol, a distinction has been made between "*operating protocols*" and "*distribution agreements*". See J. L. Westbrook, International Judicial Negotiation, *Tex. Int'l L. J.*, 2003, p. 572.

[22] Lists of protocols have been drafted. See *e.g.* at <www.tri-leiden.eu> for a list prepared by the TRI Leiden group or see the list prepared by the American Law Institute for the so-called Transnational Insolvency Project (American Law Institute, *Transnational Insolvency: Cooperation among NAFTA Countries. Principles of Cooperation among the NAFTA Countries*, Huntington 2003), that is published at the end of the article B. Leonard, The way ahead: protocols in international insolvency cases, *Am. Bankr. Inst. J.*, 1998, pp. 12 *et seq.*

[23] Information regarding the Lehman Brothers' case can be found in Alvarez/ Marsal, *Lehman Brothers Holdings Inc., International Protocol Proposal*, 11 February 2009, available at <http://dm.epiq11.com/LBH/Document/GetDocument/1131024>; Official Representatives and other Participating Affiliates Pursuant to the

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Bank of Credit and Commerce International (BCCI),[24] and the one made for the *MacFadyen-Arbuthnot* case should be brought to mind.[25]

No substantial differences seem to exist, in principle, between protocols concerning commercial groups and protocols concerning banking groups. Doubts may arise in relation to the fact that many legal orders have different rules for commercial insolvencies and banking insolvencies respectively.[26] However, protocols are instruments designed *ad hoc* for each specific case and therefore it is not possible to identify *ex ante* what particular features the protocol in hand might have.

Numerous benefits stem from the use of this form of cooperation in the field of insolvency: costs reduction; maximization of the value of the assets due to the coordinated management of the proceedings; decrease in conflicts of jurisdiction; higher foreseeability of results; a transparent and efficient handling of intra-group claims; the sale of assets as a complex transaction.[27] Moreover, the

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CROSS-BORDER INSOLVENCY PROTOCOL FOR THE LEHMAN BROTHERS GROUP OF COMPANIES, *Report of Activities through January 15, 2010*, available at <http://dm.epiq11.com/LBH/Document#maxPerPage=25&page=1>; United States Bankruptcy Court, Southern District of New York, *In re Lehman Brothers Holdings Inc., et al., Debtors, Chapter 11 Case No.08-13555 (JMP) (Jointly Administered)*, Order Approving the Proposed Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, 17 June 2009; WEIL/ GOTSHAL/ MANGES LLP, *Debtors' Motion Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of a Cross-Border Insolvency Protocol*, 26 May 2009, available at <www.iiiglobal.org>; *Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies*, 12 May 2009, at <www.iiiglobal.org>.

[24] Information regarding the BCCI case can be found in the so-called *Patrikis Report* (BASEL COMMITTEE ON BANKING SUPERVISION, *The Insolvency Liquidation of a Multinational Bank*, December 1992, at <www.bis.org>) and on the *Global Report on the liquidation of the BCCI group (1991 – 2012)*, of 16 March 2012. The latter document used to be available at <www.bcci.info/pdf/bcci_global_report.pdf> for a while. However, it is no longer accessible at this time. It is to be noted that the term "protocol" is never used in the *BCCI* case. However, the practical effects pursued by the agreement entered in relation thereto are the same.

[25] [1908] 1 K.B. 675. Alongside cases illustrating successful coordination and handling of proceedings, there have been cases where the authorities involved have adopted a strictly territorial approach. An example is represented by the insolvency of an Icelandic bank named Kaupthing, which had branches and/or subsidiaries in thirteen different States. In October 2008, Iceland took control of the bank on the basis of an Emergency Act which provided for very national-oriented and ring-fencing inspired measures.

[26] In Italy, for example, banks in distress are governed by Title IV of the *Testo Unico delle leggi in materia bancaria e creditizia (TUB)* and not by the Italian Insolvency Act. As a second example, the European Union can be considered, where Regulation (EU) 2015/848 on insolvency proceedings of business entities coexists with Directives 2001/24/EC and 2014/59/EU and with Regulation (EU) 806/2014 on the insolvencies of financial institutions (Directive 2014/59/EU and Regulation (EU) 806/2014 will be discussed in more detail below).

[27] AMERICAN LAW INSTITUTE (note 22), pp. 23 *et seq.*; WEIL/ GOTSHAL / MANGES LLP (note 23), § 29; B. LEONARD (note 22), p. 12; E. FLASCHEN/ R. SILVERMAN, Cross-border Insolvency Cooperation Protocols, *Tex. Int'l L. J.*, 1998, p. 587; UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment, 30 May 1997, § 173.

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flexibility granted by protocols is undoubtedly an advantage in a field, like that of insolvency, where we can encounter a huge variety of different situations, parties' interests and the diverse features of different legal orders.[28]

IV. Main Elements of Cross-Border Insolvency Protocols

Given the peculiarities inherent in cooperation when insolvency proceedings are conducted with protocols, it is useful to briefly analyze the main elements of insolvency protocols, with the ultimate aim of understanding what their nature is from a legal perspective.

A. Content and Form Requirements

A good starting point is in Protocol's form and content. Since protocols are documents drafted on a spontaneous basis, there are no specific requirements as to form: they are generally drafted in writing, but they can also be oral. Moreover, depending on the circumstances of each case, they can be agreed upon by the interested parties[29] at the beginning of the insolvency procedure or at a more developed stage.

Cases in which protocols have been used vary from liquidation to reorganization proceedings, from cases where more the one main proceedings had been opened to cases where a main proceeding was matched with one or more secondary proceedings, both with regard to a single company and with regard to companies that are part of a same group.

Notwithstanding the fact that, as already mentioned, there are no particular formal requirements, the structure of protocols is often always the same, to the extent that model protocols have been drafted[30] and lists of issues that should ideally be taken into consideration when drafting a protocol have been made.[31]

The content of a protocol can be either generic or specific. It is generic when it simply provides for an agreement to cooperate. In other words, when it foresees the need for future cooperation between the parties or the ways in which it

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[28] On the total inadequacy of any rigid rule, see K. NADELMANN, Solomons v. Ross and International Bankruptcy Law, *Mod. L. R.,* 1946, p. 167; UNCITRAL, Practice Guide on Cross-Border Insolvency Cooperation, 2009, p. 7.

[29] On which see *infra*.

[30] See for example B. LEONARD/ J. BELLISSIMO, *Prospective Model International Cross-Border Insolvency Protocol*, International Insolvency Institute, 2009.

[31] See, in relation to protocols within the ambit of Regulation (EC) No. 1346/2000, e.g. Appendix 1 to the *European Communication and Cooperation Guidelines for Cross-border Insolvency Developed under the aegis of the Academic Wing of INSOL Europe by Professor Bob Wessels and Professor Miguel Virgós*, July 2007, at <www.insol.org>.

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should happen. This kind of protocols are frequent at the beginning of the insolvency and they often provide for an institutionalized exchange of information on the different proceedings. This form of cooperation can be enacted, for example, through mutual exchange of court orders or of minutes of hearings or of unofficial internal guidelines.[32] Even if it is true that parties may also give this kind of information to the courts, a direct exchange between courts is much more appealing. Asking for the parties to carry out this task might not be desirable, mainly because the information they transmit might not be impartial.[33] A second and more developed form of cooperation is that of protocols with more detailed content. These are generally aimed at negotiating shared solutions and measures,[34] mainly of a procedural nature. In fact, in most of the cases, these protocols are aimed at making it easier for courts to cooperate in the management of proceedings opened in respect of the same debtor or in respect of two or more debtors of the same group. Every now and then, substantive issues are also dealt with in these protocols.

Examples of rules set out in protocols are: (i) provisions setting out common procedural rules or, more generally, organizational issues; (ii) rules prescribing how the group should be managed while it is in distress; (iii) rules prescribing the way in which assets are to be disposed of; (iv) lists of creditors and provisions encouraging the establishment of creditors' meetings.

B. Actors Involved in Cooperation through Protocols

As far as actors involved in cooperation through the use of protocols are concerned, there are again no specific rules, since protocols, as already stated, are by their very nature forms of cooperation enacted on a spontaneous basis. Protocols are based on (and therefore guarantee) the autonomy of all the parties involved, namely of all those parties playing, in one way or another, an active role in a cross-border insolvency proceeding: liquidators, courts, companies in distress and their creditors, individually considered or organized in a creditors' committee.

It is the courts that instigate the process of drafting a protocol by convincing (in most cases) the liquidator to directly communicate and exchange information with foreign liquidators so as to conclude a cooperation agreement. According to the UNCITRAL Practice Guide, a process instigated by the courts is a guarantee of success in cooperation efforts because those same courts would then be available to assist where necessary.[35]

Once drafted, these agreements are normally signed by the liquidators and then – whenever possible – formally approved by the court.[36] Such a formal

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[32] UNCITRAL, *Practice Guide* (note 28), pp. 37 and 39.

[33] See further J.L. WESTBROOK (note 21), pp. 579 *et seq*.

[34] IDEM, p. 581.

[35] In favor of a court-led initiative to exclude the debtor and creditors, see also E. WARREN/ J.L. WESTBROOK (note 20), p. 29.

[36] Courts approval vis-à-vis protocols is more frequent in common law systems and, in particular, in the United States. This is probably because courts in civil law countries are

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approval assists the effectiveness of the protocol by acting as a deterrent against disobeying parties (in particular creditors of a specific legal order, that may have an interest in challenging one or more aspects of the protocol, to neutralize its globally positive effects). Sometimes protocols are also signed by the creditors' committee, even if creditors' participation is usually rare, mainly because, if there are too many creditors, they would prevent a smooth negotiation process.[37] However, even if not directly participating in the actual drafting, creditors are usually given the chance to comment on the content of protocols.[38]

Formal approval by the courts (and where applicable, the creditors' committee) of the different legal orders implicated is generally subject to reciprocity. However, difficulties may arise due to the fact that, while the participation of liquidators in a protocol's drafting may not be such a remote possibility, when it comes to courts a number of procedural issues may prevent the success of the operation.[39]

C. Obstacles to Cooperation through Protocols

In general, courts of common law countries have more discretion than courts of civil law countries as far as their activities are concerned. Therefore, cooperation can be more easily achieved by common law courts, even in the absence of a specific normative provision authorizing it.[40] On the contrary, in the absence of a provision of this kind, the success of cooperation in civil law countries may be compromised.[41]

Other obstacles, of a more practical nature, can sometimes be encountered when trying to set up a protocol. First of all, there may be linguistic differences among the actors involved.[42] Second, States may be reluctant toward a dialogue between national courts and foreign courts or liquidators. Third, courts may simply not have enough time to embark on such an unexplored and unusual path due to their notoriously high workload.

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required to comply with highly detailed sets of rules that, as will be specified in more detail *infra*, often do not explicitly provide such judicial intervention.

[37] E. WARREN/ J.L. WESTBROOK (note 20), p. 29.

[38] UNCITRAL, *Practice Guide* (note 28), pp. 32 *et seq*.

[39] AMERICAN LAW INSTITUTE (note 22), pp. 65 *et seq*.

[40] E. WARREN/ J.L. WESTBROOK (note 20), p. 29; J.L. WESTBROOK, The elements of coordination in international corporate insolvencies: what cross-border bank insolvency can learn from corporate insolvency, in LASTRA (ed.), *Cross-border bank insolvency*, Oxford 2011, p. 199; UNCITRAL *Model Law* (note 27), § 38 and 182; UNCITRAL *Practice Guide* (note 28), at 17; J. L. WESTBROOK (note 21), p. 569 and 582 *et seq.*

[41] L.M. LOPUCKI (note 16), p. 2219.

[42] On linguistic obstacles that may be encountered by judges of different EU Member States, see, in general, A. STADLER, Practical Obstacles in Cross-Border Litigation and Communication Between (EU) Courts, *Er. L. Rev.,* 2012, pp. 151 *et seq.*

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V. The Legal Nature of Protocols

Beyond the main external elements of protocols, that stem out from an objective analysis of the same, the unprecedented character of said instruments suggests that we might draw a number of theoretical conclusions about them.

It is first necessary for us to understand what the legal nature of protocols is, since the answer to this question may entail practical consequences in terms of establishing what, if any, is the law applicable to protocols.

From the description of the tangible features of protocols made in the preceding section, it appears possible to qualify protocols as the idea of a "dialogue between courts" in practice.[43] A number of renowned scholars have recently paid a great deal of attention to this phenomenon which looks to be absolutely unprecedented: "[*i*]*l y a quelques années, l'idée d'un dialogue entre juges transgressant les frontières aurait été considérée impossible: on aurait abordé le dialogue entre le juge et les parties – le fameux* Rechtsgespräch*, mais un dialogue entre juges (en dehors des délibérations) paraissait plus ou moins impossible: la Cour ne discute que par ses jugements…*".[44] This dialogue, in the form of direct communications between courts involved in insolvency proceedings opened in different States in respect of a same debtor or of more debtors part of a same group, represents "*the culmination of judicial co-operation*",[45] "*le degré supérieur de la coordination des justices étatiques*".[46]

This dialogue between courts, representing the highest degree of cooperation between them, brings into the fray what has been called "*joint trans-border case management*",[47] "*une intégration informelle* […] *des procédures nationales au sein d'une espèce de procedure supranationale qui en réaliserait la synthèse*".[48] These communications outline rules – otherwise missing – that permit the coordinated handling of proceedings opened in different States, creating an intangible procedural framework that is necessarily located at the supranational

[43] On the use of terms such as "cooperation" or "coordination" over terms such as "dialogue" when reference is made to relations between private parties rather than between legal orders, see S. MENÉTREY, Dialogues et communications entre juges: pour un pluralisme dialogal, in S. MENÉTREY/ B. HESS (sous la direction de), *Les dialogues des juges en Europe*, Bruxelles 2014, p. 119.

[44] B. HESS, Avant-propos, in S. MENÉTREY/ B. HESS (note 43), p. 10.

[45] P. SCHLOSSER, Jurisdiction and International Judicial and Administrative Cooperation, *Recueil des Cours,* 2000, p. 396. In the same sense see also M. LAAZOUZI, Nature juridique des communications entre juges, in S. MENÉTREY/ B. HESS (note 43), pp. 104 *et seq.*

[46] M. LAAZOUZI (note 45), p. 86. See also P. MAYER, La notion de coordination et le conflit de juridictions, in E. PATAUT/ S. BOLLÉE/ L. CADIET/ E. JEULAND (sous la direction de), *Les nouvelles formes de coordination des justices étatiques*, Paris 2013, pp. 3 *et seq.*, in particular p. 9.

[47] P. SCHLOSSER (note 45), p. 396.

[48] L. D'AVOUT, De l'entraide judiciaire internationale au contentieux civil intégré, in E. PATAUT/ S. BOLLÉE/ L. CADIET/ E. JEULAND (note 46) at 117. See also p. 140.

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level. These rules have in fact been called "*the otherwise-missing transnational bankruptcy law*".[49]

As to the kind of instrument within which protocols are entailed, it can undoubtedly be classified as a form of agreement.[50] However, there is no uniform view as to what kind of agreement is at stake.[51] For example, the UNCITRAL has proposed a classification of protocols either as contracts (while the Practice Guide[52] refers more generically to "business arrangements") or as acts of the courts that are called upon to approve them.[53]

A. Protocols as Treaty Instruments

According to a number of scholars, protocols can be defined as "*ad hoc* private international insolvency law treaties"[54] or as "court-created treaties"[55] or as "mini-treaties" entered into by courts of different States to delineate the roles that each of them will have in the resolution of a given case.[56] Even without explicitly referring to treaties, some other scholars similarly held that protocols cannot be viewed as anything other than the mechanism and the result of a negotiation between authorities (as already mentioned, courts often approve a protocol as long as the court of at least one other legal order has approved it), without taking into consideration the role played by the parties.[57]

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[49] E. WARREN/ J.L. WESTBROOK (note 20), p. 28.

[50] The likeness between the two can clearly be seen if one looks, for example, at Procedural Principle No. 14 and at the *Appendix C* of the *Principles of Cooperation among the NAFTA Countries* (note 22) p. 123, that respectively refer to "agreement" or "protocol" and to "agreements", "understandings" and "agreed-upon arrangements"; guideline 12(4) of the *European Communication and Cooperation Guidelines* (note 31), and Recital No. 49, Articles 41 par. 1 and 56 par. 1 of Regulation (EU) 2015/848.

[51] The doubts surrounding the nature of these agreements are evident in the use of the peculiar term "private treaties" in Developments in The Law – Extraterritoriality, *Harv. L. Rev.* 2011, p. 1302. Similarly, the request from the debtors to the U.S. Bankruptcy Court for the Southern District of New York in the *Lehman Brothers* case to approve the protocol refers to it as to a "privately negotiated treaty". United States Bankruptcy Court (note 23) § 18.

[52] UNCITRAL *Practice Guide* (note 28).

[53] UNCITRAL *Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency*, 21 July 2010, § 50.

[54] E. FLASCHEN/ R. SILVERMAN (note 27), p. 589; ID., Maxwell Communication Corporation plc: The Importance of Comity and Co-operation in Resolving International Insolvencies, in B. LEONARD/ C. BESANT (eds.), *Current issues in cross-border insolvency and reorganizations*, London 1994, p. 44.

[55] S. DARGAN, The emergence of mechanisms for cross-border insolvencies in Canadian law, 17 *Conn. J. Int'l L.*, 2001-2002, p. 124.

[56] A.M. SLAUGHTER, A global community of courts, 44 *Harv. Int'l Law J.* (2003), p. 193.

[57] J.L. WESTBROOK (note 21), p. 573.

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However, this position, according to which insolvency protocols are to be classified as treaties, is not convincing. Even if, from a subject matter point of view, it can be held that an agreement that foresees a duty on courts and liquidators of different States to cooperate can have its origin in the international legal order, what is absolutely conclusive in preventing protocols from being seen as treaties is that the latter are entered into by actors with international legal personality – States and international organizations – through those persons having the power to represent them in the negotiations or in the ratification of the treaty. Neither liquidators nor courts are among these persons. In other words, insolvency procedures are not actors with international legal personality and liquidators and courts do not have the power to bind a State.

B. Protocols as Contracts

A different view has been proposed by an Author that has classified protocols as contracts entered into by the parties involved in an insolvency proceeding and that, as always happens with contracts outside of the ordinary course of business and that are entered into after the opening of the insolvency proceeding, should be approved by the competent court.[58] Similarly, another scholar has held that protocols are instruments of a private character, as demonstrated by several clauses usually inserted in the protocols, according to which the provisions of the protocol are subject to the applicable law and that they should not be read in contrast with the rights and duties of the liquidators and of the courts.[59] Further, Advocate General Mengozzi, in the *Nortel* case, referred to a protocol entered into between English administrators and a French liquidator and subsequently approved by the

[58] A. SEXTON, Current problems and trends in the administration of transnational insolvencies involving enterprise groups: the mixed record of protocols, the UNCITRAL Model Insolvency Law, and the EU insolvency regulation, 12 *Ch. J. Int'l L.*, 2012, p. 818. The author criticizes in particular Flaschen and Silverman's thesis, referred to above, holding that protocols cannot be seen as treaties because: (i) they are not binding for the courts, whereby a treaty would instead be binding; (ii) any actors of the insolvency procedure can refuse to sign a protocol. A position similar to Sexton's has been adopted by those that, in relation to the *Maxwell Communication Corporation* case (United States Bankruptcy Court, Southern District of New York, *In Re Maxwell Communication Corporation plc*, Debtor. Chapter 11 Case No. 91 B 15741 (TLB)), held that the approval of the protocol by English and US courts gave the protocol the force of law for that specific case: see E. WARREN/ J.L. WESTBROOK (note 20), p. 28. The contractual view in relation to protocols has also been held by V. RÉTORNAZ, Cooperation in the new EU Regulation on insolvency proceedings: an unfinished transition from status to contract, this *Yearbook,* 2015/2016, p. 351.

[59] J. ALTMAN, A test case in international bankruptcy protocols: the Lehman Brothers insolvency, 12 *San D. J. Int'l L.*, 2011, p. 483. Also the English courts, in a decision rendered within the *BCCI* case held that the agreement entered into between English and Luxembourgish liquidators allowed them to act in a given way "as a matter of contract": see [1997] 1 BCLC 80.

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French court as a "contractual document".[60] In the same direction, albeit in a wider perspective, a renowned scholar has suggested that protocols can represent an unprecedented form of contractualization in the management of international disputes, acting as a sort of cooperative process.[61]

The notion of protocols as contracts does not pose any difficulties as far as the subject matter of the agreement is concerned. It is true that, in principle, a contract outlines a legal relationship between the parties, while most protocols regulate, at least *prima facie*, procedural issues. This being said, the ultimate aim pursued by protocols, namely maximization of the value of the assets, has, without any doubt, a substantive character.[62] Nevertheless, legal orders also tend to recognize the validity of some agreements originating from private parties' autonomy which regulate procedural issues: compromissory clauses, choice of forum and choice of law clauses are just a few examples of this.

However, this theory meets a stumbling block if the kind of actors that enter into a protocol are compared to the kind of actors that enter into a contract. Courts are organs of a given State and liquidators are – together with the courts – members of the insolvency proceeding. Granted, public law actors can enter into contracts. However, this happens only when they exercise so-called *jure privatorum* rights. This is not the case for a liquidator or a court helping to stabilize a company in distress: they will be called upon to cooperate with their foreign colleagues only insofar as they act in their capacities. If they were to act as private parties, they would end up deciding on other parties' "rights", *i.e.* on procedural aspects on which they would not have any control, and, at the same time, they would not have any interest in signing a protocol, not even if it were qualified as a contract in favor of a third-party beneficiary.

C. Protocols as Non-Binding Agreements

A further possibility consists in classifying protocols as non-binding agreements, *i.e.* as a kind of "gentlemen's agreement". In this regard, however, it is important to point out that, according to the UNCITRAL Practice Guide, protocols – even if they can in principle either be binding or not for the parties that sign them or entail both binding and non-binding provisions[63] – are in practice almost always

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[60] Opinion of Advocate General Mengozzi delivered on 29 January 2015 in case C-649/13, *Comité d'entreprise de Nortel Networks SA and Others v. Cosme Rogeau liquidateur de Nortel Networks SA* and *Cosme Rogeau liquidateur de Nortel Networks SA v. Alan Robert Bloom and Others*, par. 27. The EU Court of Justice, in its decision of 11 June 2015, then used the more generic term "agreement" (see § 25).

[61] L. CADIET, Inaugural lecture. Towards a New Model of Judicial Cooperation in the European Union, at <www.mpi.lu>; ID., Conclusion d'un processualiste, in E. PATAUT/ S. BOLLÉE/ L. CADIET/ E. JEULAND (note 46), pp. 225 *et seq.*

[62] In this sense see L. CADIET, Conclusion (note 61), p. 226. This peculiarity, according to the author, leads us to re-consider the traditional distinction between merit and procedure.

[63] UNCITRAL, *Practice Guide* (note 28), p. 38.

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perceived as binding.[64] Nevertheless, at least three considerations can be adduced to substantiate the "gentlemen's agreement" theory. First of all, the wide use that protocols make of terms that do not precisely define the kind of conduct required. Secondly, the uncertainty concerning a hypothetical breach of a protocol. In fact, it is not clear who can invoke such a breach (liquidators? courts? creditors?), nor is it clear who is entitled to hear the claim, or which legal consequences can derive from the breach. Thirdly, we can conclude that the approval of protocols by courts indirectly confirms their non-binding nature, at least before such approval occurs. In this sense, a provision in the Lehman Brothers protocol reads that the protocol should have "remained in effect with respect to any Official Representative until", *inter alia*, the "entry of an order (or similar action) terminating [the] protocol by the Tribunal having jurisdiction over such Proceeding". However, this third consideration is not valid for those legal orders that do not require approval by a court.

Other provisions contained in the Lehman Brothers protocol further support the categorization of the agreements at stake as non-binding. At paragraphs 1 and 2, the following clauses can be found: "[t]he parties acknowledge that this Protocol represents a statement of intentions and guidelines" and "[t]his Protocol shall not be legally enforceable nor impose on Official Representatives any duties or obligations". In the same direction, Tony Lomas, one of the liquidators appointed in the United Kingdom for Lehman Brothers Inc. Europe, stated in an interview that its decision not to sign the protocol could be ascribed to the desire to not be "morally blocked".[65] It is true that the protocol, at para. 14, states that "[n]othing herein shall create a right for any entity that is not a party to the Protocol, and a party hereto shall not be bound by this Protocol in its dealings with any entity that is not a party hereto", thereby suggesting, *a contrario*, that whoever is a party to the protocol is entitled to all the rights deriving therefrom. However, it seems reasonable to hold that the expression "having a right under the protocol" does not refer to any active juridical position, *i.e.* "a legal right", but rather to the mere possibility of "doing something". This would be somewhat confirmed by the fact that in the request for approval of the protocol filed before the U.S. Bankruptcy Court for the Southern District of New York it is stated that the protocol is not a "legally binding document", but simply a "statement of intentions and guidelines".[66]

D. Protocols as an Example of "*vita giuridica internazionale*"

Not even the theory of the non-binding nature of protocols is entirely convincing, as it conceals the legal value that protocols seem in any case to have. It therefore appears that the best way to explain the legal value of protocols is by considering the fact that certain situations may give rise to legal relationships even outside of

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[64] IDEM, pp. 27 *et seq.*

[65] See P. ALDRICK/ H. EBRAHIMI, PwC rejects global plan for Lehman recoveries, *The Telegraph* 26 May 2009.

[66] United States Bankruptcy Court (note 23) § 18.

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the scope of any given legal order.[67] Therefore, the legal character of these events is not accorded to them by national legal orders, nor by the international legal order. Rather, it stems from a classification of these events as events of "*vita giuridica internazionale*". The practice of drafting protocols arose spontaneously to address the needs posed by a global economic climate, that entails those "institutes created by an international cultural environment with regard to juridical events that have an international character".[68] The institutes of the *vita giuridica internazionale* "objectively takes into account the coexistence of multiple national legal orders" that are in a reciprocal relationship with respect to one another.[69]

This classification of protocols as a product of *vita giuridica internazionale*, that originates outside of national (as well as international)[70] legal orders, to satisfy tangible needs, does not imply that protocols can be deemed, *in any case*, immune from whatever legal assessment legal orders may make of them. The reason being that, at the very moment when the enactment of these institutes entails a contact with a specific legal order,[71] the institutes will necessarily be subject to whatever consequences derive from any applicable normative provisions.

Under this perspective, a clear analogy can be seen between cross-border insolvency protocols and two other phenomena that are of an inherently "social" character. The first of these is international commercial arbitration, which some authors have described as a purely a-national (or delocalized) institution, at least in its origins.[72] A second reference may be made to the "international contract", a

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[67] P. ZICCARDI, Diritto internazionale in generale, *Enc. dir.*, XII, Milano 1964, pp. 988 *et seq.*, now in ID., *Vita giuridica internazionale. Scritti scelti a cura degli allievi*, Milano 1992, I, pp. 56 *et seq.* See in particular p. 66.

[68] IDEM. See in particular p. 70 (translation is ours).

[69] IDEM, pp. 72 *et seq*. See also S.M. CARBONE/ R. LUZZATTO, *Il contratto internazionale*, Torino 1994, pp. 7 *et seq*. (translation is ours).

[70] It has authoritatively been suggested that protocols may be considered part of an order that is different both from national legal orders and from the international legal orders. In particular, they may be considered as a *lex mercatoria* applicable in international insolvency cases (see *e.g.* B. WESSELS, *Judicial Coordination of Cross-border Insolvency Cases, Inaugural lecture, University of Leiden Law School, 6 June 2008*, Deventer 2008, p. 44) or as a customary law applicable in international commercial transactions (R. MASON, Cross-border insolvency and Legal Transnationalisation, *Int. Ins. Rev.*, 2012, p. 122).

[71] Ziccardi has underlined the very frequent tendency of the institutes of the *vita giuridica internazionale* to come into contact with both national legal orders and the international one. See *Vita giuridica internazionale* (note 67), p. 87.

[72] See further P. FOUCHARD, *L'arbitrage commercial international*, Paris 1965; R. LUZZATTO, International Commercial Arbitration and the Municipal Law of States, *Recueil des Cours,* 1977, in particular pp. 17 *et seq.,* F. RIGAUX, Souveraineté des États et arbitrage transnational, in *Le droit des relations économiques internationales, Etudes offertes à Berthold Goldman*, Paris 1982, pp.261 *et seq.* and E. GAILLARD, Aspects philosophiques du droit de l'arbitrage international, *Recueil des Cours,* 2008, pp. 53 *et seq.* Also in relation to international investment arbitration it has been observed that the legal rights that treaties grant to investors and the arbitral proceeding offered to protect these rights are institutes of the *vita giuridica internazionale*: see Z. CRESPI REGHIZZI, Diritto internazionale e diritto interno nelle controversie sottoposte ad arbitrato ICSID, *Riv. dir. int. priv. proc.,* 2009, p. 24.

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contract that is complete and self-sufficient, is supranational in its origin, and does not need to be integrated by provisions of any national legal order.[73]

VI. Applicable Law Issues Concerning Protocols

As far as protocols are concerned, there are two essential moments when they come into contact with national legal orders: the moment of their creation and the moment when a procedural or substantive measure provided for by a given protocol produces effects into a national legal order. This contact is the reason why a number of issues of applicable law need to be solved. As to the creation of protocols, both the law applicable to the capacity of the parties to enter into the protocol and the law applicable to the form of protocols need to be determined. As to the effects of the protocols in the legal orders, the law applicable to each of the procedural and substantive provisions contained in a protocol needs to be determined.

It is to be noted that provisions concerning applicable law can rarely be found in protocols or in those soft law instruments that have been created to support the practice of cooperation.[74] The reason lies in the fact that protocols are, by their very nature, pragmatic instruments oriented toward an economic result, to the extent that the existing normative layer is often, erroneously, neglected.

A. The Law Applicable to the Capacity of the Parties

As to the law applicable to the capacity of the parties, it seems that the most appropriate solution is the one that deems applicable the law of the State in which the relevant party whose capacity is to be verified operates. The parties that are called upon to enter into a protocol are organs of insolvency proceedings and are therefore subject to the procedural rules of their respective legal orders. Consequently, it seems necessary at this stage to refer to all legal orders involved with distributive application of the different applicable laws.[75]

In this regard, a further step could be made to investigate whether specific provisions exist in national legal orders authorizing courts and liquidators to enter into protocols and, if so, whether in these provisions useful information on parties' capacity can be found.[76] A number of legal orders have provided an explicit legal

[73] See S.M. CARBONE/ R. LUZZATTO (note 69), in particular pp. 72 *et seq.*

[74] See note 79.

[75] The pattern would be the same as, for example, the one enshrined in Article 6 of Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[76] Adopting a slightly different perspective, one author has questioned whether protocols (which the author in question refers to as "*accords de communication directe*") themselves could be considered the legal basis authorizing courts to reciprocally communicate between each other. The answer is in the negative: either courts have this power independently of the existence of a protocol authorizing them to operate in that way

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basis for courts and liquidators to enter into protocols.[77] As to those countries that have not explicitly provided for such a basis, it is first important to exclude the possibility that customary international law might be the basis of an obligation on States to authorize courts and liquidators to negotiate and enter into protocols. This (among other reasons) is because the so-called *opinio juris ac necessitatis* seems to be lacking. Three other hypotheses can be advanced: first, protocols may deemed to be based on an implicit legal basis, represented by that scope of procedural initiative granted to courts to favor a smooth advancement of the proceeding.[78] Second, it has been suggested that a legal basis (or simply a basis) for protocols is to be found in those soft law instruments drafted by international organizations or practitioners or scientific associations,[79] that often make explicit reference to protocols.[80] Third, the principle of comity might be deemed to be the legal basis for

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or when courts do not have such a power on the basis of a specific provision, a protocol alone will not suffice to form such a basis. M. LAAZOUZI (note 45), p. 106.

[77] For example, through the adoption of the UNCITRAL Model Law on Cross-border Insolvency and, in particular, of its Article 27(1)(d). Among these countries, the United States can be mentioned; see U.S. Code, Chapter 15, Title 11. As far as commercial insolvencies are concerned, reference is to be made to Regulation (EU) 2015/848. See in particular Recital No. 49 and Articles 41, 42, 56 and 57.

[78] The English liquidator appointed in the *MacFadyen* case made this argument before the King's Bench Division, wherein a creditor had requested that the court declare itself incompetent to approve a protocol: "*it is submitted that ... the Court has an inherent general jurisdiction to sanction a scheme which is manifestly for the benefit of all the creditors*" ([1908] 1 K.B. 675).

[79] In the banking sector the following soft law instruments can be mentioned: GROUP OF THIRTY, *International Insolvencies in the Financial Sector – A Study Group Report*, Washington 1998; FINANCIAL STABILITY FORUM, *FSF Principles for Cross-border Cooperation on Crisis Management*, 2 April 2009, available at <www.financial stabilityboard.org>; FINANCIAL STABILITY BOARD, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, October 2011, available at <www.financial stabilityboard.org>; BASEL COMMITTEE ON BANKING SUPERVISION, *Report and Recommendations of the Cross-border Bank Resolution Group*, March 2010, available at <www.bis.org>; INTERNATIONAL MONETARY FUND, *Resolution of Cross-Border Banks - A proposed Framework for Enhanced Coordination*, 11 June 2010, available at <www.imf.org>. In the commercial sector: COMMITTEE J, SECTION ON BUSINESS LAW, INTERNATIONAL BAR ASSOCIATION, *Cross-Border Insolvency Concordat*, 17 September 1995, available at <www.iiiglobal.org>; Articles 25 – 27 of the UNCITRAL Model Law (note 27) and the *Practice Guide* (note 28); the third part of the UNCITRAL Legislative Guide (note 53); AMERICAN LAW INSTITUTE, *Principles of Cooperation* (note 22); INTERNATIONAL INSOLVENCY INSTITUTE, *Prospective Principles for coordination of multinational corporate group insolvencies*, June 2012, available at <www.iiiglobal.org>; WORLD BANK, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2011, available at <http://siteresources.worldbank.org>; *European Communication and Cooperation Guidelines* (note 31).

[80] See A. KAMALNATH, Cross-border insolvency protocols: a success story? 2 *Int'l J. Leg. Stud. Res.*, 2013, p. 176; J. FARLEY/ B. LEONARD/ J. BIRCH, *Coordination and cooperation in cross-border insolvency cases*, 6 February 2004, available at <www.americancollegeofbankruptcy.com>, at 6; P. ZUMBRO, Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool, *Bus. L. Int'l*, 2010, p. 165.

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protocols,[81] in the sense that protocols are a tool through which legal orders take into account the positions of the other legal orders. However, none of these three further hypotheses is entirely satisfactory, in particular from a civil law perspective, as they all make reference to abstract principles or soft law rules that, traditionally, civil law countries do not deem sufficient to constitute a valid legal basis. It follows that, in the absence of a tangible "hard law" legal basis, it cannot be so easy for a civil law country to accept the use of protocols by its courts and liquidators.[82] It is therefore clear that an explicit legal basis authorizing the use of protocols is absolutely necessary. This would also help to assure the protection of the fundamental rights of the parties to those insolvency proceedings that are coordinated through the use of protocols, among which, in particular, the right to a fair process.[83]

B. The Law Applicable to the Form

As far as the law applicable to the form is concerned, it has already been noted that at the supranational level, no particular requisite is mandated. However, States might still prescribe a specific form for protocols. A cumulative application of the various applicable laws will therefore need to be made, with the negative consequences in terms of *favor validitatis* following therefrom.

C. The Law Applicable to Procedural and Substantive Provisions Contained in a Protocol

As to provisions contained in a protocol, whenever they detail procedural obligations, the law of the State implicated by the measure should be applied.

For explicit references see, *inter alia*: Principle No. 4 of the *Cross-Border Insolvency Concordat* (note 79); the 14th Principle of the *Principles of cooperation among the NAFTA countries* (note 22) (see comment to para. *B* of the 14th principle); the *Prospective Principles* (note 79); the *European Communication and Cooperation Guidelines* (note 31). The third part of the UNCITRAL Legislative Guide (note 53) and the *Principles for Effective Insolvency* (note 79) make a more generic reference to "cross-border insolvency agreements".

[81] *Contra* S. DARGAN (note 55), p. 120.

[82] See further *e.g.* P. ZUMBRO (note 80), p. 158 footnote 3. For the opposite attitude of common law countries see, *ex multis*, FARLEY/ B. LEONARD/ J. BIRCH (note 80), p. 7: "the working philosophy in those jurisdictions was that if something was not forbidden and it made sense to do it, then it was judicially permitted".

[83] See S. JACKSON/ R. MASON, Developments in Court to Court Communications in International Insolvency Cases, 19 *U. NSW L. J.*, 2014, pp. 519 *et seq.*; S. DARGAN (note 55), p. 124; B. HESS, Justizielle Kooperation / Judicial Cooperation, in P. GOTTWALD, B. HESS (Hrsg), *Procedural Justice. XIV. IAPL World Congress / XIVème Congrès mondial de l'AIDP. Heidelberg 2011*, Bielefeld 2014, pp. 431 *et seq.*; C. KESSEDJIAN, L'avenir de la coopération judiciaire transfrontière, in S. MENÉTREY/ B. HESS (note 43), p. 353.

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The more controversial issue is the law applicable to the substantive provisions of the protocol. In theory, drafters of protocols want substantive issues to be governed by just one law. However, in each of the legal orders involved, there may be mandatory provisions which courts may not be able to depart from. Moreover, a valid choice of law contained in a protocol does not bind third country courts and the latter could therefore refuse to recognize a measure adopted on the basis of a protocol in relation to a right that, according to the conflict of law provisions of such a third country, should be governed by a law different than that chosen in the protocol.

VII. Developments in Banking Insolvency Law in the European Union

In the European Union, the normative gap that liquidators and courts have tried to fill in through protocols is no longer a subject of discussion.

With regard both to corporate insolvencies and to banking insolvencies, a number of EU legislative initiatives introduced relevant provisions specifically aimed at regulating group insolvencies. Reference should be made to Regulation (EU) 2015/848 on insolvency proceedings (recast)[84] and to Directive 2014/59/EU (so-called "BRRD")[85] together with Regulation (EU) 806/2014 (the so-called "SRM" Regulation).[86]

As far as banking groups are concerned, spontaneous cooperation through protocols seems to be an outdated model for handling insolvencies of these entities, except for those fields that do not fall under the scope of application of the Directive and of the Regulation.[87] The fact that these instruments have become obsolete derives from the introduction by the Directive and the Regulation of two

[84] Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings.

[85] Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council.

[86] Regulation (EU) No. 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010.

[87] Three main areas are not covered by the directive: first, liquidation proceedings in respect of both EU and non-EU groups; second, resolution proceedings in respect of groups that are partially outside the EU and in respect of which neither the EU nor member States managed to enter into those cooperation agreements encouraged by the directive; third, resolution of groups that are completely outside the EU.

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new models which seek to regulate cross-border cases involving banking groups in distress.[88]

The interaction between the Directive and the Regulation depends on the fact that the Regulation is based on the provisions of the Directive, but applies only to entities established in a so-called "participating member State", namely "a Member State whose currency is the Euro or a Member State whose currency is not the Euro which has established a close cooperation in accordance with Article 7" of Regulation (EU) No. 1024/2013.[89] Therefore the Regulation provides the instruments to guarantee a more efficient application of the provisions of the directive in the so-called participating member States.

A. The BRRD

The model introduced by the Directive in a way codifies – through the institution of "resolution colleges" – the same cooperation practice that used to be carried out spontaneously through protocols. Resolution colleges are essentially a framework within which participating authorities, among which – primarily – the group level resolution authority[90] and the national resolution authorities, can undertake all relevant activities regarding preparation, coordination and enactment of a resolution[91] with respect to a given group. The possibility to adopt a group resolution

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[88] Among the first comments to the BRRD and to the SRM Regulation see, *inter alia*, D. BUSCH, *Governance of the Single Resolution Mechanism*, in D. BUSCH/ G. FERRARINI (eds.), *European Banking Union*, Oxford 2015, pp. 281 *et seq.*; A. DOMBRET/ P. KENADJIAN, *The bank recovery and resolution directive: Europe's solution for "Too Big To Fail"?*, Berlin 2013; S. GLEESON/ R. GUYNN, *Bank resolution and crisis management*, Oxford 2016, pp. 204 *et seq.*; A. KERN, European Banking Union: a Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism, *Eur. L. Rev.,* 2015, pp. 154 *et seq.*; J.V. LOUIS, La difficile naissance du mécanisme européen de resolution des banques, *Cah. dr. eur.,* 2014, pp. 7 *et seq.*; M. SCHILLIG, *Resolution and Insolvency of Banks and Financial Institutions*, Oxford 2016, pp. 467 *et seq.*; G. PENNISI, The impervious road to the Single Resolution Mechanism (SRM) of the European Banking Union (EBU), *Riv. st. pol. int.*, 2015, pp. 229 *et seq.*; S. SCHELO, *Bank recovery and resolution*, Alphen aan den Rijn 2015. See also F. CROCI, *Adottata la c.d. BRRD Directive nel quadro dell'Unione bancaria*, 24 July 2014, at <www.eurojus.it>; J. ALBERTI, *Adottato il meccanismo di risoluzione unico, "secondo pilastro" dell'Unione Bancaria: prime considerazioni*, 29 July 2014, at <www.eurojus.it>.

[89] See further, Article 4, para. 1 of Regulation (EU) No. 806/2014, which in turn makes reference to Article 2 of Regulation (EU) No 1024/2013.

[90] According to Article 2 para. 1 No. 44 of the Directive, the group-level resolution authority is the resolution authority of the Member State in which the consolidating supervisor is situated. In turn, the consolidating supervisor is, according to Article 4 para. 1 No. 41 of Regulation (EU) No. 575/2013, "a competent authority responsible for the exercise of supervision on a consolidated basis of EU parent institutions and of institutions controlled by EU parent financial holding companies or EU parent mixed financial holding companies".

[91] Resolution authorities, according to Article 3 of Directive 2014/59/EU, are public administrative authority or authorities entrusted with public administrative powers

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plan is foreseen as an alternative to the adoption of a resolution measure in regard to a single entity. However, under exceptional circumstances, the resolution authority of a given company may deem it inappropriate to opt in to such a group resolution program. In this case, the program would not comprise the entire group and different individual measures may still be adopted in relation to a single entity. One of the weaknesses of the Directive, namely the possibility of escaping from a group resolution plan, should not be underestimated, as it may essentially threaten the success of the plan itself.

The model adopted by the Directive is therefore, again, that of modified territoriality, notwithstanding the fact that a global solution has been recognized, in several instances, as the most desirable one.[92] In any case, the mere fact that a binding legislative act has been enacted to prescribe (almost) mandatory cooperation and clear boundaries within which it should take place, should have the positive effect of favoring the successful outcome of the entire operation.[93]

B. The SRM

The system created by the Regulation takes a step further, by setting up and centralizing the resolution mechanisms.[94] Through the creation of the Single Resolution Mechanism,[95] the competence to draft and adopt resolution plans in

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designated by each Member State and that are "empowered to apply the resolution tools and exercise the resolution powers". Resolution tools under the directive are (a) the sale of business tool; (b) the bridge institution tool; (c) the asset separation tool; (d) the bail-in tool (see Article 37).

[92] See, not necessarily with reference to the European Union system, M. ČIHÁK/ E. NIER, The Need for Special Resolution Regimes for Financial Institutions – The Case of the European Union, at 26, *IMF Working Paper* (September 2009), available at <www.imf.org>; E. HÜPKES, Rivalry in Resolution. How to reconcile local responsibilities and global interests?, *Eur. C. Fin. L. Rev.*, 2010, p. 239; C. CUMMING/ R. EISENBEIS, Resolving Troubled Systemically Important Cross-Border Financial Institutions: Is a New Corporate Organizational Form Required?, *Fed. Res. Bank of NY St. Rep.* (July 2010), p. 39, available at <www.newyorkfed.org>; B. WESSELS, *Towards a European Bank Company Law?*, in F. GRAAF/ W. RANK (eds.), *Financiële sector en internationaal privaatrecht, Financieel Juridische Reeks* 3, NIBE-SVV, Amsterdam 2011, at 139 *et seq.* For a solution more in line with that prescribed by the Directive, see W. FONTEYNE/ W. BOSSU/ L. CORTAVARRIA-CHECKLEY/ A. GIUSTINIANI/ A. GULLO/ D. HARDY/ S. KERR, *Crisis Management and Resolution for a European Banking System*, IMF Working Paper, March 2010, p. 57 *et seq.*, available at <www.imf.org>.

[93] See *Communication from the Commission*, COM (2009) 561 cit., p. 13. In the same sense see also BINDER, *Cross-border cooperation of bank resolution in the EU: All problems resolved?* Version of 19 April 2016, available at <http://papers.ssrn.com> p. 11.

[94] The term "institutionalization" (in Italian "*istituzionalizzazione*") is used by A. GARDELLA, La risoluzione dei gruppi finanziari *cross-border* nell'Unione Europea, in R. D'AMBROSIO (a cura di), *Scritti sull'Unione Bancaria, Quaderni di ricerca giuridica della Banca d'Italia*, luglio 2016, p. 167.

[95] The Single Resolution Mechanism ("SRM") is the second pillar of the European Banking Union. The first pillar is represented by the Single Supervisory Mechanism

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relation to the entities listed in Article 7 paragraph 2 of the Regulation is taken away from national resolution authorities and is given to a European Union agency, the Single Resolution Board.[96] The plans are then in any case enacted by the national resolution authorities. The Single Resolution Committee is therefore a purely EU law mechanism and as such represents an all-new scheme which has no parallel in any other regional organization. The European Union has taken control of a process which member States had been unsuccessful in regulating through public international law mechanisms.[97]

The system created by the Regulation also has a particular meaning and importance in relation to cross-border groups in distress, considering that, as stated by recital No. 10 of the Regulation, Directive "2014/59/EU is a significant step towards harmonization of the rules relating to the resolution of banks across the Union and provides for cooperation among resolution authorities when dealing with the failure of cross-border banks. However, that Directive establishes minimum harmonization rules and does not lead to centralization of decision making in the field of resolution". In other words, the directive "does not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups which may affect the overall costs of resolution".[98]

Notwithstanding the above, at a closer look, not even the system created by the Regulation is immune from weaknesses. The risk exists that the internal dynamics of the European Union institutions will slow down the functioning of the Single Resolution Board. The procedure to adopt a resolution plan, as described by Article 18 of the Regulation, entails the possibility that the Council and the Commission may block the entry into force of the resolution plan by expressing objections within 24 hours from the receipt of the plan by the Board. The main concerns are raised by the participation of the Council, both because through the Council Member States could pursue their national preferences and because Article 18 para. 8 of the Regulation provides that if the Council objects to the resolution of an entity because the "public interest criterion referred to in paragraph 1(c) is not fulfilled,[99] the relevant entity shall be wound up in an orderly manner in accordance with the applicable national law". Moreover, Member States

("SSM") created with Regulation (EU) No. 1024/2013 and the third pillar will be the European Deposit Insurance Scheme ("EDIS"), which the European Commission announced its intention to create in a legislative proposal on 24 November 2015.

[96] See in particular Articles 42 to 66 of the Regulation to understand what the Board is and how it operates.

[97] Scholars have held that setting up and centralizing resolution mechanisms could also be a successful solution outside the European Union. In this regard the creation of a "Supranational Insolvency Court" based in The Hague has been suggested, see S. GOPALAN/ M. GUIHOT, Cross-border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution, *The Geo. Wash. Int'l. L. Rev.*, 2016, p. 615.

[98] Gardella talks in this regard of the hybrid nature of resolution colleges. See A. GARDELLA (note 94), p. 165.

[99] This is one of the three criteria set forth by Article 18 for the adoption of a resolution plan by the Board. It implies a high degree of discretion.

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and national authorities may undermine the execution of the measures adopted by the Board.

VIII. Concluding Remarks

From the analysis above, it clearly appears that traditional private international law methods, in particular when designed autonomously by States, are no longer sufficient to satisfy all the needs of the current business climate. Businesses are becoming more and more globalized and hence find themselves connected to more than one State. This climate must be effectively managed through new methods that, to be effective, cannot be linked to a specific State, but should be located at a supranational level, taking into account the needs of all States involved.

In the specific field of international insolvency law, these methods were first developed *ad hoc* – in some cases supported by a number of soft law instruments – by the actors involved, mainly liquidators and courts. Interesting instruments called cross-border insolvency protocols have been used over the years to coordinate insolvencies spread over more than one State.

Very recently, the European Union has, through binding normative provisions (Directive 2014/59/EU and Regulation (EU) 806/2014) in some way codified this spontaneous practice, promoting the maximum coordination of insolvency proceedings opened in more than one State (therefore, in particular, of insolvency proceedings opened in respect to multinational groups). The leading role in cooperation is carried out by an agency of the European Union, the Single Resolution Board.

The developments described are indeed of interest, offering much to observe and study, both from a practical and from a theoretical point of view.

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Printed in Germany

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