SCRITTI DI DIRITTO PRIVATO EUROPEO
E INTERNAZIONALE

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Enhancing Enforcement under Brussels Ia

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Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation

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Preface

The present *Volume* collects the results of research activities conducted under the En2Bria Project, which stands for "Enhancing Enforcement under Brussels Ia". This project has been co-funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598, and has started the first of March 2019. The University of Genoa has been the Coordinator and Partners institutions have been the University of Valencia, of Côte d'Azur, and of Tirana.

The project's main objective was to shed light on the terms whereby the relationship between Regulation EU 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and other EU law instruments could be handled. As known, this regulation is commonly referred to into both scholarship and case law either as Brussels Ia or Brussels I bis Regulation, generally based on domestic influences and traditions. Consistently with these approaches, Regulation 1215/2012 will either be referred to alternatively in this *Volume* as Brussels Ia or Brussels I bis, acknowledging that the instrument remains the same.

Art. 67 Brussels Ia Regulation was thus the object of the investigation, which follows a line of continuity with a previous project on the principle of specialty focused on art. 71 of the same instrument.

To carry out the task, the working group has collected a significant number of data – decisions coming from the member States involved in the research, as well as some relevant judgments from other close jurisdictions with which the research group had sufficient knowledge to carry out reliable analysis. Data collection has also led to a rationalization of different concurring rules which are indeed able to trigger art. 67 Brussels Ia Regulation.

As will be argued in this *Volume*, art. 67 Brussels Ia Regulation, despite being a rather short provision, in particular when compared to others, raises a number of methodological, teleological, practical and policy-oriented questions that are emerging in their full force and potential only in recent times.

The first chapter will dwell on art. 67 examining in detail its *rationale*, scope of application and the interpretative issues on coordina-

tion between the *lex generalis* and various *lex specialis* that are left open to law-making institutions and practitioners to deal in the future.

The following chapters approach art. 67 Brussels Ia Regulation not from an inter-sectorial point of view, but rather fully and deeply investigate the complex determination of jurisdiction (as few special rules on free movement of decisions are given) in those areas where concurring *lex specialis* must be coordinated with the ordinary regime.

To a different extent, all investigations – which have been carried out also in comparative perspective based on the data collected during the project – highlight how fragmentation and specialization of private international law *lato sensu* leads domestic courts to adopt solutions that are deemed to be effective and efficient, but might not necessarily be uniform thought the European judicial space, thus possibly still encouraging to some extent *forum shopping* or eventually paving the way to inconsistent decisions.

At the same time, it has also emerged how, in an effort to avoid fragmentation, especially in the field of intellectual property protection, to avoid triggering art. 67 Brussels Ia Regulation and apply exclusive rules on jurisdiction in given IP matters, courts might seeks the venue of connected and related actions to ensure consolidations of proceedings, as courts might be influenced by material law in the characterization of given legal relationships to determine the scope of application of a *lex specialis* – either to make it applicable or to avoid its application in favour of the *lex generalis*.

Problems of coordination have also been studied against the background of international conventions – and casting an eye to the future scenario, given that in most recent times some relevant instruments have been adopted by the Hague Conference for Private international law, to which the European Union has itself become party to.

A significant feature of the En2Bria project was the involvement of a third country in the process of acceding the Union; if the uncertainties surrounding the interpretation and application of art. 67 Brussels Ia Regulation might endanger the principle of certainty of law, to some extent promote procedural tactics the Union traditionally wishes to fight, up to the point it leaves open to inconsistent decisions, all these problems appear to be significantly enheighten for professionals

of a State that is still in a process of "aligning" its own domestic legislation to the EU acquis.

A rationalization of the main proposals contained in the various chapters can be found at the end of the *Volume*. One of the aims of the project was to develop recommendations and guidelines to improve the legal framework concerning judicial cooperation in civil matters. These recommendations and guidelines have been drafted based on the main criticalities examined. To the extent possible, each principle, guideline, and recommendation developed is accompanied by a comment, offering a direct succinct explanation from a theoretical and practical perspective that grounds the corresponding suggestion, and by an indication of a possible action to be adopted by the relevant targeted group to settle the main criticalities encountered.

Some relevant specifications must be made here as well. In the first place, we would like here to make the due disclaimer excluding the Commission and the EU responsibility. The content of the Brussels Ia – EN2BRIa, Project, and its deliverables, amongst which this *Volume* and the single chapters, represent(s) the view(s) of the single author(s) only and is/are his/her/their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains. The same disclaimer extends to any European institution, agency, or organization. In the second place, consistently with common practice, this *Volume* has been subject to linguistic revision and double blind review.

Ilaria Queirolo
Genoa, November 2020

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Art. 67 Brussels I bis Regulation: An Overall Critical Analysis

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* Only for academic purposes, I. Queirolo has written para. 1; C.E. Tuo para. 4.; P. Celle para. 2.3.; L. Carpaneto para. 3; P. Pesce para. 6.; 6.1.; 6.2.; 6.3; S. Dominelli para. 2; 2.1.; 2.1.1.; 2.1.2.; 2.2.; 2.2.2.; 5; 6.4; 6.5; 7.

1. Introduction: General remarks on the scope of the application of the provision and the lex specialis principle

The European Union has a clear interest in establishing common rules between Member States in the allocation of jurisdiction and recognition of decisions in cross-border civil and commercial matters. The creation of an integrated judicial space is functional[1] to the "*sound operation of the internal market*"[2]. The coexistence of diverse municipal rules concerning the free movement of judgments and decisions can impair free movement of people[3]. The uncertainty, if not the impossi-

[1] CARBONE S.M., TUO. C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 2.

[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1, as amended, recital 4 (hereinafter Brussels I bis Regulation). In the scholarship, see *ex multis*, JENARD P., *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, in OJ C 59, 5.3.1979, p. 1, at p. 4; SALERNO F., *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione). Evoluzione e continuità del "Sistema Bruxelles-I" nel quadro della cooperazione giudiziaria europea in materia civile*, Milano, 2015, p. 1 ff; MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale. Volume I, Parte generale e obbligazioni*, Milano, 2015, p. 59 ff; CLERICI R., *Art. 81 del Trattato sul funzionamento dell'Unione europea*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 500 ff; MARI L., *Il diritto processuale civile della Convenzione di Bruxelles, I, Il sistema della competenza*, Padova, 1999, p. 2, and p. 9 ff; GEIMER R., *Internationales Zivilprozessrecht*, Köln, 2015, p. 112 ff; HESS B., KRAMER X., *From Common Rules to Best Practices in European Civil Procedure: An Introduction*, in HESS B., KRAMER X. (eds), *From Common Rules to Best Practices in European Civil Procedure, Baden-Baden*, 2017, p. 9 ff; BASEDOW J., *Aufgabe und Methodenvielfalt des internationalen Privatrechts im Wandel der Gesellschaft*, in RUPP C. (ed), *IPR zwischen Tradition und Innovation*, Tübingen, 2019, p. 1, at p. 6 ff, and HAUSMANN R., QUEIROLO I., *Introduzione*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Monaco di Baviera, 2012, p. 4, at p. 9 ff, with further references to legal writings.

[3] Tampere European Council 15 and 16 October 1999, Presidency Conclusions, point 5, and points 33 f. Already on the necessity to harmonize and unify rules of private international

bility, to enforce abroad, rights acquired in a legal system and incorporated into a judicial order becomes a limit to free movement of persons and economic factors. Hence, the necessity for the European Union to ensure the "exportability" of rights acquired in a given Member State also in others, by unifying rules on recognition and enforcement of decisions.

As well-known, the (now) Brussels I bis Regulation provides for such a regime between Member States in civil and commercial matters[4], and – additionally – also sets uniform rules on international[5] (sometimes territorial[6]) jurisdiction. A common regime on the allocation of jurisdiction serves a number of goals. Not only does it foster foreseeability and certainty of the competent court in the different Member States[7], as all are bound by the same rules (thus also fighting *forum shopping*[8]); it also serves the goal of free movement of decisions as it overrules some national practices. Under domestic law, it is common practice that foreign decisions be recognised and enforced if the foreign court rendering the decision was competent according to the internal law of the requested State (not of the foreign State itself)[9]. This is generally no longer the case under the Brussels I bis Regulation. On the one side, EU courts are all bound by the same heads of ju-

law, see MANCINI P.S., *Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali*, in *Antologia del diritto internazionale privato*, Milano, 1964, p. 54.

[4] On which see *amplius infra*.

[5] Most of its provisions allocate international jurisdiction between Member States, with the consequence that territorial competence is still determined according to domestic law. Cf Brussels I bis Regulation, art. 4.

[6] Cf Brussels I bis Regulation, art. 7(1); (2); (4); (5); art. 8(1); art. 11(1)(b); art. 12; art. 18(1); art. 21(1)(b)(i), (ii); art. 24(5). Here the uniform instrument of EU not only allocates international jurisdiction between the Member States, but also identifies the competent territorial jurisdiction within that specific State, with the consequence that domestic civil procedure is further eroded in that it shall find application as per the identification of the relevant competent office.

[7] Brussels I bis Regulation, recital 4, recital 15.

[8] On forum shopping in cross-border cases, see BELL A., *Forum Shopping and Venue in Transnational Litigation*, Oxford, 2003.

[9] In Italy, see Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, in GU n. 128 del 3-6-1995 - Suppl. Ordinario n. 68, art. 64(1)(a).

risdiction, hence the law of both the State of the court of origin and of the State requested of recognition and enforcement is the same; on the other side, the court requested of recognition and enforcement is prevented from reviewing *in most cases*[10] the competence of the court of origin.

Whereas EU international civil procedure wishes to settle and compose fragmentation of solutions between Member States at least in a functional spirit to the realization of the internal market, an endogenous fragmentation persists *within* the EU legal order. It is widely acknowledged that the Brussels I bis Regulation is, to a certain extent, a point of reference in the field of European judicial cooperation. It is "around" this "system" that fundamental autonomous concepts and notions have been developed, such has "civil and commercial matters", or "contracts". However, the European Union legal order has become significantly more complex over time, and – just as that of any Member State – stratification and fragmentation of laws call practitioners for a careful evaluation of possible concurring applicable rules in order to determine which one ousts the other. The search for the correct legal basis governing jurisdiction or recognition and enforcement at the EU law level can become particularly challenging, especially for lawyers whose native Member State adopts a (tentative[11]) comprehensive codification of private international law. The European Union does not have a PIL "code"[12], regardless of any dis-

[10] Brussels I bis Regulation, art. 45(3), according to which, without prejudice for the rules on jurisdiction for the protection of weaker parties and on exclusive jurisdiction, "*the jurisdiction of the court of origin may not be reviewed. The test of public policy … may not be applied to the rules relating to jurisdiction*".

[11] With reference to the Italian legal system, see IVALDI P., *La riforma della legge n. 218/95: un'occasione per il riordino del diritto internazionale privato della navigazione*, in CAMPIGLIO C. (ed), *Un nuovo diritto internazionale privato*, Milano, 2019, p. 131 ff.

[12] On the question of codification of EU private international law, see KADNER GRAZIANO T., *Codifying European Union Private International Law: The Swiss Private International Law Act – A Model for a Comprehensive EU Private International Law Regulation?*, in *Journal of Private International Law*, 2015, p. 587; KRAMER X.E., *European Private International Law: The Way Forward (in-depth analysis European Parliament, JURI Committee)*, Brussels, 2014; LEIBLE S., UNBERATH H. (eds), *Brauchen wir eine Rom 0-Verordnung?*, Sipplingen, 2013; LEIBLE S., MÜLLER M., *The Idea of a "Rome O Regulation"*, in *Yearbook of Private International Law*, Volume XIV, 2012/2013, p. 137; BIAGIONI G., DI NAPOLI E., *Verso una codificazione europea del diritto internazionale privato? Una breve premessa*, in *Quaderni di SIDIBlog*, 2014, p. 125; SALERNO F., *Possibili e opportune regole generali uniformi dell'UE*

course of whether this should comprehend a general theory along the line of the tradition of some Member States[13]. It follows that provisions can be found in different EU regulations, in domestic provisions transposing European directives, in international treaties binding all Member States of the European Union as well as in the Founding Treaties[14].

As fragmentation of domestic laws is, to some extent, settled, whereas fragmentation at the EU law level is not. The first challenge lies in the identification of provisions whose scope of application might overlap. Practitioners face an exponential growth of regulations specifically devoted to private international law[15], as well as other

in tema di legge applicabile, in *Quaderni di SIDIBlog*, 2014, p. 129; ESPINELLA A., *Some Thoughts on a EU Code of Private International Law*, in *Quaderni di SIDIBlog*, 2014, p. 135; CRESPI REGHIZZI Z., *Quale disciplina per le norme di applicazione necessaria nell'ambito di un codice europeo di diritto internazionale privato?*, in *Quaderni di SIDIBlog*, 2014, p. 143; FULLI-LEMAIRE S., *Il futuro regolamento «Roma 0» e la qualificazione*, in *Quaderni di SIDIBlog*, 2014, p. 150.

[13] See most recently, WILKE F.M., *Der Allgemeine Teil zwischen Tradition und Innovation*, in RUPP C. (ed), *IPR zwischen Tradition und Innovation*, Tübingen, 2019, p. 29 ff.

[14] TFEU, art. 268, and art. 270.

[15] Cf Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, in OJ L 181, 29.6.2013, p. 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, in OJ L 343, 29.12.2010, p. 10; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1, as amended; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1, as amended; 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, in OJ L 7, 10.1.2009, p. 1, as amended; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in OJ L 143, 30.4.2004, p. 15, as amended; 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, in OJ L 338, 23.12.2003, p. 1, as amended; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 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, in OJ L 183, 8.7.2016, p. 1, as amended; 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

substantive law instruments that might contain some private international law provisions[16]. Additionally, EU law is not strictly governed by a hierarchy principle between sources of law. Indeed, regulations (here the Brussels I bis Regulation) do not necessarily take precedence over directives[17], whose content is, however, subject to national transposition. As a consequence, domestic provisions transposing EU directives fall within the category of EU law that should be taken into consideration by practitioners for the purposes of identifying the proper head of jurisdiction and of rules governing the free movement of decisions[18]. The second challenge for practitioners consists in solving the order of priority in applicability. After diverse unities of laws are properly and correctly identified, to the extent their scope of application overlaps, one of them must be given precedence. As mentioned, between secondary EU laws instruments there is in general no principle of hierarchy: relationships between such legal sources are usually solved according to the temporal principle *lex posterior derogat priori*, but also according to the general maxim *lex posterior generalis*

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the property consequences of registered partnerships, in OJ L 183, 8.7.2016, p. 30, as amended; 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, in OJ L 201, 27.7.2012, p. 107, as amended; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in OJ L 189, 27.6.2014, p. 59; Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, in OJ L 200, 26.7.2016, p. 1, and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19, as amended.

[16] Most recently, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1, as amended, art. 79 on jurisdiction, and art. 82.

[17] For all, ADAM R., TIZZANO A., *Manuale di diritto dell'Unione europea*, Torino, 2017, p. 164.

[18] Amongst the most known, there are domestic provisions transposing Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in OJ L 18, 21.1.1997, p. 1, art. 6, as amended in 2020.

non derogat legi priori speciali. From the combination of the temporal and specialty criteria follows that a general act prevails over previous one, but special rules will still stand even if the special rules prior date the subsequent general regime.

The above appears to be a very general and straightforward consideration. Yet, two sensitive issues arise as preliminary matters. In the first place, assuming there is a *lex specialis* pre-dating a *lex generalis*, should the first always prevail where the general regime introduces significant legislative changes? If the new general rules aim at "modernising" the system – should these still be ousted by a pre-existing *lex specialis*? An "artificial" and extreme example can be created: under the Brussels I Regulation a *lex specialis* rule creates an expedited *exequatur* procedure in favour of a contractually weaker party. After Brussels I bis, should the *lex specialis* still oust the new rules on recognition and enforcement in the new *lex generalis*? Of course, the example is artificially constructed – yet the problem of the "survival" and *automatic* precedence of pre-existing provisions (on jurisdiction or enforcement) over an updated legal framework (which clearly promotes certain values) should be kept into account by the lawmaker. In the second place, the question is: which *lex generalis* sets the rules governing international jurisdiction and rules for the free movement of decisions within the European judicial space? The absence of a "universal" instrument of private international law, that is of a European code of private international law, imposes a sectorial and careful approach. There are little doubts to advocate against the idea that the Brussels I bis Regulation constitutes the *lex generalis* in its field, *i.e.* cross border judicial cooperation in civil and commercial matters. This, however, is subject to an autonomous interpretation of EU law, and art. 1 of the instrument contributes in setting the limits to this general system. According to art. 1(1) of the Brussels I bis Regulation, regardless of domestic qualification, for the purposes of the instrument, some matters are *not* civil and commercial in nature, with the consequence that international jurisdiction and recognition and enforcement of decisions is solely governed by domestic law of the Member States (possibly, as bound by international law). This is the case for revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority. It

should be noted, however, that the list offered by the provision is not exclusive, as this is preceded by the words "in particular". The focus remains "civil and commercial matters", which, according to the case law of the Court of Justice of the European Union, means that the parties (public and/or private) involved in a case have acted without recourse to public powers. Recourse to such powers would exclude the case from 'civil and commercial matters' within the meaning of art. 1 Brussels I bis Regulation[19].

Art. 1(2) of the Brussels I bis Regulation further reduces the role of *lex generalis* of the instrument in that some matters, even though potentially falling within the definition of "civil and commercial matters", are nonetheless excluded from the scope of application of the regulation. This is for a number of reasons. In some areas, the European Union still has no competences, as is the case for status or legal capacity of natural persons (art. 1(2)(a), first phrase). On some points it was difficult to find a political understanding (as on arbitration; art. 1(2)(d))[20]. In other fields, the Union has now developed specific rules

[19] In the most recent case law, Judgment of the Court (First Chamber) of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18, para. 34. See also Judgment of the Court of 14 October 1976, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, Case 29-76, para. 4 ("*Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers*").

[20] On arbitration and Brussels I bis Regulation, see HAUBERG WILHELMSEN L., *International Commercial Arbitration and the Brussels I Regulation*, Cheltenham, 2018; WINKLER M., *West Tankers: la Corte di Giustizia conferma l'inammissibilità delle anti-suit injunctions anche in un ambito escluso dall'applicazione del Regolamento Bruxelles I*, in *Diritto del commercio internazionale*, 2008, p. 735; PERILLO F., *Arbitrato comunitario e anti-suit injunctions nella sentenza West Tankers della Corte di Giustizia*, in *Diritto del commercio internazionale*, 2009, p. 351; MERLIN E., *Proroghe pattizie e principio di "pari autorità" nell'accertamento della competenza internazionale nel Reg. CE 44/2001*, in *Rivista di diritto processuale*, 2009, p. 971; LA MATTINA A., CELLERINO C., *L'arbitrato e il nuovo Regolamento (UE) 1215/2012: vecchie questioni e nuovi problemi aperti*, in *Diritto del commercio internazionale*, 2014, p. 551; LEANDRO A., *Le anti-suit injunctions a supporto dell'arbitrato: da West Tankers a Gazprom*, in *Rivista di diritto internazionale*, 2015, p. 815; BRIGGS A., *Arbitration and the Brussels Regulation Again*, in *Lloyd's Maritime and Commercial Law Quarterly*, 2015, p. 284; KRUGER T., *Arbitrage en Brussel I(bis)*, in *Revue de droit commercial belge*, 2017, p. 308; HARTLEY T.C., *The Brussels I Regulation and Arbitration*, in *International and Comparative Law Quaterly*, 2014, p. 843, and CARBONE S.M., PESCE F., *Some Remarks on Arbitral Awards and EU Fundamental Freedoms*, in BERGÉ J.-S., GIORGINI G.C. (eds), *Le sens des libertés économiques de circulation*, Bruxelles, 2020, p. 113.

from which the Brussels I bis Regulation wishes to disconnect – as is the case maintenance obligations arising from a family relationship (art. 1(2)(e))[21]; wills and succession (art. 1(2)(f))[22], and insolvency proceedings (art. 1(2)(b))[23].

Ever since its establishment, the Brussels I bis Regulation has relied on the autonomous concept of "civil and commercial matters", which was meant to be as broad as possible, "*apart from certain well-defined*" cases[24], so as to ensure a system featuring a broad scope of application[25]. Even though the list of "well-defined" exceptions has grown over time reducing the scope of application of the Brussels I bis Regulation, as is the case of the maintenance obligations arising from a family relationship[26], the instrument remains the *lex generalis* in the field, despite the fact that rules on jurisdiction and free movement of decisions might be found in other acts that "enter in competition" with the Brussels I bis Regulation. This characteristic, which is not stated, is evident in the instrument – whose aim is to universally govern international civil procedural matters in cross-border cases (without necessarily harmonising domestic procedural laws between Member States[27]). Its legal framework not only wishes to be as broad as possible *ratione materiae,* but aims to be as comprehensive as possible as well, just as any *lex generalis*. It is the Brussels I bis Regulation, rather than other acts that concur with it, that also poses complete rules on *lis alibi pendens*, on connected and related claims, warranty actions, provisional measures, principles and rules on examination as to jurisdiction and admissibility of the claim, party autonomy, and protection of weaker parties.

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[21] Council Regulation (EC) No 4/2009, cit.

[22] Regulation (EU) No 650/2012, cit.

[23] Regulation (EU) 2015/848, cit.

[24] Brussels I bis Regulation, recital 10.

[25] Judgment of the Court (First Chamber) of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18, para. 31.

[26] POCAR F., VIARENGO I., *Il regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari*, in *Rivista di diritto internazionale privato e processuale*, 2009, p. 805, and PESCE F., *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, Roma, 2015, p. 19 ff.

[27] See however the proposal for Directive common minimum standards of civil procedure in the European Union.

All the above elements point to the conclusion that the Brussels I bis Regulation *is* the *lex generalis* governing jurisdiction and free movement of decisions, within the limits of the concept of "civil and commercial matters" according to its art. 1(1) and (2). This idea is reinforced by the very circumstance that the Brussels I bis Regulation quasi-explicitly acknowledges its *status*, and – as *lex generalis* – unilaterally regulates its own relationship with other sources of law (both of EU law and international law) whose scope of application might overlap.

1.1. Different concurring regimes and different disconnection clauses

The relationship of the Brussels I bis Regulation with other instruments is generally solved according to the *lex specialis* principle. This holds true for other sources of EU law (art. 67), and international conventions concluded by the Members State that are not ousted by the regulation (art. 69 and 71). Of course, also bilateral agreements between a third State and a Member State concluded before the entry into force of the Brussels I Regulation, gain precedence over the Brussels I bis Regulation (art. 73).

The *lex specialis* principle operates differently, and for different reasons where it comes to either other sources of EU law, or international treaties.

The disconnection clause contained in art. 67 of the Brussels I bis Regulation provides as follows: "*This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*"[28].

[28] In the scholarship, see MANKOWSKI P., *Art. 67 Brüssel Ia-VO*, in RAUSCHER T. (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Köln, 2016, p. 1215; ID, *Article 67*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 1020, and BORRÁS A., DE MAESTRI M.E., *Articolo 67*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Monaco di Baviera, 2012, p. 928.

The reason for this approach in coordination is apparent and self-evident: the Brussels I bis Regulation acknowledges that specific acts, as *lex specialis*, are better placed to address a specific matter, and – for that reason – deserve precedence. There is little concern on whether the special rule was enacted by the European Union before or after the Brussels I bis Regulation[29] (yet, as mentioned *supra*, there could be reason to cause concern). The provision at hand operates a permanent unilateral disconnection in favour of the special regime, provided that this regime concurs with the general one and a choice between two competing rules must be made. After all, all rules have been adopted by the same legislator, and it could be assumed that this entity has the full grasp of its own legal system – which needs to be coordinated[30]. Moreover, such a coordination is not hierarchical in nature; even though there is no formal hierarchy between regulations and directives, the first are directly applicable over domestic legislations. So, if domestic legislations transpose a directive containing a *lex specialis* rule on jurisdiction or on free movement of decisions, such domestic provisions will gain precedence over the Brussels I bis Regulation[31].

Where it comes to international conventions, the coordination of the regulation – its underlying rationale – must consider several scenarios.

The first hypothesis that calls for coordination is that of an international treaty in force between two or more Member States only. No third States are party to such international agreement. The European Union "abrogates" treaties between Member States with a general scope of application. Most of such international agreements were destined to govern the free movement of decisions in "civil and commer-

[29] MANKOWSKI P., *Article 67*, cit., p. 1021, and KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, Frankfurt am Main, 2011, p. 719.

[30] Cf Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1 (hereinafter Brussels I Regulation), recital 24, according to which "… *for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*". See also KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, cit., p. 719.

[31] MANKOWSKI P., *Article 67*, cit., p. 1023.

cial matters". Art. 69 of the Brussels I Regulation (so, Reg. 44/20001) seemed restrictive, to some extent, as it provided that the instrument would "*supersede the following conventions*"; on its own end, the Brussels I bis Regulation is clearer about its aim, which is ousting *all* general conventions. Art. 69 of the Brussels I bis does not make reference to a list, but specifies that the instrument "*supersede*[s] *the conventions that cover the same matters*… [i]*n particular*" those contained in a specific list drafted by the European Commission following communications of the single Member States. The use of the words "*in particular"* leaves little doubt about the fact that the previous list was not meant to be exhaustive. There is, moreover, little surprise about the solution adopted in terms of coordination: as both instruments concerned (an international treaty and the regulation) have a general scope of application (either determining jurisdiction or rules on free movement of decisions in civil and commercial matters), neither is a *lex specialis*. Or rather, both are *lex generalis*. If this is so, it is perfectly consistent with general approaches wherefore the most recent applies. Of course, the unilateral "abrogation" of international treaties with a general scope of application between Member States only, does not raise significant issues within the international arena, in so far as no State will breach the treaty (by non- applying it), as all, bound as they are by EU law, shall turn to the more evolved Brussels I bis Regulation.

This leads to the second main hypothesis of coordination. The concern for "*respect for international commitments*"[32] has led the European Union to ensure precedence of international agreements concluded by a Member State and a third State, if such treaty was concluded before the entry into force of the Brussels I Regulation[33], i.e. when the Union acquired and exercised competences in the field of judicial cooperation[34] (or before the time of accession to the Union of a given

[32] Brussels I bis Regulation, recital 35.

[33] Brussels I bis Regulation, art. 73(3).

[34] POCAR F. (ed), *The External Competence of the European Union and Private International Law*, Padova, 2007; FRANZINA P. (ed), *The External Dimension of EU Private International Law after Opinion 1/13*, Cambridge, 2017; CREMONA M., MONAR J., POLI S. (eds), *The External Dimension of the Area of Freedom, Security and Justice*, Brussels, 2011; BRAND R.A., *The Lugano Case in the European Court of Justice: Evolving European Union Compe-*

Member State, if this has become part of the Union after the entry into force of the Brussels I Regulation, unless differently provided for during the accession period that might "anticipate" the applicability of the instrument). Here, the disconnection can only operate for existing treaties concluded by the Member States, as the competence has been exercised by the Union, to the extent the material scope of application (either general or on specific matters) overlaps. The *rationale* behind it does not necessarily rely on a *lex specialis*-based argument. Given that a number of Brussels rules can and must be applied also when the cross-border element only involves one Member State and a third country, the Union seeks to relieve that Member State from the necessity to choose which imperative and non-derogable regime give effect to in such a case. Should courts apply the bilateral treaty, they would breach EU law, as the Brussels I bis Regulation is not dispositive. Should they apply the regulation, they would breach an international obligation concluded directly with the third State, and under public international law, "internal" legislative evolutions are not adequate to justify a breach of the *pacta sunt servanda* principle[35].

The third hypothesis for coordination taken into account by the regulation concerns international conventions devoted to specific matters. Here, *lex specialis* considerations return as the driving *ratio* to solve the matter of possible conflicts of applicable provisions, just as in art. 67. According to art. 71, the Brussels I bis Regulation does "*not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments*". As a preliminary remark, a difference in wording between the 1968 Brussels Convention and the Brussels I Regulation(s) must be highlighted[36]. Art. 57 of the former

tence in Private International Law, in *ILSA Journal of International and Comparative Law*, 2005, 2, p. 297, and MILLS A., *Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?*, in *International & Comparative Law Quarterly*, 2016, p. 541.

[35] Cf Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, in United Nations, Treaty Series, vol. 1155, p. 331, art. 27, according to which "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*".

[36] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version), in OJ L 299, 31.12.1972, p. 32.

provided that "*This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgments*". The latter regime, instead, does not allow Member States to enter new conventions autonomously. In the context of the regulations, the *lex specialis* principle only operates for *already existing* treaties[37], as the competence in the field of judicial cooperation in civil and commercial matters has been exercised by the Union. It is only the Union that will be authorised to (directly or indirectly[38]) conclude new treaties whose scope of application overlaps with the Brussels I bis Regulation. In other words, unlike art. 67, art. 71 does not provide for a "permanent" unilateral disconnection, thus being closer to other coordination mechanisms specifically designed for international treaties. Air and maritime transportation rules deserve priority as they better attain specific results. Moreover, the Union has an interest in "saving" such international conventions, as these promote certainty and foreseeability beyond the borders of the European judicial space. Such international treaties remain applicable in the relationships between one Member States and a third country, and as well as between Member States. It is in the context of this provision that

[37] Cf *ex multis*, BORRÁS A., DE MAESTRI M.E., *Articolo 71*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Monaco di Baviera, 2012, p. 938, at p. 939.

[38] The European Union can directly participate to negotiations and conclude an international agreement, if this is possible in the specific context; should the treaty be discussed in a forum where international regional organisations are not allowed, the Union can authorise Member States to conclude a treaty. Moreover, if an international treaty also covers aspects that go beyond the scope of the Union's competences, also the participation of the Member States is necessary. On the EU treaty making power, see CREMONA M., *Who Can Make Treaties? The European Union*, in HOLLIS D.B. (ed), *The Oxford Guide to Treaties*, Oxford, 2012, p. 93; KUIJPER P.J., WOUTERS J., HOFFMEISTER F., DE BAERE G., RAMOPOULOS T., *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford, 2013, p. 1 ff; ROSAS A., *The Status in EU Law of International Agreements Concluded by EU Member States European Union Law*, in *Fordham International Law Journal*, 2011, p. 1304; MERPI R.L. II, *The Lisbon Treaty and EU Treaty-Making Power: The Next Evolutionary Step and Its Effect on Member States and Third Party Nations*, in *Wayne Law Review*, 2010, p. 795; GEIGER R., *External Competences of the European Union and the Treaty-Making Power of Its Member States Commentary*, in *Arizona Journal of International and Comparative Law*, 1997, p. 319; BARONCINI E., *Il Treaty-Making Power della Commissione europea*, Napoli, 2008, and CELLERINO C., *Soggettività internazionale e azione esterna dell'Unione europea. Fondamento, limiti e funzioni*, Roma, 2015.

the Court of Justice of the European Union has had some occasions to clarify the operativity of the *lex specialis* principles, and its limits when European and non-European provisions concur. The first principle that may be inferred from the case law is that conventions on special matters by no means constitute an absolute autonomous and self-contained regime. Indeed, for aspects of the international civil procedure that are not directly addressed in the international convention on special matters, the Brussels I bis Regulation "returns" fully applicable. So, if an international convention contains rules on jurisdiction, but is silent on *lis alibi pendens*, jurisdiction will be addressed under the treaty, but the domestic court of the Member State will have to apply the regulation (if there is another European court seised[39]) to solve the question of the court seised first[40]. Where the treaty contains no rule on choice of court agreements[41], and these are not prohibited, the Brussels I bis Regulation should be applicable on such a matter. Additionally, if the convention contains *some* rules on choice of court agreements, but is silent on the validity of the clauses, whilst some courts have applied the *lex fori*[42], the proper "integrated" solution

[39] On "purely international" *lis alibi pendens*, see the new provision Brussels I bis Regulation, art. 33.

[40] Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj", Case C-406/92, para. 23 f. On the decision, see BRIGGS A., *The Brussels Convention tames the Arrest Convention*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1995, p. 161; HUBER P., *Fragen zur Rechtshängigkeit im Rahmen des EuGVÜ - Deutliche Worte des EuGH*, in *Juristenzeitung*, 1995, p. 603; HARTLEY T.C., *Admiralty Actions under the Brussels Convention*, in *European Law Review*, 1995, p. 409; MANKOWSKI P., *Spezialabkommen und EuGVÜ*, in *Europäisches Wirtschafts- & Steuerrecht*, 1996, p. 301, and CUNIBERTI G., *L'expertise judiciaire en droit judiciaire européen*, in *Revue critique de droit international privé*, 2015, p. 520.

[41] In the sense that if the international convention contains rules on choice of court agreement they should be applicable instead of those contained in the Brussels I regime, see in the domestic case law Nejvyšší soud (CZ) 16.02.2011 - 4 Nd 418/2010, in unalex CZ-28 ("*According to Article 71(1) Brussels I Regulation, a jurisdictional rule in a convention on particular matters is to be given priority over the jurisdiction provisions in the Brussels I Regulation. This also applies to prorogation agreements. Therefore, if an international convention in relation to particular matters contains provisions on jurisdiction agreements, such provisions are to be given priority over Article 23 Brussels I Regulation*").

[42] To that effect, see OGH 27.11.2008 - 7Ob194/08t, in unalex AT-615 ("*The form of a jurisdiction agreement is not regulated in the CMR. This gap is therefore to be closed by recourse to national law*"), and Cour de cassation (BE) 29.04.2004 - C.02.0250.N - Continental Cargo Carriers nv ./. Zust Ambrosetti e.a., in unalex BE-108 ("*Article 31(1) of the Convention*

should point towards the application of the relevant rules (and recitals) contained in the Brussels I bis Regulation[43]. This appears consistent with that case law of the Court of Justice of the European Union according to which matters not covered by special conventions fall within the scope of application of EU law[44]. The second principle that can be inferred from the case law is even more significant, as the Brussels regime is not limited to a "fill the gap" role, but rather becomes the benchmark for the application of international conventions in special matters – that is, the Brussels regime acquires a "quasi-constitutional" value where its most fundamental aims and goals cannot be derogated from. In other words, the *lex specialis* principle is "conditioned", and primacy of international conventions might not be granted despite the disconnection clause. According to the Court of Justice of the European Union, "*... specialised conventions ... cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles ... of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union. Observance of each of those principles is necessary for the sound operation of the internal market ... Article 71 ... cannot have a purport that conflicts with the principles underlying the legislation of which it is part. Accordingly, that article cannot be interpreted as meaning that, in a field covered by the regulation, ... a specialised convention ... may lead to results which are less favoura-*

on the International Carriage of Goods by Road (CMR) contains no provision regarding the form and the drafting of a jurisdictional clause by the parties, under which all disputes, a transport under this Convention may give rise to, may be brought before the courts of the signatory countries of the Convention, so that, even in the light of the provision of Article 71(1) of the Brussels I Regulation, these matters are subject to the national law that governs the contract between the parties").

[43] Brussels I bis Regulation, art. 25 on formal validity, and recital 20 on substantive validity ("*Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State*").

[44] Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj", Case C-406/92, par. 23 f.

ble for achieving sound operation of the internal market than the results to which the regulation's provisions lead"[45]. For those reasons, rules and principles contained in conventions on special matters must be evaluated against the background of the aims, the wording and the case law delivered on the Brussels Regulation(s). Only to the extent the former are to no prejudice to the aims of the latter, they can be applied.

Along this line of arguments, the Court of Justice of the European Union has denied that rules on *lis alibi pendens* contained in interna-

[45] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, para. 49 ff. On the decision, see MAGRONE M.E., *Trasporto merci: Convenzione ad hoc applicabile solo se prevedibile e in grado di limitare liti parallele*, in *Guida al Diritto*, 2010, 21, p. 96; KUIJPER P.J., *The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation No. 44/2001 - Case No. C-533/08, TNT Express Nederland BV v. AXA Versicherung AG*, in *Legal Issues of Economic Integration*, 2011, p. 89; TUO C.E., CARPANETO L., *Connections and Disconnections Between Brussels Ia Regulation and International Conventions on Transport Matters*, in *Zbornik Pravnog fakulteta u Zagrebu*, 2016, 2-3, p. 141. On art. 71 of the Brussels I bis Regulation and corresponding provisions in the Brussels Convention and the Brussels I Regulation, see also in particular MANKOWSKI P., *Article 71*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 1044; CARBONE S.M., *From Speciality and Primacy of Uniform Law to its Integration in the European Judicial Area*, in CARBONE S.M. (ed), *Brussels Ia and Conventions on Particular Matters. The case of Transports*, Rome, 2017, p. 17; TUO C.E., *Brussels Ia and International Transports Conventions: the Regulation's «Non Affect» Clause through the Lens of the CJEU Case Law*, in *idem*, p. 33; CARPANETO L., *On Collisions and Interactions between EU law and International Transport Conventions*, in *idem*, p. 63; ESPINOSA CALABUIG R., *Brussels Ia Regulation and Maritime Transport*, in *idem*, p. 107; PUETZ A., *Brussels Ia and International Conventions on Land Transport*, in *idem*, p. 141; SOLETI P.F., *Brussels Ia and International Air Transport*, in *idem*, p. 181; CELLE P., *Jurisdiction and Conflict of Laws Issues between Contracts of Transport and Insurance*, in *idem*, p. 215; CARREA S., *Brussels Ia and the Arrest of Ships: from the 1952 to the 1999 Arrest Convention*, in *idem*, p. 237; BORRÁS A., DE MAESTRI M.E., *Articolo 71*, cit., p. 938; BARIATTI S., *La giurisdizione e l'esecuzione delle sentenze in materia di brevetti di invenzione nell'ambito della C.E.E.*, in *Rivista di diritto internazionale privato e processuale*, 1982, p. 484; CARBONE S.M., *La nuova disciplina comunitaria relativa all'esercizio della giurisdizione e il trasporto marittimo*, in *Rivista di diritto internazionale privato e processuale*, 1988, p. 633; CERINA P., *In tema di rapporti tra litispendenza e art. 57 nella Convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 953; GAJA G., *Sui rapporti fra la Convenzione di Bruxelles e le altre norme concernenti la giurisdizione e il riconoscimento di sentenze straniere*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 253, and VASSALLI DI DACHENHAUSEN T., *I rapporti tra Convenzione di Bruxelles con le altre convenzioni sulla competenza giurisdizionale e l'esclusione delle sentenze in materia civile e commerciale*, in *Jus*, 1990, p. 119.

tional treaties may be applicable if they do not guarantee the same effects in avoiding parallel proceedings. This has been the case where rules on parallel proceedings have not been triggered for the lack of the requirement of the "same cause of action" in proceedings for damages, and separated, but connected, actions for a negative declaration[46]. Moreover, "*In the case of the recognition and enforcement of judgments, the relevant principles are those of free movement of judgments and mutual trust in the administration of justice (favor executionis)*"[47]. This, in particular, raises the issue of the disconnection clause under the current Brussels I bis Regulation, whose abolition of the *exequatur* might surely be more favourable than the regime contained in a number of treaties concluded outside the European judicial area. If the perspective is that of the favour of the creditor that should accede to a speedy mechanism for the enforcement of his claim, the abolition of *exequatur* in the most recent intra-EU regime (better yet, the postponement of a possible judicial control over the existence of grounds for non-recognition and non-enforcement), might be impossible to attain outside the specific context of the European judicial integration. It seems thus possible that the Court of Justice of the European Union will, at some point, have to tackle whether rules on free movement of decisions contained in treaties on specific matters will have a residual scope of application. The answer, of course, will require a case-by-case study; yet if the adopted benchmark is that of "*results which are less favourable for achieving sound operation of the internal market than the results to which the regulation's provisions lead*"[48], the "survival" of rules contained in treaties that do not provide for direct enforceability of decisions should not be taken for granted.

The fourth main hypothesis for coordination taken into account by the regulation concerns "*common courts*" between Member States (art. 71 bis ff), most notably the Unified Patent Court created by way

[46] Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C‑452/12, para. 42 ff.

[47] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, para. 54.

[48] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, para. 49 ff.

of an international agreement between *some* Member States with competences over infringement and validity of both unitary patents and European patents[49]. According to art. 7 of such international agreement, the Unified Patent Court has its central division seat in Paris, and Member States can set up a local division of the court within their own territory. The Court, and its divisions, functionally replace[50] national courts that would be competent under the Brussels I bis Regulation[51]. The Brussels I bis Regulation also makes clear, amongst other things, that its own *lis pendens* rule will be applicable (art. 71 ter), and that specific rules on enforcement of decisions contained in the system of the common court will only apply if both the State of origin and the requested State are party to the common court (art. 71 quater); in other cases, the enforcement of the common court's decision will follow the rules contained in the Brussels I bis Regulation. Again, it can be seen how the *lex specialis* principle underlying the relationship between different instruments highlights at least the "gap filling" function of the Brussels I bis Regulation: all matters that are not expressly covered by the international instrument, or should this not be applicable in a given Member State as this is not party to

[49] Agreement on a Unified Patent Court, in OJ C 175, 20.6.2013, p. 1.

[50] MANKOWSKI P., *Article 71b*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 1075, at p. 1079.

[51] According to art. 24(4) of the Brussels I bis Regulation, "*in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence*", exclusive competence is for "*the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State*". International jurisdiction in intellectual property matters is thus already a complex regime; for a domestic Trade Mark, the Brussels I bis Regulation is applicable to both online and offline infringements; in the case of an EU Trade Mark, jurisdiction for infringement matters is Regulation 2017/1001, art. 125; on the validity of a domestic Trade Mark, the Brussels I bis Regulation provides for exclusive jurisdiction, whilst for the validity of an EU Trade Mark, the EU Trade Mark Court shall have exclusive jurisdiction.

the relevant convention, the Brussels I bis Regulation "returns" in the forefront, and its rules must be applied.

Other than these main issues of coordination, the Brussels I bis Regulation also has some gaps that raise some questions, even with regard to the declination of *lex specialis* principle.

The first unregulated scenario is that of new special conventions concluded by the European Union with third States. Art. 71 only specifically relates to already existing conventions concluded by Member States (assuming that the external competence has been acquired by the Union). If one insists on the formal source of rules on jurisdiction and free movement of decisions, art. 71 could be applied by analogy. Alternatively, it could be argued that the accession of the Union to the convention by way of a Council decision fulfils the requirements of "EU act" for the purposes of art. 67, in that the convention becomes applicable following incorporation within an act of the Union.

The second unregulated scenario relates to the Union acceding an international convention already concluded by all its Member States. Whereas some courts have approached the coordination issue under art. 71 of the Brussels I bis Regulation, others have done so under art. 67[52].

1.2. Different declinations of *lex specialis* principle: advocating for the non-applicability by way of analogy of the TNT case law to art. 67 Brussels I bis Regulation

Focusing on the issue of international conventions and on the "proper" disconnection clause, as the normative text is silent on the

[52] Cf in the context of the 1999 Montreal Convention on Air carrier liability, Cassazione SS.UU. n. 3561/2020, in *En2Bria* database, approaching the coordination matter under the focal lens of art. 71 Brussels I bis Regulation, and LG Bremen, 3 S 315/14, in *En2Bria* database, approaching the coordination matter under art. 67. See also Opinion of Advocate general Szpunar delivered on 14 January 2020, Case C‑641/18, LG v Rina SpA, Ente Registro Italiano Navale, fn. 91, writing that "*It has been suggested in legal literature that Article 71 of Regulation No 44/2001 does not govern the relationship between that regulation and those international conventions to which all the Member States and the European Union are parties. Such conventions are an integral part of the legal order of the European Union and thus their relationship to the regulation should be assessed on the basis of Article 67 of that regulation or on the basis of Article 216(2) TFEU*".

point and considering the diverging approaches followed in the case law so far, it must necessarily be noted how the existence of two possible diverse venues for coordination, namely art. 67 and art. 71, does not appear to be irrelevant. As seen, the *lex specialis* principle behind the two rules is not necessarily implemented in the same way, for a number of reasons. It should thus in particular be addressed if and to what extent the principles surrounding the *lex specialis* approach developed in the context of art. 71 can (or should) be transposed to art. 67 as well.

On the one side, one could wonder whether the "fill the gap" approach that has emerged in the case law related to art. 71, and that can be derived from art. 71 bis ff of the regulation, is and should also be valid for art. 67. If another EU law act, or if a domestic provision implementing a directive, provides *some* rules on international jurisdiction and/or free movement of decisions, there is little ground to argue that the Brussels I bis Regulation should not cover any other aspect. From a teleological perspective, the Brussels I bis Regulation is the main instrument, that could be supplemented in some parts by other special acts of the European Union. It seems perfectly consistent with this approach to make recourse to the Brussels I bis Regulation for any aspect that might not be covered by the special EU act at hand. On the other side, more doubts arise on the possibility and the opportunity to transpose the "conditional *lex specialis* principle" developed by the Court of Justice of the European Union also in the context of art. 67. Such doubts are grounded on the *rationale* behind the additional requirements (super)imposed[53] by the Court in the context of art. 71 Brussels I bis Regulation, as well as to the critiques that can be made against such an approach. The provision makes no reference[54] to *any* additional requirement of compatibility of international conventions. In this sense, purposive "*interpretation gain*[s] *the upper hand over verbal and textual interpretation*"[55]. Yet, it could be argued against such methodology, that art. 71 can only be triggered for conventions already concluded by the Member States before the entry into force of

[53] MANKOWSKI P., *Article 71*, cit., p. 1051.

[54] BORRÁS A., DE MAESTRI M.E., *Articolo 71*, cit., p. 942.

[55] MANKOWSKI P., *Article 71*, cit, p. 1051.

the first Brussels I Regulation, as the competence on the point has been absorbed by the European Union. If this is true, all such conventions were already known to the European lawgiver at the moment of the adoption of both the Brussels I Regulations, thus accepting these conventions *without any need* to conform to a minimum European standard in their application between Members States. Alternatively, art. 71 would have clearly provided so. Additionally, the introduction of a fundamental requirement, i.e. the necessity for conventions to conform to European standards of judicial cooperation, raises uncertainties as practitioners would necessarily have to verify the case law of the Court of Justice despite plain wording. Moreover, other than the few judgments already delivered by the Court, it will fall, in the first place, upon domestic courts and practitioners to advocate on whether a specific convention fulfils the "conditional *lex specialis*" requirement. With possible fragmented approaches and solutions within the European judicial space before the new intervention of the Court of Justice[56]. Lastly, the necessity for other instruments to conform to the Brussels Regulations might turn out to be excessively restrictive for non-European rules on the free movement of decisions, even though such rules have been adopted by special regimes that originally were granted primacy. With the abolition of the *exequatur* procedure, few purely international regimes could be deemed to protect the *favor creditoris* principle at a level that is comparable with the one offered by the European Union. In other terms, the ever (even though sometimes slowly) growing level of mutual trust between Member States, and the subsequent evolution of the judicial cooperation regime, could, over time, progressively reduce the applicability of rules on free movement of decisions contained in special conventions applicable between Member States.

The reason behind the superimposition of an additional requirement to the *lex specialis* principle is evident. Fundamental values of the Brussels I bis Regulation cannot be derogated from even by special rules that should take primacy (even though the text of the provision

[56] TUO C.E., *Regolamento Bruxelles I e convenzioni su materie particolari: tra obblighi internazionali e primauté del diritto dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 377.

does not require so, and despite the circumstance that such conventions were known by the EU lawgiver at the time of the adoption of the Brussels Regulations). Yet, this necessity does not exists in the same terms in the context of art. 67 of the Brussels I bis Regulation. All relevant concurring provisions are adopted by the same entity. All rules are part of one single legal order. If a special rule is inconsistent with the fundamental "quasi-constitutional" values of Brussels I, it should not fall upon courts and practitioners to verify the compatibility of the rules. It should be for the lawmaker to autonomously and unilaterally "adjourn" its own special rules (a scenario which is impossible for international treaties) and make them consistent with the founding principles of the *lex generalis*. This, together with the critiques that can be raised against the methodological approach followed by the Court of Justice of the European Union under art. 71 of the Brussels I bis Regulation, should point to the conclusion that the additional requirement developed in this specific context *should not* be extended to art. 67 as well, where thus the *lex specialis* principle is to find full application granting primacy to special rules, even though they might have a lower standard than the one (ever changing and rising) adopted in the Brussels I regime.

2. "Instruments of Union…"

Having established that the Brussels I bis Regulation is, in fact, the *lex generalis* and that it entails different mechanisms to unilaterally coordinate with special regimes that should gain precedence, even though not all approaches already developed by the case law can or should be transposed *sic et simpliciter* also in the interpretation and application of art. 67, the provision at hand provides that "*This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*".

The first question that can be addressed in the context of the provision refers to the notion of "*instruments of the Union*". The definition employed by the Brussels I bis Regulation finds no counterpart in the

Treaty on the Functioning of the European Union, which adopts a different terminology. Part six (*Institutional and financial provisions*), Title I (*Institutional provisions*), Chapter 2 (*Legal acts of the Union, adoption procedures and other provisions*), refers to "*legal acts of the Union*" (Section 1). Art. 288 therein purports the well-known list of regulations, directives, decisions, recommendations and opinions. Art. 216, in Part five (*External action*), Title V, refers to "*international agreements*". The word "*instrument*(s)" is used in other contexts, such as the solidarity clause in art. 222 ("*The Union shall mobilise all the instruments at its disposal*"), or to refer to "*financial instruments*" in the field of monetary union. The wording of art. 67 therefore seems odd at first, as it could have used more common terminology – i.e., regulations, directives and decisions – or categories that are widely known, such as "secondary EU law"[57] with binding effects. However, if it assumed that the wording used by the lawgiver is by no means casual, but is rather well pondered and expressive of a specific intention, one cannot avoid to dwell on what "*instruments of the Union*" are for the scope of application of the provision at hand. A deliberate choice to abandon consolidated references to normative acts should point towards the conclusion that art. 67 has an "inclusive" nature and wishes to extend its scope of application "beyond" established categories. This seems overall consistent with the underlying *lex specialis* principle and objective. Special rules and regimes within EU law should be granted primacy regardless of the name of the act, as long as this creates binding rules that enter in competition with the Brussels I bis Regulation. The intention to extend the scope of application of the provision finds comfort in other linguistic versions of the regulation. The Italian version refers to "*atti dell'Unione*"[58], whilst the German one to "*Unionsrechtsakten*"[59]. It should however be noted that the

[57] Commenting on the provision, KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, cit., p. 718, explicitly refer to "*sekundären Unionsrecht*".

[58] "*Il presente regolamento non pregiudica l'applicazione delle disposizioni che, in materie particolari, disciplinano la competenza, il riconoscimento e l'esecuzione delle decisioni e che sono contenute negli atti dell'Unione o nelle legislazioni nazionali armonizzate in esecuzione di tali atti*".

[59] *"Diese Verordnung berührt nicht die Anwendung der Bestimmungen, die für besondere Rechtsgebiete die gerichtliche Zuständigkeit oder die Anerkennung und Vollstreckung von*

terminology used in such linguistic versions is not translated into "*instruments*", but rather into "*acts*". These expressions are preferable to "*instrument*", as "*acts*" are generally referred to "acts adopted by the Union", thus secondary law. Moreover, always with regard to the nature of such "acts" or "instruments", an evolution between the Brussels I and the Brussels I bis Regulation should be highlighted. The former entailed a recital, which could have offered some guidance on the point. Recital 24 expressly made reference to "*atti comunitari*"[60] or to "*Gemeinschaftsrechtsakten*"[61], thus essentially referring to secondary law in the Italian and German versions (whilst the English version kept the word "*instruments*"[62]). Nonetheless, the Brussels I bis Regulation does not entail a similar recital in its text. Such evolution in the content of the explanatory parts of the regulation might have little impact on the interpretation of art. 67; it could simply be the result of an (assumed) clarity of the provision, which requires no guidance (a circumstance that, as will be argued, is false and should lead to a reintroduction of a more detailed recital). Or, it could be seen as the will to intentionally avoid any guidance on whether art. 67 should be applicable to other "instruments" than secondary law *stricto sensu*.

There is little doubt on the fact that regulations fall within the scope of application of the provision, whereas directives – that are not directly applicable and require national transposition – fall within the scope of application of the second prescription of the rule (i.e., "*national legislation harmonised pursuant to such instruments*"), if they contain uniform rules on international jurisdiction or on free movement of decisions.

If the text and aim of art. 67, so if the literal and teleological interpretation, also in light of the historic evolution of the recitals, suggest

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Entscheidungen regeln und in Unionsrechtsakten oder in dem in Ausführung dieser Rechtsakte harmonisierten einzelstaatlichen Recht enthalten sind".

[60] "*Lo stesso spirito di coerenza esige che il presente regolamento non incida sulle norme stabilite in tema di competenza e riconoscimento delle decisioni da atti normativi comunitari specifici*".

[61] "*Im Interesse der Kohärenz ist ferner vorzusehen, dass die in spezifischen Gemeinschaftsrechtsakten enthaltenen Vorschriften über die Zuständigkeit und die Anerkennung von Entscheidungen durch diese Verordnung nicht berührt werden*".

[62] "*Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*".

a wide notion of "*instruments of the Union*" that does not preemptively and necessarily coincide with secondary law under art. 288 TFEU, the issue turns on whether *any rule* binding for the European Union and its Member States should fall within the scope of application of the provision at hand. The answer to such a question is by far not straightforward. It can already be said that the question should be answered in the negative (in the sense that "*instruments of the Union*" should mostly coincide with secondary law). However, different scenarios must be evaluated separately.

2.1. Heads on jurisdiction contained in the Founding Treaties

Consistently with the idea that the European Union is a *sui generis* international organization[63], where non-State actors also directly enjoy both duties and rights, also against the Union itself, the Founding Treaties entail a number of provisions related to jurisdiction in contractual and non-contractual matters. Amongst the most relevant provisions, under 270 TFEU "*The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union*". As known, following the suppression of the European Union Civil Service Tribunal in 2016, such a competence has been transferred to the General Court[64]. Such a head of jurisdiction would compete with protective fora contained in the Brussels I bis Regulation, namely artt. 20 ff, according to which the weaker party (the employee) can only be summoned before a court of the Member State in which she or he is domiciled[65], unless a valid choice of court agreement is concluded[66], whereas actions against the em-

[63] Judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62.

[64] Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, in OJ L 200, 26.7.2016, p. 137.

[65] Brussels I bis Regulation, art. 22(1).

[66] Brussels I bis Regulation, art. 23.

ployer can be instituted at a number of courts[67]. It is apparent that an (exclusive) head of jurisdiction that concentrates all employment disputes before the Court of Justice pursues a different policy goal than the criteria laid down in the Brussels I bis Regulation. As a preliminary reflection, this corroborates the previous conclusion that the case law developed by the Court of Justice in relation to art. 71 of the regulation should not *sic et simpliciter* be transposed by analogy also to the context of art. 67 – should this be applicable in the case at hand. The "conditional *lex specialis* principle" would have the effect of a regulation substantively overruling primary law. Not only; this would be to the detriment of the competences of the Court of Justice of the European Union – a reason that leads to believe that the Court itself would not extend the *TNT* golden rule to art. 67, especially if the relationship of art. 270 TFEU with the Brussels I bis Regulation were the first to be decided after *TNT*, as a "closure" on the matter of employment contracts would make it methodologically difficult afterwards to accept a limited primacy of special EU rules in the context of art. 67.

Further heads of jurisdiction are contained in the Founding Treaties. Under art. 268 TFEU, "*The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340*". Reference to the latter provision clears that the Court of Justice has jurisdiction over non-contractual liability of the Union for damages caused by its institutions or by its servants in the performance of their duties (art. 340(2) TFEU[68]), whilst the European Central Bank shall "*make good any damage caused by it or by its servants in the performance of their duties*" (art. 340(3) TFEU). Such heads of jurisdiction could potentially enter in competition with a number of provisions of the Brussels I bis Regulation, namely the forum of the defendant under art. 4, which enshrines the fundamental principle of *actor sequitur forum rei*; the alternative heads of jurisdiction in matters relating to tort, delict or quasi-delict, for which art. 7(2) provides the additional competence of the courts for the place where the harmful event occurred or may occur; as well as the possibility for the parties

[67] Brussels I bis Regulation, art. 21.

[68] VAN DAM C., *European Tort Law*, Oxford, 2013, p. 31.

to choose the competent court by way of agreement (art. 25) or by way of appearance without challenging jurisdiction (art. 26). Moreover, rules for the concentration of proceedings might also be impaired by art. 268 TFEU. Having identified the heads of jurisdiction in the Founding Treaties that might compete with those contained in the Brussels I bis Regulation, two points appear essential to dwell on the venue for coordination between the instruments.

Firstly, it must be determined whether heads of jurisdiction contained in the treaties are "exclusive", in the sense that they oust the application of the Brussels I bis Regulation, or whether they concur, thus leaving it to the plaintiff the choice of the instrument upon which jurisdiction of the court is grounded. Both art. 270 and art. 268 TFEU make clear that the Court of Justice "has competence". Provisions are, however, silent on the "exclusive" jurisdiction of the Court. Despite the wording, that could be changed accordingly, the Court of Justice has adopted the view that its jurisdiction is exclusive in nature[69]. This being so, the heads of jurisdiction contained in the Founding Treaties do potentially oust the principles and rules contained in the Brussels I bis Regulation, not leaving plaintiffs the choice between different fora. Secondly, it should be determined whether the Founding Treaties are "*instruments of the Union*" for the purposes of art. 67 Brussels I bis, which could activate the coordination mechanism therein contained. As the provision at hand uses a terminology from which it can be inferred that the aim is to expand its scope of application, thus to increase the coordination of the regulation with other acts of the European Union, it could theoretically be argued that primary law could amount to the non-technical definition of "instrument" of the Union. On the other side, the venue for coordination could lie not in art. 67, but rather in the inherent supremacy of primary law over secondary law. In this sense, even if art. 67 could encompass the Founding Treaties, it must be determined if these take precedence by virtue of the disconnection clause contained in the Brussels I bis Regulation, or ra-

[69] Judgment of the Court of 14 January 1987, Zuckerfabrik Bedburg AG and others v Council and Commission of the European Communities, Case 281/84, para. 12. Cf LENAERTS K., MASELIS I., GUTMAN K., *EU Procedural Law*, Oxford, 2014, p. 483.

ther oust *proprio motu* the regulation, which finds no application at all (art. 67 included).

It should nonetheless be noted that it has emerged from a scrutiny of the case law that only few decisions have expressly dealt with the matter of the coordination between Brussels I and heads of exclusive jurisdiction contained in the treaties.

2.1.1. Approaches in the case law

Two judgments relate to alleged violations of copyrights by the European Union. In the first proceedings, the plaintiffs sought before domestic courts in Ireland a declaration that they were "*the author and licensee and, the legal and beneficial owners of the copyright in an artistic work known as the, 'Contra Device', or, 'the Euro Symbol'*". The plaintiffs thus sought a declaration that "*the European Commission, their servants or agents, knowingly infringed the Plaintiffs' right of paternity and copyright in this artistic work and, falsely attributed its authorship to persons other than the Plaintiffs*"[70]. The Supreme Court of Ireland approached the matter of coordination between instruments in the light of general theory of hierarchy of law. It grounded its reasoning invoking the case law of the Court of Justice whereby, in competition matters, it has been stated that an exception to the rules on dominant positions granted by a regulation "*cannot derogate from a provision of the Treaty*"[71]. Moving from these considerations, the High Court of Ireland declined its jurisdiction as "*in case of a conflict between the E.C. Treaty and secondary legislation of the European Community, the Treaty provisions prevail. It is therefore manifestly clear, altogether apart from any considerations of Chapter VII Article 67 of Council Regulation (E.C.) Number 44/2001, (if it applies) that the Special Jurisdiction provisions of Section 2, Article 5 of the Regu-*

[70] High Court of Ireland, Kearns & Anor v. European Commission [2005] IEHC 324 (21 October 2005).

[71] Judgment of the Court of First Instance (Third Chamber, extended composition) of 8 October 1996, Compagnie maritime Belge transports SA and Compagnie maritime Belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH & Co. and Nedlloyd Lijnen BV v Commission of the European Communities, Joined cases T-24/93, T-25/93, T-26/93 and T-28/93, para. 152.

lation, which the Plaintiffs contend to apply on this matter, cannot oust the clear and emphatic provisions of Article 235 of the E.C. Treaty, conferring exclusive jurisdiction on the European Court of Justice in respect of claims to which Article 288 Part 2 applies". In other words, primacy of the Founding Treaties is not achieved by virtue of the disconnection clause contained in the Brussels regime.

In the second proceedings instructed before the (then) Court of first instance, a US company also alleged a breach by the European Union and the European Central Bank of its (inherited) patents and copyrights. It was alleged that the European Central Bank committed or authorised the commission of i) designing euro banknotes using the method covered by the patent at issue registered in a number of Member States and protected by a European patent (registered with a judicial proceedings after a first rejection of registration); ii) printing, iii) issuing and authorising use of such banknotes as legal tender in the euro area[72]. The parties to the dispute, the company and the European Central Bank, had different opinions on the competence of the Court of first Instance. The European Central Bank challenged the jurisdiction of the Court arguing that actions for the infringements of patents did not fall within the field of its exclusive competence[73]. Rather, proceedings were under the exclusive jurisdiction of domestic courts under the Brussels I (bis) Regulation. On its side, the US company argued that any claim for non-contractual liability was exclusively reserved to the European Court of Justice[74], the Brussels I (bis) Regulation granting primacy to the rules on jurisdiction contained in the treaties[75]. In the plaintiff's eye, "*Article 67 of Regulation No 44/2001 ex-*

[72] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 15. On which see SERRANÒ G., *Art. 268 del Trattato sul funzionamento dell'Unione europea*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 1341, at p. 1343.

[73] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 32.

[74] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 37.

[75] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 38 ("*In particular, the applicant states that the jurisdiction of the Court of First Instance cannot be governed*

cludes the regulations application to jurisdiction conferred by Community instruments such as the Treaty"[76]. The arguments in the proceedings before the European Court are quite different from those advanced before the Irish Supreme Court. Where the latter concluded that primary law ousts the Brussels I regime based on its hierarchical supremacy, the same reasoning is not relied upon by the plaintiffs before the European court, as here primacy of the treaties is advocated *by way of application* of art. 67. The answer of the Court of first instance is not conclusive of whether the treaties supersede the regulation, or whether it is the regulation that unilaterally retrocedes in its application in favour of exclusive heads of jurisdiction provided for in primary law. The Court adhered to the pleadings of the European Central Bank in the part where this institution characterized the legal action as action for a declaration of infringement or patent rights[77]. Not being the subject matter an action for damages, the Court excluded its jurisdiction *ratione materiae*[78], avoiding the need to rule on the relationship between the Brussels I (bis) Regulation and the treaties. The Court excluded its jurisdiction also in respect to the connected claim for compensation: as the violation of the patent was not ascertained by a court of law and the necessary requirements to start proceedings were not fulfilled[79], thus making for the Court of first Instance unnecessary to dwell on the matter.

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by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters…").

[76] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 39.

[77] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 52 ff.

[78] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 71.

[79] Order of the Court of First Instance (First Chamber) of 5 September 2007, Document Security Systems, Inc. v European Central Bank (ECB), Case T-295/05, para. 80 ("*for the Community to incur non-contractual liability, within the meaning of the second paragraph of Article 288 EC, as a result of the unlawful conduct of its bodies, a set of conditions must be satisfied, namely, the unlawfulness of the alleged conduct of the institutions, the reality of the damage and the existence of a causal link between the alleged conduct and the damage complained of*"). For a study on the elements of non-contractual liability, see VILLATA F.C., *Art. 340 del Trattato sul funzionamento dell'Unione europea*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 1519, at p. 1520 ff; SERRANÒ G., *Art. 268 del Trattato sul funzionamento dell'Unione europea*, cit., p. 1341 ff;

2.1.2. Venues of coordination between heads of jurisdiction contained in the Founding Treaties and the Brussels I bis Regulation: A methodologically-relevant issue (in particular, for Eurojust)

Some elements emerge for the case law taken as a case study. Founding Treaties could, in theory, be considered "*instruments of the Union*" for the purposes of art. 67 Brussels I bis Regulation. Whereas such an approach followed before the Court of Justice might be more plain, bearing in mind the English version of art. 67 Brussels I bis Regulation, the same conclusion could require more efforts if the benchmark is "*atti dell'Unione*" or "*Unionsrechtsakten*". These expressions adopt more likely the view of an "*instrument adopted by the European Union*". As extensive as this interpretation could be, Founding Treaties – despite being binding law for the Union – have not been adopted by the international organization, but by Member States. In this sense, whilst the interpretation is reserved to the Court of Justice of the European Union, or to the EU law giver that could change the text of the provision, the inclusion of Founding Treaties within the scope of application of art. 67 of the Brussels I bis Regulation cannot be surely and safely admitted nor excluded on the basis of the wording of the provision alone. Even though art. 67 seems inspired to extend its scope of application, Founding Treaties might not be reconducted within the notion of *Unionsrechtsakten*.

This being said, the coordination between the different sources of law can be approached by way of two venues: either the treaties prevail *proprio motu* on any regulation because of their inherent supremacy, or the Brussels I bis Regulation, applicable as *lex generalis*, activates its disconnection clause contained in art. 67 granting primacy to the treaties – if treaties are deemed to fall within the scope of application of the provision. Be as it may, practical results might not change, as the Court of Justice would, in any case, exercise its exclusive jurisdiction (that includes an assessment over illicit conducts of the Union,

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Petrašević T., Krmek M., *The Non-Contractual Liability of the EU – Case Study of Šumelj Case*, in Duić D., Petrašević T. (eds), *EU and Comparative Law Issues and Challenges Series*, Osijek, 2017, p. 256 ff.

and therefore a stronger control over its policies in comparison to breaches of contracts[80]). The question still appears to be methodologically relevant, however, as it concurs in defining the notion of "*instruments of the Union*". Furthermore, even though it has been argued *supra* against an automatic extension of the "conditional *lex specialis* principle" approach also to art. 67, should this happen, the Court of Justice would have an interest in pursuing the *proprio motu* venue of coordination of the treaties, as this would exempt the Court from a scrutiny of its exclusive jurisdiction in light of the fundamental principles of European civil procedure contained in the Brussels I bis Regulation (amongst which, the highly ranked *actor sequitur forum rei* principle[81]). To avoid any inconvenience and methodological uncertainty, the EU lawgiver could (at least) introduce (*rectius*, reintroduce) a recital in the Brussels I bis Regulation offering some guidance on whether or not "*instruments of the Union*" should include the Founding Treaties. An inclusion would indicate a preference for the EU lawgiver of the venue of coordination by way of art. 67 Brussels I bis Regulation. An exclusion or silence on the point would not change the current scenario, thus still giving the Court of Justice the possibility to ensure primacy of the Founding Treaties by way of supremacy over secondary law. In any case, the choice between the approach to follow on the coordination matter should be thoroughly and deeply reasoned by the EU lawgiver and by the Court of Justice. As written by the European Parliament itself, "*Article 340(2) TFEU refers to 'institutions' but in practice this has not been limited to 'institutions' as defined in Article 13 TEU, but the European Investment Bank has also been allowed to be held liable … To sum up, all bodies and agencies and, after Lisbon, even the European Council (which is now officially an EU institution) may be defendants in the action for damages*"[82]. If one concedes that art. 340(2) TFEU is applicable to

[80] SERRANÒ G., *Art. 268 del Trattato sul funzionamento dell'Unione europea*, cit., p. 1342.

[81] Stressing the departure from such a rule in the context of exclusive jurisdiction under art. 340 TFEU, LOUKAKIS A., *Non-Contractual Liabilities from Civilian Versions of GNSS: Current Trends, Legal Challenges and Potential*, Baden-Baden, 2017, p. 137.

[82] EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Briefing: Court of Justice at work, Action for damages against the EU*, PE 630.333 – December 2018, available online, p. 3 f. In the

"*all bodies and agencies*", the supremacy of primary law over secondary EU law might create problems where regulations, directives, and decisions seek to depart from the exclusive jurisdiction of the Court of Justice of the European Union.

This is the case, for example, of the European Union Agency for Criminal Justice Cooperation (Eurojust). According to its current regulation establishing the Agency[83], but on this point consistently with previous acts[84], "[in] *the case of non-contractual liability, Eurojust shall … make good any damage caused by Eurojust or its staff in the performance of their duties*", and "*national courts of the Member States competent to deal with disputes involving Eurojust's liability as referred to in this Article shall be determined by reference to Regulation (EU) No 1215/2012 of the European Parliament and of the Council*"[85]. The choice followed in the context of Eurojust is, however, not unanimous. For other agencies, such as Frontex[86], the European Environmental Agency[87], the European Agency for Safety and Health at Work[88], the European Medicines Agency[89], or the European Food

scholarship, on the extensive application of art. 340(2) TFEU, see VILLATA F.C., *Art. 340 del Trattato sul funzionamento dell'Unione europea*, cit., p. 1521; SERRANÒ G., *Art. 268 del Trattato sul funzionamento dell'Unione europea*, cit., p. 1342, and p. 1347.

[83] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, in OJ L 295, 21.11.2018, p. 138.

[84] On which see CHAMON M., *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford, 2016, p. 358, and there fn. 319.

[85] Regulation (EU) 2018/1727, cit., art. 27c.

[86] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, in OJ L 295, 14.11.2019, p. 1, art. 97.

[87] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, in OJ L 126, 21.5.2009, p. 13, art 18.

[88] Regulation (EU) 2019/126 of the European Parliament and of the Council of 16 January 2019 establishing the European Agency for Safety and Health at Work (EU-OSHA), and repealing Council Regulation (EC) No 2062/94, in OJ L 30, 31.1.2019, p. 58, art. 27.

[89] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, in OJ L 136, 30.4.2004, p. 1, art. 72.

Safety Authority[90] – among others, the Court of Justice of the European Union is explicitly identified as the sole court having exclusive jurisdiction for non-contractual liability as well. If it is true that Eurojust is a "*Union body with legal personality*"[91], and that art. 340(2) TFEU is applicable to "*all bodies and agencies*"[92], should the EU lawgiver or the Court of Justice approach the matter of coordination between the Brussels I bis Regulation and the Founding Treaties following the supremacy theory, as the Irish Supreme Court did[93], a provision granting jurisdiction to domestic courts over non-contractual liability, cases of the Agency would be null and void, as a regulation "*cannot derogate from a provision of the Treaty*"[94]. It is in these terms that the specific question at hand, even if it might have little practical consequences as the different venues of coordination would ensure the application of art. 340(2) TFEU (provided, as mentioned, that art. 67 is not interpreted in light of the *TNT*[95] case law), bears significant importance, as the methodologies followed to answer it can exercise systemic effects beyond the boundaries of the question itself.

2.2. Do "international customary rules" fall within the scope of application of the provision?

Provided that the non-technical expression of "*instruments of the Union*" employed by art. 67 of the Brussels I bis Regulation could ex-

[90] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, in OJ L 31, 1.2.2002, p. 1, as amended, art. 47.

[91] Cf. Regulation (EU) 2018/1727, cit., recital 1.

[92] EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Briefing: Court of Justice at work, Action for damages against the EU*, PE 630.333 – December 2018, available online, p. 3 f.

[93] High Court of Ireland, Kearns & Anor v. European Commission [2005] IEHC 324 (21 October 2005).

[94] Judgment of the Court of First Instance (Third Chamber, extended composition) of 8 October 1996, Compagnie maritime Belge transports SA and Compagnie maritime Belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH & Co. and Nedlloyd Lijnen BV v Commission of the European Communities, Joined cases T-24/93, T-25/93, T-26/93 and T-28/93, para. 152.

[95] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08.

tensively be interpreted also to possibly include the Founding Treaties (unless these oust *proprio motu* the applicability of the entire regulation), the following question is whether such a definition could be interpreted so broadly to encompass "rules binding for the European Union", namely international customary law and negative heads of jurisdiction contained in public international law as well.

On the one side, customary international law may be "part" of EU law and a limit to secondary EU legislation. On the other side, customary international laws are not "*instruments of the Union*". Even less "*Unionsrechtsakten*". Unlike the Founding Treaties, the terminology employed is stronger in excluding the possibility that international customary law falls within the scope of application of art. 67 Brussels I bis. Sovereign debt has recently shown the extent of the importance of the question to determine whether or not, now or in the future, and in light of the most recent case law of the Court of Justice of the European Union, art. 67 Brussels I bis could or should also be applicable for international customs relating to State immunity for sovereign debtors. The issue of the coordination of the Brussels I bis Regulation, or the lack thereof, with international customary law has received particular attention due to the position of Advocate general Szpunar, and the subsequent decision of the Court[96]. In an opinion delivered following a request from Italian courts on the applicability of the Brussels I Regulation to actions for damages against recognized organizations classifying ships for foreign States under international obligations and

[96] Judgment of the Court (First Chamber) of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18. Both the Court and Advocate general have concluded that "*Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third State, on behalf of that State and in its interests, falls within the concept of 'civil and commercial matters' within the meaning of that provision. The principle of customary international law concerning the jurisdictional immunity of States does not preclude the application of Regulation No 44/2001 in proceedings relating to such an action*". This, as specified by the Court, "*provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine*". The Italian *Corte di cassazione* with judgment number 28180, of 10 December 2020 (in *En2Bria Database*) has followed similar reasonings. *Ex multis*, on classification societies see BASEDOW J., WURMNEST W., *Third-Party Liability of Classification Societies*, Berlin, 2005; LAGONI N., *The Liability of Classification Societies*, Berlin, 2007. .

treaties, Advocate general Szpunar argued that "*Article 71 of Regulation No 44/2001 solely concerns conventions to which the Member States were party at the time when that regulation was adopted. The static nature of that provision sits ill with the evolving nature of customary international law which, moreover, is binding both on the Member States and on the European Union. Indeed, to take the view that Article 71 of Regulation No 44/2001 determines the relationship between that regulation and the principle of customary international law concerning the jurisdictional immunity of States is to suggest that the EU legislature wished to 'freeze' customary international law in the state it was in when that regulation was adopted. Such a solution would be clearly incompatible with Article 3(5) TEU, in accordance with which the European Union is to contribute to the strict observance and the development of international law*"[97]. In these terms, it becomes clear how delicate the issue of the relationship between immunities and EU civil procedure, and their proper coordination is, and how relevant its assessment for the correct functioning of the rules surrounding judicial cooperation in civil and commercial matters becomes. It has long been debated whether private international law is "part" of public international law[98]. Even though authoritative scholars from different legal traditions have tried to argue that the former is a branch of the latter, with the consequence that principles and rules developed in the context of public international law would have direct

[97] Opinion of Advocate general Szpunar delivered on 14 January 2020, Case C‑641/18, LG v Rina SpA, Ente Registro Italiano Navale, para. 134.

[98] See MORELLI G., *Elementi di diritto internazionale privato italiano*, Napoli, 1971, p. 12 f; LEIBLE S., RUFFERT M. (eds), *Völkerrecht und IPR*, Jena, 2006; MUIR WATT H., *Private International Law Beyond the Schism*, in MUIR WATT H. (ed), *Private International Law and Public Law, Volume II*, Cheltenham, 2015, p. 949 ff; MILLS A., *The Confluence of Public and Private International Law*, in MUIR WATT H. (ed), *Private International Law and Public Law, Volume II*, Cheltenham, 2015, p. 737 ff; MICHAELS R., *Public and Private International Law: German Views On Global Issues*, in *Journal of Private International Law*, 2008, p. 121; MUIR WATT H., FERNÁNDEZ ARROYO P. (eds), *Private International Law and Global Governance*, Oxford, 2014; MANKOWSKI P., *Das Verhältnis von Internationalem Privatrecht und Völkerrecht in der Entwicklung*, in DETHLOFF N., NOLTE G., REINISCH A. (eds), *Rückblick nach 100 Jahren uns Ausblick – Migrationsbewegungen*, Heidelberg, 2018, p. 45; ABOU-NIGM V., MCCALL-SMITH K., FRENCH D. (eds), *About Linkages and Boundaries in Private and Public International Law*, Oxford, 2018; HESS B., *The Private-Public Divide in International Dispute Resolution*, in *Recueil des cours*, vol. 388, p. 71 ff.

and automatic effects on the content of rules on international jurisdiction and applicable law, it is now generally accepted in continental Europe that conflict of laws is, indeed, autonomous – i.e. it is "private international law" rather than "international private law"[99]. Despite the autonomous nature of the two branches, concepts in the two fields have been interpreted coherently in a number of cases. The definition of "State" for the purposes of statehood and applicable law usually relies on an effectiveness test[100]. In the field of immunities, concepts and approaches are more likely to be consistent. As framed by the Permanent Court of International Justice, the territorial understanding of "jurisdiction"[101] bears the consequence that "*the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State*"[102]. Jurisdiction, as long as it is territorial[103], can be exercised even in respect to conducts that take place abroad under exorbitant heads of jurisdiction[104]. Yet, State immunity is a limit even to territorial jurisdiction[105] (unless an international wrongdoing is explicitly supported internally to pro-

[99] On the terminology, MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale. Volume I: Parte generale e obbligazioni*, Milano, 2017, p. 2.

[100] See BASEDOW J., *Non-Recognised States in Private International Law*, in *Yearbook of Private International Law*, 2018/2019, p. 1; DICKINSON A., *Territory in the Rome I and Rome II Regulations*, in BASEDOW J., MAGNUS U., WOLFRUM R. (eds), *The Hamburg Lectures on Maritime Affairs 2011-2013*, Heidelberg, 2015, p. 69, and DOMINELLI S., *European Judicial Space and Diplomatic Relations: A Uniform Conflict of Laws Issue?*, in *Freedom, Security & Justice*, 2017, 3, p. 107, where further references in the scholarship and in the case law.

[101] On the subject, see RYNGAERT C., *Jurisdiction in International Law*, Oxford, 2015.

[102] Permanent Court of International Justice, The Case of the S.S. "Lotus", Judgment 7th September 1927, in Collection of Judgments, Series A, n. 7, p. 4, at p. 18.

[103] VERHEUL J.P., *The Forum Actoris and International Law*, in *Essays on International and Comparative Law in Honour of Judge Erades*, The Hague, 1983, p. 196, at p. 199.

[104] GIULIANO M., *La giurisdizione civile italiana e lo straniero*, Milano, 1970, p. 9 ff, noting that limits imposed on States by way of international conventions highlight how, absent such agreements, States were free to determine the content of their heads of jurisdiction under general public international law. See also MORELLI G., *Il diritto processuale civile internazionale*, Padova, 1938, p. 145 ff.

[105] This being the field which mostly gave raise to customs; cfr. KOH H., *International business transactions in United States Courts*, in *Recueil des cours*, vol. 261, p. 13, at p. 132.

mote constitutional values[106]). An idea of "absolute immunity" is now generally abandoned in international law[107], which has developed a "commercial activity exception" to immunity[108]. Even though it remains difficult to determine the content of the rule of State immunity, the fact that a "contract", a "transaction" – or even "activity" or "non-contractual damage" – can be undertaken by any private entity without recourse to impositive and authoritative powers, usually constitutes the *discrimen* for the recognition of foreign immunities[109]. The *discrimen* between *acta iure imperii* and *acta iure gestionis* has been employed in EU law as well. EU regulations[110] are only applicable in

[106] As is the case for Italy, whose Constitutional court developed the principle that the permanent constitutional adaptor to general public international law cannot operate where the custom is contrary to certain fundamental and non-renounceable values of the constitution. This, without contesting the content of international customary law as reconstructed by the International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, available online. On Judgment n. 238/2014 of the Italian Constitutional court, for indications in the scholarship and in the case law, see DOMINELLI S., *Recent Opposing Trends in the Conceptualisation of the Law of Immunities: Some Reflections*, in ULRICH G., ZIEMELE I. (eds), *How International Law Works in Times of Crisis*, Oxford, 2019, p. 129, at p. 133 ff.

[107] Corte d'Appello Lucca, 1887, Hamspohn contro Bey di Tunisi, in *Foro it*., 1887, I, p. 474, and Tribunal civil of Brussels, Societe pour la fabrication de cartouches v Colonel Mutkuroff, Ministre de la guerre de la principaute de Bulgarie, in *Pandectes periodiques*, 1889, p. 350. *Contra*, Hong Kong Court of Final Appeal 8 June 2011 and 8 September 2011, Democratic Republic of the Congo and others v FG Hemisphere Associates LLC, respectively in (2011) 147 *ILR*, p. 376, and (2011) 150 *ILR*, p. 684. Also, for a comment on recognizing immunity on the basis of reciprocity after the 2012 judgment of the ICJ, see FOX H., WEBB P., *The Law of State Immunity*, Oxford, 2013, p. 14 f.

[108] Cf, on "contracts" and "activities" in the context of the United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, WITTICH S., *Article 2(1)(c) and (2) and (3)*, in O'KEEFE R., TAMS C., (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property. A Commentary*, Oxford, 2013, p. 54, at p. 61, and p. 63. See also NINO M., *State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 819, at p. 822, and ADINOLFI G., *Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction*, in *idem*, p. 885, at p. 892.

[109] However, "*international public law itself has yet to establish unequivocal criteria to distinguish acta iure imperii and iure gestionis*" (VISCHER F., *General Course on Private International Law*, in *Recueil des cours*, vol. 232, p. 13, at p. 192). See also QUEIROLO I., *Immunity*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 896 ff.

[110] However, it must be noted, there are some circumstances where, by way of express inclusion foreseen by the relevant regulation, matters that could be qualified as "public law ac-

"civil and commercial matters", as their legal basis (art. 81 TFEU) prescribes. This means: where the domestic court qualifies the matter as falling within the notion of *acta iure imperii*, the court shall not apply EU regulations, and proceed according to domestic law to either declare its jurisdiction, or recognise immunity to the foreign defendant State. Notwithstanding the different purpose of the same classification (*acta iure imperii*), the Court of Justice of the European Union has traditionally defined the scope of application of EU law in such a way that domestic courts had comparable legal reasoning to follow for the subsequent assessment of immunities under national law[111], as it referred to the necessity of investigate the use of authoritative powers by authorities. An approach that resembles patterns in public international law to determine the existence of State immunity[112].

Consistently with such case law, actions for payment of parking spots have been qualified as "contracts", due to the lack of authoritative powers on the public or delegated private body managing parking areas[113]. From a methodological perspective, the case-by-case analysis requires an investigation on the basis and the detailed rules governing the bringing of the action[114]. Yet, such an approach appears residual; for the court, where actions for damages were connected to war crimes[115], the claim – civil in nature – was not to be examined in light of the basis of the action. For conducts that are the typical expressions

tions" do fall within the scope of application of EU law, this being in particular the case of placement of children in institutions or others, which in some States presupposes a public law act by which parental responsibility is taken from the parents.

[111] Judgment of the Court of 14 October 1976, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, Case 29-76, in *Reports of Case*s, 1976, p. 1541, at p. 1551. Cf SCHLOSSER P., *Report on the on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, in OJ C 59, 5.3.1979, p. 71, at p. 83.

[112] Cf, Nejvyšší soud 30.10.2012 - 33 Cdo 3015/2011, in *unalex* CZ-61.

[113] Judgment of the Court (Second Chamber) of 9 March 2017, Pula Parking d.o.o. v Sven Klaus Tederahn, Case C-551/15; but see differently, AG München, 30.09.2015 - 412 C 18198/15.

[114] In these terms, Opinion of the Advocate general Bot delivered on 9 December 2014, Joined Cases C‑226/13, C‑245/13, C‑247/13 and C‑578/13, para. 53.

[115] Judgment of the Court (Second Chamber) of 15 February 2007, Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias, Case C-292/05, para. 36 ff.

of sovereign powers, such as the use of force, and subsequent judicial proceedings, such investigation does not seem necessary[116]. With the consequence that the proper qualification of the foreign State conduct as *acta iure imperii* or *acta iure gestionis* appears necessary only in so far as the foreign State has not acted in an *icto oculi* exercise of sovereign powers.

2.2.1. Unilateral changes of State bonds

There is little surprise in the fact that many recent cases concerning State immunities tackle the issue of State liability for the performance of bonds, either following a suspension of payment or a cut in the original nominal value[117]. The performance of the original contract has raised issues both in terms of immunity from adjudication as well as of immunity from execution, since it is quite likely that the foreign debtor has in the State of the forum only military assets, or assets reserved for diplomatic functions, as the case of bank accounts could be[118]. It is in respect of the first of these issues that consistency seems

[116] Opinion of the Advocate general Bot delivered on 9 December 2014, Joined Cases C‑226/13, C‑245/13, C‑247/13 and C‑578/13, cit, para. 57.

[117] A reconstruction of State practice as per immunity in cases of unilateral suspension of State bonds or unilateral cuts can now take advantage of a conspicuous case law from different countries. Yet, it appears that different solutions have been inspired by a number of considerations. Moreover, most of such a case law relates to State bonds sold on the secondary market, rather than to bonds acquired by international organizations to "save" a State from default. Such rules and solutions have been adopted to cope with the matter of actions by private parties against the foreign State, following usually over-the-counter exchange of titles governed by private law rather than by public international law.

[118] Reference is made to ITLOS, «ARA Libertad» (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, *ITLOS Reports*, 2012, p. 332, and to the arbitral proceedings closed by conjunct request for termination in Permanent Court of Arbitration, PCA 104115, In the matter of The Ara Libertad Arbitration between The Argentine Republic and The Republic of Ghana, Termination order 11 November 2013. In the scholarship, see KRASKA J., *The "Ara Libertad"*, in *The American Journal of International Law*, 2013, p. 404, and QUEIROLO I., *Immunità degli Stati e crisi del debito sovrano*, in ADINOLFI G., VELLANO M. (eds), *La crisi del debito sovrano degli Stati dell'area euro. Profili giuridici*, Torino, 2013, p. 152, at p. 179. In the case law, see also Cour européenne des droits de l'homme (cinquième section), NML Capital LTD contre la France, Requête no 23242/12, 5 février 2015, available online, and on sovereign debt restructuring and property rights, see FRIGO M., *Le operazioni di ristrutturazione del debito obbligazionario alla luce delle norme CEDU in materia di dirit-*

challenged today, as approaches in public and EU private international law might diverge – thus imposing reflections of a coordination between two diverging systems under the focal lens of art. 67 Brussels I bis Regulation.

State bonds, per se, should fall within the commercial exception to State immunity[119]. Their contractual nature is not disputed and sometimes contain an express waiver of immunity, choice of court clauses and *optio legis*[120] (to "incentivize the sales[121]). Such waiver of immunity clauses *in contracts* should play no role in the *acta iure imperii* qualification[122]. Eventually, these might be a warning of a potential "weakness" of the title. The question is whether subsequent unilateral changes contained in public laws may affect the private nature of the contract. The United States Supreme Court argued that "*Argentina's issuance of the Bonds was a 'commercial activity' under the FSIA;*

to di proprietà, in ADINOLFI G., VELLANO M. (eds), *La crisi del debito sovrano degli Stati dell'area euro. Profili giuridici*, Torino, 2013, p. 135, at p. 144 ff.

[119] On sovereign debt, see *ex multis* BONAFÈ B.I., *State Immunity and the Protection of Private Investors: The Argentine Bonds Case before Italian Courts*, in *The Italian Yearbook of International Law*, 2006, p. 165; BORDONI M., *Default nel debito pubblico ed immunità dello Stato estero dalla giurisdizione civile*, in *Rivista di diritto internazionale*, 2006, p. 1031; ID, *Bonds argentini, immunità degli Stati esteri dalla giurisdizione civile e stato di necessità: orientamenti giurisprudenziali a confronto*, in *Comunicazioni e studi*, 2007, p. 140; DE LISA I., *Il contenzioso argentino alla luce dei trattati bilaterali di investimento*, in *Il diritto del commercio internazionale*, 2011, p. 973; DELAUME G., *The Foreign Immunities Act and the Public Debt Litigation: Some Fifteen Years Later*, in *The American Journal of International Law*, 1994, p. 257; DORIGO S., *Il debito pubblico argentino dinanzi ai giudici italiani*, in *Rivista di diritto internazionale*, 2002, p. 958; FRANCIONI F., *Access to Justice, Denial of Justice and International Investment Law*, in *The European Journal of International Law*, 2009, p. 729; LAUTERPACHT H., *The Problem of Jurisdictional Immunities of Foreign States*, in *British Yearbook of International Law*, 1951, p. 224; MEGLIANI M., *Debitori Sovrani e obbligazionisti esteri*, Milano, 2009; PUSTORINO P., *Bond argentini, stato di necessità e diritti individuali nella giurisprudenza costituzionale tedesca*, in *Diritti umani e diritto internazionale*, 2008, p. 142; SACERDOTI G., *I contratti tra Stati e stranieri nel diritto internazionale*, Milano, 1972; SINCLAIR I., *The Law of Sovereign Immunity: Recent Developments*, in *Recueil des cours*, vol. 167, p. 117.

[120] VILLATA F.C., *La ristrutturazione del debito pubblico greco del 2012: nuove prospettive per l'optio iuris*, in ADINOLFI G., VELLANO M. (eds), *La crisi del debito sovrano degli Stati dell'area euro. Profili giuridici*, Torino, 2013, p. 107 ff.

[121] CHOI S., GULATI M., POSNER E., *The Evolution of Contractual Terms in Sovereign Bonds*, in *Journal of Legal Analysis*, 2012, p. 131, at p. 151.

[122] Cf QUEIROLO I., *Immunità degli Stati e crisi del debito sovrano*, cit., p. 171 ff.

[the] *rescheduling of the maturity dates on those instruments was taken in connection with that commercial activity...*"[123].

Concerning Greece as an "EU domiciled" sovereign debtors[124], following the 2012 changes of bonds after the adoption of Law 4050/2012 (Rules on the modification of titles issued or guaranteed by the Greek State with the Bondholders' agreement) several approaches

[123] Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992), at p. 620. With the consequence that Argentina has been ordered to pay suspended payments (see Lightwater Corp. v. Republic of Argentina, No. 02 Civ. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003; Anye Salinovich et. al. v. Rep. Argentina, 7 June 2012; United States Court of Appeals for the Second Circuit, NML Capital, Ltd. v. Republic of Argentina, August Term, 2011, Decided October 26, 2012). In Germany, consistently, see Landgericht Frankfurt am Main 14..2003, n. 294/02, in *Zeitschrift für Wirtschafts- und Bankrecht*, 2003, p. 783; OLG Frankfurt, 13.06.2006 - 8 U 107/03, in *Zeitschrift für Wirtschafts- und Bankrecht*, 2007, p. 929; United States District Court for the District of Columbia, Salah Turkmani v. The Republic of Bolivia, 193 f. supp. 2d 165, and *Morgan Guaranty Trust Co. of New York* v. *Republic of Palau*, 702 F.Supp. 60 (S.D.N.Y.1988). On the role of the waiver of immunity, cf also the reconstruction of the domestic case law in Republic of Argentina v. NML Capital, Ltd., 573 U.S. (2014), and KOUTSOUKOU G., ASKOTIRIS N., *Tightening the Scope of General Waivers of Sovereign Immunity from Execution*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 285. Not only, defences on the merits have been quashed by domestic courts: international law principles on state of necessity have been deemed not applicable to private contracts. Cf BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 03. Juli 2019 - 2 BvR 824/15, on which WAGNER J., *In Another Argentinian State Bankruptcy Case the German Federal Constitutional Court once again Rejects the Existence of a State of Necessity as a General Principle of International Law*, in *GPIL – German Practice in International Law*, 24.10.2019. In Italy, following a period in which lower courts developed inconsistent solutions on the matter (denying immunity, Giudice di Pace Brescia 13 agosto 2004, *Bellitti e Donati* c. *Rep. Argentina*, decreti ingiuntivi n. 1816 e 1817, quoted in BORDONI M., *Bonds argentini, immunità degli Stati esteri dalla giurisdizione civile e stato di necessità: orientamenti giurisprudenziali a confronto*, cit. p. 145, *passim*; Trib. Roma 22 luglio 2002, *Mauri et. al.* c. *Rep. Argentina*, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 174, and Trib. Roma 22 marzo 2005, in *Dir. e giust.*, 2005, 29, 42; granting immunity; Trib. Milano 11 marzo 2003, *Gallo* c. *Rep. Argentina*, in *Foro it*., 2004, I, p. 293; Trib. Milano 11 marzo 2003, *Goldoni et. al*. C. *Rep. Argentina*, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 1102, and Trib. Roma 31 marzo 2003, *Gallo* c. *Rep. Argentina*, in *Giuri. Romana*, 2003, p. 271) the Supreme Court settled the issue by recognizing immunity to Argentina (Cass. civ. sez. un., ordinanza 27 maggio 2005 n. 11225, *Borri* c. *Repubblica Argentina*, in *Rivista di diritto internazionale*, 2005, p. 856) following some reasoning to be found *incidenter tantutm* in the case law of the Italian Constitutional Court rendered on the Nigerian moratorium (see Corte costituzionale sentenza 329/1992).

[124] On the applicability of the uniform rules in civil and contractual matters against defendants domiciled in a Member State of the European Union, see for all VLAS P, *Article 4*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 106.

in the case law can be detected. These raise questions in terms of coordination between Brussels I and public international law.

As known, Greek law changed the law applicable to bonds, which allowed for insertion of Collective action clauses (CAC). If the majority of the bondholder (the Greek Central Bank) accepted the new title, the acceptance was also binding for the rest of the clients[125]. German courts (that could have been)[126] competent as courts of the place of the performance of the contract under art. 7(1)(a) of the Brussels I bis Regulation, raised a preliminary question as per the applicability of the service of documents regulation. Advocate general Bot[127] did not, in principle, adhere to the idea "*once a trader, always a trader*"[128] and argued that when the State "*avails itself of its sovereign power with direct regard to the contract*"[129] the act is *iure imperii* and EU law should not be applied. The Court did not adopt this solution and argued that national authorities should deny the application of the service of documents regulation only in so far as the document "*manifestly falls outside*" the scope of application of the instrument[130]. In the court's eye, the issuance and management of bonds, i.e. the legal basis

[125] See in particular VILLATA F.C., *Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-of-Law Agreements and New EU Rules on Derivative Instrument*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 325.

[126] Declining jurisdiction under the special heads of jurisdiction in EU uniform law, OLG Oldenburg, 18.04.2016 - 13 U 43/15.

[127] Advocate General Bot, 9 December 2014, joined Cases C-226/13, C-245/13, C-247/13 and C-578/13, Stefan Fahnenbrock et al. v Hellenische Republik, para. 61 ff.

[128] On the expression, see GEIMER R., *Vertragsbruch durch Hoheitsakt: „Once a trader, not always a trader?" – Immunitätsrechtlicher Manövrierspielraum für Schuldnerstaaten?*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2017, p. 344.

[129] Advocate General Bot, 9 December 2014, joined Cases C-226/13, C-245/13, C-247/13 and C-578/13, Stefan Fahnenbrock et al. v Hellenische Republik, para. 65.

[130] Judgment of the Court (First Chamber) of 11 June 2015, Stefan Fahnenbrock and Others v Hellenische Republik, Case C-226/13, para. 48. Other than the already quoted scholarship, see on the judgment MANKOWSKI P., *Zustellung der von Privatpersonen erhobenen Klagen wegen des Zwangsumtauschs von griechischen Staatsanleihen an Griechenland nach EuZustVO ("Fahnenbrock")*, in *Entscheidungen zum Wirtschaftsrecht*, 2015 p. 495; WAGNER R., *Anwendbarkeit der EuZVO auf Klagen gegen den griechischen Staat wegen des Zwangsumtauschs von Staatsanleihen*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2015, p. 636, and KNÖFEL O.L., *Griechischer Schuldenschnitt - Zustellung deutscher Klagen gegen den griechischen Staat*, in *Recht der internationalen Wirtschaft*, 2015, p. 503.

of the action, do not necessarily presuppose the exercise of sovereign powers[131].

The German *Bundesgerichtshof* dissented with the Court of Justice, and argued that civil actions for the enforcement of contracts changed by the Greek State were indeed actions related to *acta iure imperii*, thus falling outside the scope of application of EU law[132]. Nonetheless, other jurisdictions have been more adherent to the case law of the Court of Justice of the European Union. Following a preliminary request by Austrian courts, Advocate general Bot, again, sought to exclude such actions from the scope of application of EU international civil procedure[133]. The Court of Justice of the European Union[134], in a rather succinct judgment, took the chance to share the conclusions put forth by the Advocate general, in that the unilateral change of the applicable law, thus the retroactive insertion of CAC clauses exceeds the "*scope of the ordinary legal rules applicable to relationships between private individuals*"[135]. Yet, Austrian courts still had the possibility to declare their jurisdiction and deny immunity based on national exorbitant heads of jurisdiction[136]. Nonetheless, the coexistence of two different notions of *acta iure imperii* – one for the purposes of applicability of EU law and one for the purposes of State immunity – is not a

[131] *Idem*, para. 53.

[132] BGH, Urteil vom 8.3.2016 – VI ZR 516/14, in *Neue Juristische Wochenschrift*, 2016, p. 1659, with note by MÜLLER. See also VAN CALSTER G., *Fahnenbrock: 'Civil and commercial' viz bearers of Greek bonds. ECJ puts forward 'direct and immediate effect'*, 11 March 2016, online.

[133] Opinion of Advocate general Bot delivered on 4 July 2018, Case C‑308/17, Hellenische Republik v Leo Kuhn, para. 48 ff.

[134] Judgment of the Court (First Chamber) of 15 November 2018, Hellenische Republik v Leo Kuhn, Case C-308/17, on which see KEHRBERGER R., *Anwendungsbereich der EuGVVO bei staatlich angeordnetem Schuldenschnitt*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2019, p. 90; VOGL T., *Zur internationalen Zuständigkeit für Klage einer natürlichen Person gegen Griechenland auf Erfüllung griechischer Staatsanleihen bzw. Schadensersatz ("Kuhn")*, in *Entscheidungen zum Wirtschaftsrecht*, 2019, p. 95, and MANKOWSKI P., *Griechische Staatsanleihen und der griechische Schuldenschnitt vor dem EuGH (Folge Zwei)*, in *Zeitschrift für Wirtschaftsrecht*, 2019, p. 193.

[135] Judgment of the Court (First Chamber) of 15 November 2018, Hellenische Republik v Leo Kuhn, Case C-308/17, para. 35 ff.

[136] MANKOWSKI P., *The Saga of the Greek State Bonds and their Haircut: Hellas Triumphans in Luxemburg. Really?*, in *Conflictoflaws.net*, 22 November 2018.

desirable result[137], so domestic courts have changed their first approach to ultimately declare lack of jurisdiction as well[138].

2.2.2. "Instruments of the Union" does not include "any binding rule for the Union": Why art. 67 Brussels I bis Regulation cannot – and should not – extend its scope of application to international customary law rules on State immunity

Assuming that the current approach in EU law to *acta iure imperii* is not sufficient, from the material and personal scope of application, to argue that this already encourages in strict legal terms the emergence of a new customary rule on immunities for sovereign debtors, the question is whether the Brussels I bis Regulation should *directly coordinate* itself with the law of State immunity. In other words, the question is whether domestic courts should declare their lack of jurisdiction for *acta iure imperii* in application of EU law, rather than following a two-step procedure where EU law is declared not-applicable at first, and immunity is recognised following the first stage, but in application of domestic heads of jurisdiction interpreted in light of public international law in such a manner to avoid a double meaning of the same relevant concept.

As seen, art. 71 ff prescribes the prevalence of pre-existing international treaties to which Member State are parties to and that overlap *ratione materiae* with the regulation[139]. Recalling Advocate general

[137] For all, see FRANQ S., *Article 45*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 864, at p. 868.

[138] OGH 10 Ob 103/18x, su cui v. WALTER S., *The Aftermath of the CJEU's Kuhn Judgment – Hellas triumphans in Vienna. Really*, in *Conflictoflaws.net*, 12 February 2019.

[139] In the scholarship, see CARBONE S.M., *From Speciality and Primacy of Uniform Law to its Integration in the European Judicial Area*, cit., p. 17; TUO C.E., *Brussels Ia and International Transports Conventions: the Regulation's «Non Affect» Clause through the Lens of the CJEU Case Law*, cit., p. 33; CARPANETO L., *On Collisions and Interactions between EU law and International Transport Conventions*, cit., p. 63; ESPINOSA CALABUIG R., *Brussels Ia Regulation and Maritime Transport*, cit., p. 107; PUETZ A., *Brussels Ia and International Conventions on Land Transport*, cit., p. 141; SOLETI P., *Brussels Ia and International Air Transport*, in cit., p. 181; CELLE P., *Jurisdiction and Conflict of Laws Issues between Contracts of Transport and Insurance*, cit., p. 215, and CARREA S., *Brussels Ia and the Arrest of Ships: from the 1952 to the 1999 Arrest Convention*, cit., p. 237.

Szpunar's arguments, such a provision is not useful for the case of customary international law, as this "*concerns conventions to which the Member States were party at the time when that regulation was adopted. The static nature of that provision sits ill with the evolving nature of customary international law which, moreover, is binding both on the Member States and on the European Union*"[140]. The question then is whether or not art. 67 of the Brussels I bis Regulation might be of any relevance. However, this should be excluded for a number of reasons and the provisions appears to be unsuited for the purpose at hand. In other words, art. 67 is not the correct instrument to ensure proper coordination between the Brussels I bis Regulation and negative heads of jurisdiction contained in public international law.

A negative answer is supported by a literal interpretation of the provision at hand. Despite the use of the non-technical terminology, "*instruments of Union"*[141], and acknowledging that the aim is to ensure coordination to the fullest, to interpret such a notion with a wider "rules biding for the Union" would seem rather far-fetched. Notwithstanding that international customs are, under some conditions, a parameter of validity of EU secondary law[142], these do not appear fit to trigger the EU disconnection clause, as they are not "*contained in instruments of the Union*". *De lege lata*, should some successfully argue that international customs are more than a simple parameter of validity of EU secondary law, such an improbable connection to public international law would require the existence of a somewhat certain customary rule, which, in light of the current practice, might be difficult for the Court of Justice to reconstruct. Moreover, if one accedes to the supremacy theory as a venue for coordination, customary law alone – as primary law – would oust the applicability of the regulation, and not as a result of the venue for coordination given under art. 67. *De lege ferenda*, the coordination of the Brussels I bis Regulation with the law of State immunity seems unlikely as well. *If* the EU lawmaker

[140] Opinion of Advocate general Szpunar delivered on 14 January 2020, Case C‑641/18, LG v Rina SpA, Ente Registro Italiano Navale, para. 134.

[141] On which, MANKOWSKI P., *Art. 67 Brüssel Ia-VO*, cit., p. 1215; ID, *Article 67*, cit., p. 1020.

[142] Cf Judgment of the Court of 16 June 1998, A. Racke GmbH & Co. v Hauptzollamt Mainz, Case C-162/96.

wanted to promote a direct coordination between these two, a change in the wording of art. 67 of the regulation would not suffice. The legal basis for EU judicial cooperation, so the provisions in the Treaties of the European Union, is limited to "civil and commercial matters". The direct coordination of the regulation with the law of State immunity, so the duty for domestic courts to declare their lack of jurisdiction in application of EU law, would make the instrument applicable to sovereign acts, thus beyond the competence of the Union as *acta iure imperii* are intrinsically not "civil and commercial matters". In other words, to render art. 67 Brussels I bis applicable to immunity and oblige Member States to directly declare lack of jurisdiction (rather than just declare the inapplicability of the instrument), the Union would have to develop a competence over immunity itself. Which is currently not the case, and ontologically "non-civil and non-commercial". It is, therefore, unlikely that in the future there will be an expansion of competence of the Union in such a way.

2.3. When should "international treaties" fall within the scope of application of the provision?

Art. 67 Brussels I bis Regulation refers to "*provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union*". The rationale of the provision is that such instruments are to be considered as *lex specialis* in respect of the Brussels I bis Regulation[143]. As a re-

[143] CARBONE S.M., TUO C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale – Il regolamento UE n. 1215/2012*, cit., p. 19; Judgment of the Court (Fourth Chamber) of 5 June 2014, Coty Germany GmbH v First Note Perfumes NV, Case C-360/12, para. 26-27 ("*... it should be noted that, notwithstanding the principle that Regulation No 44/2001 applies to court proceedings relating to a Community trade mark, the application of certain provisions of that regulation to proceedings in respect of the actions and claims referred to in Article 92 of Regulation No 40/94 is precluded under Article 90(2) of that regulation. In the light of that exclusion, the jurisdiction of the Community trade mark courts provided for in Article 91(1) of Regulation No 40/94 to decide actions and claims referred to in Article 92 of that regulation results from rules directly provided for by that regulation, which, as was stated by the Advocate General in point 36 of his Opinion, have the character of lex specialis in relation to the rules provided for by Regulation No 44/2001*"). This approach has been confirmed in more recent decisions such as Judgment of the Court (Second Chamber) of 13 July 2017, Bayerische Motoren Werke AG v Acacia Srl, Case C-433/16; Judgment of the

sult, in order to verify when art. 67 should apply to international treaties, which include provisions governing jurisdiction and the recognition and enforcement of judgements, it should be ascertained whether: a) such international treaties refer to a specific matter; and b) they can be considered has having the same legal position as an instrument of the Union.

As concerns the first issue, there is little doubt that a specialised convention in the field of international transport by way of a specific mean of transportation (by air, by sea, etc.) is a "*special matter*" in respect of the Brussels I bis Regulation[144]. In respect of the second issue, the key distinction which should be made concerns whether or not an international treaty can be considered to have been stipulated by the Union in the exercise of its external competence, since in the former case the long standing position of the Court of Justice of the European Union is that such international agreement must be considered as an act which is an integral part of the Union law[145]. This position has been confirmed in several decisions of the Court of Justice in respect of specialised international conventions in the field of transportation, where it has been stressed that when the relevant international treaty has been signed by the Union pursuant a decision of the Council, it becomes an integral part of the European Union legal order, and therefore can be interpreted and applied by the Court as a part of Union law[146]. As a result, it is arguable that, when the European Union is

Court (Second Chamber) of 18 May 2017, Hummel Holding A/S v Nike Inc. and Nike Retail B.V., Case C-617/15. In doctrine, see also MANKOWSKI P., *Article 67*, cit., p. 1020, and BORRÁS A., DE MAESTRI M.E., *Articolo 67*, cit., p. 928.

[144] See by analogy Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08; Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12, where a specialised convention on road carriage has been considered as concerning a "particular matter" to the purposes of art. 71 of the Regulation 44/2001/EC.

[145] Judgment of the Court of 30 April 1974, R. & V. Haegeman v Belgian State, case 181/73.

[146] Judgment of the Court (Grand Chamber) of 10 January 2006, The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, Case C-344/04; see also Judgment of the Court (Fourth Chamber) of 9 July 2020, SL v Vueling Airlines SA, Case C-86/19; Judgment of the Court (Fourth Chamber) of 19 December 2019, GN v ZU, Case C-532/18; Judgment of the Court (Third Chamber) of 12 April 2018, Finnair Oyj v Keskinäinen Vakuutusyhtiö Fennia, Case C-258/16; Judgment of the Court (Third Chamber) of 6 May 2010, Axel Walz v Clickair SA,

a signing party of an international treaty pursuant the exercise of its external competence, such international agreement should be considered as having the same status as an "*instrument of the Union*" to the purposes of the application of art. 67 of the Brussels I bis Regulation[147], i.e. having the same character of *lex specialis* in respect of the latter which has been recognised to other instruments of European legislation[148]. In fact, applying art. 67 to such international treaties ratified by the Union would be basically a confirmation of the primacy that they have over secondary Union legislation[149].

It is therefore somewhat surprising that, so far, the Court of Justice of the European Union, when given the opportunity, has not clearly expressed such an approach yet. In fact in a recent case[150] the Court, requested to decide which jurisdiction rules would apply to actions which, according to the claimant, would fall in part within the scope of application of the Montreal Convention[151] and in part within the

Case C-63/09; Judgment of the Court (Fourth Chamber) of 10 July 2008, Emirates Airlines - Direktion für Deutschland v Diether Schenke, Case C-173/07. In doctrine see TUO C.E., CARPANETO L., *Connections and Disconnections*, cit., p. 141 and in general LEGROS C., *L'intégration des conventions internationales dans le droit dérivé de l'Union européenne : l'exemple du droit des transports*, in DAURIAC I., FOYER J., JAULT-SESEKE F., MEUNIER J. (eds), *Le droit entre tradition et modernité. Mélanges à la mémoire de Patrick Courbe*, Paris, 2012, p. 367.

[147] Opinion of Advocate General Szpunar delivered on 20 May 2015 in Case C‑240/14, Eleonore Prüller-Frey v Norbert Brodnig, Axa Versicherung AG.

[148] Cf Judgment of the Court (Fourth Chamber) of 5 June 2014, Coty Germany GmbH v First Note Perfumes NV, Case C-360/12; Judgment of the Court (Second Chamber) of 13 July 2017, Bayerische Motoren Werke AG v Acacia Srl, Case C-433/16, and Judgment of the Court (Second Chamber) of 18 May 2017, Hummel Holding A/S v Nike Inc. and Nike Retail B.V., Case C-617/15.

[149] Judgment of the Court (Fourth Chamber) of 10 July 2008, Emirates Airlines - Direktion für Deutschland v Diether Schenkel, Case C-173/07; Judgment of the Court (Fourth Chamber) of 22 December 2008, Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA, Case C-549/07.

[150] Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18.

[151] Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal on 28 May 1999 and approved on behalf of the European Community by Council Decision 2001/539/EC of 5 April 2001, in OJ 2001 L 194, p. 38. In general, SOLETI P.F., *Brussels Ia and International Air Transport*, cit., p. 181.

scope of application of Regulation (EC) No 261/2004[152], has stated that "*Article 67 and Article 71(1) of Regulation 1215/2012 allow the application of rules of jurisdiction relating to specific matters which are contained respectively in Union acts or in conventions to which the Member States are parties. Since air transport is such a specific matter, the rules of jurisdiction provided for by the Montreal Convention must be applicable within the regulatory framework laid down by it*"[153]. Despite the ambiguous wording adopted in the decision, it seems clear that art. 71 of the Brussels I bis Regulation does not apply to specialised conventions to which the Union is party[154], but only to specialised conventions to which only the Member States are party[155], so that despite the lack of an express acknowledgement, it seems inevitable that only art. 67 of the Brussels I bis Regulation applies. However, as already mentioned, such application is a sectorial projection of the general principle concerning the binding effect that such specialised conventions to which the Union is party have on the Union itself, and the resulting primacy of them on the secondary legislation of the Union.

As a result, it must be pointed out that, in respect of such specialised conventions, the proper application of the art. 67 rule, i.e. that the Brussels I bis Regulation "*shall not prejudice*" the application of them, must be construed taking into consideration the specific character of such conventions.

First of all, it should be carefully ascertained the extent to which the Union has bound itself to the application of the specialised convention in respect of the jurisdiction rules contained in the same, in the context of the accession process. In fact, the binding effect of the specialised convention and the resulting primacy of its jurisdiction rules within the Union legal order depend upon the extent to which the

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[152] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, in OJ 2004 L 46, p. 1.

[153] Case C-213/18, para. 36.

[154] See also in the domestic case law, LG Bremen, 05.06.2015 - 3 S 315/14, cit.

[155] TUO C.E., *Brussels Ia and International Transports*, cit., p. 33; TUO C.E., CARPANETO L., *Connections and Disconnections*, cit., p. 141; MANKOWSKI P., *Article 71*, cit, p. 1044.

Union has bound itself to them. Council Decision 2012/23/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards artt. 10 and 11 thereof, is a clear illustration of the issue. Art. 10 of the Protocol of 2002 replaces art. 17 of the Athens Convention on the jurisdiction criteria adopted for actions arising from art. 3 and 4 of the Athens Convention[156], whilst art. 11 adds to the Athens Convention art. 17 bis on the recognition and enforcement of judgements[157]. Council Decision 2012/23/EU, clearly explains that, whilst the rules on jurisdiction set out in art. 10 thereof should take precedence over the relevant Union rules, i.e the jurisdiction criteria set out in the Brussels I bis Regulation, the rules on recognition and enforcement of judgments laid down in art. 11 of the Athens Protocol should not take precedence either over the relevant rules of the Union, as extended to Denmark[158], or

[156] "*Article 17 - 1 An action arising under Articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums: (a) the court of the State of permanent residence or principal place of business of the defendant, or (b) the court of the State of departure or that of the destination according to the contract of carriage, or (c) the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or (d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State. 2 Actions under Article 4bis of this Convention shall, at the option of the claimant, be brought before one of the courts where action could be brought against the carrier or performing carrier according to paragraph 1. 3 After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration*".

[157] "*Art. 17 bis - 1 Any judgment given by a court with jurisdiction in accordance with Article 17 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present the case. 2 A judgment recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened. 3 A State Party to this Protocol may apply other rules for the recognition and enforcement of judgments, provided that their effect is to ensure that judgments are recognised and enforced at least to the same extent as under paragraphs 1 and 2*".

[158] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 299, 16.11.2005, p. 62.

over the rules of the Lugano Conventions[159] - the rationale for such choice being that in the relationships among the European Union Member States the Brussels I bis Regulation already ensures that judgments are recognised and enforced at least to the same extent as under the rules of the Athens Protocol. Therefore, as a result of the reservation expressly made by the Union upon accession[160], the decisions issued by a court of a Member State, being competent on the basis of the jurisdiction criteria set out in art. 17 of the Athens Convention, as amended, concerning actions based on art. 3 and 4 of the same Convention, are to be recognised and enforced pursuant to the rules of the Brussels I bis Regulation, and not pursuant art. 18, as amended, of the Athens Convention. As a result, in light of its art. 67, the Brussels I bis Regulation must not be applied "in prejudice of" provisions governing jurisdiction and recognition and enforcement of judgments in specific matters contained in a specialised convention, but in order to ascertain if there is in fact any "prejudice" in applying the Brussels I bis Regulation it is necessary as a first step to verify the extent to which the provisions of the specialised convention are in fact applicable to the Union on the basis of the accession instrument and, therefore, have become part of the Union legal order.

The disconnection issue also seems to be addressed in the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999[161]. According to its art. 2, "*without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual*

[159] Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of September 1988, in OJ L 319, 25.11.1988, p. 9; Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, in OJ L 339, 21.12.2007, p. 3.

[160] Council Decision 2012/23/EU, art. 2.3; see GAHLEN S., *Jurisdiction, Recognition and Enforcement of Judgments under the 1974 PAL for Passengers Claims, the 2002 Protocol and the EU Regulation 329/2009*, in *European Transport Law*, 2014, p. 13.

[161] OJ L 51, 23.2.2013, p. 8.

relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned". On the other hand, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations[162] does not incorporate the jurisdiction provisions of the Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV). As a result, due to art. 2 of the agreement, the application of the jurisdiction provisions under the Brussels I bis Regulation seems to be possible only when a mutual relationship between two Member States is involved, whilst in the other cases the jurisdiction rules of CIV shall apply. Also, the recognition and enforcement of judgement issued by a court in a Member State in a matter relating to the CIV shall fall within the scope of application of the Brussels I bis Regulation.

It is also possible for a specialised convention to be ratified by Member States only, but with the authorisation and on behalf of the Union. Also, in such cases the specialised convention becomes binding on the Union and the relationship with the Brussels I bis Regulation is governed by similar rules[163]. For example, Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention[164]) expressly states that, since artt. 38, 39 and 40 of the convention affect the secondary legislation on jurisdiction and the recognition and enforcement of judgments of the Union, Members States are required, upon accession, to declare that judgments on matters covered by the Convention shall, when given by a court of the other Member States, be recognised and enforced in the Member States making the declaration according to the relevant Union second-

[162] OJ L 315, 3.12.2007, p. 14.

[163] CARBONE S.M., TUO C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale – Il regolamento UE n. 1215/2012*, cit., p. 18.

[164] OJ L 337, 13.12.2002, p. 55.

ary legislation (art. 2). As a result, despite the Union being not formally party to the HNS Convention, the jurisdiction rules of the latter would apply pursuant art. 67, whilst recognition and enforcement of judgement would be directly governed by the Brussels I bis Regulation, whenever applicable.

If the disconnection issue is not addressed at accession level, art. 67 comes fully into play and, in such a case, the exact scope of application of the jurisdiction provisions in the specialised convention must be ascertained, in order to properly define the extent to which art. 67 requires that the Brussels I bis Regulation should not prejudice such rules of the convention.

This is clearly illustrated in the case of the 1999 Montreal Convention[165]: in the Council Decision 2001/539/EC concerning the Union accession to it there is no specific reservation, so that art. 33 of the convention[166] has become fully part of the Union legal order. In order to properly ascertain if the jurisdiction provisions of the 1999 Montreal Convention are applicable, it should be verified whether the action brought before the court falls within the scope of application of the specialised convention on the basis of its criteria. This operation may involve an assessment of the connecting criteria adopted by the convention, to be interpreted in good faith in accordance with the ordinary

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[165] See Convention for the Unification of Certain Rules for International Carriage by Air, cit.

[166] "*Art. 33 - 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the states Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. For the purposes of paragraph 2, (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard. 4. Questions of procedure shall be governed by the law of the court seized of the case*".

meaning to be given to its terms in their context and in the light of its object and purpose, in keeping with general international law, which is binding on the European Union, as codified under art. 31 of the 1969 Vienna Convention on the Law of Treaties[167]. A clear illustration of this operation is a case decided by the Court, in which the applicability of the 1999 Montreal Convention was excluded because the defendant did not fall within the definition of "*air carrier*" and therefore to decide whether the action brought by the Plaintiff would be subject to art. 33 of the same[168] became irrelevant. In this respect, the Court of Justice of the European Union has also clearly stated that rights based on the provisions set out under Regulation No 261/2004 on compensation and assistance to air passengers[169] fall within a distinct regulatory framework in respect of the one set out by the 1999 Montreal Convention, so the rules on international jurisdiction provided for in the Montreal Convention do not apply to applications made on the basis of Regulation No 261/2004 alone, which must therefore be examined in the light of the Brussels I bis Regulation and its predecessors[170].

A significant application of this approach is the already discussed Adriano Guaitoli Case C-213/18[171], where the plaintiffs had brought an action for indemnity and damages resulting from a delay during air transport, based on both the 1999 Montreal Convention and the Regulation No 261/2004. The Court considered that, despite the factual ba-

[167] Cf Judgment of the Court (Grand Chamber) of 10 January 2006, The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, Case C-344/04; see also Judgment of the Court (Fourth Chamber) of 9 July 2020, SL v Vueling Airlines SA, Case C-86/19; Judgment of the Court (Fourth Chamber) of 19 December 2019, GN v ZU, Case C-532/18; Judgment of the Court (Third Chamber) of 12 April 2018, Finnair Oyj v Keskinäinen Vakuutusyhtiö Fennia, Case C-258/16; Judgment of the Court (Third Chamber) of 6 May 2010, Axel Walz v Clickair SA, Case C-63/09; Judgment of the Court (Fourth Chamber) of 10 July 2008, Emirates Airlines - Direktion für Deutschland v Diether Schenke, Case C-173/07.

[168] Case C-240/14, para. 35-36.

[169] Regulation (EC) No 261/2004, cit.

[170] See cases C‑94/14, C-204/08, C-344/04; see ADOBATI E., *I passeggeri di un volo intracomunitario possono richiedere l'indennizzo forfetario tanto al giudice del luogo di partenza quanto a quello di arrivo dell'aereo in caso di annullamento del volo*, in *Diritto comunitario e degli scambi internazionali*, 2009, p. 545.

[171] See Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18.

sis on the claim was the same, the jurisdiction criteria applicable for the action for damages caused by delay pursuant to art. 19 of the 1999 Montreal where to be found only in art. 33 of the Convention, whilst the jurisdiction criteria applicable for the action for indemnity pursuant to Regulation No 261/2004 where to be found in the Brussels I bis Regulation.

As a result, when applying art. 67, proper consideration must be given to the actual extent of the scope of application of the specialised convention, since the need to not prejudice its provisions on jurisdiction is restricted to the cases which are wholly and solely within its legal framework.

In this respect, a comparison can be made on the different result of the disconnection resulting from art. 67 of the Brussels I bis Regulation in consideration of the different scope of application of the 1999 Montreal Convention and of the Athens Convention, as amended by the Protocol of 2002 in respect of the direct action against the compulsory liability insurer. Art. 50 of the 1999 Montreal Convention requires parties to ensure that air carriers are adequately insured to cover liability under that convention and the Union has implemented such requirement by way of Regulation EC/785/2004[172]; however, neither the 1999 Montreal Convention, nor the Regulation address the issue of the possibility of a direct action of the victim against such a compulsory liability insurer. On the contrary, the Athens Convention, as amended by the Protocol of 2002, not only provides for a compulsory insurance to cover the liability under such convention, but also expressly gives the victim the right to bring direct action against such compulsory liability insurer (art. 4 bis) and provides for the jurisdiction criterion applicable to such an action (art. 17.2). Given the different material content of the two specialised conventions, it seems that, in respect of the 1999 Montreal Convention, a direct action against the liability insurer of the air carrier would not fall within the legal framework of the convention and, therefore, art. 67 would not require the application of art. 33 of the convention, so that the Brussels I bis

[172] Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, in OJ L 138, 30.4.2004, p. 1.

Regulation should apply. On the contrary, in respect of the Athens Convention, as amended by the Protocol of 2002, such an action would fall within the scope of application of the convention, and therefore art. 67 would require the application of y its art. 17 instead of the Brussels I bis Regulation.

The final step to be taken in examining the disconnection issue in respect of specialised conventions in the transport sector is that, just like any provision of the convention, jurisdiction provisions adopted in such instruments must be construed by taking good faith in consideration and in accordance with the ordinary meaning to be given to their terms, in their context, and in the light of their object and purpose, in keeping with general international law on the interpretation of treaties[173].

However, such provisions are not a complete and autonomous system, and should be incorporated in the general framework of the EU legal order, since in some cases – just like the provisions on jurisdiction adopted by Union secondary legislation in special matters – they will need to be integrated by and coordinated with the general principles of the Brussels I bis Regulation. In this respect, to the extent to which the specialised convention provisions do not specifically address an issue, it is wholly advisable to make use of the general rules of the Brussels I bis Regulation to give an interpretation which is not only permitted by the wording of the provision, but which is also coherent with the general principles of the Union legal framework.

In some circumstances, the application of art. 67 to specialised conventions which are binding upon the Union might lead to results resembling the application of art. 71 to specialised conventions which are not binding upon the Union. For example, the Union is not party, either directly or via the accession of Member States on its behalf, to

[173] Cf Judgment of the Court (Grand Chamber) of 10 January 2006, The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, Case C-344/04; see also Judgment of the Court (Fourth Chamber) of 9 July 2020, SL v Vueling Airlines SA, Case C-86/19; Judgment of the Court (Fourth Chamber) of 19 December 2019, GN v ZU, Case C-532/18; Judgment of the Court (Third Chamber) of 12 April 2018, Finnair Oyj v Keskinäinen Vakuutusyhtiö Fennia, Case C-258/16; Judgment of the Court (Third Chamber) of 6 May 2010, Axel Walz v Clickair SA, Case C-63/09; Judgment of the Court (Fourth Chamber) of 10 July 2008, Emirates Airlines - Direktion für Deutschland v Diether Schenke, Case C-173/07.

the Convention on the Contract for the International Carriage of Goods by Road ('CMR'), signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978 ('the CMR'), so the Court of Justice has clearly stated that the relationship between such specialised convention and the Brussels I bis Regulation is governed by art. 71 of the latter[174]. In this context, it is well known the Court of Justice of the European Union has established that, pursuant to art. 71, the jurisdiction provisions of the CMR must be given the effect that an action for a negative declaration or a negative declaratory judgment in a Member State does have the same cause of action as an action for indemnity brought in respect of the same damage and against the same parties or the successors to their rights in another Member State. The Court of Justice of the European Union based such decision on the need to minimise the risk of concurrent proceedings, which is one of the objectives and principles which underlie judicial cooperation in civil and commercial matters in the Union[175]. In the absence of any specific indication to the contrary, it is arguable that a similar conclusion may be reached even pursuant to art. 67 for specialised conventions which are binding on the Union, because also such conventions should properly be integrated and coordinated, whenever possible, within the Union legal framework.

In any case, there is a significant difference between the operation of art. 67 and the operation of art. 71. In fact, since the specialised conventions to which art. 71 applies are not directly binding on the Union, the Court of Justice has clearly stated that the application of such conventions cannot compromise the principles which underlie judicial cooperation within the Union, such as the principle of free movement of judgments, of predictability as to the courts having jurisdiction and, therefore, legal certainty for litigants, the sound administration of justice, the minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European

[174] See Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, and Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12.

[175] Case C-452/12, para. 44.

Union[176]. A specialised convention cannot lead to results which are less favourable to the achievement of such aims compared to those resulting from the provisions of the Brussels I bis Regulation. As a result, when applying art. 71, the court is usually required to positively ascertain the absence of conflict between the specialised convention and the Union legal framework, as expressed in the principles underlying the Brussels I bis Regulation. On the contrary, since art. 67 applies to specialised conventions which are directly binding upon the Union, in case of conflict between a provision in the specialised convention and a provision of the Brussels I bis Regulation, which cannot be solved by way of applicable criteria for interpretation of an international treaty, the provision in the specialised convention should prevail.

3. … or "national legislation harmonised pursuant to such instruments" …

3.1. Rationale, interpretation and application of the lex specialis principle under art. 67 Brussels I bis Regulation

The EU enjoys an express and potentially "systematic" competence in the field of private international law (*rectius* judicial cooperation in civil matters). This is not the case in matters which traditionally the civil law countries define as matters of private law. Indeed, the EU doesn't have an express competence on property, contracts, tort, company or commercial law, but has competences in specific fields, where

[176] See Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, and Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12. In doctrine see ESPINOSA CALABUIG R., *Brussels Ia Regulation and Maritime Transport*, cit., p. 107; PUETZ A., *Brussels Ia and International Conventions*, cit., p. 141; TUO C.E., *Regolamento Bruxelles I e Convenzioni su materie particolari: tra obblighi internazionali e Primauté del diritto dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 377; KUIJPER P.J., *The changing Status of Private International Law*, cit., p. 89; CREMONA M., *The Internal Market and Private International Law Regimes: a comment on Case C-533/08 TNT Express Nederland BV* c. *AXA Versicherung AG, judgment of the Court (Grand Chamber) of 4 May 2010*, in *EUI Working Paper*, 8, 2014.

the relevant rules of the TFEU point out to the legislative procedure to be followed and the kind of measure that may be adopted, irrespective of their private or public law nature. As a consequence, the intervention in the field of private law follows a piecemeal approach. When measures of a substantive private law nature are adopted as EU law, they are likely to interfere with the functioning of the measures of private international law and the need to coordinate the different sources clearly arises[177]. In some cases, substantive private law rules and private international law rules may live together and complement each other. However, when a friction between the two arises, EU private international law instruments tend to apply the *lex specialis* principle and, as a consequence, grant priority to those EU instruments holding a special character.

Other than the Rome I and Rome II Regulations, the *lex specialis* principle is expressly envisaged under art. 67 of the Brussels I bis Regulation, which grants priority to provisions on procedural aspects (such as jurisdiction or recognition and enforcement of judgments) contained in EU instruments as well as in national legislation harmonised pursuant to such instruments. More precisely, whilst the Brussels I system (i.e. the rules, which starting from the 1968 Brussels Convention passing to the Brussels I Regulation, are now provided for by the Brussels I bis Regulation) provides rules on jurisdiction and recognition of decisions in (all) civil and commercial matters, art. 67 makes reference to "*provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*". It is not clear which specific "instruments of the Union" art. 67 refers to. No doubt the above notion is meant to encompass all possible instruments of secondary legislation, from regulations (also in private international law matters) to decisions and directives and national legislation, deriving from the transposition of EU directives into national legislation.

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[177] See BASEDOW J., *Conflict of Laws and the Harmonization of Substantive Private Law in the European Union*, in ANDENAS M., DIAZ ALBART S., MARKESINIS B., MICKLITZ H., PASQUINI N. (eds), *Liber Amicorum Guido Alpa*, London, 2007, p. 168 ff.

In this perspective, it shall be considered that EU generally makes use of "decisions" when adopting and implementing international conventions in the EU legal order. When such conventions include rules on jurisdiction or recognition and enforcement, clearly interfere with the functioning of the Brussels I bis Regulation. Such a situation seems to fall within the scope of application of art. 67 and, therefore, priority should be granted to the decision implementing the convention by virtue of the *lex specialis* principle. However, even if the trend is to grant priority to the procedural rules of the international convention at stake, national case-law does not expressly solve the issue of whether such a priority is granted on the basis of the *lex specialis* principle *ex* art. 67 or on the basis of the "non affect clause" of art. 71 of the Brussels I bis Regulation[178]. Such ambiguity mainly regards the case-law concerning the COTIF system, due to the instruments by virtue of which the EU ratified the convention (and its annexes) and introduced it within the EU legal order[179]. Besides decisions, however, it is mainly by virtue of directives and regulations that the EU exercise its sectorial competences in the field of "private law" as well as "private international law".

When directives are at stake, priority is granted not only to the instrument itself, but also to national legislation adopted by each Member State in its implementation. As a consequence, art. 67 grants priority to a non-uniform set of rules deriving from the implementation of the directive system[180]over a uniform set of rules provided by the Brussels I bis Regulation, under the assumption that the latter set of rules is more focused, more specialized and, consequently, better suited to being applied.

Besides decisions and directives, art. 67 of the Brussels I bis Regulation also applies *vis-à-vis* regulations, which, however, may vary significantly. More precisely, regulations generally introduce a uni-

[178] Reference is made to the decisions rendered by Tribunal of Torino, 27 March 2007, Tribunal of Genova, 18 June 2016, Tribunal of Bolzano, 4 March 2008, in *En2Bria database*.

[179] The issue has been analyzed within the project Brussels Ia and Transport; See PUEZ A., *Brussels Ia and International Conventions on Land Transport*, cit., p. 160-171.

[180] A good example of a mandatory regulation is the one concerning the rights of air passengers. See BASEDOW J., *The Gradual Emergence of European Private Law*, in *Ankara Law Review*, 2004, pp. 1-18.

form regime, which may have a mandatory nature and, therefore, apply to all that fall within their scope of application, creating rights and duties between private individuals[181]. In some cases, regulations are characterized by an optional nature and, as a consequence, give actors to whom they are directed the right to opt for, or out of, the provided regime. Optional regulations have already been adopted in the field of intellectual property and company law. The optional character depends not only on the fact that it is up to the parties to choose to apply such a model of law, which otherwise is not mandatory and therefore shall not be applied, but also on the fact that it does not replace the corresponding rules of national law, which, therefore, still apply. As highlighted by authoritative scholars, it is likely that the latter instruments will also be applied to matters of private law, where they shall provide a "model law" of sorts, which may be construed as an alternative to the different domestic law solutions adopted in the Member States. Such instruments have potentially relevant advantages: a model law is better than the different national laws of the Member States, as it may become a source of inspiration for national legislation and might even be extended to purely internal situations. Even if the opportunity to adopt such instruments is still being debated, due attention should be paid to the possibility for them to become future instruments of private ordering of cross-border legal relations[182], particularly with regard to (private law of) contracts[183], and, therefore, fall within the scope of application of art. 67.

A further issue that should be considered is whether the list of instruments considered under art. 67 may extend to not binding instruments, such as recommendations. If one follows a literal interpretation

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[181] See BASEDOW J., *Conflict of Laws and the Harmonization of Substantive Private Law in the European Union*, cit., p. 170.

[182] See MONTI M., *A New Strategy for the Single Market – At the Service of Europe's Economy and Society*. Report to the President of the European Commission, Barroso, 9 May 2010, p. 93 where he makes reference to the possibility to explore the idea of a 28th regime, which is an EU framework alternative to, but not replacing national rules and which may expand the options available to business and citizens in the single market. See also TERRYN E., *The Common Frame of Reference: an optional instrument?*, PE 425-611, Brussels, 2010, available online.

[183] See TERRYN E., *The Common Frame of Reference: An Optional Instrument?*, cit., p. 14.

of art. 67 and, therefore, takes into consideration the wording of art. 67 and, in particular, the use of the term "provision", it seems reasonable to include within the scope of application of the rule just the binding acts of secondary legislation mentioned under art. 288 TFEU. However, in recent times, the Commission has also adopted recommendations, aimed at providing guiding principles in the application of other EU instruments, dealing with relevant procedural aspects which interfere with the application of the Brussels I bis Regulation. Reference is made, in particular, to the 2013 recommendation adopted with regard to the consumer collective redress Directive (on which see *amplius*, *infra*). While art. 67 clearly grants priority to the Directive on consumer collective redress, more ambiguous is the relationship between art. 67 and the recommendation which offers important guidelines for the application of the directive itself. The issue deserves some attention, especially if such a peculiar use of the instrument of the recommendation by the Commission becomes frequent in practice.

Having examined the scope of art. 67 and, more precisely, the possible acts to which the *lex specialis* principle shall apply, specific attention shall be paid to the problems encountered in its concrete application. In this regard, the focus of the following paragraphs is on the "directive systems" dealing with specific topics which might fall within the category of civil and commercial matters and providing rules with a procedural nature or dealing with procedural matters and their implementation in national legal orders. With regard to the abovementioned directives, once ascertained that they fall within the scope of application of the Brussels I bis Regulation, one should first check whether they provide rules of a procedural nature (i.e., on jurisdiction or recognition and enforcement). In some cases, the directives contain provisions dealing with procedural matters, which cannot be qualified as procedural and, that therefore, interfere with the application of the Brussels I bis Regulation. This is, for example, the case of the Directive 2000/31 on information society services[184]: art. 14(3) of the Directive provides that "*This article shall not affect the possibility for*

[184] 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'), in OJ L 178, 17.7.2000, p. 1.

a court or an administrative authority ... of requiring the service provider to terminate or prevent an infringement". Such a rule clearly does not contain a direct or indirect head of jurisdiction in a special matter to which, by virtue of art. 67, shall be granted priority over the Brussels I bis Regulation.

Other directives clearly introduce procedural rules which directly impact on the functioning of the Brussels I bis Regulation so that art. 67 comes into play. More precisely, reference is made to those directives which have been adopted when exercising competence in the field of labour and social law, for the protection of weaker parties such as employees and consumers.

3.2. The posting of workers Directive and its "interference" with Rome I and Brussels I bis Regulations: the search for "the best of two worlds"

Within the European Union, the posting of workers is an increasing practice, as it is an inherent element of the freedom to provide services. It also constitutes a very delicate topic, which is paradigmatic of the tension between market and social needs within the EU[185]. "Posted workers" are workers who, for a limited period of time, perform their work in the territory of a Member State other than the one where they normally work. The typical scenario is one where an employer sends a worker to carry out services to a service recipient abroad. It is, therefore, a situation with a cross-border and temporary nature. More complicated scenarios may arise, as there may be cases of multiple postings to multiple countries. The Court of Justice has frequently been asked to find a balance between the need to enhance the fundamental freedom to provide services and the need to grant protection to posted workers from the risk of earning less than local workers and from a condition of vulnerability, which could expose them to fraudulent activities, such as undeclared work practices[186].

[185] See RASNACA Z., BERNACIAK M., *Posting of Workers before National Courts*, Brussels, 2020; BASEDOW J., *The Law of Open Society. Private Ordering and Public Regulation in the Conflict of Laws*, The Hague, 2015, p. 382.

[186] See GIESEN R., *Posting: Social Protection of Workers vs. Fundamental Freedoms?*, in *Common Market Law Review*, 2003, pp. 143-158.

The legal framework of reference at the EU level is composed by (i) the posting of workers Directive 96/71[187], amended in 2018, aimed at balancing the promotion of the free movement of services in a climate of fair competition and the protection of the posted workers, (ii) the enforcement Directive, attempting to ease the work of national judicial authorities[188] and (iii) the social security Regulation[189]. More precisely, the posting of workers Directive establishes a set of minimum terms of employment and standard conditions that the host State undertakes to respect, leaving it up to the law of the sending State (home State) to regulate such aspects as employment contracts and social security. The application of this Directive has not been simple and the decision rendered in the *Laval* case is a good example of this[190]. In the light of the shortcomings, and, taking into account the more proactive social attitude of the EU after the Lisbon Treaty, as well as the increasing number of posted workers (also due to the enlargement of the EU occurred from the entrance into force of the Directive in 1999), two initiatives have recently been adopted. Firstly, the so called enforcement Directive (i.e. Directive 2014/67) aimed at allowing a more uniform interpretation, application and enforcement of the common standards set up by the Posting of Workers Directive. Besides a clearer definition of the responsibilities of the Member States with regard to verifying compliance with the posting of workers Directive, the Enforcement Directive states that penalties and fines imposed on service providers by one Member States shall be enforced and recovered in the other Member States. Secondly, Directive 2018/957 has been

[187] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in OJ L 18, 21.1.1997, p. 1.

[188] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System, in OJ L 159, 28.5.2014, p. 11.

[189] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, in OJ L 166, 30.4.2004, p. 1.

[190] See GRUSIC U., *European Labour Market: Posted Workers Directive and the Social Implication of the Movement of Labour*, in MUIR WATT H., BIZIKVA L., BRANDAO DE OLIVIRA A., FERNANDEZ ARROYO D.P. (eds), *Global Private International Law: Adjudication withour Frontiers*, Cheltenham, 2019, p. 473 ff.

adopted with the purpose of recasting the posting of workers Directive and of tackling its major shortcomings concerning remuneration, working condition, and the situation of posted temporary agency workers. As far as remuneration is concerned, the amended version of the posting of workers Directive now follows the so-called principle "*equal pay for equal work*" more strictly.

The (previous and present version of the) directive clearly interferes with the functioning of EU private (and procedural) international law rules, given that the posting of workers is inherently a cross-border situation, which may give rise to issues of jurisdiction, applicable law and recognition of decisions. In establishing which aspects of the relationship between sending company and posted workers shall be regulated by the law of the sending State (home State) and which aspects shall be regulated by the law of the host State, the posting of workers Directive interferes with the conflict of law rules under the Rome I Regulation. More precisely, art. 3 of the posting of workers Directive establishes that "*irrespective of which law applies to the employment relationship*", specific aspects of the posted worker/posting undertaking relationship shall be regulated by the law of the State where the work is carried out. The host State provisions regulating the rights, terms and conditions envisaged by art. 3 are mandatory rules, blocking *ex ante* the functioning of the conflict of law rules provided for by the Rome I Regulation. As for the other aspects, the relationship between the posting of workers Directive and the Rome I Regulation is less clear[191]. The posting of workers Directive recalls the application of the law of the home State for all aspects – other than those considered by art. 3 – concerning employment contracts and social security. However, no mandatory character is attached to the above provision, which, also takes on the role of a conflict-of-laws rule. A competition may therefore arise with the conflict of laws rules established in the Rome I Regulation and, more precisely, with art. 8

[191] See VAN HOEK A.A.H., HOUWERZIJL M., *Complementary Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, November, 2011, p. 3 f, where the Authors recommend a clarification of the relationship between the Rome I Regulation and the posting of workers Directive and an interpretation of the concept of posting in the directive in the light of the Rome I Regulation, and also attention to the responsibility of the sending State in offering adequate protection to the posted workers.

on individual employment contracts. It appears that the *lex specialis* principle envisaged by art. 23 of the Rome I Regulation should grant priority to the rules contained in the posting of workers Directive. However, such an issue is more theoretical than practical, in so far as it appears that the elements of connections privileged by art. 8[192] should, in the majority of the cases, grant the application of the law of the home State.

On the other hand, in case of posting, the home State legislation apply to social service issues, provided that the duration of such work does not exceed twenty-four months and that the worker is not sent there to replace another person. With the purpose of granting "the best of both worlds", the posting of workers Directive (complemented by the social security Regulation) establishes a complex "cohabitation" of the law of the home State and the law of the host State, whereby the host State law applies to all art. 3 aspects with regards to posting, while other aspects of the employment contract. However, should the posting last longer than 18 months, than all aspects of the contract shall follow the law of the host State. Similarly, social security matters shall be regulated, for 24 months, by the home State, and thereafter by the host State.

With reference to the special regime introduced by the posting of workers Directive, the Rome I Regulation shall play the residual role of identifying the applicable law to any aspects of the posted worker/posting company not expressly regulated by the former.

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[192] Art. 8 of the Rome I Regulation (Individual employment contracts) states as follows: "*1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article. 2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country. 3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. 4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply*".

The relationship between the posting of workers Directive and the Brussels I bis Regulation is apparently less complicated. The posting of workers Directive has, in fact, introduced a clear rule on international jurisdiction, in order to grant posted workers the possibility to start a proceeding before the authorities of the Member State where they are or were posted. Under art. 6 of the directive, "*In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*". For posted workers to be able to rely on the forum envisaged by art. 6, two conditions must be fulfilled. First of all, the forum under art. 6 has a *ratione materiae* "limited" jurisdiction to proceedings concerning the enforcement of the rights, terms and conditions of employment expressly enlisted by the directive itself. As mentioned, under art. 3 of the posting of workers Directive, Member States are bound to ensure that undertakings for posting workers (in compliance with the timing provided by the directive itself) guarantee the following terms and conditions: "*(a) maximum work periods and minimum rest periods, (b) minimum paid annual leave (c) remuneration, including overtime rates, this point does not apply to supplementary occupational retirement pension schemes, (d) the conditions of hiring-out workers, in particular the supply of workers by temporary employment undertakings, (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons*"[193]. All potential issues strictly concerning the posting of workers fall within the jurisdiction of the art. 6 *forum*, but, on the other hand, only those issues shall be

[193] See art. 3 of the Directive 96/71.

decided by that *forum*. Other issues concerning employment contracts (i.e. conclusion and termination) or the obligations of social protection do not fall within the jurisdiction of the host State under the terms of art. 6. This, however, does not exclude, the possibility of extending the host State jurisdiction in order to encompass them, by virtue of the rules of the Brussels I bis Regulation. The posting of workers Directive expressly excludes from its scope of application "*the merchant navy undertaking as regards seagoing personnel*" (art. 1(2)). This casts doubts as to the applicability thereof to transport workers at large[194].

For art. 6 to apply, it is also necessary that workers be posted in the territory of a Member State of the EU. In this light, the jurisdiction under art. 6 is (also) limited *ratione spatii*, meaning that the situation at stake clearly is cross-border in nature, but has to remain within the EU borders in order not to fall outside of the scope of application of the posting of workers Directive. The rationale behind the rule is clear, as it is meant to complement, at the level of jurisdiction, the protection granted to posted workers at a substantial level by art. 3. On the other hand, however, it is also meant to grant a smooth functioning of judicial proceedings involving posted workers. Art. 6 shall, in fact, grant coincidence between *jus* and *forum* and, therefore, prevents the court of the host Member State from (searching for and) applying foreign laws. Such a protection is clearly limited to the EU space, as it is by virtue of the posting of workers Directive that posted workers enjoy "*the best of the two systems*" (i.e. host and home Member State) and that any problems arising from a posting may be solved. However, as such a special protection is only granted within the EU space, the posting of (EU) workers outside the EU cannot rely on the jurisdictional clause under art. 6 of the Posting of Workers Directive, are however entitled to make use of the rules on jurisdiction under the Brussels I bis Regulation. In this regard, the Brussels I bis Regulation has significantly enhanced the protection granted to employees at a

[194] See VAN HOEK A.A.H., HOUWERZIJL M., *Complementary Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, cit., p. 7.

procedural level[195]. Whilst under Regulation No 44/2001 it was possible for the employee to start proceedings *vis-à-vis* the employer, provided that the latter was domiciled in the EU, under the Brussels I bis Regulation such a limit no longer applies and it is now possible for the employee to start an action against his/her employer even if the latter is not domiciled in the EU.

Before turning to general issues of coordination between the posting of workers Directive and the Brussels I regime, which allow to draw some general conclusions on the practical "usefulness" of the rule on jurisdiction enshrined in the Directive when compared with the instruments for the protection of the "weaker party" that have emerged, and are now crystallized in the Brussels I bis Regulation, case-law has dwelled on the temporal scope of application of the special head of jurisdiction. More precisely, in a case the worker was posted to Germany, while the employer was from a third State which became a Member State after the posting. According to the German court, the principle of specialty under Art. 67 Brussels I operates at the time in which jurisdiction must be assessed by the national court, i.e. when the action is brought before a court of law. In this sense, it does not bear relevance that the facts of the case took place in a Member State that, at the time of the events, was not a Member State, but it was such at the time the proceedings were commenced[196]. Similarly, courts have grounded their jurisdiction on art. 6 of the posting of workers Directive also in the case of a defendant who was domiciled in Norway, and the Lugano Convention was applicable, as Member State courts are called to give way to special acts over the convention, due to its Protocol No 3[197].

Additionally, the question that must be addressed with regard to the head of special jurisdiction contained in the posting of workers Directive concerns whether or not it is exclusive in nature, or rather concurring, in the sense that the relevant party has an obligation to start

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[195] CARBONE S.M., TUO. C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., pp. 175-177 and pp. 195-203; see also GRUSIC U, *Recognition and Enforcement of Judgments in Employment Matters in EU Private International Law*, in *Journal of Private International Law*, 2016, pp. 521-544.

[196] Bundesarbeitsgericht, 15 February 2012, 10 AZR 711/10, in *En2Bria database*.

[197] ArbG Wiesbaden, 15 April 1998, 3 Ca 1970/97, in *En2Bria database*.

proceedings that fall within its scope of application either before courts identified by the directive or the Brussels I bis Regulation, or only before the courts competent under art. 6 of the directive. As the wording of the latter provision instructs that "*judicial proceedings may be instituted*", rather than "*shall*", it seems consistent to argue that the head of jurisdiction concurs with those of the Brussels I bis Regulation, leaving choice of the instrument to the interested party.

Moreover, the rule on connected and related actions in the Brussels regime is also applicable. Indeed, under current rules, the employee has the chance to start a *case vis-à-vis* more than one employer before the domicile of only one of them[198]. Such a rule might be very useful where multiple postings of workers to multiple countries are involved.

Furthermore, in addition to the general *forum* of the domicile of the respondent-employer, the employee is allowed to start action before (i) the courts of the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so or (ii) for the case where the employee does not or did not habitually carry out his work in any one country, the courts for the place where business which engaged the employee is or was situated, even if the employer is not domiciled in the EU[199].

The employee may also agree with the employer on the competent court, provided that such agreement is concluded after the beginning of the proceeding and it makes it possible for the employee to choose among one or more courts, in addition to those envisaged under art. (23)2 Brussels I bis. On the other hand, it is generally not possible for the defendant-employee to tacitly accept the forum selected by the applicant-employer *per facta concludendia*: in order for a tacit acceptance of jurisdiction to be validly made by the employee, the court must ascertain whether or not the employee is informed[200].

[198] More precisely, the rule on connection and related actions under Regulation n. 44/2001 applied only to consumer and insurance contracts, not to employment ones. Such a lacuna has been pointed out by the Court of Justice in Judgment of the Court (First Chamber) of 22 May 2008. Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard, Case C-462/06, para. 18-34 and, as a consequence, art. 20 of Brussels I bis Regulation expressly states that the rule on connection under art. 8 applies to actions started by the employee against the different employers (see art. 20 of the Brussels I *bis* Regulation).

[199] See art. 21 Brussels I bis Regulation.

[200] See art. 26 Brussels I bis Regulation.

A further important instrument of protection of employees is the one introduced under art. 45 of the Brussels I bis Regulation: a decision concerning a contract of employment shall not be recognised and executed in another Member State, if it conflicts with the rules on jurisdiction envisaged for the employee in all cases where the employee is the defendant.

Given the above, the posted worker's right of access to justice seems to be granted adequate protection. Problems do not concern the legal framework of reference, but mainly the posted workers' knowledge of their rights as well as the suitable mechanism of enforcement within the Member States.

If one considers the relationship between the posting of workers Directive and the Brussels I bis Regulation, an open issue is whether, given the new legal framework provided for by the latter Regulation and its protective attitude *vis-à-vis* the employee, the *lex specialis* principle under art. 67 granting priority to the rules provided by the Directive, shall be "rigidly" applied. A comparison between the procedural rules provided for by the directive on one side, and the mechanism of protection envisaged by the regulation on the other, makes it clear that the latter grants a higher level system of protection for the employee. In this light, if the posted worker does not opt for art. 6 forum and prefers to start an action according to the Brussels I bis rules, it is likely that the jurisdiction will be of a court of the home State, as the latter is a State of the EU. In such a case, however, the substantial protection of the directive is safeguarded, as the court shall have to apply the law of the host State to all art. 3 directive issues.

When the most favourable regime on jurisdiction, the posted worker should also pay due attention to the implementation of art. 6 under the posting of workers Directive into the Member States' legal orders[201]. From the above, although the EU legal order is particularly sensitive to issues deriving from the posting of workers and access to justice is granted, the regime is extremely technical one and implies well informed choices. This runs counter to the real situation of posted

[201] For an analysis of the implementation of the Posting of workers Directive in the Italian legal order, see MANCINO R., *Distacco dei lavoratori nell'ambito di una prestazione transnazionale di servizi*, in *Nuove leggi civ. comm*, 2000, 5, p. 899.

workers, who frequently do not have any knowledge of their rights or of the way they may obtain protection.

3.3. Consumer collective redress: the interactions between the 2009/22 Directive and Brussels I bis Regulation

As opposed to what happens in the case of posted workers, who benefit from an articulated and tailored legal framework of reference which even gives rise to a sort of "competition" between the protection provided by the posting of workers Directive and the Brussels I bis Regulation, in the field of consumer protection and, more precisely, of collective redress, the legal framework for cross-border situations does not provide a specific and tailored solution and, as a consequence, does not grant adequate protection. As a matter of fact, EU law has traditionally been sensitive in the field of consumer protection and particular attention has been devoted to "collective redress", a term which refers to a variety of mechanisms for the resolution of mass disputes, where numerous claimants bring a single action or procedure. In this regard, two instruments are particularly relevant: (i) Directive 2009/22 on injunctions for the protection of consumers' interests and (ii) the Commission's Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights under Union law[202]. Both instruments address the harmonisation of national laws for the exercise of collective redress. More precisely, Directive 2009/22[203] is aimed at approximating national provisions on injunctions, in order to provide an effective remedy to infringements of the law which harm the collective interests of consumers.

The injunctions envisaged by the Directive shall result in (i) enjoining the cessation or prohibition of an infringement; (ii) eliminating the continuing effects of an infringement, by virtue of the publication of

[202] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, in OJ L 201, 26.7.2013, p. 60.

[203] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, in OJ L 110, 1.5.2009, p. 30.

the decision, (iii) sentencing defendants to comply with a decision, by envisaging the payment of a fine (art. 2).

Actions for an injunction may be initiated by qualified entities (i) constituted according to the law of a Member State, (ii) holding a legitimate interest in ensuring that the provisions referred to in art. 1, (iii) such as being public bodies and organizations "whose purpose [it] is to protect the interests" of consumers. Each Member State shall enlist the qualified entities and forward said list to the Commission.

Clearly, when cross-border injunctions are at stake, private international law issues arise. However, the Directive does not expressly tackle issues of jurisdiction, applicable law and recognition and execution of decisions. In this perspective, with reference to jurisdiction, the Directive clarifies that it applies "*without prejudice to the rules of private international law and the Conventions in force between Member States, while respecting the general obligations of the Member States deriving from the Treaty, in particular those related to the smooth functioning of the internal market*" (recital 7). Similarly, art. 2(2) states that no prejudice shall occur with regard to the rules of private international law with respect to applicable law, which shall be either the law of the Member State where the infringements originated or the law of the Member State where the infringement has its effects. In this respect, no specific interference with the Brussels I bis Regulation exists and, as a consequence, there is no need to apply the *lex specialis* principle[204].

Furthermore, practice shows that cross-border injunctions under the Directive are very rare, as cost risk is the major deterrent against the initiation of an action for injunction. Besides this, the EU regime on injunctions requires a high level of knowledge and skill. Where the latter does not exist, injunctions are not used[205].

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[204] See decision ex §139 German Code of civil procedure Hanseatische Oberlandesgericht Hamburg, 15 U 58/19 vom 15.11.2019, in in *En2Bria database*, stating that: "*Art. 2 Directive 2009/22/EC does not contain a rule on jurisdiction to be transposed into domestic law; hence, domestic provisions transposing the directive do not contain harmonized heads of jurisdiction for the purposes of art. 67 Brussels I bis Regulation*".

[205] See Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (former Directive 98/27/EC), available online, at pp. 9-12. A major shortcoming of the current directive lays on the fact that no solutions are provided for consumer law infringements committed by traders established abroad.

Directive 2009/22 has been repealed (with effect from 25 June 2003) by Directive 2020/1828[206] with the aim of strengthening procedural mechanisms for the protection of the collective interests of consumers, taking into consideration the new challenges deriving from the globalised and digitalised marketplace.

In this respect, the scope of application of the new Directive is wider, aimed at covering areas such as data protection, financial services, travel and tourism, energy, and telecommunications. Whilst the not affect clause with respect to private international law is confirmed, the new Directive clarifies when a representative action should be qualified as a domestic or as a cross-border and introduces a more detail regime on the representative actions, injunctive and redress actions.

Due attention shall now be paid to the Commission's Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights under Union law[207]. Quite unusually, the harmonisation of national legislation is here promoted by virtue of a recommendation (i.e. a non-binding instrument) enlisting key principles on collective redress. In so far as the cross-border dimension of the above mechanisms is at stake, the intention of the Commission is once again to rely on EU private international law rules with a view to preventing forum shopping and to ensuring coordination among national collective redress procedures. In this light, the mutual recognition of group of claimants and representative entities has been stressed (see Principle 17 of the Commission's Recommendation). Even if no direct interference exists between the directive and the Brussels I bis Regulation, consumer collective redress is a procedural instrument, and in so far as it reaches a cross-border dimension, must rely on the

[206] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, in OJ L 409, 4.12.2020, p. 1.

[207] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, in OJ L 201, 26.7.2013, p. 60.

procedural rules provided by the Brussels I Regulation[208]. As a preliminary comment, the Brussels I bis Regulation (as well as the other EU instruments on private international law matters) is meant for traditional two-party conflict cases, rather than cases involving numerous claimants[209]. In this respect, the rules of the Brussels I bis Regulation need to be adapted to the special features of collective actions. The problem was discussed[210] whilst the negotiations on the recast were taking place, and the need for a special rule on jurisdiction was taken into account. The introduction of an exceptional ground of jurisdiction capable of departing from the defendant's domicile and allowing for the starting of an action in the place where the representative entity is established or domiciled was duly examined. Such an exceptional ground is mainly inspired by the principle of proximity with the dispute and is grounded on the assumption that the representative entity would rarely commence a collective redress abroad[211]. Furthermore, the representative entity is likely to come from the country mostly affected by malpractice and, therefore, where the majority of the affected consumers reside. The entity would, therefore, be most interested party in starting the collective redress., Special grounds of jurisdiction for collective actions has not been introduced into the current version of the Brussels I bis Regulation. However, under art. 79, a report of the Commission on the application of the Brussels I bis Regulation shall be presented by January 11, 2022. This would be the next opportunity to discuss the relationship between the two instruments and the possible introduction of an *ad hoc* forum for collective redress actions.

A second aspect to be considered in light of the next recast is whether a special rule on *lis pendens*, allowing the court of a Member

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[208] See PORETTI P., *Collective Redress in the European Union – Current Issues and Future Outlook*, in *EU and Comparative Law Issues and Challenges Series*, Issue 3, 2019, p. 339 ff; TANG Z.S., *Consumer Collective Redress in European Private International Law*, in *Journal of Private International Law*, 2011, pp. 101-147.

[209] See BOSTERS T., *Collective Redress and Private International Law in the EU*, The Hague, 2019, spec. p. 2.

[210] See CARBALLO PINEIRO L., *Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?*, in *Journal of European Consumer and Market Law*, 2012, pp. 81-94.

[211] See TANG Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, Oxford, 2009, p. 289.

State to decline jurisdiction in favour of the first seised court, is necessary. In collective redress it is first of all necessary to understand whether the collective action shall be treated as a single action or as the sum of actions of the single consumers against the defendant. The actors, in fact, do not coincide perfectly: on the one side, there is the representative entity and, on the other, the single represented consumer. The case might also be that more than one representative entity has started actions in different countries, thereby representing different group of consumers (or possibly, not perfectly coinciding groups of consumers). Such a case may fall within the rule on connection, though not strictly speaking under the rules of *lis pendens*. This does not *tout court* avoid the occurrence of irreconcilable judgments.

Applicable law constitutes a further issue. Although in principle, the Rome I Regulation may also be applied to collective proceedings, no specific provision is foreseen for mass claims, as individual litigation alone is taken into account. Under art. 6, the mandatory rules of the habitual residence of (each of) the consumers shall apply irrespective of applicable law, implying that, in collective redress cases, a court may not apply the same law and standards to all contracts concerned. In turn this will lead to inefficiencies. On the other hand, when no protective choice of law rules applies, as for example is the case of contracts concerning financial instruments (see art. 6(4)(d) and (e) Rome I Regulation), the law will either be chosen by the parties (more often than not that reported on standard-form contracts) or according to general rule of art. 4. Neither situation offers a very good solution. *Ad hoc* solutions therefore seem necessary, as pointed out by the Commission and by the Parliament. Three connecting factors have been considered to be relevant in cases of collective redress: (i) the defendant's habitual residence, (ii) the Member State which is most affected by the collective redress and (iii) the Member State where the representative entity is located.

When it comes to enforcement, the highest level of mutual trust expressed by the abolition of *exequatur* also applies to judgments deciding on injunction in collective actions. It shall be noted that, during the recast, the Commission suggested retaining the *exequatur* for judgments adopted in collective redress mechanisms, due to the significant

differences between national legal orders[212]. However, the proposal was not extended to decisions concerning injunctions in collective actions as a higher level of harmonisation was already obtained by virtue of Directive 2009/22[213].

In conclusion, the above analysis confirms that the existence of instruments of EU law dealing with private and procedural law matters "affect" the functioning of the Brussels I bis Regulation and demands some form of coordination. The *lex specialis* principle is the mechanism of coordination capable of tackling (at least to a certain extent) issues deriving from the direct interference of "clear cut" provisions on jurisdiction and on recognition and execution contained in EU instruments on the Brussels I bis Regulation. However, national case-law has shown some difficulties when the relevant provisions are contained in international conventions which have been transposed in the EU legal order by virtue of decisions. In this regard, it would be helpful for the Court of Justice to provide some guidance on the application of art. 67 in respect of art. 71. Furthermore, it is likely that new issues will arise in the application of art. 67 of the Brussels I bis, not only by reason of the growing legislative activity of the EU in private law matters, but also given the evolution of some instruments (such as the optional regulations) as well as the unusual recourse to some instruments (such as recommendations) as means of harmonisation.

4. ... that "govern jurisdiction"

The non-affect clause laid down in art. 67 of the Brussels I bis Regulation applies to the extent that a given situation raising questions of jurisdiction (or recognition and enforcement of judgments) simultane-

[212] More precisely, under art. 37 of the Commission proposal, the abolition of *exequatur* should still apply to judgments given in another Member State "*in proceeding which concern the compensation of harm caused by unlawful business practices to a multitude of injured partiers and which are brought by i. a state body, ii. a non-profit making organization whose main purpose and activity is to represent and defend the interests of group of natural or legal persons, other than by, on a commercial basis, providing them with legal advice or representing them in court, or iii. A group of more than fifteen claimants*".

[213] On this point, see CARBALLO PINEIRO L., *Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?*, cit., p. 85.

ously falls within the scope of application of both the Brussels I bis Regulation and another EU law instrument providing rules on jurisdiction (and/or recognition and enforcement of judgments) in relation to a "specific matter".

The first condition for this non-affect clause to come into play seems to be that the EU law instrument "competing" with the Brussels I bis Regulation and this latter regulation refer to the same field of application. Indeed, when it comes to EU law instruments governing issues of jurisdiction (and recognition or enforcement of judgments) in (certain fields of civil and commercial) matters which are excluded from the Brussels I bis Regulation's scope of application, this latter regulation is radically prevented from coming into play on the basis of its art. 1, with the consequence that, in these very cases, art. 67 Brussels I bis is devoid of any relevance[214]. Thus, for example, as an effect of the exclusion envisaged by art. 1(2)(a) and (b) of the Brussels I bis Regulation, issues of jurisdiction (and recognition of judgments) arising in the field of insolvency or of matrimonial and parental responsibility fall outside the scope of the regulation and are peacefully governed by Regulation 2015/848[215] and Regulation No 2201/2003[216], respectively[217].

[214] See MANKOWSKI P., *Article 67*, cit., p. 847. Of a different opinion are the authors who interpret art. 67 as encompassing also EU law instruments governing issues of jurisdiction (and the recognition of judgments) in relation to (civil and commercial) matters excluded from the Brussels I bis regulation's field of application (see, e.g., BORRÁS A., DE MAESTRI M.E., *Articoli 67-72*, in HAUSMANN R., QUEIROLO I., SIMONS T. (eds), *Commentario al Regolamento «Bruxelles I»*, Munich, 2012, p. 928). It is, however, difficult, following such an interpretation, to understand the exact meaning of art. 67, as it would result in a mere and useless duplication of art. 1.

[215] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19.

[216] 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, in OJ L 338, 23.12.2003, p. 1. As well known, this regulation has been repealed by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1, which pursuant to its art. 100 shall be applicable to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022.

[217] MANKOWSKI P., *Article 67*, cit., p. 847.

Much debate still ensues, however, in light of the exclusion set forth by art. 1(2)(e), concerning the exact delimitation of the Brussels I bis Regulation's applicability in the field of maintenance obligations. As a matter of fact, Regulation No 4/2009[218] applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, with the exclusion of maintenance obligations (i) arising by reason of death and (ii) resulting from the agreement of the parties and, pursuant to its art. 68(1) and (2) and recital 44, it takes prevalence over the Brussels I bis Regulation. However, whilst maintenance obligations arising by reason of death are covered by Regulation No 650/2012[219], no specific rules exist in relation to maintenance obligations resulting from the agreement of the parties, which therefore are to be deemed still covered by the Brussels I bis Regulation[220]. This interpretative solution finds general support in doctrinal writings and seems to be upheld as fully consistent with the jurisprudence of the Court of Justice of the European Union according to which the reciprocal delimitation of each regulation's scope of application cannot be such as to leave inadmissible gaps between one another[221].

However, as appropriately remarked in the literature, this conclusion raises some practical concerns by reason of the special forum (of the creditor's domicile) for maintenance obligations formerly provided by art. 5(2) Brussels I having been abolished by the Brussels I bis Regulation[222].

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[218] 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, in OJ L 7, 10.1.2009, p. 1.

[219] 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, in OJ L 201, 27.7.2012, p. 107.

[220] See CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu: l'environnement normative du nouveau règlement*, in *Revue critique de droit international privé*, 2016, p. 290.

[221] CARBONE S.M., TUO C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 45. See also recital 7 of the abovementioned Regulation (EU) 2015/848.

[222] CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., pp. 291-292: as observed by the author, controversies concerning maintenance obligations may still be brought before the court of either the defendant's (*i.e.* debtor's) domi-

When, on the contrary, the situation raising issues of jurisdiction (or recognition and enforcement of judgments) is concerned with a subject matter falling within the scope of application of both the Brussels I bis Regulation and another instrument of EU law, and such latter instrument provides for rules on jurisdiction (and/or recognition of judgments) specifically tailored to that very subject matter, art. 67 of the regulation applies, with the non-affect clause thereby enshrined assigning prevalence to the jurisdiction rules provided for under the competing EU law instrument. The acts adopted by the EU legislature which benefit from the non-affect clause envisaged by art. 67 are constantly increasing and cannot be exhaustively listed here. However, according to the prevailing view in doctrinal writings[223], among such instruments certainly stand, for example, Regulations 2017/1001 on the European Union trade mark[224], No 6/2002 on Community designs[225], 2016/679 on the protection of natural persons with regard to the processing and the free movement of personal data[226], and No

cile, according to art. 4 Brussels I bis, or the Member State where the contractual maintenance obligation should have been performed, according to art. 7(1)(a) of the same regulation. If this latter place has not been directly indicated by the parties within the agreement, it has to be identified on the basis of the law applicable to the maintenance obligation, as referred to by the relevant conflict of laws rule of the forum State, in accordance with the Court of Justice's jurisprudence dating back to the 1976 *Tessili* judgment (judgment of the Court of 6 October 1976, Industrie Tessili Italiana Como v Dunlop AG., Case 12/76). Depending on the legislative solutions adopted by each national legal order, the place of performance of maintenance obligations may be localised in the Member State of domicile of either the debtor or the creditor, which latter case only brings to the same practical result previously triggered by art. 5(2) Brussels I. As noticed by the Author, therefore, the amendment introduced by the Brussels I bis Regulation is to be criticized in that the latter regulation does no longer provide for a special head of jurisdiction entirely protective of the maintenance obligation's creditor.

[223] See GAUDEMET-TALLON H., ANCEL M.E., *Compétence et exécution des jugements en Europe. Règlements 44/2001 et 1215/2012 Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, Paris, 2018, p. 43 and p. 52; CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., p. 293; MANKOWSKI P., *Article 67*, cit., p. 848.

[224] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in OJ L 154, 16.6.2017, p. 1 (see arts. 122 ff).

[225] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, in OJ L 3, 5.1.2002, p. 1 (see arts. 79 ff.).

[226] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1 (see art. 79(2).

2157/2001 on the Statute for a European company[227], which latter provides European companies having moved their statutory seat from one Member State to another with a special jurisdiction regime not applicable to companies constituted in accordance with national laws.

When EU law instruments regarding specific matters do not provide for *ad hoc* rules on jurisdiction, the courts with international competence to hear controversies relating to those very matters are to be identified on the basis of the relevant provisions of the Brussels I bis Regulation, provided obviously that the conditions for the applicability thereof are entirely satisfied and regardless of any reference to such a regulation being present in the competing EU law instrument which comes into play for the purposes of governing the substance of the dispute.

This is, for example, the case of regulation no. 261/2004[228]. Indeed, said regulation fails to establish rules on international competence specifically designed to operate in relation to the claims for compensation that air passengers are entitled to bring under the same regulation when their flight has been delayed or cancelled. Nor can any such rule be deemed provided for by art. 16 of the mentioned regulation since, as appropriately remarked in doctrinal writings, such a provision only

[227] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), in OJ L 294, 10.11.2001, p. 1 (on the transfer of the seat, see art. 8(2)-(13); cf (16), according to which "*An SE which has transferred its registered office to another Member State shall be considered, in respect of any cause of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member States where the SE was registered prior to the transfer, even if the SE is sued after the transfer*"; at the same time, the regulation at hand specifically declares to be "*without prejudice to any provision which may be inserted in the 1968 Brussels Convention or in any text adopted by Member States or by the Council to replace such Convention, relating to the rules of jurisdiction applicable in the case of transfer of the registered offices of a public limited-liability company from one Member State to another*" – cf recital 25).

[228] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, in OJ L 46, 17.2.2004, p. 1. In relation to this regulation and to its relationship with the Brussels I bis Regulation for the purposes of establishing the courts having jurisdiction to hear the claims brought by air passenger, see Judgment of the Court (Fourth Chamber) of 9 July 2009, Peter Rehder v Air Baltic Corporation, Case C-204/08, para. 28; Judgment of the Court (Sixth Chamber) of 11 April 2019, ZX v Ryanair DAC, Case C-464/18, para. 24; Judgment of the Court (First Chamber) of 7 November 2019, Guaitoli e a. v easyJet Airline Co. Ltd, Case C-213/18, para. 42.

applies to administrative procedures, which passengers are enabled to activate before the public authority appointed by each Member State to hear complaints about alleged infringements of the regulation itself committed by air carriers[229].

On a separate note, the question concerning whether EU law instruments governing specific matters without providing for *ad hoc* rules on jurisdiction might nonetheless be of relevance for the purposes of the interpretation of the heads of jurisdiction laid down in the Brussels I bis Regulation remains unanswered. As a matter of fact, art. 67 fails to address this very issue which, in the light of the current evolution of EU rules in the field of judicial cooperation in civil and commercial matters, it is for the European Court of Justice to deal with on a case-by-case basis, similarly to what the Court has actually done so far in its consolidated jurisprudence[230].

A different rationale underlies the relationship between the Brussels I bis Regulation and the so-called satellite EU regulations, which have instituted simplified uniform legal proceedings in the field of judicial cooperation in civil and commercial matters[231]. As well known,

[229] Of this view are DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, in *Il diritto marittimo*, 2020, pp. 416-417, who argue that the exclusive aim of the procedure envisaged by said art. 16 is to sanction air carriers for failures – if any – to comply with their obligations arising from EU law.

[230] See, e.g., the recent Judgment of the Court (First Chamber) of 18 November 2020, Ryanair DAC v Delays Fix, Case C-519/19, and, previously, Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, and the related comment TUO C.E., *La nozione di "luogo di abituale svolgimento dell'attività lavorativa" ancora al vaglio della Corte di giustizia UE: il caso degli assistenti di volo*, in *Il diritto marittimo*, 2018, p. 403.

[231] Reference is made to the following acts: Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in OJ L 143, 30.4.2004, p. 15; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in

these EU law instruments have an optional character and therefore, despite the (at least partial) overlap of their respective scope of application with that of the Brussels I bis Regulation, cannot be said to compete with this latter regulation for the purposes of the non-affect clause laid down in art. 67 to come into play[232].

Furthermore, each of the above-mentioned regulations either expressly or implicitly presupposes the operation of the Brussels I bis Regulation in order to preliminarily establish the courts having jurisdiction to hear the dispute[233]. Hence, this is a further reason why at least as far as the issue of jurisdiction is concerned, such instruments do not actually compete with the Brussels I bis Regulation[234].

As pointed out in doctrinal writings, however, three areas may be identified of potential concurrence of the satellite regulations with the Brussels I bis Regulation, namely (i) claims against consumers, since both the European Enforcement Order (no. 805/2004) and the European Payment Order (no. 1896/2006) regulations stipulate that this kind of action must be brought exclusively before the court of the defendant's domicile, with the consequent exclusion of any possibility to derogate from such a head of jurisdiction pursuant to art. 19 of the Brussels I bis Regulation[235]; (ii) the heads of jurisdiction respectively

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OJ L 189, 27.6.2014, p. 59. The Regulations on the Payment Order and on the Small Claims Procedure have been amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, in OJ L 341, 24.12.2015, p. 1.

[232] CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., p. 296; MANKOWSKI P., *Article 67*, cit., p. 849.

[233] See art. 6(1)(b) of Regulation No. 805/2004, art. 6 of Regulation No. 1896/2006, art. 6 of Regulation No. 655/2014 and art. 4(1) together with Annex I of Regulation No. 861/2007.

[234] For an extensive analysis of the cases in which the instruments in question actually compete with the Brussels I bis Regulation as far as concerns enforcement of judgments, see CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., pp. 300-306.

[235] Which, as well known, lists the conditions for a jurisdiction clause entered into with a consumer (as the weaker contractual party) to be deemed validly concluded and effective under the Brussels I bis Regulation. See CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., p. 298, who however concludes that no "real concurrence" may actually be devised between the two mentioned satellite regulations and the Brussels I bis Regulation, as the exception specifically regarding consumers does not put into

laid down in the European Account Preservation Order (no. 655/2014) and the Brussels I bis regulations for the purposes of issuing an account preservation order, since, whilst pursuant to regulation no. 655/2014 such an order may only be delivered by the courts of the Member State having jurisdiction as to the substance of the dispute, under the more liberal approach followed by the Brussels I bis Regulation the competence lies with the courts of any Member State whose relevant rules allow for said order to be handed down, regardless of whether the courts of another Member State have jurisdiction as to the substance of the matter[236]; (iii) claims brought under the Small Claims Procedure (no. 861/2007) and the European Payment Order (no. 1896/2006) regulations in the fields of consumers' and employment contracts which, as a result of the reference thereby made to the relevant heads of jurisdiction in the Brussels I bis Regulation, can now also be brought against defendants domiciled in third States[237].

5. … "or recognition of judgments" …

Not all acts, *rectius* – "EU instrument" –, providing for special rules on jurisdiction also entail *lex specialis* rules on recognition and en-

question the general reference to the Brussels I bis system of rules on jurisdiction enacted by the satellite regulations.

[236] See again CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., pp. 298-299, who observes that given the more restrictive approach of Regulation No 655/2014 *vis-à-vis* the rule on jurisdiction for provisional and protective measures envisaged by the Brussels I bis Regulation, a concurrence in favour of the latter may actually be deemed existent between the two regulations as far as concerns the application of rules on jurisdiction. However, the author also notices that the lack of extraterritorial effects under (a combined reading of art. 2(a) and recital 33 of) the Brussels I bis Regulation of provisional and protective measures not rendered by the court having jurisdiction as to the substance of the case significantly limits the advantages of the "forum shopping" allowed by art. 35 of the same regulation.

[237] In these terms CERQUEIRA G., *La réduction progressive du domaine matériel du règlement Bruxelles I refondu*, cit., pp. 299-300, who however adds that, in consideration of the limited applicability of Regulations Nos 861/2007 and 1896/2006 only to controversies having a trans-national character, such regulations cannot benefit from the extension of the revised field of application of art. 25 the Brussels I bis Regulation (regarding, as well known, agreements on jurisdiction) to parties both domiciled outside the EU.

forcement of decisions[238]. To some extent, this could be seen as in indicium of a different conceptualization of the diverse rules: where special heads of jurisdiction might be needed to pursue and fulfil specific policy-oriented goals – as the protection of weaker parties; the concentration of jurisdiction upon specific courts; the pursuit of uniformity in specific matters –, the Brussels I bis regime for the free movement of decisions remains the central focus of the EU system in civil and commercial matters[239]. Interestingly, the idea that the Brussels I regime on free movement of decisions should remain at the centre stage of EU international civil procedure, thus proliferation of concurring regimes should theoretically be kept at a minimum as far as possible, finds comfort in two different occasions, where the Union has explicitly accepted to introduce within the EU legal order some international treaties in special matters, yet it has opted out from the relevant special rules on free movement of decisions to safeguard the applicable Brussels I regime. This has been the case with the already mentioned HNS Convention, and the Athens Convention. As for the first one, the Decision of the Council authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea[240] explicitly provided that, when ratifying or acceding to the HNS Convention, Member States shall declare that judgments on matters covered by the Convention shall, when given by a court of a Member

[238] This being for example the case of Directive 96/71/EC, cit., on posting of workers; of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1 – the so called GDPR; of Art. 268 TFEU, and of the 1999 Montreal Convention to which the EU has become party with Decision 2001/539/EC.

[239] Yet, not the sole in the European judicial space. Before the adoption of instruments that have come along the abolition of the intermediate *exequatur* procedure, on the existence of different models on free movement of decisions in EU law see in particular FRACKOWIAK-ADAMSKA A., *Time for a European "Full Faith and Credit Clause"*, in *Common Market Law Review*, 2015, p. 191.

[240] 2002/971/EC: Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), in OJ L 337, 13.12.2002, p. 55.

State, still be recognised and enforced in another Member State according to the relevant internal European rules on judicial cooperation in civil and commercial matters[241]. As for the second international instrument upon accession, the European Union made a declaration to the effect that decisions, rather than the international instrument itself, would still move between Member States according to EU law[242]. Despite an interest in seeking international coordination in specific matters, the results attained by the Union in the field of free movement of decisions appear so significant to the extent these special rules, whose effectiveness is lower than those adopted between Member States, do not make their "way in" to oust the Brussels I bis Regulation. It is under this light and taking into consideration this point of view that the "scarcity" in number of *lex specialis* rules on recognition and enforcement provisions that do overlap and possibly oust Brussels I can be understood and possibly justified.

Some regulations, in particular in the field of intellectual property protection, do include *some* rules on "enforcement"; yet, these are more properly rules on jurisdiction – whose aim is to identify the competent court to issue levy of execution[243].

An interesting scenario of possible coordination between special and general regimes may be offered by the Directive on certain aspects of mediation in civil and commercial matters[244]. According to art. 6 thereof, entitled "*Enforceability of agreements resulting from mediation*", a mediation agreement may be declared enforceable with the consent of both parties. As stated in the provision, the content of

[241] 2002/971/EC: Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), art. 2.

[242] 2012/23/EU: Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards artt. 10 and 11 thereof, in OJ L 8, 12.1.2012, p. 13, art. 2(3).

[243] Cf. Regulation EU 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in OJ L 154, 16.6.2017, p. 1, art. 23, and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, in OJ L 3, 5.1.2002, p. 1, art. 30.

[244] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in OJ L 136, 24.5.2008, p. 3.

the agreement may be made enforceable by a court or other competent authority in a judgment or in an authentic instrument, unless the content of the agreement is contrary to the public policy of the State requested to grant enforceability. The mediation Directive thus provides a specific rule on, and grounds for refusal of, enforceability, assuming that the mediation agreement must be enforced in the State where the request for enforceability is lodged[245]. Yet, at the same time, the provision clearly acknowledges that the same mediation agreement may be enforced abroad. To that end, art. 10(4) of the directive prescribes that the procedure does not affect rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable, i.e. most likely, the Brussels I bis[246]. Under the focal point of coordination between instruments, the question is whether or not the two enforceability procedures are cumulative, in the sense that, once the requisites for enforceability set forth in the mediation Directive, namely respect of public policy of the interested State, are met (and the mediation agreement has been recognised in the State of origin[247]), the ground to refuse enforcement abroad under art. 45 Brussel I bis Regulation does no longer find application. The question can only be negative, and the two procedures should be considered cumulative in nature, meaning that art. 45 Brussels I bis (or its specific rules on free movement of authentic acts, where relevant on a case-by-case approach) should still find application. This is not only consistent with the wording of the mediation Directive, which explicitly provides for the (comprehensive) application of the rules on free movement of de-

[245] On the relationship between the mediation Directive and rules on free movement of decisions and authentic instruments contained in the general EU regulations on international civil procedure, see ESPLUGUES C., *Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC*, in ESPLUGUES C. (ed), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, Volume II, Cambridge, 2014, p. 485, at p. 761 ff.

[246] On the application of the mediation Directive in family matters, see CARPANETO L., *La Direttiva n. 2008/52 sulla mediazione civile e commerciale*, in QUEIROLO I., BENEDETTI A.M., CARPANETO L. (eds), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 547, at p. 557.

[247] On the complex relationship between mediation agreements non-certified in the State of origin and their "movement" within the European judicial space under the mediation directive, see for all PALAO MORENO G., *Enforcement of Foreign Mediation Agreements within the European Union*, in BERGÉ J.-S., FRANQ S. (eds), *Boundaries of European Private International Law*, Brussels, 2015, p. 79, at p. 85 ff.

cisions and authentic acts, but also appears to be consistent with the *ratio* of the legal framework to be coordinated. Art. 10 might appear to create a double burden for mediation agreements to be enforced abroad, yet this is only a natural consequence following the "origin" of the content of the agreement. As mediation agreements are the output of party autonomy[248], the State needs to exert a certain control over the result of such negotiation, before granting the enforceability within its system. Said control is not necessary where judicial decisions are at hand, as courts cannot adopt judgments against public policy. In this sense, the additional requirement imposed by the mediation Directive only serves the purpose of "equating", to some extent, the mediation agreement to "judicial decisions". Once this step is completed, the mediation agreement, to which enforceability is granted, may circulate in the European judicial space according to the relevant rules – hence the necessity to apply the full set of grounds to refuse recognition and enforcement of the Brussels I bis Regulation. In other terms, as long as the additional burden imposed by the mediation Directive is conceived as a public instrument to elevate contracts to "quasi-decisions", the two procedures – and the different requirements for recognizing enforceability – should be considered cumulative, with the consequence that the mediation Directive in no way ousts the application of the general rules on recognition and enforcement.

5.1. Special rules on recognition and enforcement in "optional" regulations after the abolition of the intermediate *exequatur* procedure in the *lex generalis*

Amongst those provisions that do provide for special rules on free movement of decisions which are able to compete with the Brussels I bis Regulation, the first group of such rule are contained in the Regulation establishing the European Enforcement Order for uncontested claims[249]. By setting particular procedural standards[250], the instrument

[248] Cf *ex multis* GALLETTO T., *Il modello italiano di conciliazione stragiudiziale in materia civile*, Milano, 2010, p. 84.

[249] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in OJ L 143, 30.4.2004, p. 15, as amended.

allows certified orders for uncontested claims to be directly enforceable in other EU member States[251], with reduced grounds for the courts of the place of enforcement to refuse enforcement[252]. However, such an instrument is optional in nature[253], and its competition – or concurrence – with the general system, as per the rules on enforcement[254], rests on party autonomy: indeed, it is up to the creditor to voluntarily opt for the *lex specialis* regime[255]. The Regulation on the European Enforcement Order for uncontested claims directly seeks a coordination with the Brussels I bis Regulation. In order to be applicable, the former instrument requires the respect of the rules on jurisdiction in insurance matters[256], as well as of the Brussels rules on exclusive jurisdiction[257]. However, such a unilateral coordination of the Regulation on the European Enforcement Order for uncontested claims is also aimed at reducing the applicability of the Brussels I bis Regulation, if the party seeks certification under the European Enforcement Order. In particular, whereas the Brussels rules on consumer matters pave the way to a number of possibly competent fora – such as the State of domicile of the professional, if the action is started by the consumer[258] – a decision in consumer matters can only be certified under the Euro-

[250] Regulation (EC) No 805/2004, cit., art. 12 ff.

[251] Regulation (EC) No 805/2004, cit., art. 4.

[252] Provided that all conditions for the applicability of the instrument are satisfied, enforcement of certified orders can be refused only if the latter is "*irreconcilable*" with an earlier judgment given in any Member State or in a third country, provided that i) the earlier judgment involved the same cause of action and was between the same parties; ii) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; iii) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin (in these terms, Regulation (EC) No 805/2004, cit., art. 21).

[253] Regulation (EC) No 805/2004, cit., art. 6, clearly states that a judgment shall be certified "*upon application*".

[254] Regulation (EC) No 805/2004, cit., art. 27 expressly provides that the instrument shall not prejudice the possibility of seeking recognition and enforcement under the rules of the (then) Brussels I Regulation.

[255] See MANKOWSKI P., *Article 67*, cit., p. 1023, writing that "*If the other EU Act has only an optional nature the Brussels Ibis Regulation is not prejudiced*", thereby setting the matter in terms of "*competition and contest, not hierarchy*".

[256] Regulation (EC) No 805/2004, cit., art. 6(1)(a).

[257] Regulation (EC) No 805/2004, cit., art. 6(1)(a).

[258] Brussels I bis Regulation, art, 17 ff.

pean Enforcement Order for uncontested claims, if the court of origin was that of the consumer's domicile Member State[259].

Along a similar line of reasoning, the European Account Preservation Order procedure[260] prescribes that jurisdiction for adopting the order, upon request of the interested party, either lies with the courts who have issued a judgment or with the courts that would be competent to rule on the merits according to the applicable rules on international jurisdiction (i.e., mainly the Brussels I bis Regulation). Yet, by reducing the applicability of the *lex generalis* for the purposes of obtaining the order, where the debtor is a consumer, jurisdiction rests only with the courts of the Member State in which the debtor is domiciled.

Additionally, the Regulation establishing the European Payment Order[261] abolishes the intermediate *exequatur*[262] procedure if a number of conditions are met – and it coordinates with the Brussels I regime on the side of jurisdiction as the *lex specialis* rule on jurisdiction of the European Payment Order Regulation provides for the sole competence of the courts of domicile of the consumer – if he/she is the defendant[263], thus, excluding the possibility of express and implicit choice of court agreement that might validly be concluded in the context of the Brussels I bis Regulation.

Again, the Small Claims Regulation[264] does not set rules on jurisdiction, but rather only provisions for the free movement of decisions rendered at the end of such a uniform civil procedure throughout the Union. Therefore, the court of the place of enforcement would only be able to refuse on grounds of irreconcilability with other decisions[265].

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[259] Regulation (EC) No 805/2004, cit., art. 6(1)(d).

[260] Regulation (EU) No 655/2014, cit., art. 6.

[261] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1, as amended.

[262] Regulation (EC) No 1896/2006, cit., art. 19.

[263] Regulation (EC) No 1896/2006, cit., art. 6(2).

[264] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1, as amended.

[265] Regulation (EC) No 861/2007, cit., art. 22(1).

Such instruments are interesting in terms of relationship between *lex generalis* and *lex specialis* in that there are diverse levels of coordination.

Firstly, the applicability of such instruments is transferred to party autonomy: such rules are applied by courts in so far as the interested party exerts a right that has been recognized to him/her by the law itself. In this sense, special rules take precedence over general rules in a seemingly mixture of optional and hierarchical hybrid nature: optional rules are applied in so far as party autonomy authorised by the law, is effectively exercised.

Secondly, the European Payment Order Regulation provides rules listed under the heading "*jurisdiction*", which do not set rules on allocation of jurisdiction. Generally speaking, rules on jurisdiction in optional concurring acts rather determine the applicability of the instrument itself. So far as certain (general) rules on jurisdiction, and eventually only those general rules identified by the special regime are respected, the *lex specialis* can be opted in by the relevant interested party.

Thirdly, the *special* rules on free movement of decisions, which mainly aim at abolishing the intermediate *exequatur* procedure might be questioned both in light of the new Brussels I bis regime, as well as in light of the new rules contained in the Brussels II ter Regulation, where relevant[266]. In more recent times, scholars[267] have extensively discussed the "destiny" of such special acts as those above, which provide for an optional regime of free movement of decisions that is considerably "lighter" than those set out under Brussels I Regulation. The Brussels I bis Regulation has not abolished those special acts[268], which not only still stand, but some have been revised following the

[266] Regulation (EC) No 1896/2006, cit., art. 6(2).

[267] MANKOWSKI P., *The Impact of the Brussels Ibis Regulation on the 'Second Generation' of European Procedural Law*, in MANKOWSKI P. (ed), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020, p. 230 ff.

[268] Contrary to initial proposals; see Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2010/0748 final, art. 92(2), according to which it was proposed "*Except with respect to judgments referred to in Article 37(3), this Regulation shall replace Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims*".

entry into force of the Brussels I bis regulation – this being the case of the Small Claims Regulation[269]. As pointed out in the literature[270], the EU lawgiver has invested resources in carrying out investigations aimed at amending texts that are (only) at first sight similar to the general regime. Yet, this is not necessarily the case, as the interest of keeping such alternative instruments rests in their stronger enforcement possibility. Despite the fact that a party might need to lodge a specific application to obtain a certification for the purposes of such special regimes – such as for the European Enforcement Order for uncontested claims[271] whereas under the Brussels I bis Regime decisions enforceable in their country of origin can immediately be enforced abroad – the optional regimes, whilst adding procedures, end up reducing the *lex generalis* grounds to refuse recognition and enforcement.

Not only special regimes can still retain an additional added value in terms of EU policy on the creation of an European judicial space where decisions can freely move; some regimes, such as that of the Small Claims Regulation, provide for limited grounds to enforcement based on the uniform procedure established in the relevant act. If the competent court is determined according to the same rules in all Member States (i.e., the Brussels I bis Regulation); if any court should apply the same substantive law (by way of either the Rome I or Rome II Regulations), the main remaining variable still standing is how the procedure is carried out. The harmonisation[272] of such an element being a further reason to reduce the scope of the grounds to refuse

[269] Regulation (EC) No 861/2007, cit.; Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, in OJ L 341, 24.12.2015, p. 1.

[270] MANKOWSKI P., *The Impact of the Brussels Ibis Regulation on the 'Second Generation' of European Procedural Law*, cit., p. 238 f.

[271] MANKOWSKI P., *The Impact of the Brussels Ibis Regulation on the 'Second Generation' of European Procedural Law*, cit., p. 242 ff.

[272] On the relationship between civil procedure and free movement of decisions, see MAŃKO R., *European Parliamentary Research Service: Europeanisation of Civil Procedure. Towards Common Minimum Standards?*, Brussels, 2015.

recognition and enforcement[273]. In this sense, such optional regimes play an evident role in the harmonisation of civil procedure throughout member States, in an era where the adoption of EU Common Minimum Standards of Civil Procedure[274] is gaining centre stage in the legal debate. If, therefore, the political will is to move towards such uniform procedural rules, it appears important that *lex specialis* regulations already providing for harmonised procedural law and connected rules on free movement of decisions do not give way to the *lex generalis* by way of abrogation as they could contribute to the construction of a common legal procedural culture.

5.2. Consequence for breach of special heads of jurisdiction at the recognition stage

A final consideration needs to be addressed in the relationship between general and special rules on jurisdiction, and recognition and enforcement of decisions. As previously argued, it most commonly appears that concurring acts pursue specific policy goals by setting rules on jurisdiction, whilst general rules on free movement of judgments remain applicable. This raises the question as to whether or not a possible violation of the special rules on jurisdiction might constitute a valid ground to refuse recognition and enforcement under the Brussels I bis Regulation. From the perspective of art. 45 Brussels I bis Regulation, the question is particularly sensitive when special (alternative and non-mandatory) rules on jurisdiction are given for the protection of weaker parties. The question being whether or not art. 45

[273] Cf *ex multis* D'ALESSANDRO E., *Il titolo esecutivo europeo nel sistema del Regolamento n. 1215/2012*, in *Rivista di diritto processuale*, 2013, p. 1044, at p. 1046, comparing the abolition of the *exequatur* procedure in the Brussels I bis Regulation to the decisions rendered at the end of a proceedings conducted under harmonized rules (i.e. Regulation (EC) No 1896/2006, cit., and Regulation (EC) No 861/2007, cit., and to Regulation (EC) No 805/2004, cit.).

[274] See European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union, in OJ C 334, 19.9.2018, p. 39. In the scholarship, see for all KRAMER X.E., *Strengthening Civil Justice Cooperation: The Quest for Model Rules and Common Minimum Standards of Civil Procedure in Europe*, in RODRIGUES M.A., ZANETI H. JR (eds), *Coleção Grandes Temas do Novo CPC - v.13 - Cooperação Internacional*, 2019, p. 591 ff, available online.

can be "supplemented" with additional grounds to refuse recognition and enforcement.

5.2.1. Posting of workers

Art. 6 of the posting of workers Directive may serve as a case-study. According to the provision at hand, "*In order to enforce the right to the terms and conditions of employment guaranteed ..., judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*". As a general principle, under the Brussels I bis Regulation, "*the jurisdiction of the court of origin may not be reviewed*", unless the case falls within the scope of application of the provisions (of the very same instrument) devoted to the protection of disadvantaged parties or exclusive competences[275]. If the employer starts a negative declaratory action before the courts of the Member State that wrongfully assumes to be the State of positing, can the general ground to refuse recognition and enforcement be extended beyond its explicit wording to include also art. 6 of the posting of workers Directive? A positive answer would be based on an interpretation *contra litteram*, and go against the idea that grounds to refuse recognition and enforcement are narrowly constructed[276], as these remain the exception to the system. A negative answer would, on the other hand, clash with the aim of both instruments to pursue a high level of protection of the weaker parties.

5.2.2. GDPR

Another scenario could be pictured in the context of the GDPR, the Regulation on data protection[277]. Its art. 79(1) introduces[278], and clear-

[275] Brussels I bis Regulation, art. 45(3).

[276] For all, CARBONE S.M., TUO. C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 350.

[277] Regulation (EU) 2016/679, cit.

[278] The "historical" normative antecedent to the GDPR, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with

ly identifies, the right of data subjects to start proceedings for alleged violation of data protection. Para. 2 of the same provision turns to the rule on jurisdiction and, in a trilateral relationship, becomes less clear as it provides that an action "against data controller or data processors" can be started before the courts of their Member State, or before the courts of the Member State of habitual residence of the data subject. Whilst it could be implicit that the persons starting the proceedings under art. 79(2) is the weaker party *ex* art 79(1), i.e. the data subject, it must be noted that para. 2 is silent on the matter. And the relationship is, as mentioned, trilateral. This is opposed to provisions in the Brussels I bis Regulation that clearly set out that *actions against weaker parties*[279] can generally only be started at the State of their domicile. As constructed, art. 79(2) might find little application against data subjects – as the provisions makes clear that only actions against data processors or data controllers (and not actions against data subjects) fall within its scope of application. Yet, *a data processor*, having knowledge of the intention of the data subject to start proceedings at his place of residence, might itself present a negative declaratory action *against the data controller*. The existence of such proceedings could be enough to trigger art. 81 of the same regulation, according to which, if there is a pending case having (not necessarily the same parties, but only) the same subject matter, as regards processing by the same controller or processor, the court second seised (in our case, by the weaker party) – *may* stay proceedings (this being sufficient not to speak of *lis pendens*). The GDPR wishes to ensure better protection of data subjects – nonetheless procedural tactics might run against such a goal[280]. In this scenario, the reasoning of part of the

regard to the processing of personal data and on the free movement of such data, in OJ L 281, 23.11.1995, p. 31, did not provide for rules on jurisdiction concurring with the general regime. On this point, see KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 653, at p. 668.

[279] Cf, Brussels I bis Regulation, art. 14 in insurance matters; art. 18(2) in consumer contracts, and art. 22(1) in employment matters.

[280] Yet, this element raises the additional question whether or not principles developed by the Court of Justice of the European Union for collective actions representing consumers, namely excluding the forum for the "weaker party" to such institutions, might also be transposed *sic and simpliciter* in the framework of the GDPR where this allows data subject to del-

scholarship should be recalled and appears to be agreed with[281]. Not only art. 79 GDPR due to its construction might difficulty find practical application *against a data subject* – such a possibility should teleologically be excluded. As the *ratio* of the GDPR is the protection of the weaker party, this should not be used to its detriment, for example to allow abusive negative declaratory actions by data controllers. Of course, data controllers still have the possibility to start proceedings against data subjects – only under the Brussels I bis Regulation (most likely, the rules over consumer contracts). Such actions are, in fact, not prohibited to their core, but rather fall within the scope of application of the general instrument governing international jurisdiction – i.e. the Brussels I bis Regulation. Should, however, abusive negative declaratory actions nevertheless take place to frustrate the right of data subject under art. 79(2) GDPR, the question remains open: can art. 45 Brussels I bis be supplemented with a violation of art. 79 GDPR as a valid ground to refuse recognition and enforcement of the decision?

6. … in civil and commercial matters (i.e., on the necessary overlap of the material scope of application with the Brussels I bis Regulation for its disconnection clause to be triggered)

As mentioned above (see *supra*, introduction), the disconnection clause hereby considered does not operate on the ground of the *lex posterior* principle: as already stressed, a *lex specialis* can indeed prevail on a *lex generalis* even if the first one has been previously ap-

egate their actions to collective bodies (art. 80 states that "*The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law*").

[281] MARONGIU BUONAIUTI F., *La disciplina della giurisdizione nel regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"*, in *Cuadernos de Derecho Transnacional*, 2017, p. 448, at p. 451.

proved. On the contrary, its operativeness has to be considered as an application of the general principle according to which a more specific and detailed discipline derogates to the general one: so, since the same Brussels I bis Regulation quasi-explicitly acknowledges its *status* of *lex generalis* as concerns the civil judicial cooperation in civil and commercial matters between Member States, and since it unilaterally regulates its own relationships with other sources of law falling within the same material scope of application for ruling a narrower portion of it, it is now useful to (*i*) clarify the concept of "civil and commercial matters", whilst still stressing which civil and commercial subjects are anyway excluded from the scope of the Regulation, and (*ii*) recall the meanings of "judicial authority" bound by the Regulation, and "decision" that can be recognized and enforced according to its provisions.

6.1. Definition of "civil and commercial matters" under EU law

The functioning of the disconnection clause contained under art. 67 cannot be understood without delimiting the boundaries of the notion of "civil and commercial matters". It is only once it has been definitely fixed that the analysis will be able to face the following issue, i.e. which ones, among civil and commercial matters, expressly or implicitly fall outside the application of the Brussels I bis Regulation, either under an *ad hoc* provision or following the disconnection clause here considered. In the latter case, by clearly delimiting the "overlap area" between the Brussels I bis Regulation and other instruments, it is possible to understand when, according to art. 67, the former should be discarded in favour of the other(s).

Besides specifying that the material scope of application of the Brussels Ibis Regulation has to be referred to civil and commercial matters, the opening provision of art. 1(1) specifies that "[i]*t shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority* (*acta iure imperii*)". A first notation is self-evident: such a specification does not add anything to the previous express exclusion, since none of those matters are generally considered to be civil or commercial. Nevertheless, the same sentence was already used by the EU legislator within other instruments adopted in the field of civil

judicial cooperation[282], in order to clarify that the concept of "civil and commercial matters" should be considered an autonomous notion of EU law, and should therefore be interpreted accordingly. In this sense, no residual space is left to a possible different qualification made by the domestic legal order, where the relationship between an individual and a public authority, acting as public power thanks to its authoritative position provided for by the public law, could also be considered a civil law issue, without any impact on the exclusion of the application of the Brussels I bis regime here at stake. A similar consideration could arise should national law consider a relationship as ruled by the administrative law while, under the application of the regulation, it should be referred to the civil matter field due to the fact that the public authority, in the specific case, acted as an individual[283]. In this con-

[282] In the very same exact terms, see for instance Art. 1(1) of the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (*Rome II*), or Art. 2(1) of the Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims.

[283] See for instance the considerations made by the ECJ, among others, in the *flyLAL* case: "*Exclusions from the scope of Regulation No 44/2001 are exceptions which, like all exceptions, and in the light of the objective of that regulation, which is to maintain and develop an area of freedom, security and justice by facilitating the free movement of judgments, must be strictly interpreted. The action brought by flyLAL seeks legal redress for damage relating to an alleged infringement of competition law. Thus, it comes within the law relating to tort, delict or quasi-delict (see, by analogy, judgment in Sunico and Others, EU:C:2013:545, paragraph 37). Therefore, an action such as that at issue in the main proceedings, the subject-matter of which is legal redress for damage resulting from the infringement of rules of competition law, is civil and commercial in nature. It is true that the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of civil and commercial matters, the position is otherwise where the public authority is acting in the exercise of its public powers (...). The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 44/2001 (...). Thus, so far as air navigation charges are concerned, the Court has held that the control and surveillance of air space are activities which in essence fall within the remit of the State and which, in order to be carried out, require the exercise of public powers (...). However, the Court has already held that the provision of airport facilities in return for payment of a fee constitutes an economic activity (...). Such legal relations therefore do indeed come within the scope of civil and commercial matters. In circumstances such as those at issue in the main proceedings, such a conclusion is not contradicted by the fact that the alleged infringements of competition law resulted from provisions of Latvian law or by the fact that the State holds 100% and 52.6% of the shares in the defendants in the main proceedings*" (Judgment of the Court (Third Chamber) of 23 October 2014, flyLAL-Lithuanian Airlines

text, the reference to the (distinction between) *acta iure imperii* (and *acta iure privatorum*), as internationally well-known, is certainly useful to better argue the limits of the regulation's material scope of application[284].

There's no doubt that the content of the para. 2 of art. 1 is otherwise more "effective", as it aims to clarify the regulation's material scope of application by listing a number of matters that, even if theoretically imputable to the "civil and commercial" field, are anyway expressly excluded by the application of the regulation. Such a choice does not have a unique reason in common to the different letters from (a) to (f).

First of all, in some cases the exclusion is justified by the existence of another specific instrument currently ruling the particular matter. This is the case with (*i*) the maintenance obligations arising from a family relationship, parentage, marriage or affinity (letter (e)), ruled by the Regulation (EC) No 4/2009[285]; (*ii*) the insolvency proceedings mentioned under letter (b) and ruled by the Regulation 2015/848[286];

AS, in liquidation v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, Case C-292/05, para. 27-34).

[284] A useful reference can be made to the abovementioned judgment which gave the opportunity to make clear that "[t]*he legal action for compensation brought by the plaintiffs in the main proceedings against the Federal Republic of Germany derives from operations conducted by armed forces during the Second World War. (...) there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy. It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated. (...) a legal action such as that brought before the referring court therefore does not fall within the scope ratione materiae of the Brussels Convention*", but the same reasoning can be transposed to the currently in force Brussels I bis Regulation (Judgment of the Court (Second Chamber) of 15 February 2007, Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias, Case C-292/05, para. 36-39).

[285] 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, in OJ L 7, 10.01.2009, p. 1. Due to the time of its adoption, this particular exclusion for maintenance obligations was not present in the previous Regulation Brussels I, which actually included maintenance obligations within its material scope of application.

[286] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 05.06.2015, p. 19. On the specific coordination

(*iii*) "*the rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage*", so described by the second part of letter (a) and now become the subject – for the only States participating in the enhanced cooperation and so bound by them – of "twin" Regulations 2016/1103[287] and 2016/1104[288]; (*iv*) the wills and succession *mortis causa* under letter (f) and specifically ruled by the Regulation 650/2012[289].

However, reference should not be made merely to the legislative instruments approved within the European cooperation in civil matters: with regards to international commercial arbitration, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10th June 1958, plays a key role. Its broad worldwide application therefore originally led to the exclusion of the same arbitral matter from the 1968 Brussels Convention's scope of application. Such an exclusion was then transposed to the Brussels I Regulation and has now been absorbed by the Brussels I bis Regulation, where a specific compatibility clause is included in art. 73(2)[290]. In

between the Brussels I regime and insolvency, see *amplius* the specific contributions in this *Volume*.

[287] 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, in OJ L 183, 08.07.2016, p. 1.

[288] 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, in OJ L 183, 08.07.2016, p. 30.

[289] 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, in OJ L 201, 27.07.2012, p. 107.

[290] "*This Regulation shall not affect the application of the 1958 New York Convention*". See also the new recital (12), according to which "[a] *ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to*

other terms, if a matter falls within the scope of application of the New York Convention, it falls outside the scope of the Brussels I bis Regulation, so that any issue of existence, scope and validity of an arbitration agreement is automatically excluded from the scope of application of the EU Regulation[291].

Despite the above, the exclusion of the arbitration matter from the scope of the Brussels I bis Regulation still gives rise to a vivid judicial and doctrinal debate. Indeed, as well-known and pointed out by many authors over recent years[292], the application of the Brussels I bis regime can not only affect the intra-European recognition of arbitral awards, but also the same (free) access to arbitration. This could be the case, for example, when a judicial proceedings declares null and void an arbitration agreement and rules on the merits accordingly. If a parallel arbitration proceedings takes place in another Member State, the free movement the arbitration award according to the New York Convention could be impaired due to the existence of the first judicial decision[293]. And what about an *anti-suit injunction* issued by an arbitral tribunal and subject to a recognition proceeding under the New York Convention in a Member State, towards the uniform EU rules on conflict of jurisdictions provided for by Brussels I bis Regulation (i.e. a potential manifestation of the so-called *parallel proceedings* problem, faced by the 2015 ECJ's *Gazprom*[294] case-law)[295], or the judici-

the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation".

[291] AMBROSE C., *Arbitration and the Free Movement of Judgments*, in *Arb. Int.*, 2003, p. 3 ff.

[292] The mutual relationship between the commercial arbitration and the BI bis Regulation's scope of application has been especially analysed after the first relevant decision issued on the subject matter by the Court of Justice in the *West Tankers* case (Grand Chamber, 10 February 2009, Case C-185/07), concerning the compatibility with the previous Regulation BI (No 44/2001) of an *anti-suit injunction* issued by a court of a Member State on the ground that such proceedings would be contrary to an arbitration agreement.

[293] See, among others, LA MATTINA A., CELLERINO C., *L'arbitrato e il nuovo regolamento (UE) 1215/2012: vecchie questioni e nuovi problemi aperti*, in *Diritto del commercio internazionale*, 2014, p. 551, at p. 569 ff.

[294] Judgment of the Court (Grand Chamber) of 13 May 2015, Case C-536/13, *Gazprom*.

[295] On this LAYTON A., *Arbitration and Anti-suit Injunctions under EU Law*, in FERRARI F. (ed), *The Impact of the EU Law on International Commercial Arbitration*, New York, 2017,

ary decision / arbitral award on the substance of a case following the assessment on the invalidity of the arbitration clause/agreement[296]?

From this perspective, the evolution of EU private international law is now implying a 'mutual trust' principle between national systems[297] to such an extent that the gap with the regime foreseen by the 1958 New York Arbitration Convention for the recognition of arbitral awards is growing increasingly. Both ECJ case-law and the literature have shown that EU principles, such as the denial to review the jurisdiction of the court of origin and the automatic recognition of judgments, may affect access to arbitration, so that the exclusion of arbitration from the scope of application of the Brussels I bis Regulation may prevent, rather than encourage, citizens from using this ADR instrument[298].

Returning to the general consideration on civil and commercial matters expressly excluded by the material scope of the Brussels I bis Regulation, one should recall that, in one case, it is the same abovementioned "*ad hoc*" Regulation which contains a specific provision aimed at defining its relationship with the general discipline on civil judicial cooperation provided for by the Brussels system. More precisely, Regulation 4/2009 is a case in point: due to the lack of an express exclusion for maintenance obligations within the previous Regulation 44/2001 (Brussels I), which included those non-contractual obligations within its material scope of application[299], the EU legislator had to introduce a precedence clause stating that "(…) *this Regulation shall modify Regulation (EC) No 44/2001 by replacing the provisions of that Regulation applicable to matters relating to maintenance obligations*" (art. 68(1)) into Regulation 4/2009. Nowadays, such a speci-

p. 63 ff.; GAJA G., *Convenzione di New York sull'arbitrato e anti-suit injunctions*, in *Rivista di diritto internazionale*, 2009, p. 503 ff.

[296] See CARBONE S.M., *Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del regolamento (UE) 1215/2012*, in *Diritto del commercio. internazionale*, 2013, particularly p. 679-680.

[297] As it has more recently stressed by the Court of Justice in *Achmea* case, concerning arbitrations provided for in bilateral investment treaties concluded among Member States (Grand Chamber of 6 March 2018, Case C-284/16): see in particular para. 58.

[298] See for instance SALERNO F., *Il coordinamento tra arbitrato e giustizia civile nel regolamento (UE) n. 1215/2012*, in *Rivista di diritto internazionale*, 2013, p. 1189.

[299] It rather provided to this purpose a specific conflict of jurisdiction rule, *sub* art. 5 n. 2.

fication has lost its *raison d'être*, given that the current Brussels I bis Regulation expressly excludes maintenance obligations from its scope, under art. 1(2)(e)[300]. Also, on the specific issue of maintenance obligations, we still need to mention that there are some obligations, of maintenance in nature, though not based on the existence of family relationships, with respect to which the Brussels I bis Regulation continues to be applicable. This is because the regulation only expressly excludes maintenance claims "*arising from a family relationship, parentage, marriage or affinity*", so that it still includes within its scope maintenance obligations based on the existence of (i) a *contract*: it is for instance the case of the donation[301], which under the Italian legal system gives rise to a specific maintenance obligation (*alimony*) of the donee towards the donor[302]; or (ii) a *tort*: in this case the maintenance claim presents a compensatory nature, and is connected with the existence of a pecuniary loss suffered by the creditor[303]. Unlike obligations arising from the existence of a family relationship, however, these different categories of maintenance claims cannot be ascribed to the operation of EC Regulation 4/2009, but rather to contractual or – as the case may be – non-contractual matters, subject to the special jurisdiction criterions provided for by artt. 7(1) and (2) of the Brussels I bis Regulation (in addition to the general provisions of art. 4 ff).

In addition to the abovementioned exclusions, which are due to the existence of others instruments especially devoted to ruling on a specific area included in the field of "civil and commercial matters" (such as wills, maintenance, commercial arbitration, etc.), art. 1(2) indicates that status or legal capacity of natural persons (letter (a), first part), on

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[300] See, *ex multis*, MANSEL H.-P., THORN K., WAGNER R., *Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon*, in *iPrax*, 2010, p. 7.

[301] On the inclusion of the donation institution into the area of contracts in European law, see SCHMIDT-KESSEL M., *At the Frontiers of Contract Law: Donation in European Private Law*, in VAQUER A. (ed), *European Private Law Beyond the Common Frame of Reference. Essays in Honour of Reinhard Zimmermann*, Groningen, 2008, p. 84 ff.

[302] According to Art. 437 of the Civil Code.

[303] As an example, under Latvian law the obligation to provide maintenance to the debtor is transferred to the person who caused the death, as a particular way to "compensate" the damage occurred (this and other information relating to the discipline of maintenance obligations under the various European national legal systems can be found online on the website of the European Judicial Atlas in civil matters).

the one side, and social security (letter (c))[304], on the other, must also be excluded from the regulation's scope of application. So, as regards these different matters, the necessary reference is still represented by the conflict of jurisdiction rules provided for by every single domestic legal system of the Member States.

Finally, it is also necessary to mention that there are more complex considerations that could be raised by specific judicial requests, such as ancillary or indirectly raised claims, preliminary issues or proceedings, incidental questions and provisional measures. Several guidelines have been fixed to this purpose by the ECJ case-law. First of all, it may be stated that if the principal subject matter of the dispute is an excluded matter, then the whole dispute falls outside the regulation's scope of application, including any incidental or preliminary matter that would otherwise be included[305]. Then, even if it is not possible, in principle, to bring within the scope of the regulation provisional or protective measures relating to matters which are excluded from it[306], nevertheless where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the regulation, the latter is applicable and therefore may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings fall outside the application

[304] According to the Report *Jenard* (p. 13), this exclusion has to be limited to disputes between the administrative authorities and employers or employees. However, public authorities' actions against third parties or in subrogation to the rights of an injured party may fall within the Brussels I bis Regulation (in these very terms see ROGERSON P., *Article 1*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 53, at p. 76).

[305] ROGERSON P., *Article 1*, cit., p. 84. See already the judgment of the Court of 25 July 1991, Marc Rich and Co. A.G. and Società Italiana Impianti P.A., Case C-190/89, at para. 26 (referred to the original 1968 Brussels Convention): "*In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention*".

[306] Judgment of the Court of 27 March 1979, Jacques de Cavel v Louise de Cavel, Case 143/78, at para. 9.

of the EU instrument[307]. Some Authors still consider such clarifications to be unsatisfactory, especially where reference is made to arbitration and insolvency matters[308].

6.2. Relevant definition of "court" and subject bound to apply the Brussels I bis Regulation under EU law

The discipline on conflict of jurisdictions and recognition of judgments provided by the Brussels I bis Regulation (the so-called "Brussels system", initially created by the 1968 Brussels Convention) applies to all national bodies that exercise jurisdictional functions. To date, the Court of Justice of the European Union has returned to this issue several times, every time maintaining its clear position, namely that the rules at stake have to be applied by domestic "judges", whatever the nature of the court or tribunal[309]. Therefore, no doubt can now be raised about the fact that the regulation also covers civil claims brought before both criminal[310] and administrative courts. So, how can one identify those (public) bodies that fall within the notion of "court" under the discipline at stake? According to the case-law of the ECJ, it is widely acknowledged by the scholarship that this term should, on the one hand, receive an extensive interpretation, even if, on the other,

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[307] Judgment of the Court of 17 November 1998, Van Uden Maritime BV, trading as Van Uden Africa Line, and Kommanditgesellschaft in Firma Deco-Line and Another, Case C-391/959, at para. 34.

[308] See for instance CARBONE S.M., TUO. C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 350 ff. According to P. ROGERSON, *Article 1*, cit., p. 85, "*the problem is merely then postponed to the question of recognition and enforcement of any judgement given*".

[309] Art. 3 specifies the definition of "court", for the purposes of the Regulation, with specific reference to two national situations: "*For the purposes of this Regulation, 'court' includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation: (a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző); (b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten)*".

[310] In that sense see for instance the judgment of the Court (Third Chamber) of 22 October 2015, Aannemingsbedrijf Aertssen NV, Aertssen Terrassements SA v VSB Machineverhuur BV and others, Case C-523/14, para. 25 ff.; and the judgment of the Court of 21 April 1993, Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann, Case C-172/91, at para. 16.

it is absolutely essential that such a qualification be only recognized to an authority (*i*) which is permanent; (*ii*) established only according to the (relevant domestic) law; (*iii*) required to apply provisions of law; (*iv*) whose jurisdiction is mandatory; (*v*) with a third and impartial position towards the parties; (*vi*) acting according to the adversarial principle and in respect of the rights of defence[311]. Consistently with such indications[312], the notion of "court" used by the regulation cannot include an arbitrator or an arbitration board, even in case of a formal arbitration whose seat is located in a Member State. This is so, because "*the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator*"[313].

Again, by way of taking into consideration the notion of "court" under the Brussels I bis Regulation, a brief recall has to be granted to Recital (11), covering a very specific issue: i.e., the fact that the terms "courts" and "tribunals" of the Member States should include courts or tribunals common to several Member States, "*such as the Benelux Court of Justice when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore*", of course, "*judgments given by such courts should be recognised and enforced in accordance with th*[e same] *Regulation*".

[311] See for all CARBONE S.M., TUO. C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 24.

[312] Since, on this side, the interpretation conferred to the notion of "court" cannot be considered as broad as it was defined here above.

[313] Judgment of the Court (Fourth Chamber) of 27 January 2005, Guy Denuit and Betty Cordenier v Transorient - Mosaïque Voyages et Culture SA, Case C-125/04, para. 13 (the notion of "court" was in this case referred to the use of it made by the EC Treaty under the provision governing the requests of preliminary rulings). On this point see also CHABOT G., *Un tribunal arbitral conventionnel ne constitue pas une juridiction au sens de l'article 234 CE*, in *La Semaine juridique*, 2005, II, n. 10079.

6.3. Relevant definition of "judgment" under the Brussels I bis Regulation

Moving on to the notion of "decision" taken into account by the Brussels I bis Regulation – i.e. "what" may be recognised and enforced under its rules –, one should, first and foremost, recall that a "decision" must be issued by a Member State (including Denmark[314]). From this perspective, it does not matter where the domicile of the parties has been fixed – whether within or outside of the EU – or, more importantly, if the jurisdiction exercised by an EU court was founded on the grounds set to this purpose by the regulation itself or on domestic conflict of jurisdictional rules.

As regards the formal issue concerning the "label" given by the court to the measure at stake, art. 2(a) of the regulation clarifies that the term 'judgment' is used by the same regulation to refer to "*any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*" and, for the purposes of Chapter III, it also includes "*provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter*", but "[i]*t does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement*". Conversely, according to the Schlosser report (but the opinion is generally shared by the authors), any decision on a mere procedural reason – e.g. the compliance with a time limit – cannot be considered to fall within the regulation's scope, as decisions on procedural matters are not binding as to the substance[315].

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[314] As a consequence of the agreement concluded between Denmark and the EC on 19 October 2005, and of the following letter of 20 December 2012 stating that Denmark would have applied the Regulation Brussels I bis in its quality of a mere recast of the previous Bruxelles I, considered by the original agreement.

[315] SCHLOSSER P., *Report on the on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, in OJ C 59, 5.3.1979, p. 71, at para. 191.

There are, however, some peculiar decisions that, despite being only "procedural" in nature, are relevant for the application of the regulation – for instance such giving application to institutions as *lis pendens* and related actions (art. 29 ff.). With regard to this, the European Court of Justice has underlined the fact that a restrictive interpretation of the concept of judgment would give rise to a category of judicial decisions which are not among those exceptions exhaustively listed in the regulation, which could not be categorised as 'judgments' for the purposes of its application and that courts of other Member States would accordingly not be obliged to recognise. Indeed, "[i]*t is clear that such a category of decisions, including in particular those by which a court in another Member State declined jurisdiction on the basis of a jurisdiction clause, would be incompatible with the system established by* [the] *Regulation No* [1215/2012]*, which favours the unimpeded recognition of judgments and rules out the possibility of review of the jurisdiction of the court of the Member State of origin by the courts of the Member State in which recognition is sought*"[316].

At the same time, the judgments considered by the Brussels I bis Regulation are not only those which are final and binding within their original legal system. According to art. 38, if a foreign decision has not yet become final and is challenged in the Member State of origin, proceedings carried out in another Member State, where such a decision is invoked, may be suspended.

Finally, a few words will be said on the *effects* of judgments considered by the Regulation. As stated by Mr. Jenard in his Report, the uniform discipline here considered "*must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given*"[317]. This approach is now shared also by the new art. 54 of the Brussels I bis Regulation, where the scenario of a judgment containing a measure or an order which is not known in the law of the addressed Member State is taken into consideration. If this is the case, that measure or order shall, as far as possible, be adapted to a measure or an order known in the law of that Member

[316] Judgment of the Court (Third Chamber) of 15 November 2012, Gothaer Allgemeine Versicherung AG and others v Samskip GmbH, Case C-456/11, para. 31.

[317] Report *Jenard*, p. 43.

State which has equivalent effects and pursues similar aims and interests. Such adaptations shall not, however, result in effects that go beyond those provided for in the law of the Member State of origin[318].

6.4. Civil and commercial matters: insolvency (related) proceedings as a case study

Having established that i) art. 67 Brussels I bis Regulation is triggered when two regulations overlap in their material scope of application, ii) most instruments for judicial cooperation rely upon the definition of "civil and commercial matters", and iii) fragmentation in such a field has led to the adoption of special rules on jurisdiction and free movement of decisions which, for some time, have determined the operability of art. 67 Brussels I (bis), the relationships between the Brussels regime and the rules in insolvency matters have presented – and still present – some challenges to the coordination of the legal frameworks. Insolvency has its own rules, amongst others, on jurisdiction and free movement of decisions. Such rules were originally contained in the 2000 Insolvency Regulation and are now in the 2015 Insolvency Regulation Recast[319]. The Brussels regime traditionally contained an "insolvency exception" in art. 1[320]. In this sense, the two instruments (should) have set a clear scope of application, thereby avoiding the necessity to trigger the disconnection clause contained now in art. 67 Brussels I bis. Always in terms of positive coordination, the regime of free movement of decisions in insolvency matters strongly relies on Brussels I: art. 32(1) of the 2015 Insolvency Regulation Recast defers

[318] See already Judgment of the Court, 4 February 1988, Horst Ludwig Martin Hoffmann v Adelheid Krieg, Case 145/86, para. 31: "a foreign judgment which has been recognised (…) must *in principle* have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given" (italic added).

[319] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30.6.2000, p. 1, and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19.

[320] See now Brussels I bis Regulation, art. 1(2)(b) ("*This Regulation shall not apply to ... bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*").

to the Brussels I bis rules the regime for the free movement of decisions[321].

However, the coordination between the different legal regimes is anything but easy.

In the first place, from a practical perspective, the scope of application between the Brussels I bis Regulation and the Insolvency Regulation is not as straightforward as it could be[322]. Art. 1(2)(b) Brussels I bis Regulation mentions an insolvency exception but does not offer a definition of the notion. This could be derived from the relevant definitions of the 2015 Insolvency Regulation Recast, which is also unclear. The latter instrument has witnessed an extension in its scope of application (in comparison to the 2000 Insolvency Regulation) and is now applicable both to collective public proceedings aimed at liquidating insolvent debtors and to the saving of distressed companies. For the purposes of the latest insolvency regulation, "insolvency proceedings" are those listed under Annex A. The issue regarding the blurred and uncertain scope of application between the two instruments relates to the value of the classification of "insolvency proceedings" under Annex A of the 2015 Insolvency Regulation Recast. If a domestic procedure presents "insolvency features" listed under art. 1 (i.e. it is a public collective proceeding based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation or liquidation where the debtor is divested of its assets or otherwise supervised, along with a stay of individual proceedings), then does it automatically determine the applicability of the insolvency regulation framework? According to recital 9 of the insolvency regulation[323], as supported by previous case law of the Court of Justice of the European

[321] 2015 Insolvency Regulation Recast, art. 32(1).

[322] See S. BARIATTI, I. VIARENGO, F.C. VILLATA, F. VECCHI, *The Scope of the Regulation*, in B. HESS, P. OBERHAMMER, S. BARIATTI, C. KOLLER, B. LAUKEMANN, M. REQUEJO ISIDRO, F.C. VILLATA (eds), *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, Baden-Baden, 2017, p. 33, at p. 64 ff.

[323] "*This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met...*".

Union[324], the *inclusion* of a national proceedings within the annex determines the applicability of the insolvency regulation without possibility for (domestic and foreign) authorities to contest such application, regardless of whether the proceedings actually presents insolvency features under art. 1 of the regulation[325]. On the contrary, in terms of relationships between Brussels I bis and insolvency, it is not easy to answer on the issue of the *non-inclusion* of a domestic proceedings under Annex A of the 2015 Insolvency Regulation Recast. Recital 9, *in fine*, suggests that "*National insolvency procedures not listed in Annex A should not be covered by this Regulation*", possibly regardless of whether the single procedure not listed theoretically fulfils the requirements set by art. 1 insolvency regulation[326] (a circumstance that has led scholars to call for a revaluation of the value of annexes in the context of insolvency regulations[327]). At the same time, recital 7 of the insolvency regulation suggests that "*the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012*". Therefore, if a domestic insolvency proceedings presenting the characteristics of art. 1 Insolvency Regulation Recast is not included in Annex A, the ap-

[324] Cf Judgment of the Court (Fifth Chamber), 18 April 2013, Meliha Veli Mustafa v Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguritelen institute, Case C-247/12, para. 36

[325] G. MOSS, T. SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, in G. MOSS, I. FLETCHER, S. ISAACS (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, Oxford, 2016, p. 430, at p. 434. See Judgment of the Court (First Chamber), 22 November 2012, Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o., Case C-116/11. In the context of the 2000 Insolvency Regulation, thus when the rescue of companies was still outside the scope of application of the instrument, the Court of Justice of the European Union argued that "*once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation*" (para. 33).

[326] Supporting a strict view, Judgment of the Court (Third Chamber), 8 November 2012, Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm, Case C-461/11, para. 24 ("*The Swedish debt relief procedure also does not appear in Annex A to Regulation No 1346/2000. Since that regulation applies only to the proceedings listed in that annex, the debt relief procedure at issue in the main proceedings does not fall within its scope*").

[327] B. HESS, *Scope of the Regulation*, in B. HESS, P. OBERHAMMER, T. PFEIFFER, A. PIEKENBROCK, C. SEAGON, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings*, 2014, available online, p. 35, at p. 95 ff, suggesting amongst others that annexes acquire a simple informative value, leaving normative value only to art. 1.

plicability of Brussels I bis is not automatic. Operators must first verify whether or not the (additional and autonomous) conditions of the "insolvency" exception under art. 1(2)(b) Brussels I bis are (not) met. According to a consolidated case law of the Court of Justice of the European Union, Brussels rules are not applicable due to the insolvency exception if judicial actions are based on domestic insolvency collective and public proceedings whose aims are the public administration of assets of insolvent debtors for the interests of creditors. The exception extends to actions deriving from and closely linked to insolvency proceedings – such as those private law or company law actions whose legal basis is the state of insolvency and the insolvency proceedings[328] –, the *discrimen* in general terms being whether or not an action can be started by a party without a prior declaration of insolvency.

A rationalisation of the above leads to the following[329]: if a domestic insolvency proceedings is listed in Annex A 2015 Insolvency Regulation Recast, this instrument will be applied *ratione materiae*. If not, due to recital 9, the insolvency rules should not be applicable – however, due to recital 7, this does not necessarily mean that the Brussels I bis Regulation will become immediately applicable. If a domestic insolvency proceedings *does not fall* within the autonomous notion of the "insolvency exception" developed in the context of the Brussels regime, these *rules will be applicable*. If a domestic insolvency proceedings *does fall* within the autonomous notion of the "insolvency exception" developed in the context of the Brussels regime, these rules *will not be* applicable, the matter thus being governed by domestic law as no EU-derived rule is applicable[330].

[328] See Judgment of the Court of 22 February 1979, Henri Gourdain v Franz Nadler, Case 133/78, para. 4 ff.

[329] Thoroughly on this point, see A. LEANDRO, *The Minefield of the Interference of the Brussels Ibis Regulation and the European Insolvency Regulation (Recast)*, in P. MANKOWSKI (ed), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020, p. 188, at p. 189 f., and S. BARIATTI, I. VIARENGO, F.C. VILLATA, F. VECCHI, *The Scope of the Regulation*, cit., p. 87.

[330] In the case law, the complexities are well exemplified by Judgment of the Court (Fifth Chamber) of 29 April 1999, Eric Coursier v Fortis Bank and Martine Coursier, née Bellami, Case C-267/97, a moment in time where the Brussels "insolvency exception" was already developed, but no insolvency regulation was yet adopted. Creditors in France obtained a first

Clearly, the very first question – i.e. determining which EU instrument governs jurisdiction and free movement of decision is applicable – is anything by easy to answer. As noted in the scholarship, uncertainties as to the exact scope of application of the relevant instruments may lead to a certain degree of forum shopping[331], a practice that is generally considered to be against the interests of EU international civil procedure.

In the second place, and following the above, the topic of "insolvency related" proceedings opens up to relevant uncertainties in terms of coordination between the Brussels I bis Regulation and the special rules in insolvency matters.

Whereas the subject of the interface between the two relevant instruments has been the subject matter of in depth studies[332], from the very specific focal lens of art. 67 Brussels I bis Regulation, the con-

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decision. A second insolvency judgment, always in France, suspended individual actions. As the debtor obtained a new employment in Luxembourg, the creditor requested the *exequatur* of the first decision in Luxembourg, which was granted. Opposing recognition and enforcement, the debtor contested that the second French judgment deprived the first French judgment of its "enforceability in the Member State of origin", thus making recognition and enforcement impossible in the requested Member State as well. The issue was thus the relationship between the first French (civil law) decision and the second (insolvency law) decision in Luxemburg. In a rather succinct passage – also to be read in light of the year of the decision – the Court argued that "*As regards a judgment such as the insolvency judgment which concerns a matter expressly excluded from the purview of the Brussels Convention, it is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of that judgment within its territory*" (para. 32).

[331] B. HESS, T. PFEIFFER, P. SCHLOSSER, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, 2007, available online, p. 41, para. 88.

[332] *Ex multis* B. LAUKEMANN, *Jurisdiction – Annex Proceedings*, in B. HESS, P. OBERHAMMER, T. PFEIFFER, A. PIEKENBROCK, C. SEAGON, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings*, 2014, available online, p. 166 ff; GEERT VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, in *European Business Law Review*, 2016, p. 735, at p. 741 ff; S. BARIATTI, *Filling in the Gaps of EC Conflict of Laws Instruments: The Case of Jurisdiction Over Actions Related to Insolvency Proceedings*, in G. VENTURINI, S. BARIATTI (eds), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar*, Milano, 2009, p. 23; S. BARIATTI, I. VIARENGO, F.C. VILLATA, F. VECCHI, *The Scope of the Regulation*, cit., p. 77 ff; F. MARONGIU BUONAIUTI, *Gap colmato? I rapporti tra Regolamento (UE) 2015/848 e il Regolamento Bruxelles I bis*, in A. LEANDRO, G. MEO, A. NUZZO (eds), *Crisi transfrontaliera di impresa: orizzonti internazionali ed europei*, Bari, 2018, p. 103 ff, and A. LEANDRO, *The Minefield of the Interference of the Brussels Ibis Regulation and the European Insolvency Regulation (Recast)*, cit., p. 190 ff.

cluding following points may be made: ii) art. 67 as a *lex generalis-lex specialis* disconnection clause only operates in so far as two instruments overlap in their material scope of application; ii) art. 1 Brussels I bis Regulation (formally) only excludes "insolvency proceedings" from its scope of application – thus "deactivating" art. 67; iii) the "insolvency exception" has, for many years now, been interpreted by the Court of Justice of the European Union, so as to extend to proceedings "deriving from" or "closely connected to" insolvency proceedings. Despite this and after years of consistent case law of the Court of Justice, art. 1 Brussels I bis Regulation has not been "adjourned". From the perspective of art. 67 Brussels I bis Regulation, a non-updated text of art. 1 might lead to the risk of thinking that the relationship between the Brussels regime and the insolvency regulation is to be governed under the disconnection clause at hand, whilst the (difficult, and unclear) demarcation of the material scope of application of the two instruments should, on the contrary, lead to the non-application of art. 67 Brussels I bis Regulation, which postulates an overlap in the material scope of application between the *lex generalis* and the *lex specialis*. Just as the relationships between Brussels I bis and Regulation 4/2009 are (no longer) resolved under the disconnection clause, the same should hold true in cases of insolvency, even though significant complexities remain as to the identification, in given cases, of actions "deriving from", or "closely connected to" insolvency proceedings that escape the Brussels I bis Regulation and fall within the scope of application of (newly introduced) rules on *vis actractiva concursus* in the 2015 Insolvency Regulation Recast (which, moreover, no longer requires a state of insolvency to be applicable[333]).

[333] On the effects of the extension of the scope of application of the Insolvency Regulation over the "insolvency exception" in the Brussels regime, see A. LEANDRO, *The Minefield of the Interference of the Brussels Ibis Regulation and the European Insolvency Regulation (Recast)*, cit., p. 197, noting that "[a] *renewed meaning of insolvency law, in fact, has arisen ... which opens up to new ways of handling a crisis or would-be crisis. This results in the adaptation (and bringing to date) of the 'insolvency exception' of the Brussels Ibis Regulation to the new scope of the EIR. Accordingly, the Gourdain criterion of the 'direct connection between actions and insolvency law' ends up changing in terms of content rather than purpose*". Before the extension of the scope of application of the 2015 Insolvency Regulation Recast to pre-insolvency proceedings, which did fall under the scope of application of Brussels I, see B. HESS, *Scope of the Regulation*, cit., p. 92, referring to arrangements to restructure the debt within a company, which could have been approved by a court or incorporated within a public

In addition, even though the relationship between the Brussels I bis Regulation and the 2015 Insolvency Regulation should not be laid down in terms of art. 67 Brussels I bis, it does not mean that the two instruments have no connections whatsoever. As interpreted and expanded by the case law of the Court of Justice of the European Union, the "insolvency exception" serves as a "bridge", i.e., as a "connection or disconnection" between relevant regimes[334]. Art. 6(1) 2015 Insolvency Regulation Recast grants insolvency courts with jurisdiction over civil claims deriving from or closely linked to insolvency proceedings[335]. Art. 6(2), in respect to ancillary or insolvency related proceedings, if these are related to a civil law action against the same defendant, grants the insolvency practitioner the *possibility*[336] to bring both (insolvency related and non-insolvency related) actions before

act, thus moving across the European judicial space according to the respective Brussels I provisions.

[334] In these terms, A. LEANDRO, *The Minefield of the Interference of the Brussels Ibis Regulation and the European Insolvency Regulation (Recast)*, cit., p. 191. However, as noted by F. MARONGIU BUONAIUTI, *Gap colmato? I rapporti tra Regolamento (UE) 2015/848 e il Regolamento Bruxelles I bis*, cit. p. 105, to some extent linguistic versions might pave the way to doubts. Whereas the English version of current art. 1(2)(b) Brussels I bis Regulation is fairly consistent with its corresponding rule in the Brussels I Regulation, the Italian version has changed. Under Regulation 44/2001 the 'insolvency exception' was drafted for "*i fallimenti, i concordati e la procedure affini*". The same exception under Regulation 1215/2012 is much more 'elaborate', and refers to legal person in a state of liquidation, as the provision now reads that "*i fallimenti, le procedure relative alla liquidazione di società o altre persone giuridiche che si trovino in stato di insolvenza, i concordati e le procedure affini*". As argued in the scholarship, the difference in wording in the (Italian) version of the 'insolvency exception', even though at first sight might appear to promote a restrictive approach in its interpretation, should not lead to this conclusion as all elements not included in the provision were already identified by the case law of the Court of Justice of the European Union. Moreover, if this 'insolvency exception' must create a disconnection – or a "bridge" – between the two instruments such as the different notions must be read one in light of the other, art. 1(2)(b) Brussels I bis Regulation should be interpreted so as to include also insolvency proceedings whose object is to save the company, thus where it is not strictly possible to speak of a legal person in a state of liquidation.

[335] The provision at hand crystallising the previous case law of the Court of Justice of the European Union concerning the relationships between the two relevant regulations and the insolvency exception in the Brussels regime (F. MARONGIU BUONAIUTI, *Gap colmato? I rapporti tra Regolamento (UE) 2015/848 e il Regolamento Bruxelles I bis*, cit. p. 104).

[336] On the elective nature of art. 6(2) 2015 Insolvency Regulation Recast, concurring with Brussels I bis Regulation, S. BARIATTI, I. VIARENGO, F.C. VILLATA, F. VECCHI, *The Scope of the Regulation*, cit., p. 101.

the court of the Member State of domicile of the defendant, if this court has "*jurisdiction* [over the non-insolvency related claim[337]] *pursuant to Regulation (EU) No 1215/2012*". This means that the insolvency practitioner is granted the possibility to 'extrapolate' an insolvency-related claim falling within the scope of application of the Insolvency Regulation and start judicial proceedings under the rules of a regulation (Brussels I) inapplicable *ratione materiae* to insolvency-related claims.

Moreover, a further coordination between the two instruments takes place in relation to the free movement of decisions. Judgments opening insolvency proceedings delivered by the competent court are recognised in all other Member States (art. 19 Insolvency Regulation Recast), and produce, with no further formalities, the same effects in any other Member State (art. 20). Judgments concerning the course and closure of the insolvency proceedings are enforced under the Brussels I bis Regulation, public policy being the only ground to refuse recognition or enforcement[338] (art. 32, and 33). In this sense, the Brussels regime constitutes the backbone of the rules on free movement of decisions in cross-border insolvency law as well – the latter which thus also enjoys the "evolution" in terms of postponement of *exequatur*, but enhances its own system, as insolvency law reduces the grounds (of what would otherwise be the *lex generalis*) to refuse recognition and enforcement in the requested Member State.

6.5. Civil and commercial matters: child's property proceedings

Incidenter tantum, always as general remarks on the notion of "civil and commercial matters", thus on the relationships between different instruments, and recalling that art. 67 Brussels I bis Regulation triggers the disconnection clause only in so far as there is an overlap in the material scope of application between *lex generalis* and *lex specialis*, making it particularly important to discern the scope of applica-

[337] F. MARONGIU BUONAIUTI, *Gap colmato? I rapporti tra Regolamento (UE) 2015/848 e il Regolamento Bruxelles I bis*, cit. p. 115.

[338] See S. BARIATTI, *Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2009, 629, p. 643 f.

tion of the regulations, the Brussels II bis Regulation should be mentioned as well[339]. As known, this instrument governs jurisdiction and free movement of decisions in the field of matrimonial matters where status issues are at stake, and matters of parental responsibility. Brussels I bis, on its side, contains a "status or legal capacity" exception in art. 1(2)(a). Between the two instruments there should be no overlap in the material scope of application, with the consequence that the non-affect clause should not be triggered.

Again, this does not imply that no relationship whatsoever exists between the two regulations. Although case law on this point may, with some difficulty, be collected, it is particularly noteworthy to recall that the Brussels II bis Regulation applies to "*measures for the protection of the child relating to the administration, conservation or disposal of the child's property*" (art. 1(1)(e)). As is made clear by recital 9 of the regulation, "*As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property... Measures relating to the child's property which do not concern the protection of the child should continue to be governed by* [the Brussels I bis Regulation]". In this sense, it becomes sensitive for practitioners and courts to determine whether a measure does indeed concern the "protection" of the child – the consequence being the applicability of one instrument rather than the other[340]. Part of the schol-

[339] 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, in OJ L 338, 23.12.2003, p. 1, now Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1.

[340] On a more and broad dogmatic level, one could also wonder whether the applicability of the Brussels I bis Regulation to child's property proceedings that are not aimed for adopting protective measures – as a pure litigation between the buyer of the immovable property and the child's sellers' representative – would also affect the special attention the Brussels II bis/ter rules reserve to children. As the Brussels II bis Regulation clearly points outs, "*This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights*

arship has correctly outlined that this distinction is rather peculiar, as "*almost every measure concerning the child's property will have a protective nature*"[341].

In any case, the relationship on this point between Brussels I and Brussels I bis seems to be resolved in light of the different scope of application of the instruments, rather than under the *lex specialis* principle incorporated in art. 67 Brussels I bis Regulation. Nonetheless, it should also be noted that, *in fine*, the new recital 10, Brussels II bis Recast adds that "*However, it should be possible for the provisions of this Regulation on jurisdiction over incidental questions to apply in such cases*". Whereas this seems to incorporate traditional principles of international civil procedure, it translates into a further expansion of the scope of application of Brussels I bis.

7. Art. 67 Brussels I bis Regulation: some critical remarks, and suggestions

From an introductory perspective, it emerges how a relatively "simple" provision (art. 67 Brussels I bis Regulation), if compared for example on rules on jurisdiction in contractual matters, poses a significantly high number of interpretative questions based solely on the wording of the text. To such interpretative questions, others which need assessment come to the forefront taking into consideration methodological approaches followed in the application of the provision.

of the European Union" (recital 33). Even though the Brussels I regime is not specifically created and tailored upon the needs of children, the Charter of Fundamental Rights of the European Union (in OJ C 326, 26.10.2012, p. 391) remains primary EU law, which secondary law, such as regulation, must conform to. In this sense, thus, the change of instrument will surely determine a "loss" in focus and perspective of "child's protection"; in any case, courts and practitioners will have to balance the needs and interests of "commercial cases involving children" with specific children's rights that might emerge in single proceedings.

[341] PINTENS W., *Article 1*, MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume IV, Brussels IIbis Regulation*, Köln, 2017, p. 52, at p. 80.

7.1. Art. 67 as the proper legal basis to govern the disconnection with international conventions concluded by all Member States and by the European Union, in light of art. 216(2) TFEU

Different approaches have emerged in the case law concerning the applicability of either art. 67 or art. 71 Brussels I bis Regulation for international conventions to which the European Union has become part. The European Union has become part to the 1999 Montreal Convention[342]. Some domestic courts have resolved the issue of coordination between the special international regime and the Brussels I bis Regulation in light of art. 71[343], whereas others have solved the matter in light of art. 67[344]. Other courts have argued for their jurisdiction, without addressing the matter of coordination of relevant instruments neither under art. 67 nor under art. 71 Brussels I bis Regulation[345]. The scholarship generally maintains that art. 67 Brussels I bis Regulation should also find application for international agreements concluded by the European Union as, by virtue of art. 216(2) TFEU, "*Agreements concluded by the Union are binding upon the institutions of the*

[342] See 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), in OJ L 194, 18.7.2001, p. 38.

[343] Cass. Civ. Sez. Unite 8.7.2019, n. 18257, in *En2Bria* database ("*L'art. 71, comma 2, lettera a), del Regolamento, stabilisce il criterio per dirimere i conflitti nell'ipotesi di concorrente applicabilità della normazione convenzionale e di quella europea* [...]. *Può concludersi, pertanto, nel senso dell'applicabilità, in via generale dei criteri di radicamento della giurisdizione contenuti nell'art. 33, comma 1, della Convenzione di Montreal, sia perché in relazione di specialità* [...]. See also Cass. Civ., Sezioni Unite, 13.02.2020, n. 3561, in *En2Bria* database.

[344] LG Bremen, 05.06.2015 - 3 S 315/14, in *En2Bria* database ("*Zur Entscheidung über den materiell-rechtlichen Schadensersatzanspruch ergibt sich die internationale Zuständigkeit deutscher Gerichte aus Art. 33 des Montrealer Übereinkommens zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999 …. Dieses beansprucht gemäß Art. 67 EuGVVO (nicht Art. 71 EuGVVO…)*"). See DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, cit., at p. 401, text and footnote.

[345] Tribunale Napoli, 7 febbraio 2011, in *En2Bria* database.

Union and on its Member States"[346]. The choice between the two competing disconnection clauses is relevant, as if one concedes that the additional conditions super-imposed by the case law of the Court of Justice of the European Union in the context of art. 71 should not apply to art. 67, a higher degree of certainty and foreseeability on the application of the legal regime follows.

The COTIF convention proves the relevance of such a choice. The European Union is a party to the COTIF convention[347], which is thus part of EU law. According to the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV), judicial actions may be brought before the courts of Member States designated by agreement between the parties or before the courts of the Member State on whose territory the defendant has his/her domicile, habitual residence, principal place of business or the branch or agency which concluded the contract of carriage[348]. Such heads of jurisdiction are thus concurring with the courts having competence under Brussels I bis in contractual or non-contractual matters, depending on the claim. Even though the Brussels I bis Regulation takes precedence in intra-EU relationships[349], in fully international cases recourse to art. 71 would at least require a reflection on whether the contractual fora under art. 7 of the regulation, more specifically – the place of perfor-

[346] KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, cit., p. 719, and PUETZ A., *Rules on Jurisdiction and Recognition or Enforcement of Judgments in Specialised Conventions on Transport in the Aftermath of TNT: Dynamite or Light in the Dark?*, in *The European Legal Forum*, 2018, p. 117, at p. 125.

[347] 2013/103/EU: Council Decision of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, OJ L 51, 23.2.2013, p. 1.

[348] CIV, art. 57.

[349] Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 , as amended by the Vilnius Protocol of 3 June 1999, OJ L 51, 23.2.2013, p. 8 (art. 2: "*Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned*").

mance of service –, and the *ratio* they serve, do fall within those non-renounceable principles in the terms developed by the Court of Justice in *Nipponkoa* case. Recourse to art. 67 as a venue for coordination would ease the approach and ensure higher predictability, in that such a compatibility test should not be deployed. On this point, however, no case law of the Court of Justice of the European Union is given yet, with the consequence that it will be for the Court, in the last place, to ensure that international conventions to which the EU as acceded are coordinated with the general regime under art. 67 of the Brussels I bis Regulation (and that to such provision the *TNT* and *Nipponkoa* golden rules are not extend to).

Of course, a policy-making question remains: should the accession by the EU to international treaties in special matters require an autonomous disconnection clause? After all, the scenario is not fully consistent either with "*pure*" "*other EU instruments*" under art. 67 (as the Council decision acceding to a convention might pose some reservations, yet a "systemic view" or "unilateral control" of the legislator would nonetheless miss), and it would not fit a "*pure*" "*international treaties concluded by Member States*" scenario under art. 71. In other words – should the EU lawmaker introduce a *tertium genus* which specifically takes into consideration both the international origin of the *lex specialis* and the adhesion of the Union by way of unilateral act? This, of course, is a political matter; yet additional guidance on the complex topic of the connections and disconnections of the *lex generalis* with *lex specialis* is more than welcome, as artt. 67 and 71 both partially incorporate *ratios* that could potentially be deemed applicable to international treaties ratified by instruments of the Unions.

7.2. Concurring exclusive and non-exclusive overlapping rules

Art. 67 Brussels I bis Regulation and its disconnection venue only finds application when special rules overlap with the scope of application of the general regime. In some cases, art. 67 is not triggered. However, the same special act might contain both provisions that fall outside the scope of application of the Brussels I bis Regulation, as well as rules that do indeed concur. A most notable example in this context is the Regulation against the effects of the extra-territorial ap-

plication of legislation adopted by a third country[350]. On the one side, such an instrument sets rules on recognition and enforcement of decisions, prescribing that no judgment in which extra-territorial application of given laws shall be recognised or enforced in the Member States. Yet, such a rule is only applicable to third-country judgment[351]. As the Brussels I bis Regulation deals with the free movement, the recognition and enforcement of decisions rendered by courts or tribunals of Member States[352], the two instruments do not overlap in their material scope of application – thereby rendering coordination unnecessary. At the same time, art. 6 of the Regulation against the effects of the extra-territorial application of legislation also affirms the right of the damaged parties to start proceedings for redress. Strictly speaking, the regulation does not contain rules on jurisdiction – as it makes a full renvoi to the 1968 Brussels Convention – even though the latest amended version of the Regulation against the effects of the extra-territorial application of legislation is dated 2018 (and no reference to the Brussels I bis Regulation, or the Brussels I Regulation, has been made[353]). Even if the Regulation against the effects of the extra-territorial application of legislation entails no rule on jurisdiction as the instrument auto-coordinates itself with the general regime, which becomes applicable, the first regulation shows how coordination under art. 67 Brussels I bis Regulation should deal with "*provisions*" contained in other EU law instruments, rather than instruments in general. Courts and practitioners should always carefully evaluate "other" EU law acts that, despite having little application in practice and whose name might suggest a lack of overlap of the material scope of application, may require proper coordination under art. 67 Brussels I bis.

[350] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, in OJ L 309, 29.11.1996, p. 1, as amended.

[351] Council Regulation (EC) No 2271/96, cit., art. 4 ("*No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner*").

[352] Brussels I bis Regulation, art. 2(a).

[353] See however Brussels I bis Regulation, art. 82(2) ("*In so far as this Regulation replaces the provisions of the 1968 Brussels Convention between the Member States, any reference to that Convention shall be understood as a reference to this Regulation*").

Coordination issues only arise once there is a material overlap between the instruments, *rectius* – the provisions. This has, for some time, been the case surrounding the relationships between the Brussels I Regulation and Regulation 4/2009, which has been resolved with the Brussels I Recast, by removing maintenance obligation subject to the *lex specialis*[354] from its scope of application.

Even though the number of provisions concurring with the general regime might initially appear to be small, a closer analysis shows a significance in numbers, which should not surprise in the era of specialisation of law. Provisions that trigger art. 67 Brussels I bis are to be found in the field of Community plant variety rights[355]; in the posting of workers Directive[356]; in the Regulation on Community designs[357]; in the field of unitary patent protection[358], as well as in the GDPR[359]. Yet, such rules, in particular on jurisdiction (when given), are highly diverse in nature.

Some rules on jurisdiction are "optional", in the sense that a specific instrument, by pursuing its own policy goals, foresees heads of jurisdiction that are merely additional to those enshrined in the general applicable framework. This is the case of art. 6 of the posting of workers Directive, according to which proceedings "*may*" be brought before courts "*in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*".

Another, more recent, case for (possible) concurring heads of jurisdiction is given by the GDPR – that is also interesting from a methodological perspective. Recital 147 of the GDPR provides that "[w]*here*

[354] See Brussels I Regulation, art. 5, n. 2, concerning matters relating to maintenance, no longer included in the Brussels I bis Regulation.

[355] Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in OJ L 227, 1.9.1994, p. 1, as amended.

[356] Directive 96/71/EC, cit.

[357] Council Regulation (EC) No 6/2002, cit.

[358] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 1, and Agreement On A Unified Patent Court.

[359] Regulation (EU) 2016/679, cit.

specific rules on jurisdiction are contained in this Regulation … general jurisdiction rules such as those of Regulation (EU) No 1215/2012 … should not prejudice the application of such specific rules". The recital is of interest from a methodological perspective as it might be believed to be redundant – the applicability of *lex specialis* already being granted by art. 67 of Brussels I bis. Yet, in light of the mentioned ever-growing specialisation of the law, the EU lawgiver has felt compelled to remind data protection and PIL lawyers of how the relationship between the two relevant instruments must be addressed[360]. Amongst the main rules that require coordination with the general regime in light of art. 67 Brussels I bis and recital 147 GDPR, the already mentioned art. 79(2) of the latter provides that "*Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment* […a]*lternatively … before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers*".

The first question posed herein regards whether or not actions against data controllers and processors for an infringement of the GDPR[361] *must* or rather *can,* be brought in accordance with the special head of jurisdiction. The answer to such a question is anything but straightforward. Part of the scholarship advocates against the exclusive nature of the head of jurisdiction contained in the GDPR, with the consequence that the data subject could choose between art. 79 GDPR and the *fora* provided for in the Brussels I bis Regulation. Based on

[360] In the scholarship, for a study of the instrument from an international civil procedure perspective, see BRKAN M., *Data Protection and European Private International Law: Observing a Bull in a China Shop*, in *International Data Privacy Law*, 2015, p. 257; FRANZINA P., *Jurisdiction Regarding Claims for the Infringement of Privacy Rights under the General Data Protection Regulation*, in DE FRANCESCHI A. (ed), *European Contract Law and the Digital Single Market*, Cambridge, 2016, p. 81; KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 653; MARONGIU BUONAIUTI F., *La disciplina della giurisdizione nel regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"*, cit., and PIOVESANI E., *Reg. (UE) n. 2016/679: rimedi di natura privatistica e competenza internazionale in ambiente online*, in *Rivista di diritto ed economia dell'impresa*, 2020, p. 263, at p. 277 ff.

[361] GDPR, art. 82, in part. (6).

the wording of recital 147 GDPR, which establishes a principle of non-interference, "*the interpretation* [is] *that the rules of Regulation Brussels I bis continue to apply to the extent that they are compatible with the Data Regulation's rules*"[362]. However, there appears to be room to advocate to the contrary; where one has to agree that the text of the GDPR is not conclusive[363], its art. 79 explicitly uses the term "*shall*". This appears to be quite different, for example, from the terminology used in art. 6 of the posting of worker Directive, which provides that actions "*may be instituted*". A terminological difference that might exert a relevant weight on the interpretation of art. 79 GDPR as creating an exclusive head of jurisdiction. Of course, it should also be noted that if courts were to support the idea of the exclusive nature of the heads of jurisdiction at hand in the GDPR, a problem might arise in terms of coordination of proceedings. Should closely connected actions fall within and outside the scope of application of the GDPR, joining proceedings might not be possible due to the imperative and exclusive nature of the forum contained in art. 79 GDPR, unless – at least – party autonomy under the Brussels I bis Regulation (on which see *infra*) is not allowed to operate.

Less doubts on the exclusive nature of some heads of jurisdiction can be expressed with regard to the regime built into the Community designs Regulation. On the one side, said regulation clearly states that the Brussels rules still govern jurisdiction to the extent that no contrary provision is given[364], while– on the other side – it clarifies that Community design courts "*shall have exclusive jurisdiction*", thus avoiding any possible argument concerning the optional nature thereof.

The diverse nature of heads of jurisdiction raises a number of applicative problems. Even admitting that a *lex specialis* is applicable, what are the consequences in terms of *lis alibi pendens*, connected and related actions, or party autonomy?

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[362] KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 669.

[363] KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 669.

[364] Council Regulation (EC) No 6/2002, cit., art. 79.

7.2.1. Coordination of proceedings

Practical issues in the coordination of proceedings, to avoid contradictory judgments – which is one of main aims of the general legal applicable framework[365] – can be found between the Brussels I bis Regulation and both concurring and exclusive special heads of jurisdiction contained in "other" acts. Whereas parallel proceedings are obviously more unlikely in the context of exclusive concurring heads of jurisdiction[366], optional heads of jurisdiction, such as the one contained in the posting of workers Directive might very well pave the way to parallel proceedings, as the rules on jurisdiction are alternative in nature. The 2020 amendment of the directive, rightfully so, has not introduced any rule on coordination between parallel proceedings: the Brussels I bis Regulation should find application to any matter that is not covered by the *lex specialis* applicable under its own art. 67. In this sense, any matter of *lis alibi pendens* should be addressed under the specific provision of art. 29 Brussels I bis, which is not ousted by the posting of workers Directive.

The issue concerning connected claims and exclusive concurring heads of jurisdiction is less straightforward. As already mentioned, according to the GDPR, each data subject has the right to seek compensation for damages either[367] at the place of establishment of the

[365] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, and Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12.

[366] Even though the matter could be to determine the scope of application of the rule providing for exclusive concurring head of jurisdiction. The case law has in particular dwelled on whether the exclusive jurisdiction established by art. 81 of the Community designs regulation, more specifically "*the jurisdiction over actions for declaration of non-infringement of Community designs*", also covers negative declaratory actions of non-infringement of designs. Some local courts argued that "*Only positive actions for the declaration on infringement of community designs fall within the scope of application of the special heads of jurisdiction contained in artt. 79 ff of Regulation 6/2002, which takes precedence over the Brussels I bis Regulation. The same does not hold true for negative declaratory actions, which are not subject to the special and concurring regime of jurisdiction of Regulation 6/2002*" (Tribunale Torino, 17 gennaio 2019, n. 212, in *En2Bria* database). This follows a decision of the Italian supreme court (Cassazione 27 luglio 2016, n. 15539, in *En2Bria* database) raising a preliminary question to the Court of Justice of the European Union.

[367] GDPR, recital 145.

controller or of the processor of such data, or at the place of the damaged habitual residence. This raises questions in that parallel actions might be started by the damaged party against the two different defendants – i.e. the data processor and the data controller. The GDPR contains its own rule on coordination of proceedings[368], namely if actions having the same subject matter are started against the data processor or against the data controller, the court second seised *may*[369] stay proceedings; additionally, if both proceedings are before a court of first instance, the court second seised, following an application by the parties to the dispute, can decline its jurisdiction if consolidation of actions is possible before the court first seised. The first question is whether the general rule on *lis pendens* in the Brussels I bis Regulation should find application if the two proceedings involve the same cause of action and the same parties. In this sense, the creation of an autonomous regulation of connected and related actions should be no reason to deny the general "fill-the-gap" function of Brussels I bis – with the consequence that the general rules on *lis pendens* should also find application within the context of the GDPR. However, one may ask whether the applicability of the general rules of jurisdiction – amongst which those on connected actions – can also find application. If requests to cancel data under the GDPR are connected to a contract[370], can the damaged party start proceedings before the court of

[368] GDPR, art. 81 ("*1. Where a competent court of a Member State has information on proceedings, concerning the same subject matter as regards processing by the same controller or processor, that are pending in a court in another Member State, it shall contact that court in the other Member State to confirm the existence of such proceedings. 2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, any competent court other than the court first seized may suspend its proceedings. 3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof*").

[369] Suspension of proceedings by the second court remains a possibility, as is in the general legal framework for connected and related actions – even though no indication is given on when suspension may be granted. No useful guidance is given on the point by GDPR, recital 144.

[370] Data protection violations in connection to contracts have already emerged in the case law. In [2019] EWHC 879 (Comm), also in *En2Bria* database, the damaged concluded an investment contract, containing a choice of court agreement in favour of Cyprus. The contract predated the GDPR. The court concluded for the inapplicability of the GDPR at the case at

the place of performance under art. 7 Brussels I bis Regulation, and, before that same court, seek judgments to exercise the right to cancellation? Or must two different proceedings be instructed? In the latter scenario, the rule on coordination contained in the GDPR itself might not operate if the first proceedings is instructed against a party that is not the data controller or processor. Would however the court competent for the breach of contract to which a GDPR violation is connected be able to ground its jurisdiction on art. 8 Brussels I bis? More to the point, if the GDPR violation is connected to a contract, can the processor itself start a negative declaratory action under art. 7 Brussels I bis Regulation, or should this party necessarily start proceedings either at its own establishment or at the place of habitual residence of the (alleged non-) damaged party? Whereas the necessity to preserve the *effet utile* of art. 82 GDPR could ground an interpretation including negative declaratory actions promoted by data processors or controllers within its scope of application, the nature of the relationship between art. 79 of this instrument and the Brussels I bis Regulation for connected and related actions remains uncertain. It will be for the EU lawmaker, or more probably the Court of Justice of the European Union, to determine if concentration of proceedings under the general legal framework in order to avoid conflicting judgments, might be pursued, or rather, whether two connected proceedings will necessarily have to be instructed by the damaged party. It seems however that a positive answer be possible only to the extent the head of jurisdiction in art. 79 GDPR is not conceived as "*exclusive*", in that the operability of rules on connected actions might not be admissible[371].

hand as the right of the damaged party predated the regulation, thus stating that in other scenarios jurisdiction would have been governed by art. 79 GDPR, due to its prevalence granted by art. 67 Brussels I bis. Nonetheless, in the case decided by the domestic court, the contract was deemed to be a consumer contract, thus the ordinary limitations to pre-emptive choice of court agreements under the special section of the Brussels I bis Regulation were applied for the protection of the weaker party – even though this did conclude significant online trading contracts.

[371] KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 669 f, referring to the possibility to identify as additional fora under a prorogation agreement concluded in accordance to art. 25 Brussels I bis Regulation, the *forum contractus* or the *forum delictii*.

7.2.2. Party autonomy

Similarly as above, the issue of proper coordination of *lex specialis* and general rules on (direct or indirect) party autonomy remains. The former Community Trade Mark Regulation[372] established a complex system of jurisdiction, whereby Member States had to identify national "community trade mark courts"[373] having international exclusive jurisdiction for actions over infringement and validity of Community trade marks[374]. International jurisdiction was reserved to the courts of the Member State of domicile of the defendant (or of the place of his establishment, if his domicile was in a third State)[375]. In a complex effort of coordination, the Community Trade Mark Regulation called for the application of the *lex generalis*, explicitly excluding the applicability of specific provisions – namely the *actor sequitur forum rei*, heads of special jurisdiction in contractual matters, in torts or connected to an agency; and on provisional and protective measures[376]. At the same time, it also specified that both general rules on direct or indirect party autonomy were applicable in the context of the Community Trade Mark Regulation[377]. The legal framework is clear in itself: national community trade mark courts do have an exclusive international jurisdiction over actions for infringement and validity of community trade marks – thereby allowing the interested parties to choose the competence of another community trade mark court. The case law has looked into the extension of such an international jurisdiction, including its relationship with general provisions of international civil procedure. Spanish courts have argued that "*Art. 96 Regulation (EC) No 207/2009 provides an exclusive ground of jurisdiction. Therefore -in*

[372] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), in OJ L 78, 24.3.2009, p. 1; now repealed and replaced by the EU Trade Mark Regulation (Regulation EU 2017/1001, cit.).

[373] Council Regulation (EC) No 207/2009, art 95.

[374] Council Regulation (EC) No 207/2009, art 96.

[375] Council Regulation (EC) No 207/2009, art 97. The same provision provided for the *forums actoris* if neither of the two conditions were met, or for the jurisdiction of the State of the Office for Harmonisation in the Internal Market.

[376] Council Regulation (EC) No 207/2009, art 94(1); (2)(a).

[377] Council Regulation (EC) No 207/2009, art 94(2)(b).

spite of the existence of a contractual prorogation of jurisdiction between the parties in favour of a different Court-, the Community Trade Mark Court takes jurisdiction over an action for the breach of that contract (in relation to which a Community Trade Mark has been infringed) and another action for unfair competition, as long as the action for the infringement of the Trade Mark has to be considered as the principal one"[378]. In this sense, the choice of court agreement over unfair competition has been quashed, as being the question in the case at hand an ancillary question to the action over infringement[379]. Whereas concentration of proceedings is not necessarily a negative element to be pursued, clearer uniform indications should be given at the legislative level on the boundaries of such exclusive jurisdiction grounded on *lex specialis* acts and, even more so when "other" EU law provisions do not admit party autonomy that might be used to concentrate connected claims, detail their relationship with both ancillary questions and connected and related actions. The risk being that of a court exercising jurisdiction without a proper ground for it.

Other current scenarios of problematic coordination between general and special regimes addressing the matter of party autonomy are given, once again, by the GDPR. Under this last instrument, transfer of personal data to third countries or international organizations are admissible provided that a sufficient guarantee of protection is ensured. The European Commission may decide that a given (third) State does indeed offer a sufficient level of adequate protection[380] or, in the absence of such a decision, the transfer remains possible if the foreign "importer" of personal data offers sufficient safeguards[381]. Additionally, standard contracts developed by the European Commission are deemed to offer sufficient guarantees. Such standard contracts[382] also embody rules on jurisdiction[383]: according to clause 7 of

[378] Audencia Provincial de Alicante, 11 July 2018, n. 339/2018, in *En2Bria* database.

[379] Even though Regulation (EU) 2017/1001, cit., art. 132 has a specific rule dealing with some hypothesis of related actions.

[380] GDPR, art. 45.

[381] GDPR, art. 46.

[382] Cf 2010/87/: Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, in OJ L 39, 12.2.2010, p. 5.

the standard format concluded between the data exporter and the foreign data importer, "*The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject: ... to refer the dispute to the courts in the Member State in which the data exporter is established*". In this sense, a covert cumulative application might occur between the GDPR and the Brussels I bis Regulation provisions on choice of court agreement, as the effect is granting the data subject the possibility of starting proceedings against the non-EU domiciled party before the court of a Member State[384]. Not only party autonomy may be exercised in the context of data protection between the data exporter and the data importer: always from the perspective of coordination of instruments, i.e. the GDPR and the Brussels I bis Regulation, the question regards whether the data subject can validly enter into a choice of court agreement with its counterpart in order to derogate from the *fora* provided for in art. 79(2) GDPR. As seen, the latter provision establishes a special jurisdiction rule, whereby actions can be started by the 'weaker party' before the courts of his/her own habitual residence. The GDPR is however silent on the possibility of concluding choice of courts agreements – thus opening the matter up to the question regarding whether or not such agreements may be concluded at all under the scheme of art. 25 Brussels I bis Regulation. At first sight, it may be advocated that art. 25 Brussels I bis Regulation should not find application, as it may pave the way to an overruling of protection, in particular in contracts of adhesion. However, if the principle of protection of the data subject should help guiding the coordination between the GDPR and the Brussels I bis Regulation, where no specific rule on the matter is given for cases of questions simply not dealt with by the special instrument, it could reasonably be argued that the application of art. 25 Brussels I bis Regulation should not be excluded *a priori* and, under given conditions, the traditional "fill the gap" function of the

[383] On which see MANTOVANI M., *Contractual Obligations as a Tool for International Transfers of Personal Data*, in *EAPIL Blog*, 20 January 2020.

[384] In these terms, MANTOVANI M., *Contractual Obligations as a Tool for International Transfers of Personal Data*, cit.

general regime should still be followed. In particular, it seems dogmatically and methodologically consistent with the different principles at stake to argue that art. 25 Brussel I bis Regulation may also apply to choice of court agreement in personal data protection matters to the extent that such clauses offer the sole "weaker party" additional fora[385], or if such agreements are concluded after "a dispute has arisen"[386] between the parties. Additionally, as noted in the scholarship[387], recital 147 GDPR appears to establish a principle of non-interference, in that it "simply" instructs that general provisions – rather than being *tout court* non-applicable – "*should not prejudice the application of such specific rules*". If the above is true, it appears logical and consistent to argue that– within the limits provided – choice of court agreements under art. 25 Brussels I bis Regulation be also concluded for actions falling within the scope of application of art. 79 GDPR. This, regardless of the "exclusive" or non-exclusive nature of the art. 79 GDPR which, in the silence of the regime, might be coordinated with art. 25 Brussels I bis. This would lead to the consequence that, as a general principle, actions falling within the scope of application of

[385] KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 669 f, also referring to the possibility to identify as additional fora under a prorogation agreement concluded in accordance to art. 25 Brussels I bis Regulation, the *forum contractus* or the *forum delictii*. Cautious on the possibility to extend art. 25 Brussels I bis Regulation to the GDPR, albeit in light of the general principles for the protection of the "weaker parties", see FRANZINA P., *Jurisdiction Regarding Claims for the Infringement of Privacy Rights under the General Data Protection Regulation*, cit. p. 106 ff, and MARONGIU BUONAIUTI F., *La disciplina della giurisdizione nel regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"*, cit., p.452.

[386] This is the terminology generally used by the Brussels I bis Regulation, as per choice of court agreements involving contractually weaker parties. What is relevant, and not addressed by the Brussels I bis Regulation, is "when" a dispute has to be considered arisen (on which see *ex multis* JENARD P., *Report on the convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, cit., p. 33; BRIGGS A., *Civil Jurisdiction and Judgments*, New York, 2015, p. 133; GEIMER R., SCHUETZE R.A., *Europaeisches Zivilverfahrensrecht*, München, 2010, p. 311; MAYR P.G., *Art. 13*, in SIMONS T., HAUSMANN R. (eds), *Brüssel I-Verordnung. Kommentar zu VO (EG) 44/2001 und zum Übereinkommen von Lugano*, München, 2012, p. 352, at p. p. 353, and DOMINELLI S., *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, Rome, 2016, p. 322 f for further references in the scholarship).

[387] KOHLER C., *Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union*, cit., p. 669.

the GDPR might only be instructed before the courts under art. 79, whilst remaining possible to validity conclude a choice of court agreement.

In this sense, part of the case law already mentioned might be seen as leaning towards such a solution of a "limited" integrated approach. The High Court of Justice, Business and property courts of England and Wales, Queen's Bench Division, Commercial court, per Baker J[388], had the chance to dwell on the relationship between choice of court agreements concluded under the general regime and the jurisdiction rule in art. 79 GDPR. The case concerned consumer online trading contracts – the GDPR not being applicable, as the rights of the consumer predated the GDPR. Nonetheless, on the relationship between art. 25 Brussels I bis and art. 79 GDPR, the court argued that "*The only argument put forward in Prof. Harris QC's skeleton argument, for jurisdiction in respect of Ms Ang's data protection claims if the consumer rule did not allow her to get past Article 25 of Brussels (Recast), was that Article 79 of the GDPR did that trick (thanks to Article 67 of Brussels (Recast) ...). That argument could only save the exceptional claim, i.e. the one pleaded claim that is (now) governed by the GDPR, namely Ms Ang's claim for an order for rectification, destruction, erasure or blocking of her personal data still held by Reliantco pursuant to Articles 16-17 of the GDPR. I agree with the logic that underlay Prof. Harris QC's original approach: Ms Ang's data protection claims fall within the scope of Brussels (Recast) – they are civil or commercial matters not excluded by Article 1(2); they also fall within the scope of the jurisdiction clause – they arise out of and are connected with Ms Ang's customer agreement with Reliantco; however, under Article 79 of the GDPR, Ms Ang is entitled to bring proceedings here against Reliantco as data controller or processer, to enforce her rights under the GDPR, because she is habitually resident here, and that is so notwithstanding Article 25 of Brussels (Recast) thanks to Article 67 thereof*"[389]. The judgment, even though it concluded for

[388] Ramona ANG v Reliantco Investments Ltd [2019] EWHC 879 (Comm) (12 April 2019), cit.

[389] Ramona ANG v Reliantco Investments Ltd [2019] EWHC 879 (Comm) (12 April 2019), cit., para. 84 f.

the non-applicability *ratione temporis* of the GDPR seems to suggest that, whilst choice of courts being acceptable[390], they cannot be to the detriment of the *ratio* of art. 79 GDPR. An approach that presupposes the possibility to "fill the gap" of choice of court agreements in the GDPR by recurring to general rules.

7.3. Conclusive methodological remarks

Having highlighted that even clear (albeit complex) rules competing with the Brussels I bis Regulation might still generate doubts and applicative problems not in respect to the general rules derogated from, but in respect to other fundamental rules of the general framework that are not directly touched upon by the *lex specialis* provision, some general conclusive methodological remarks can be drawn in the light of practical data collection.

The first remark concerns the legislative drafting of rules on international jurisdiction. Provisions on special jurisdiction do not necessarily fall under titles with comparable wording. Whereas the posting of worker Directive speaks of "*jurisdiction*"[391], and the current EU Trade Mark Regulation speaks of "*international jurisdiction*"[392], the GDPR speaks of a "*Right to an effective judicial remedy against a controller or processor*"[393]. Consistency in labelling provisions is of valuable importance, as consistency can foster predictability and foreseeability of the law in that norms of a group can easily and immediately be associated to their proper category. Legislative drafting such as the one employed in the GDPR should be abandoned in the future (and possibly amended when the instrument is recast). Additionally, expressions such as "*right to remedy*" used in the GDPR might create interpretative problems when coupled with other titles of provisions

[390] Commenting on the decision, also pointing out how the court purports a view of possible coordination of the GDPR and the rules of the Brussels I bis Regulation on choice of court agreements within the limits of "non-interference", see PIOVESANI E., *Reg. (UE) n. 2016/679: rimedi di natura privatistica e competenza internazionale in ambiente online*, cit., p. 278.

[391] Directive 96/71/EC, cit., art. 6.

[392] Regulation (EU) 2017/1001, cit., art. 124 ff.

[393] GDPR, art. 79.

focusing on "rights" and "violations". The Air Passenger Rights[394] Regulation, for example, grants a right to compensation in cases of cancellation of flight, or flights being sensitively delayed. The case law is unanimous in arguing that the regulation does not contain any rule on jurisdiction concurring with the Brussels I bis Regulation[395]. Yet, the wording of art. 16 could be clearer. According to the provision at hand, Member States must designate national bodies ensuring the application of the regulation and ensure that rights of passengers are respected. At the same time, the provision also speaks of the right of individuals to "complain" before said bodies an infringement of the regulation. A comparison between the linguistic versions of the regulation is of little help when attempting to answer the question concerning whether or not such a "complaint" may be used to obtain a decision on compensation in favour of the passenger – thereby becoming a judicial complaint[396]. The Italian version uses the word "*reclamo*"

[394] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, in OJ L 46, 17.2.2004, p. 1.

[395] Judgment of the Court (Sixth Chamber) of 11 April 2019, ZX v Ryanair DAC, Case C-464/18, para. 32, and 36. In the domestic case law, cf Cassazione civile sez. un., 13/02/2020, n. 3561, in *En2Bria* database, para 4.1.

[396] National competent bodies ensuring the application of Air Passenger Rights generally work in a public law capacity as regulatory authorities– and therefore do not condemn the air carrier to specifically pay compensation to the passenger who lodged the complaint. If a Member State however introduces also a mandatory compensatory competence to such authorities – would the Brussels I bis Regulation stand against such a position, and, if not, what would the relationship under art. 67 Brussels Ia governed? Though infrequent, regulatory authorities being recognised the possibility to condemn parties, do actually exist. In Italy, for instance, consumers of communication services may commence a mandatory conciliation procedure before the Italian Regional Committee for Communications (Co.Re.Com). If conciliation fails, consumers have the right either to request that the authority settles the dispute or to pursue judicial proceedings before a court of law. Assuming that the Air Passenger Rights Regulation is not an obstacle to a national system developed along the lines of the Italian communication field, as it would increase the level of passenger protection, a matter of coordination between the system of accelerated justice before national authorities and the general regime might occur. If the accelerated justice regime were construed as mandatory, in the sense that parties were not free to opt for a system based on their preferences and party autonomy, could art. 67 Brussels I bis Regulation be triggered to activate the disconnection clause in favour of the *lex specialis* principle? It seems the question should be answered in the negative, as whilst theoretically art. 67 Brussels I bis Regulation is applicable where there are two imperative concurring regimes, it is also true that the provision is applicable in so far as the

while in German the word is "*Beschwerde*". Similarly, the Directive on injunctions for the protection of consumers' interests[397] mentions the right to seek protection. Art. 2 of the directive speaks of "*Actions for an injunction*" / "*Azioni inibitorie*" / "*Unterlassungsklagen*". According to the provision at hand, Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by any body or organisation which has a legitimate interest in ensuring that rules on the protection of the collective interests of consumers are complied with. According to German domestic case law, Art. 2 Directive 2009/22/EC does not contain a rule on jurisdiction to be transposed into domestic law; hence, domestic provisions transposing the directive do not contain harmonised heads of jurisdiction for the purposes of art. 67 Brussels I bis Regulation[398].

In this sense, rules should be as clear as possible in establishing rules on jurisdiction – the title of the provision becoming particularly helpful when practitioners must interpret a rule as pertaining to jurisdiction rather than administrative action.

The second, and final, remark concerns judicial approaches in respect to coordination matters between instruments. Collected data show that – on a domestic level – problems of *lex generalis* and *lex specialis* are mainly dealt with – if they are dealt with at all – at the first and second instance. Supreme court judgments on such a point are not significantly numerous, even though the extended number of

lex specialis is contained either in EU secondary law, or in domestic provisions implementing a directive. As it is hardly arguable that the Air Passenger Rights enshrines a rule on jurisdiction – art. 67 could not be triggered, with the consequence that the relevant domestic provision could be subject to non-application by national courts and authorities, because it would go against a directly applicable EU regulation. On the contrary, if the accelerated justice models were by nature optional, and therefore with no prejudice to the Brussels I bis Regulation, art. 67 of the latter would not find application and the new model could constitute a simple additional alternative to the *lex generalis*. It appears that only within these boundaries might national legislators be "inspired" by the Air Passenger Regulation into developing further non-imperative regimes of protection.

[397] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, in OJ L 110, 1.5.2009, p. 30; now Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, in OJ L 409, 4.12.2020, p. 1.

[398] Hanseatische Oberlandesgericht Hamburg, 15 U 58/19, Urteil vom 15.11.2019, in *En2Bria* database.

special rules on jurisdiction and on recognition and enforcement of decisions might justify otherwise. Moreover, courts addressing coordination matters may do so more promptly or against the backdrop of ready-reasoned principles regarding the coordination of rules on jurisdiction. Additionally, at the level of "data-management", only few databases acknowledge as their label entries art. 67 Brussels I bis Regulation, making the research of relevant case an uneasy task for both practitioners and courts themselves – both of whom might instead be looking for relevant precedents in given fields. In this sense, it appears that issues of coordination are either underestimated by courts, or these are to some extent reluctant to dwell with both international civil procedure and *lex specialis* rules in specific matters, unless the case in itself might be rather straightforward. Overall, there appears to be a tendency to "ignore" or "diminish" the relevance of the venue of coordination, which might be empowed by way of greater publicly and more readily-available information and data. Indeed, any attempt at collecting such materials would be greatly facilitated by a more detailed general system of classification of decisions both before and after they are entered into legal databases. Any rule – whether or not it is clearly mentioned in the judgment – should constitute a label entry for the purposes of subsequent legal research.

7.4. A broader conclusive policy-making suggestion: on codification and consolidation of EU private international law in civil and commercial matters

In the context of highly technical provisions on jurisdiction and free movement of decisions fragmented into an ever growing number of concurring acts adopted by the European Union, and taking into consideration the complexities of coordination between the *lex specialis* and the *lex generalis*, either directly ousted by special provisions or in whose respect doubts in applicability still persist (as could be the case of the relationship between special heads of jurisdiction and general rules on free movement of decisions), the question is whether *all rules* concerning international jurisdiction in civil and commercial matters should be codified in one single act. Starting from a terminological standpoint, as noted in the scholarship, it is the conti-

nentals' view that "*Codification makes all PIL rules readily accessible, helps avoid friction between the rules, promotes a uniform view of the whole matter, favours clarity and coherence between the different sets of rules, reduces complexity, increases legal certainty*"[399]. Under EU law, the expression "codification"[400] assumes a slightly different meaning[401] – closer to the idea of mere "consolidation" of the law. According to the 1994 Interinstitutional Agreement on Accelerated working method for official codification of legislative texts[402], "*official codification means the procedure for repealing the acts to be codified and replacing them with a single act containing no substantive change to those acts*", meaning that the procedure does "*not [*aim to*] introduce … substantive changes to the acts to be codified*". If the codification process under EU law does not require, *rectius* – prohibits *substantive* changes, such a pathway could be opened for a consolidation of existing concurring rules within one single instrument for civil and commercial matters falling under the Brussels I bis Regulation (if not directly within such an instrument itself) and special regimes. As the activity would not require the adoption of new rules, no significant problems on the competences of the EU would be raised.

The advantages of unifying diverse unities of international civil procedure become apparent in that a higher degree of accessibility, coherence and transparency would be assured. Moreover, the inclu-

[399] KADNER GRAZIANO T., *Codifying European Union Private International Law: The Swiss Private International Law Act – A Model for a Comprehensive EU Private International Law Regulation?*, cit.

[400] On codification of EU PIL, see LEIBLE S., UNBERATH H. (eds.), *Brauchen wir eine Rom 0-Verordnung?*, cit.; LEIBLE S., MÜLLER M., *The Idea of a "Rome O Regulation"*, cit.; BIAGIONI G., DI NAPOLI E., *Verso una codificazione europea del diritto internazionale privato? Una breve premessa*, cit; SALERNO F., *Possibili e opportune regole generali uniformi dell'UE in tema di legge applicabile*, cit.; ESPINELLA A., *Some Thoughts on a EU Code of Private International Law*, cit.; CRESPI REGHIZZI Z., *Quale disciplina per le norme di applicazione necessaria nell'ambito di un codice europeo di diritto internazionale privato?*, cit.; FULLI-LEMAIRE S., *Il futuro regolamento «Roma 0» e la qualificazione*, cit., and KRAMER X.E., *European Private International Law: The Way Forward (in-depth analysis European Parliament, JURI Committee)*, cit.

[401] KRAMER X.E., *European Private International Law: The Way Forward (in-depth analysis European Parliament, JURI Committee)*, cit., p. 19.

[402] Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts, in OJ C 102, 4.4.1996, p. 2.

sion of all provisions on jurisdiction and free movement of decisions within one single act would implement the coordination between general and special rules, as coordination of sections within one single regulation might be more straightforward than coordination between different acts by way of a disconnection clause.

The "distraction" of special rules from special acts to be inserted in a general instrument would not prejudice the operativity of such special rules: there appears to be no significant reason, for example, other than contextualisation of inserting rules on jurisdiction for compensation actions within the GDPR. Once all rules are contained in one single instrument, such special heads of jurisdiction might very well continue to pursue their specific policy goal – albeit within the proper context of an instrument devoted to international civil procedure. It is quite common, and nothing advocates to the contrary, that a general instrument – such as the Brussels I bis Regulation – refers to other EU law instruments for the purposes of a definition[403]. In this sense, the Brussels I bis Regulation could refer to the GDPR to determine the kind of action falling within the specific data protection related rules "codified" within the general instrument – thus being still able to ensure consistency of application.

Along this line of arguments, it appears that a consolidation by way of codification of existing rules concurring with the Brussels I bis Regulation might, in a significant number of cases, mostly bear positive externalities, in that the system would become clearer, more accessible, and give the EU lawmaker the possibility to specify the relationship between rules and exceptions, especially and expressly considering the relationships between special and general rules not directly ousted.

[403] Cf. Brussels I bis Regulation, art. 7(4), referring to Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (repealed by Directive 2014/60/EU, in OJ L 159, 28.5.2014, p. 1); art. 16(5), and art. 7 of 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), in OJ L 177, 4.7.2008, p. 6, referring to Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), in OJ L 335, 17.12.2009, p. 1, as amended.

Article 67 Brussels Ibis Regulation and Intellectual Property Litigation in the Field of European Union Trade Mark and Community design: European and Spanish Practice

Guillermo Palao Moreno

1. Introduction

Regulation (EU) No 1215/2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) -hereinafter, the Brussels Ibis Regulation-, constitutes the cornerstone of the European Union (EU) policy of Judicial cooperation in civil matters. This instrument is the result of an ongoing process which started with the publication of the so-called 1968 Brussels Convention [1] and repeals Regulation (EC) No 44/2001[2]. All three must retain our attention and are widely mentioned not only by the different instruments which are also part of the European Union Judicial Cooperation on Civil Matters Policy, but also in the case law of the Court of Justice of the European Union. However, for practical reasons this

[1] This Convention is suppressed by Regulation Brussels I bis (*ex* Article 68) *"(...) except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU*".

[2] Article 80.

chapter will only refer to the current version, although and for time reasons due to the moment of their publication, the analysed instruments refer to previous texts[3].

The Brussels Ibis Regulation and several EU instruments in specific matters contain several relevant provisions regarding their existing relationship[4]. This study considers the problems which Article 67 raises in relation to the ongoing EU harmonisation process in the field of Intellectual Property (IP) Law, when stating that: "*This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*". In this respect, it must be borne in mind that most of the Regulations related to the creation of unitary Intellectual Property Rights contain provisions which may collide with those of the Brussels Ibis Regulation –particularly in the field of jurisdiction–.

In relation to this, the following main EU Instruments in the field of Intellectual Property Law, which currently also deals with jurisdiction rules[5], should be mentioned: Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance)[6]; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs[7]; Council Regulation (EC) No 873/2004 of 29 April 2004 amending Regulation (EC) No 2100/94 on Community plant variety rights[8]. Moreover, although not in force –and facing some difficulties as a re-

[3] SORIANO GUZMÁN F.J., CARRASCOSA GONZÁLEZ J., *Marca comunitaria. Competencia, procedimiento y Derecho Internacional*, Granada, 2006, p. 3-5.

[4] Chapter VII, Articles 67 to 73.

[5] Therefore, developing a truly "*jurisdictional EU system in the field of Intellectual Property Law*", as underlined by DE MEDRANO CABALLERO I., *El futuro sistema jurisdiccional comunitario en propiedad industrial*, in *Gaceta Jurídica* 2000, n. 210, pp. 24-35.

[6] OJ L 154, 16.6.2017, p. 1. According to Article 211, this instrument repeals Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ L 78, 24.3.2009, p. 1).

[7] OJ L 3, 5.1.2002, p. 1.

[8] OJ L 162, 30.4.2004, p. 38.

sult of Brexit[9]– the texts which are part of the "Unitary Patent Package" could also be referred to: Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection[10]; Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements[11]; Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice[12]; and the Agreement on a Unified Patent Court of 2013[13].

In particular, the main objective of this chapter is the analysis of the existing relationship between the Brussels Ibis Regulation and the jurisdiction rules provided by those instruments in the field of unitary trade marks and designs. More precisely, the coordination rules of such instruments will be considered. Again, for strict practical reasons, reference will be made only to their current versions: Regulation (EU) 2017/1001 -Chapter X, Articles 122 to 135- and Regulation (EC) No 6/2002 -Title IX, Articles 79-94- (*infra* 2). Two Chapters may be examined together as their rules run parallel to each other, using virtually identical wording in their provisions – despite referring to different versions of the "Brussels" Convention/ Regulation, due to the different time of their publication-[14]. Furthermore, this study will take into account the Case Law of both the Court of Justice of the European Union and Spanish courts.

The selection of the latter is clearly justified *inter alia* by the fact that the European Union Intellectual Property Office (EUIPO), which

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[9] LAMPING M., ULLRICH H., *The Impact of Brexit on Unitary Patent Protection and its Court*, in *Max Planck Institute for Innovation and Competition Research Paper*, 2018, No. 18-20, p. 25-115.

[10] OJ L 361, 31.12.2012, p. 1.

[11] OJ L 361, 31.12.2012, p. 89.

[12] OJ L 163, 29.5.2014, p. 1.

[13] OJ C 175, 20.6.2013, p. 1.

[14] BLANCO JIMÉNEZ A., CASADO CERVIÑO A., *El Diseño Comunitario. Una aproximación al régimen legal de los dibujos y modelos en Europa*, Pamplona, 2003, pp. 173-174.

is responsible for managing the European Union trade mark and the registered Community design, is located in Alicante (Spain), as well as the corresponding European Union trade mark and the registered Community design Courts are in this Member State. However, this chapter will also take the opportunity to provide an overview of the jurisdiction rules contained in the Regulations on the European trade mark and the Community design, in accordance with the aforementioned practice and its consequences (*infra* 3).

2. The coordination of the Brussels Ibis Regulation and other EU instruments in the field of the European Union trade mark and on Community design

2.1. The lex specialis principle and Article 67 of Brussels Ibis Regulation

Article 67 of the Brussels Ibis Regulation is based on the classic principle of "*lex specialis, derogat generalis*". As a result, when an EU instrument provides a jurisdiction rule in specific matters, those offered in the former should be *tout court* disregarded. In relation to this statement, the application of both Regulation (EU) 2017/1001 -Chapter X, Articles 122 to 135- and Regulation (EC) No 6/2002 -Title IX, Articles 79-94- should preclude the application of the jurisdiction rules offered by the Brussels Ibis Regulation[15]. However, the practical application of this principle, in relation to international litigation concerning a European Union trade mark and the Community design, is not so straightforward. In this respect, their scope of application and the solutions provided for in these specific Regulations should be considered (*vide infra* 2.2) as well as taking into account he interpretation and practical application of Article 67. .

The interpretation of Article 67 by the Court of Justice of the European Union provides interesting examples concerning the existing relationship between the Brussels Ibis Regulation and the aforemen-

[15] DAVIS R., ST QUINTIN T., TRITTON G., *Tritton on Intellectual Property in Europe*, London, 2018, p. 1354-1356.

tioned instruments, in particular Intellectual Property matters in practice. In this respect, this European Court has confirmed the character of *lex specialis* of the Intellectual Property Regulations (or their precedents) in relation to the rules provided for by the Brussels Ibis Regulation in several judgements, thus precluding the application of the provision of the Brussels Ibis Regulation, when the EU instruments in specific matters are at stake.

In this respect, by way of confirming the *lex specialis* character of those instruments in specific matters, the following decisions should be mentioned: Judgment of the Court (Fourth Chamber), 5 June 2014, Coty Germany GmbH v First Note Perfumes, Case C360/12[16]; Judgment of the Court (Second Chamber) of 18 May 2017, Hummel Holding A/S v Nike Inc. and Nike Retail B.V., Case C-617/15[17]; Judgment of the Court (Second Chamber) of 13 July 2017, Bayerische Motoren Werke AG v Acacia Srl, Case C-433/16[18]; Judgment of the Court (Second Chamber) of 27 September 2017, Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA, Joined Cases C-24/16 and C-25/16[19]; and Judgment of the Court (Fifth Chamber) of 5 September 2019, AMS Neve Ltd and Others v Heritage Audio SL and Pedro Rodríguez Arribas, Case C-172/18[20].

2.2. The coordination rules in Regulations on the European Union trade mark and on Community design

Article 67 of Brussels Ibis Regulation does not offer the whole picture of the existing relationship between this EU instrument and Regulations (EC) No 6/2002 and (EU) 2017/1001. Therefore, the jurisdictional solutions provided in those texts should also be considered, in order to establish clear solutions and to avoid "forum shopping" practices[21]. Of particular relevance are those rules establishing the scope of

[16] At para. 27 (ECLI:EU:C:2014:1318).

[17] At para. 26 (ECLI:EU:C:2017:390).

[18] At para. 39 (ECLI:EU:C:2017:550).

[19] At para. 43 (ECLI:EU:C:2017:724).

[20] At para. 34 (ECLI:EU:C:2019:674).

[21] Recital 30 of Regulation (EC) No 6/2002.

application of the different instruments, those related to the determination of international jurisdiction, as well as those provisions which refer specific issues back to the Brussels Ibis Regulation. As a consequence, even through the application of the *lex specialis* principle, the Brussels Ibis Regulation still retains its application for some significant questions, when replacing or even when providing the solutions offered by Regulations (EC) No 6/2002 and (EU) 2017/1001[22].

a) First of all and according to Article 82 –in relation to Articles 81 and 83- of Regulation (EC) No 6/2002 and to Article 125 –in relation to Articles 124 and 124- of Regulation (EU) 2017/1001, the jurisdiction rules of those instruments only cover actions related to jurisdiction over infringement and validity of Community designs and European Union trade marks. Therefore, for other causes of action, the rules of jurisdiction of the Brussels Ibis Regulation shall be applicable[23].

b) Secondly, Article 79 of Regulation (EC) No 6/2002 and Article 122 of Regulation (EU) 2017/1001 should be highlighted, as far as those significant provisions provide for two main ideas. According to the am articles, on the one hand, the Jurisdiction rules of Regulations (EU) 2017/1001 and (EC) No 6/2002 take priority over those of the Brussels Ibis Regulation[24]. On the other, they establish that some provisions of the Brussels Ibis Regulation still retain a subsidiary application in relation to some specific situations[25]. The wording of para-

[22] LÓPEZ-TARRUELLA MARTÍNEZ A., *Litigios transfronterizos sobre derechos de propiedad intelectual e industrial*, Madrid, 2008, p. 33-34; PALAO MORENO G., *Aspectos de Derecho Internacional privado relativos a los dibujos y modelos comunitarios*, in PALAO MORENO G., CLEMENTE MEORO M., *El diseño comunitario*, Valencia, 2003, p. 299-304.

[23] See also, in relation to the complementary application of national law relating to infringement, Articles 17 of Regulation (EU) 2017/1001.

[24] MANKOWSKI P., *Art. 67*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation*, Cologne, 2016, p. 1020-1023, at p. 1021.

[25] DESANTES REAL M., *La marca comunitaria y el Derecho internacional privado*, in BERCOVITZ RODRÍGUEZ-CANO A., *Marca y Diseño Comunitarios*, Pamplona, 1996, pp. 225-260, at p. 235; FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, Oxford, 1998, p. 312, at p. 322 and 320-330; GASTINEL E., *La marque communautaire*, París, 1998, p. 203-204; GAUDEMET-TALLON H., *Compétence et exécution des jugements en Europe*, Paris, 2010, p. 16; SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, in FRANZOSI M., *European Community Trade Mark*, The Hague, 1997, p. 369-410, at pp. 380 and 393-395.

graph 1 of those provisions clearly states that "*Unless otherwise specified in this Regulation*", the Brussels Ibis Regulation "*shall apply*" to proceedings relating to European Union trade marks and Community designs, to applications for registered Community designs, as well as to simultaneous proceedings relating to actions on the basis of a European Union trademark or of a Community design.

Furthermore, in accordance with paragraph 3 of Article 79 of Regulation (EC) No 6/2002 and paragraph 2 of Article 122 of Regulation (EU) 2017/1001, and in the event of proceedings in respect of the actions and claims referred to in Articles 85 or 125 –Jurisdiction over infringement and validity-, a line must be drawn between those provisions of the Brussels Ibis Regulation which shall apply –Articles 4 and 6, points 1, 2, 3 and 5 of Article 7 and Article 35- and those which will apply –Articles 25 and 26, subject to the limitations in Articles 125(4) and 82(4), as well as the provisions set out in Chapter II–[26].

Nevertheless, for those provisions of the Brussels Ibis Regulation not incorporated in either of these lists –i.e. Article 8 (1)-, The Court of Justice of the European Union ruled in Joined Cases C-24/16 and C-25/16 that a court "*may therefore, by virtue of that provision and subject to the conditions laid down by that provision being fulfilled, have jurisdiction to hear an action brought against a defendant not domiciled in the Member State in which that court is situated*"[27].

However, in relation to the application of Articles 8(1) and 8(2) of the Brussels Ibis Regulation, the Spanish case-law has maintained a rather id position, in order to avoid *forum shopping* practices. As a result, while the *Audiencia Provincial de Alicante* (Provincial Court of Alicante) decided in Order No 44/2012[28], that the application of Article 6(2) of Regulation (EC) No 44/2001 could not avoid the application of Article 97 of Regulation (EC) No 207/2009, in order to alter the jurisdiction of the Tribunals to the domicile of a third party with the objective of changing the jurisdiction of the competent Court; the

[26] As far as Article 7.1 is concerned, Case C‑617/15, para. 26. In relation to Article 7.2, Case C-360/12, para. 28; and Case C‑172/18, para. 34.

[27] Joined Cases C-24/16 and C-25/16, para. 44.

[28] Audiencia Provincial de Alicante (Sección Tribunal de Marca Comunitaria) Auto núm. 44/2012, de 10 mayo (AC\2012\1807) (ECLI:ES:APA:2012:96A).

Tribunal Supremo (Spanish Supreme Court) ruled in Judgement No 1/2017[29], that Article 6(1) of Regulation (EC) No 44/2001 cannot avoid the application of Articles 79 and 82 of Regulation (EC) No 6/2002, with the objective of determining the jurisdiction of the Court of a Member State which is not closely connected. This was done in order to avoid irreconcilable judgments resulting from separate proceedings, when the infringement of several Community designs took place in another Member State where the defendant was also domiciled, so as to ultimately prevent *forum shopping* practices.

From another perspective, but also in relation to the application of Articles 79 of Regulation (EC) No 6/2002 and 122 of Regulation (EU) 2017/1001, it should be noted that the Court of Justice of the European Union ruled, in Case C-360/12, that "*2. Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of an allegation of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, prohibited by the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb) of the Member State in which the court seised is situated, that provision does not allow jurisdiction to be established, on the basis of the place where the event giving rise to the damage resulting from the infringement of that law occurred, for a court in that Member State where the presumed perpetrator who is sued there did not himself act there. By contrast, in such a case, that provision does allow jurisdiction to be established, on the basis of the place of occurrence of damage, to hear an action for damages based on that national law brought against a person established in another Member State and who is alleged to have committed, in that State, an act which caused or may cause damage within the jurisdiction of that court*".

c) Thirdly, Article 82 of Regulation (EC) No 6/2002 and Article 125 of Regulation (EU) 2017/1001, related to international jurisdiction, are also worth mentioning. Under paragraph 1, these provisions establish several grounds of jurisdiction for Community design and

[29] Tribunal Supremo (Sala de lo Civil, Sección 1ª) Sentencia núm. 1/2017, de 10 enero (RJ\2017\3) (ECLI: ES:TS:2017:24).

European Union trade mark courts which are "*Subject to the provisions of this Regulation as well as to any provisions of Regulation (EU) No 1215/2012*"[30]. However, as mentioned in paragraph 4 of both regulations, it in no way precludes the application of either Article 25 of the Brussels Ibis Regulation "*if the parties agree that a different (...) court shall have jurisdiction*", or Article 26 "*if the defendant enters an appearance before a different (...) court. (...)*".

In relation to the later provision, Judgement No 43/2016[31] by the *Audiencia Provincial de Madrid* (Provincial Court of Madrid) considered that the court in question should have jurisdiction in relation to the infringement of several international trade marks, in a case of infringement on the Internet, derived from the appearance of the defendant (Article 24 of Regulation (EC) No 44/2001), but not for the infringement of several Community trade marks (Articles 96, 97 or 98 of Regulation (EC) No 207/2009) nor for the infringement of national trademarks.

d) Finally, Article 90(3) of Regulation (EC) No 6/2002 and Article 131(2) of Regulation (EU) 2017/1001, determine that, if a Community design or European Union trade mark court is competent under Articles 82(1) to (4) or 125(1) to (4), same "*shall have jurisdiction to grant provisional measures, including protective measures, which, subject to any necessary procedure for recognition and enforcement pursuant to Chapter III of Regulation (EU) No 1215/2012, are applicable in the territory of any Member State*".

3. An overview of the jurisdiction rules contained in the Regulations on the European Union trade mark and the Community design: limits and dialogue with the Brussels Ibis Regulation

Prior to the analysis of the international jurisdiction rules present in both Regulation (EC) No 6/2002 and Regulation (EU) 2017/1001 –

[30] SALERNO F., *Gurisdizione ed eficacia delle decisioni straniere nel Regoloamento (UE) n. 1215/2012 (rifusione)*, Vicenza, 2015, p. 97.

[31] Audiencia Provincial de Madrid (Sección 28ª) Sentencia núm. 43/2016, de 5 febrero (AC\2016\268) (ECLI:ES:APM:2016:1371).

particularly from the perspective of their coordination with rules in the Brussels Ibis Regulation, their substantive scope of application should be determined, in terms of its significance in relation to the application of those instruments and of the Brussels Ibis Regulation.

3.1. Scope

From the perspective of their scope of application, the following elements should be considered:

a) Firstly, it should be underlined that, in accordance to Article 81 of Regulation (EC) No 6/2002 and Article 124 of Regulation (EU) 2017/1001 –"*Jurisdiction over infringement and validity*"-, Community design and European Union trade mark courts shall have exclusive jurisdiction in relation to proceedings related to those unitary Intellectual property Rights when: *"(a) for infringement actions and — if they are permitted under national law — actions in respect of threatened infringement*" of those unitary Intellectual Property Rights; *"(b) for actions for declaration of non-infringement*" when they are permitted under national law; *"(c) for actions for a declaration of invalidity of an unregistered Community design*" or in the event of a European Union trade mark "*for all actions brought as a result of acts referred to in Article 11(2)*"[32]; as well as *"(d) for counterclaims for a declaration of invalidity*" in relation to the aforementioned Intellectual Property Rights, if they are in connection with actions under (a).

For instance, the Court of Justice of the European Union stated in Case C-433/16, that "3) *The rule on jurisdiction in Article 5(3) of Regulation No 44/2001 does not apply to actions for a declaration of non-infringement under Article 81(b) of Regulation No 6/2002*". In addition, from a Spanish perspective, the *Audiencia Provincial de Alicante* (Provincial Court of Alicante), in its Judgement No 339/2018, determined that Article 96 of Regulation (CE) No 207/2009 – currently, Article 124 of Regulation (EU) 2017/1001– provided an exclusive ground of jurisdiction. Therefore, -in spite of the existence of a

[32] Article 11(2) determines that "*Reasonable compensation may be claimed in respect of acts occurring after the date of publication of an EU trade mark application, where those acts would, after publication of the registration of the trade mark, be prohibited by virtue of that publication*".

contractual prorogation of jurisdiction between the parties in favour of a different Court-, the Community trade mark Court should take jurisdiction over an action for the breach of that contract (in relation to which, a Community trade mark has been infringed) and another action for unfair competition, providing the action for the infringement of the trade mark is considered as the principal one.

b) Secondly, from the wording of Articles 79, 81, 93 and 94 of Regulation (EC) No 6/2002 and Articles 122, 124, 134 and 135 of Regulation (EU) 2017/1001, one may deduce that as for actions not covered by the aforementioned provisions –Articles 81 and 124-, ordinary national courts of the Member States should retain their jurisdiction[33]; courts which shall be determined by the Brussels Ibis Regulation[34]. Unless, as established in Articles 79(1) of Regulation (EC) No 6/2002 and 122(1) of Regulation (EU) 2017/1001, those instruments in specific matters ruled otherwise.

3.2. Grounds of jurisdiction

Regulations (EC) No 6/2002 and (EU) 2017/1001 develop a system that determines the international jurisdiction of courts which is aimed at offering both uniform solutions and legal certainty to the parties, so as to prevent *forum shopping* practices[35]. This system is developed in Title IX -Articles 79 to 94- of Regulation (EC) No 6/2002 and in Chapter X -Articles 122 to 135- of Regulation (EU) 2017/1001.

[33] LOBATO GARCÍA-MIJÁN M., *La marca comunitaria*, Bologna, 1997, p. 257-268.

[34] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 10-39 and p. 321; DESANTES REAL M., *Artículo 90. Aplicación del Convenio de ejecución*, in *Comentarios a los Reglamentos sobre la marca comunitaria*, Alicante, 1996, p. 919-939, p. 926-934; ESPLUGUES MOTA C., *Normas de competencia judicial internacional en materia de propiedad intelectual*, in *Los derechos de la propiedad intelectual en la nueva sociedad de la información*, Granada, 1998, p. 191-246; VERON V., *Trente ans d'aplication de Bruxelles à l'action en contrefaçon de brevet d'invention*, in *J.D.I.,* 2001, p. 805-830.

[35] SUTHERSANEN U., *Design Law in Europe*, London, 2000, p. 74.

3.2.1. Articles 82 of Regulation (EC) No 6/2002 and 125 of Regulation (EU) 2017/1001

The grounds of jurisdiction established in Article 82 of Regulation (EC) No 6/2002 and Article 125 of Regulation (EU) 2017/1001, determine which shall be the international competent courts[36], and *brevis* these grounds are structured as follows: a) Firstly, it should be determined if prorogation of jurisdiction and jurisdiction by appearance are at stake (with an exclusive character for the parties); if not b) defendant´s domicile or establishment in a Member State should be considered; if not c) *Forum actoris* (in relation to persons domiciled or established in a Member State); if not d) the plaintiff may appear before the courts of the Member State of the Office (EUIPO); or e) this person can opt for the courts of the place where the act of infringement has been committed or threatened (only for the damages caused in that country, thus following the so called "mosaic principle")[37].

From a first reading of those provisions -contrasted with Articles 83 and 126[38]- the following two main ideas a) Firstly, according to their wording, paragraphs 1 to 4 enjoy a successive application – cascade of connecting factors-, for those cases in which the infringement of the unitary Intellectual Property Right in question is at stake; thus covering all situations within the territory of any of the Member States in which the damage was caused, both from a Member State or from a third country[39]. b) Secondly, according to their paragraph 5, the plaintiff has the alternative to sue the offender in the courts of the Member State in which the act of infringement has been committed or threatened. However, as stated in Articles 83(2) and 125(3), such in-

[36] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 330-333 ; HUET A, *La marque communautaire: la compétence des jurisdictions des Etats membres pour connaître de sa validité et de sa contrefaçon (Règlement (CE) n° 40/94 du Conseil, du 20 décembre 1993)*, in *J.D.I.* 1994, p. 623-642, at p. 633.

[37] CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J., *Litigación internacional en la Unión Europea I*, Pamplona, 2017, p. 217-218.

[38] FUENTES DEVESA R., *Las competencias del Tribunal de Marca Comunitario*, in SOLER PASCUAL L.A., *La marca comunitaria, modelos y dibujos comunitarios. Análisis de la implantación del Tribunal de Marcas de Alicante*, Madrid, 2005, pp. 309-360.

[39] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 326-328.

ternational jurisdiction shall be limited only in respect of acts of infringement committed or threatened within the territory of the Member State in which that court is situated.

Therefore, in accordance with those rules, the plaintiff has the aforementioned option to bring proceedings: either before the court of the Member State in which the act of infringement has been committed or threatened with a limited territorial effect to that national jurisdiction; or before one of the successive courts above mentioned (in paragraphs 1 to 4) in respect to acts of infringement committed or threatened within the territory of any of the Member States. However, in Case C-433/16, the Court of Justice of the European Union decided that "*2) Article 82 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted to the effect that actions for declaration of non-infringement under Article 81(b) of that regulation must, when the defendant is domiciled in an EU Member State, be brought before the Community design courts of that Member State, except where there is prorogation of jurisdiction within the meaning of Article 23 or Article 24 of Regulation No 44/2001, and with the exception of the cases of litis pendens and related actions referred to in those regulations*".

a) Paragraph 1 is based on the traditional and beneficial jurisdiction rule of the defendant´s domicile, thereby considering the latter as equivalent to the place in which the offender is has an establishment, thereby widening the range of alternatives open to the former[40]. Should the defendant has several domiciles or establishments within the EU –a situation which may generate some uncertainties[41]-, factual elements of the situation should be considered to determine the competent court[42]. In relation to this, the Court of Justice of the European

[40] SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 395.

[41] DESANTES REAL M., *Artículo 93*, in *Competencia internacional*, *Comentarios a los Reglamentos sobre la marca comunitaria*, Alicante, 1996, p. 951-967, at p. 963; LOBATO GARCÍA-MIJÁN M., *La marca comunitaria*, cit., p. 113-114; SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 395.

[42] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 323-324; SANCHO VILLA D., *Disposiciones generales y principios básicos del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio*, in *Revista de propiedad intelectual,* 2000, n. 5, p. 65-88, at p. 79.

Union in Case C-617/15 ruled that "*a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an 'establishment', within the meaning of that provision, of that parent body if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the appearance of permanency to the outside world, such as an extension of the parent body*".

b) Paragraph 2 –following a *forum actoris* approach- successively establishes that the plaintiff may bring proceedings in the courts of the Member State in which the plaintiff is domiciled or, if not, in any Member State in which he/she has an establishment, thereby benefiting the plaintiff by offering him/her a competent court within the EU, when the defendant was not domiciled in a Member State or when the damage took place in several territories[43].

c) If, neither paragraph 1 nor paragraph 2 are applicable to the case, paragraph 3 determines that the international competent courts will be those of the Member State where the Office (EUIPO) has its seat –i.e. Alicante in Spain-, or more precisely the Community design and European Union trade mark courts of Alicante, this being the city where the Office headquarters are–[44]. This solution guarantees the international jurisdiction of the courts of a Member State, in any case[45]. However, in practice this ground of international jurisdiction would only apply under extraordinary circumstances[46].

d) Despite its position in the structure of the analysed provisions, paragraph 4 plays a leading role among the examined articles, as not only does it allowthe parties to agree that a different Community design or European Union trade mark court shall have jurisdiction –according to Article 25 of the Brussels Ibis Regulation-, but also that

[43] MORENILLA ALLARD P., *La protección jurisdiccional de la marca comunitaria*, Madrid, 1999, p. 116; SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 386.

[44] DESANTES REAL M., *Artículo 93*, cit., p. 965.

[45] HUET A, *La marque communautaire*, cit., p. 633; LOBATO GARCÍA-MIJÁN M., *La marca comunitaria*, cit., p. 21.

[46] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 324.

courts can be internationally competent if the defendant enters an appearance before a court –in accordance to Article 26 of Brussels Ibis Regulation-.

Although the acceptance of party autonomy can be beneficial to the parties and their interests, , it is rarely applicable and may lead to problems in practice[47]. In this respect, the Court of Justice of the European Union in Case C-433/16 decided that jurisdiction by appearance should be interpreted to the effect that "*a challenge to the jurisdiction of the court seised, raised in the defendant's first submission in the alternative to other objections of procedure raised in the same submission, cannot be considered to be acceptance of the jurisdiction of the court seised, and therefore does not lead to prorogation of jurisdiction*".

e) Alternatively -and inspired by a strict application of the territoriality principle-, paragraph 5 states that the plaintiff may bring proceedings in the courts of the Member State in which the act of infringement has been committed or threatened –i.e. the place of acting– [48]. However, as mentioned above, if the plaintiff opts for this, the court would retain jurisdiction only for the damages case in that Member State, and not globally for the rest of the territories of the EU. Therefore, in those situations, the plaintiff would, in order to obtain full redress[49], be forced to approach the courts in which harm was suffered.

In respect of this provision, the Court of Justice of the European Union ruled in Case C-360/12 that "*in the event of a sale and delivery of a counterfeit product in one Member State, followed by a resale by the purchaser in another Member State, that provision does not allow jurisdiction to be established to hear an infringement action against the original seller who did not himself act in the Member State where*

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[47] HUET A, *La marque communautaire*, cit., p. 636; SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 385-386 and 388-390.

[48] TLARSEN T.B., *The extent of jurisdiction under the forum delicti rule in European trademark litigation*, in *Journal of Private International Law*, 2018, p. 549-561; LOBATO GARCÍA-MIJÁN M., *La marca comunitaria*, cit., p. 130-143.

[49] SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 386-387.

the court seised is situated". Nevertheless, in Case C-172/18, the same Court decided that the proprietor of the infringed Intellectual Property Right could bring an infringement action against a third party before a court of the Member State "*within which the consumers or traders to whom that advertising and those offers for sale are directed are located, notwithstanding that that third party took decisions and steps in another Member State to bring about that electronic display*"[50].

3.2.2. Articles 90 and 91 of Regulation (EC) No 6/2002, and Articles 131 and 132 of Regulation (EU) 2017/1001

Apart from the solutions which have just been analysed, other specific international jurisdiction rules are established under Articles 90 and 91 of Regulation (EC) No 6/2002, and Articles 131 and 132 of Regulation (EU) 2017/1001.

a) Articles 90 and 131 refer to the very practical and significant question –especially in the field of international Intellectual Property litigation- of the availability of provisional measures, including protective measures[51]. Paragraph 1 such articles establish a similar approach to Article 35 of the Brussels Ibis Regulation[52], as they determine that application of such measures, in respect of a Community design or a European Union trade mark, are possible when they are available under the law of that State in respect of national design or trademark rights "*even if, under this Regulation*", a Community design or European Union trade mark court of another Member State "*has jurisdiction as to the substance of the matter*"; although with a limited effect to the territory of the Member State where those measures should be adopted[53].

Moreover, paragraph 2 of these paragraph 3 of both, the international competent court -derived from the application of paragraphs 1

[50] DE MIGUEL ASENSIO P.A., *Competencia judicial en materia de infracciones en línea de marcas de la Unión*, in *La Ley*, 2019, n. 71, p. 1-12.

[51] BLANCO JIMÉNEZ, A., CASADO CERVIÑO, A., *cit.*, p. 177-178.

[52] SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 397.

[53] DESANTES REAL M., *La marca comunitaria y el Derecho internacional privado*, cit., p. 245.

to 4, of Articles 82 of Regulation (EC) No 6/2002 and 125 of Regulation (EU) 2017/1001- shall have exclusive jurisdiction to grant provisional measures, including protective measures, which, subject to any necessary procedure for recognition and enforcement pursuant to Chapter III of the Brussels Ibis Regulation, are applicable in the territory of any Member State. In such situations the measures will be granted with an extra-territorial scope in other Member States, if they meet the following requirements: not only must the measure be made applicable in the Member State in which they were granted[54], but they should also take the formalities for recognition and execution of the Brussels Ibis regulation into account[55].

In relation to such a possibility, the Court of Justice of the European Union ruled in Judgment of the Court (Fourth Chamber) of 21 November 2019, Procureur-Generaal bij de Hoge Raad der Nederlanden, Case C-678/18[56], that: "*Article 90(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted as meaning that the courts and tribunals of the Member States with jurisdiction to order provisional measures, including protective measures, in respect of a national design also have jurisdiction to order such measures in respect of a Community design*".

b) Articles 91 and 133 develop specific rules for related actions[57]. Although those provisions do not directly refer to *lis pendens* situations, they do not exclude the possibility of making use of rules on *lis pendens* and related actions of the Brussels Ibis Regulation –i.e. Articles 29 to 34-[58]. Nevertheless, as underlined in paragraph 3, it should be borne in mind that, for those situations in which the Community design or European Union trade mark Court stays the proceedings,

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[54] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 341.

[55] SCORDAMAGLIA V., *Jurisdiction and Procedure in Legal Actions relating to Community Trade Marks*, cit., p. 398.

[56] ECLI:EU:C:2019:998.

[57] FAWCETT J.J., TORREMANS P., *Intellectual Property and Private International Law*, cit., p. 334-335.

[58] DICKINSON A., *Background and Introduction to the Regulation*, in DICKINSON A., LEIN E. (eds), *The Brussels I Regulation Recast*, Oxford, 2015, p. 38-39.

such court "*may order provisional measures, including protective measures, for the duration of the stay*".

a) This may happen, first of all and in accordance with paragraph 1 thereof, when a Community design or European trade mark court hearing an action referred to in Articles 81 of Regulation (EC) No 6/2002 or 124 of Regulation (EU) 2017/1001, other than an action for a declaration of non-infringement "*shall, unless there are special grounds for continuing the hearing, of its own motion after hearing the parties, or at the request of one of the parties and after hearing the other parties*", stay the proceedings where the validity of the Community design or European trade mark is already in issue before another Community design or European Union trade mark court on account of a counterclaim or where an application for a declaration of invalidity has already been filed with EUIPO.

b) Secondly, in the application of paragraph 2, EUIPO shall "*of its own motion after hearing the parties or at the request of one of the parties and after hearing the other parties*" stay the proceedings if the validity of the Community design of the European Union trade mark were already in issue on account of a counterclaim before a Community design of an EU trade mark court "*when hearing an application for revocation or for a declaration of invalidity*", unless there were special grounds for continuing the hearing. Nevertheless, when one of the parties to the proceedings before a Community design court or a European Union trade mark court so requests, "the court may, after hearing the other parties to these proceedings, stay the proceedings". EUIPO shall, in any case, continue proceedings pending before it on this occasion.

However, in Order No 122/2017, the *Audiencia Provincial de Alicante* (Provincial Court of Alicante) decided that the court not only lacked international jurisdiction *in casu* to hear a case related to the infringement of national designs, but also that the action could not be related to other action for the infringement of a European Union trade mark -as provided for by art. 30(3) of Regulation (EU) No 1215/2012-, due to the non-existence of the condition related to the close connection.

4. Assessment

The *lex specialis* principle, as established in Article 67 of the Brussels Ibis Regulation, plays a decisive role in the field of international litigation in respect to unitary Intellectual Property rights within the EU. However, when this provision is put into practice, and in connection with the international jurisdiction rules of decisive instruments, such as Regulation (EC) No 6/2002 or Regulation (EU) 2017/1001, the application of this principle is not so straightforward. *Inter alia*, as some of the provisions under the Brussels Ibis regulation shall still retain an important position, as same are referred to by Ya nos van llegando notificaciones de alumnos afectados y están preguntando por las alternativas (fechas, hora, iugar) que les corresponden hacer el examen. provisions of those instruments in specific matters. With this study, we aimed not only to show the whole picture and explain the several complexities opened up by those provisions, but also to offer ways to overcome this complex situation in order to allow a combined and coordinated application of the Regulations at stake. This analysis has also explored the relevant case law of the Court of Justice of the European Union, as well as the Spanish case law –as the Member state where the EUIPO has its seat–.

Connections, Disconnections and Fragmentation in International Civil Procedure: The Case of Intellectual Property Rights

Paula-Carmel Ettori, Jean-Sylvestre Bergé*

Introduction

With an integration system that has become more and more prominent within the European Union, private international law must be rethought in a European context. This requires a kind of dual expertise that covers both European law and private international law. Such broad-based experience is rare, since the former discipline has a more public connotation, and the latter a more private one.

Europe has adopted certain instruments, especially in civil and commercial matters, that allow for a uniform response to the basic problem of assigning jurisdiction within European spaces. This is an important foundation for the predictability of future solutions. It was

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in this context that the Brussels 1 bis Regulation was adopted (the Brussels I bis Regulation)[1].

More than just a basis for predictability, the Brussels I bis Regulation is an instrument that renders real consistency possible (at least that was the intended goal) between Member States in all matters related to jurisdiction and the recognition and enforcement of decisions in civil and commercial matters. This Regulation thus describes an independent justice system based on criteria (cumulative, alternative, or cascading, depending on the case) that make it possible to determine jurisdictional competence and to create a system for recognizing foreign legal decisions, that is based on the principle of mutual trust. This system is therefore built on different general, special and exclusive jurisdictions, unlike Common Law systems, which require that courts have both personal and material jurisdiction to be considered a court of competent jurisdiction[2].

In all instances, this mutual trust must be accepted and not imposed, in such a way that any decisions that go against this requirement can be excluded[3]. Nevertheless, in cases where too much weight might be given to this principle[3], the Brussels I bis Regulation also assigns exclusive jurisdiction for specific matters, especially in terms of industrial property. According to the text of Article 24.4 "*The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have tak-*

[1] 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, in OJ L 351 of 20.12.2012, p. 1.

[2] BENNETT A., GRANATA S., *Quand le droit international privé rencontre le droit de la propriété intellectuelle – Guide à l'intention des juges*, The Hague: The Hague Conference on Private International Law, Geneva: World Intellectual Property Organization, 2019, p. 32.

[3] TREPPOZ E., *Chronique Droit européen de la propriété intellectuelle : Épuisement international et reconnaissance des décisions étrangères*, in *RTD Eur*., 2015, p. 872.

en place." While this jurisdiction is certainly exclusive, it only applies to a narrow field of issues.

It should not be surprising that the Brussels I bis Regulation calls for exclusive jurisdiction in matters of industrial property, since these issues are strongly influenced by the principle of territoriality. E. Treppoz defines this principle with the idea that "*The scope of application for each law is therefore limited to the territory of the State from which it arises, meaning that the protections of any national law are limited in their territory*"[4]. The international framework for intellectual property law thus resembles a "patchwork"[5], with different national laws operating independently. This phenomenon can also be observed at a European level, despite institutions' legislative efforts to avoid the inevitable fragmentation of intellectual property disputes with attempts at standardization, including the creation of the Brussels I bis Regulation. It is also important to remember that only industrial property falls under the exclusive jurisdiction described by the Brussels I bis Regulation. Some categories of intellectual property, such as literary and artistic property, are governed by ordinary law. However, might using ordinary law to handle matters as specialized as literary and artistic property not create even more issues, besides those posed by intellectual property in general?

Moreover, the territoriality principle has been disrupted by a truly singular phenomenon, namely the rise of the Internet. Over the last decade, intellectual property has in fact been impacted by the way infringements of protected rights have gone digital, , thereby defying the principle of territoriality and implying that locating where the harm is being done has become arduous and, above all, uncertain). How strictly can the principle of territoriality be applied to infringements that, almost by definition, occur across borders?[6] These infringements on the Internet have become the bread and butter of intellectual property disputes, and we shall need to find a new balance between freedom of

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[4] TREPPOZ E., *Contrefaçon*, Répertoire de droit international, June 2010, para. 4.

[5] GELLER P.-E., *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, in *Vanderbilt Journal of Transnational Law*, 1998, Vol. 31, p. 554.

[6] On the cross-border aspects of intellectual property: TOMKOWICZ R., *Crossing the Boundaries: Overlaps of Intellectual Property Rights* [Thesis for the University of Ottawa], 2011, Available online.

expression and the protection of rights, which may come at the expense of the right-holder's interests. Standardizing laws top-down from the European level does not appear to be an ideal solution, as the issues at stake are constantly evolving, and even though its importance has diminished, the principle of territoriality continues to influence current laws. The choice was made to pursue reconciliation over standardization, with national - ordinary law - judges being asked to adapt and be more creative. While the Court of Justice of the European Union (CJEU) has attempted to delineate intellectual property disputes more clearly by creating independent definitions (for example: how to apply Article 7.2 of the Brussels I bis Regulation), such interpretations can only serve as starting points for national judges, who must always find ways of applying theoretical ideas to real situations. Intellectual property litigation can cover incredibly broad issues, such as those referred to in Article 24.4 of the Brussels I bis Regulation. For example, rights may be infringed as part of other actions that lead to litigation based on special statues on unfair competition or plagiarism: "*these issues may overlap and may make defining the procedure to follow more difficult. Involved parties are focused more and more on competition law, especially in instances where patents are essential to a given system*"[7]. Determining proper jurisdiction is therefore of the utmost importance in deciding what laws apply to help resolve the underlying litigation: at the European level, then, we need a regulation that takes the specific theoretical issues into account, and that aligns with the intentions of private international law. This was the specific purpose assigned to the Brussels I bis Regulation, which responds to the requirements of intellectual property issues, not by offering a solution, but by proposing a common method that can be used by all Member States. Therefore, given the specific difficulties surrounding this issue, does the practice of national judges demonstrate that they have all of the resources they need? In this case, technical issues are even more pressing than theoretical ones: until now, matters of jurisdiction and recognition have almost always been governed by Regulations (directly applicable under Article 288 of the Treaty on the Func-

[7] BENNETT A., GRANATA S., *Quand le droit international privé rencontre le droit de la propriété intellectuelle – Guide à l'intention des juges*, cit., p. 31.

tioning of the European Union[8]) on intellectual property. Might this not make things complicated for national judges, who need to navigate both the various Regulations and the Brussels I bis Regulation?

Given the difficulties described above, we now must investigate how the Brussels I bis Regulation has actually been applied in practice by national-level judges. Does their application of the Regulation effectively resolve jurisdictional conflicts and problems related to the recognition of foreign legal decisions regarding intellectual property?

The application of the Brussels I bis Regulation has been influenced by the various difficulties that arise both from the principles governing the issue of intellectual property (or that govern laws in general) and from their manipulation by the parties involved in disputes (although they may not be parties to the suit, themselves) (1). With much ingenuity and by way of following the evolution of this issue, legal precedents have, for better or for worse, been set, in order to impose a modicum of logic and flow on the complex issue of intellectual property and its interactions with issues of jurisdiction and recognition (2). It might also be useful to propose potential solutions to improve the way the Brussels I bis Regulation is applied to intellectual property matters (3).

1. Inherent difficulties in applying the Brussels I bis Regulation to Intellectual Property issues

There are four notable difficulties that arise from the application of the Brussels I bis Regulation. Two of them relate to the architecture of the Regulation itself, namely the fragmentation of intellectual property disputes (1.1.) and the nullification of these rules for the benefit of the principle of specialty (1.2.). The other two difficulties arise from the application of the Regulation, which has led to its being used to support cross-strategies (1.3.) and which does not always make it possible to effectively punish infringements (1.4.).

[8] Direct effect also qualified as complete by the Politi case (Judgment of the Court of December 14, 1971, Politi s.a.s vs. the Ministry of Finance of the Italian Republic, Case No. 43-71).

1.1. The fragmentation of intellectual property disputes

A good starting point is the *Fiona Shevill*[9] case, where the CJEU ensured that the jurisdiction of the court where the harm took place was not given too much weight, deciding as a result that the country where the operative event took place was responsible for remedying this harm in its totality, while the country where the harm was committed was only responsible for remedying the portion of the harm done on its territory. With the rise of the Internet and of digital technology, this precedent has fallen somewhat by the wayside[10].

In highly anticipated decisions in the *E-Dates* and *Martinez*[11] cases, the CJEU ruled that the court in the country where the entity distributing the information over the Internet was located, had jurisdiction, i.e. the defendant's home court. It was also decided that, given the specific issues related to the Internet and to its ubiquitous nature, the judge with jurisdiction over the victim's center of interest also had jurisdiction, and that if the plaintiff did not bring the issue before the defendant's home court or that of the plaintiff, he/she might bring it before one of the courts presiding over the location where the harm occurred. Even though this marked a major step forward, this precedent is not well suited to intellectual property issues. The question arises whether this precedent should be used in intellectual property disputes, where the location of the harmful event depends on the harm done to the object of protection, and not on the intellectual property itself.

Thus, while the European Union has developed legal instruments for determining jurisdiction and recognition (such as the Brussels I Regulation)[12], more and more criteria have been created for deciding

[9] Judgment of the Court of March 7, 1995, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd vs. Presse Alliance SA, Case No. C-68/93.

[10] For more information, see: ANCEL M.-E*., La compétence et la loi applicable en matière de propriété intellectuelle*, in R. I. D. C., 2010, p. 447.

[11] Judgment of the Court (Grand Chamber) of October 25, 2011, eDate Advertising GmbH e.a. vs. X and Société MGN LIMITED, Joined Case Nos. C-509/09 and C-161/10.

[12] Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ l 12 of January 16, 2001, p. 1.

where harm to intellectual property has taken place, in line with Article 5.3 of the Brussels I Regulation and Article 7(2) of the Brussels I bis Regulation, as well as the principle of territoriality:

- In its *Pinckney*[13] decision, the CJEU used reasoning that was highly influenced by copyright territoriality in its approach to jurisdictional disputes[14], establishing the criterion of accessibility (rather than the criterion of activity) to determine what court has jurisdiction over Internet-based copyright infringements. Not only did this solution have the positive effect of accounting for the specific issues of copyright law, but it also contributed to the creation of a "*patchwork of solutions*"[15] wherefore judges only have jurisdiction over the harms done within their territory. This situation can be criticized for "*the territorial fragmentation of protections, which results in the further fragmentation of infringements and transforms them from single crimes into constellations of criminal infringements*"[16].

In opposition to provisions set out under the Bern Convention[17], whose Article 5.2 prohibits the enjoyment and the exercising of copyrights from being subject to formalities, the CJEU continued to rule on copyright issues by affirming the criterion of reaching a new public[18].

- In terms of EU trademarks, the criterion of accessibility began to be considered less than the criterion of the target public. To this end, in its *AMS Neve and Others*[19] decision, the CJEU asserted that

[13] Judgment of the Court (Fourth Chamber) of October 3, 2013, Peter Pinckney vs. KDG Mediatech AG, Case No. C-170/12.

[14] TREPPOZ E., *Chronique de droit européen de la propriété intellectuelle : De l'inopportune invocation du principe de territorialité à l'incertaine consécration de l'accessibilité par la Cour de justice en matière de cyber contrefaçon*, in RTD Eur., 2013, p. 897.

[15] MARINO L., *Arrêt Pinckney : le critère de l'accessibilité du site détermine le juge compétent au cas de cyber-atteinte au droit d'auteur*, Gaz. Pal. March 6, 2014, No. 169b8.

[16] MARINO L., *ibid.*

[17] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, RO 1993 2659.

[18] Judgment of the Court (Fourth Chamber) of February 13, 2014, Nils Svensson e.a. vs. Retriever Sverige AB, Case No. C-466/12.

[19] Judgment of the Court (Fifth Chamber) of September 5, 2019, AMS Neve Ltd and Others vs. Heritage Audio SL and Pedro Rodríguez Arribas, Case No. C-172/18, para. 66.

"*the proprietor of an EU trade mark who considers that his rights are infringed by the use without his consent, by a third party, of a sign identical to that mark in advertising and offers for sale displayed electronically in relation to products identical or similar to the goods for which that mark is registered, may bring an infringement action against that third party before an EU trade mark court of the Member State in which consumers and traders targeted by that advertising and by those offers for sale are located, notwithstanding the fact that the third party made decisions and took steps in another Member State to bring about that electronic display*.". By adopting a "*targeted approach*"[20], the CJEU reinforced the principle of territoriality, even for industrial properties that were meant to move across borders.

This trend towards a greater number of criteria for determining jurisdiction emphasizes territoriality (to a reasonable degree) for legal and economic reasons where the law must prevail over technology. Some authors have even referred to CJUE "*opportunism*"[21] with regard to international law, since it seems to want to break free of it to create its own intellectual property rules. How should European rules and regulations be applied, then, if they conflict with international law? Furthermore, although the CJEU has tried to increase the number of self-standing concepts arising from the interpretation of Article 5.3 of the Brussels I Regulation and Article 7.2 of the Brussels I bis Regulation in order to lay the groundwork for European harmonisation, these efforts have had the opposite effect, only serving to further fragment intellectual property disputes. Only the principle of independence for patents (by which they only apply within the territory of the country where they have been registered) reflects a pure interpretation of the principle of territoriality, although the territoriality of a right does not automatically define its independence.

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[20] LUNDSTEDT L., *AMS Neve and Others (C-172/18): Looking for a Greater 'Degree of Consistency' Between the Special Jurisdiction Rule for EU Trade Marks and National Trade Marks*, in *GRUR International*, 2020, p. 355.

[21] TREPPOZ E., *Chronique de droit européen de la propriété intellectuelle : Le droit d'auteur européen asservi à la technique et libéré du droit international*, in *RTD Eur*., 2014, p. 965.

The issue, then, is the fact that European judges tend to interpret the principle of territoriality, a principle that is central to intellectual property matters, more freely (although this varies depending on the rights in question). Nowadays, we can no longer speak of territoriality in its strictest definition. Although it remains implicitly present in intellectual property disputes, the issues and questions raised by new technologies require that this historic principle be adapted to a new context. What then, practically speaking, are national-level judges to do? Tobias Lutzi has already described one approach by using the country of origin as a criterion. This significantly improves legal certainty by reducing the number of possible venues and by making it easier to predict where any litigation would take place[22].

1.2. The nullification of Brussels' regulations rules to the benefit of the principle of specialty

It has become more and more difficult for national judges to determine jurisdictional competence and to rule on recognition in intellectual property matters due to the legislative inflation in this area. As infringements have multiplied, so have efforts to fight them: that is the essence of reconciliation, though we must remember that *Specialia Generalibus Derogant* also applies within the legal system of the European Union[23].

There are several examples that may be cited.

1.2.1. The articulation of Brussels I bis Regulation and Regulation (EU) 2017/1001

According to the standard procedure for intellectual property matters established by the *Coty*[24] decision, in the case of unfair competition, international jurisdictional competence is based on Article 5.3 of

[22] LUTZI T., *Internet cases in EU private international law – developing a coherent approach*, I.C.L.Q., 2017, p. 687.

[23] This principle echoes the letter of Article 67 Brussels I bis Regulation as it is based on it. For more information, see: PALAO MORENO G., in this *Volume*.

[24] Judgment of the Court (First Chamber) of December 6, 2017, Coty Germany GmbH vs. Parfümerie Akzente GmbH, Case No. C-230/16.

the Brussels I Regulation. This solution, however, cannot be applied when an EU trademark is at issue, as the matter of jurisdictional competence then falls under Regulation (EU) 2017/1001[25], which is autonomous. More specifically, Article 122.1 of the regulation states: "*Unless otherwise specified in this Regulation, the Union rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shall apply to proceedings relating to EU trade marks and applications for EU trade marks, as well as to proceedings relating to simultaneous and successive actions on the basis of EU trade marks and national trade marks*." Thus, through specifically cited exceptions, the Brussels rules may be avoided (in the instances given under Article 122.2).

Still, it should be noted that the architecture of these regulations is totally different: under Regulation (EU) 2017/1001, judges presiding over infringement cases have territorially limited jurisdictions, while conversely, under the Brussels rules, such judges' jurisdiction is not territorially bound, providing the case concerns the event that gave rise to the harm[26]. As a result, there is no common solution for EU trademark issues, which could possibly lead to classification disputes involving parties looking to practice "*forum shopping*".

Practically speaking, attempts at reconciling Regulation (EU) 2017/1001 and the Brussels I bis Regulation have created potential pitfalls, due to venue alternatives offered by Regulation (EU) 2017/1001, namely the option given to EU trademark holders to decide whether it is the court of the defendant (Article 97.1) or the court of the territory where the infringement took place or threatened to take place (Article 97.5), that has jurisdiction. This option has sparked controversy: if there is an infringement against an EU trademark and a national trademark at the same time, there is a significant risk of "*conflicting judgments*"[27] insofar as, in matters of violations of intellectual property rights, Article 7.2 of the Brussels I bis Regulation only re-

[25] Regulation (EU) 2017/1001 of the European Parliament and of the Council of June 14, 2017 on the European Union trademark (formerly 207/2009; in OJ L 154, 16.6.2017, p. 1).

[26] TREPPOZ E., *Chronique Droit européen de la propriété intellectuelle : L'autonomie et la particularité juridictionnelle des titres communautaires*, cit., p. 960.

[27] HERPE F., *Compétence juridictionnelle en cas d'atteinte en ligne à une marque de l'UE*, in *LEPI*, November 2019, No. 112t1, p. 1.

quires that the website in question be aimed at the Member State that has claimed jurisdiction. The mere fact that a website that is the subject of litigation is accessible from the area of jurisdiction of the court in question is enough to claim jurisdictional competence, since that jurisdiction is seen as the place where the infringement was made[28]. However, when the decision in *AMS Neve and Others*[29] was handed down by the CJEU, , it offered an important clarification of Article 97.5, thereby providing better legal certainty and predictability. The CJEU recommended that there should be a degree of consistency between Article 7.2 of the Brussels I bis Regulation and Regulation (EU) 2017/1001, in order to reduce the number of simultaneous civil actions based on European trademarks and national trademarks[30].

The target public criterion that the CJEU has adapted for the particular instance of EU trademarks could, in theory, reconcile the independent law of Regulation (EU) 2017/1001 and the general law of the Brussels I bis Regulation, with the goal of avoiding contradictory judgments as much as possible. Nevertheless, new criteria invariably present interpretation difficulties, and it would have been better to simply reform the Brussels I bis Regulation. Merely using the independent definitions of the CJEU is not a permanent solution, and does nothing to modify the Regulation itself. As of 2015, issues involved in jurisdictional conflicts have evolved in many ways, and the principle of legal certainty requires that we do not allow the Brussels I bis Regulation to become obsolete.

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[28] HERPE F., *Compétence juridictionnelle en cas d'atteinte en ligne à une marque de l'UE*, cit., p. 1; Judgment of the Court (Fourth Chamber) of January 22, 2015, Pez Hejduk vs. EnergieAgentur.NRW GmbH, Case C-441/13.

[29] Judgment of the Court (Fifth Chamber) of September 5, 2019, AMS Neve Ltd and Others vs. Heritage Audio SL and Pedro Rodríguez Arribas, Case C-172/18, para. 66 ; See note 12.

[30] LUNDSTEDT L., *AMS Neve and Others (C-172/18): Looking for a Greater 'Degree of Consistency' Between the Special Jurisdiction Rule for EU Trade Marks and National Trade Marks*, cit., p. 364.

1.2.2. The articulation of Brussels I bis Regulation and Regulation (EC) 6/2002

This regulation interacts with the Brussels I Regulation in a unique manner. Article 79.3 of Regulation (EC) 6/2002[31] prohibits the application of certain provisions set out under the Brussels Regulation, though not those under Article 6.1. It is therefore possible to pursue a "*combined application of Article 83.1 of Regulation (EC) 6/2002 and of Article 6.1 of the Brussels I Regulation [or of its new version, the Brussels I bis Regulation]*"[32], which can serve to multiply the number of possible jurisdictions.

1.2.3. The articulation of the Brussels I bis Regulation and Directive (EU) 2019/790

Directive (EU) 2019/790[33] breaks with regulatory tradition. Given that it has no direct effect and must be transposed into national law, it is highly likely that national legislators will be able to fine tune their transposed laws to make them easier for national judges to apply. This is one of the major advantages of this Directive. It should also be noted that it was the first text to directly address the digital market (although one might wonder why it took so long given the long-standing issues in this area).

This Directive explicitly prohibits the application of the Brussels I bis Regulation, in an effort to harmonise copyrights and related rights. Nevertheless, it remains a rather timid attempt to establish an integrative approach, since copyright issues only make up a small portion of disputes, meaning that many problems persisted and that copyright-holders were not always given an advantage. As a result, in practice, judges did not completely abandon the Brussels I bis Regulation.

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[31] Council Regulation (EC) 6/2002 of December 12, 2001 on Community designs, in OJ L 3, 5.1.2002, p. 1.

[32] BOUCHE N., *Un an de droit international privé de la propriété intellectuelle*, in *Chron*. 4, April 2017, No. 4, para. 3.

[33] Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, in OJ L 130, 17.5.2019, p. 92.

A true dialectic between special and general has developed within intellectual property law, in terms of both location and content. It was not easy to reconcile different legal texts, leading to increasing legislative inflation. More general texts, such as the Brussels I bis Regulation may even become obsolete among the growing number of specialized texts. This will not resolve any disputes, and national courts may even become apprehensive of these texts. This apprehension is mostly felt by German courts with regard to the Unified Patent Court, whose initial purpose was to limit "forum shopping" that was undermining legal certainty and driving the fragmentation of patent disputes. This court is described by the Agreement on a Unified Patent Court[34] and would "*create a system based on the recitals of the Agreement that would improve patent enforcement and strengthen the tools for defending against baseless actions and meritless patents while improving certainty. The purpose of the Court would be to 'issue fast high-quality judgments that aim to strike a balance between the interests of the rights-holders and of other parties, all with the necessary proportionality and flexibility*"[35]. On March 20, 2020, the German Federal Court of Justice issued a statement[36] announcing that it had nullified[37] the law that ratified the Agreement on a Unified Patent Court due to "*the fact that transferring judicial functions to this Court in a way that would replace German courts would seem to require a significant amendment to the German Constitution, especially the judicial powers established in Article 92 of the German Constitution. Under Article 79 (2) of the Constitution, any law that might result in such an amendment would require a two-thirds majority in both the Bundestag and Bundesrat*"[38]. With Brexit and the unprecedented public health crisis

[34] Agreement on a Unified Patent Court, in OJ C 175, 20.6.2013, p. 1.

[35] SCHMIDT-SZALEWSKI J., RODA C., LE GOFFIC C., *Titre 3 – Juridiction unifiée du brevet*, Répertoire de droit européen / Brevet, April 2019, para. 173.

[36] Bundesverfassungsgericht, *Act of Approval to the Agreement on a Unified Patent Court is void*, press release, March 20, 2020, n°20/2020.

[37] Bundesverfassungsgericht, Germany, Leitsätze zum Beschluss des Zweiten Senats, February 13, 2020, No. 2 BvR 739/17.

[38] MEILLER C., CHAPUIS V., *Brevet : sale temps pour la juridiction unifiée du brevet*, Dalloz actualité, April 8, 2020.

over the last few months, establishment of the Unified Patent Court has been postponed indefinitely.

1.2.4. The articulation of the Brussels I bis Regulation and the European Patent Convention (EPC)

Reconciling these two instruments does not pose any particular issues. The Brussels I bis Regulation remains applicable as long as the litigation falls under the exclusive jurisdiction described under Article 24.4. Thus, "*disputes involving the legal claims of national parties to a European patent are substantially distinct from disputes involving the registration or the validity of the national party to European patents, and are not subject to the exclusive jurisdiction of the Contract State in question*"[39]. Conversely, the EPC[40] does not, in any instance, allow for the expansion of the exclusive jurisdiction under Article 24.4 of the Brussels I bis Regulation.

1.3. The utilization of Brussels rules for cross-strategies

There have been several attempts at expanding the field of exclusive jurisdiction under Article 24.4 of the Brussels I bis Regulation - none of which have come to fruition[41]. Their goal was to resolve difficulties in the interpretation of Article 7.2 of the Brussels I bis Regulation, as seen through the lens of intellectual property. At the same time, various other strategies have been developed in an attempt as meeting diverging interests.

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[39] BOUCHE N., *Un an de droit international privé de la propriété intellectuelle*, in Chron. 3, April 2016, No. 4, para. 3.

[40] European Patent Convention, October 5, 1973, RO 2007 6485.

[41] For more information, see: RAYNARD J., *L'exclusivité du juge du titre*, in *Droit international privé et propriété intellectuelle: un nouveau cadre pour de nouvelles stratégies,* Kluwer, 2010.

1.3.1. Establishing the international jurisdictional competence of a chosen court venue

This strategy was often seen while Regulation (EC) 40/94[42] was still in effect. In fact, it was common practice for judges to display a "*clear desire to adapt the principle to the specific example of trademark infringements*"[43]. In another *Coty* decision, the CJEU was able to specify that "*In that regard, it is for the court seised to assess, in the light of the evidence at its disposal, the extent to which the sale of the 'Blue Safe for Women' perfume to Stefan P., which occurred in Belgium, was capable of infringing provisions of the German law against unfair competition and, thereby, of causing damage within the jurisdiction of that court*"[44]. This amounted to asking the court seised to make a preliminary judgment on the underlying dispute (to a lesser degree, certainly) in order to confirm its jurisdictional competence. Still, the repeal of Regulation No. 40/94 signaled a desire to eliminate any machinations that might lead to forum shopping.

Because it was set upon using Brussels rules to obtain (or rather, to try and obtain) standardised judgments in the industrial property arena, (based on the principle of territoriality, more-so than literary and artistic property, making any hopes for harmonisation seem futile), the CJEU avoided an important issue, namely the dichotomy between "*act*" and "*effects*"[45]. Essentially, the *Coty* decision could lead to the conclusion that because of the principle of territoriality, it is inconceivable that acts of infringement committed in one country could produce legal effects in another. However, the purpose of industrial property rights (though the same might be said of literary and artistic property) is to provide protection that can sometimes be extraterritori-

[42] Regulation (EC) 40/94 of the Council, of December 20, 1993, on the Community trademark, OJ L 11, 14.1.1994, p. 1.

[43] BOUCHE N., *Un an de droit international privé de la propriété industrielle*, in Chron. 2, February 2015, No. 2.

[44] Judgment of the Court (Fourth Chamber) of June 5, 2014, Coty Germany GmbH vs. First Note Perfumes NV, Case C-360/12, para 58.

[45] KUR A., *Abolishing infringement jurisdiction for EU marks? - the Perfume Marks decision by the German Federal Court of Justice, International Review of Intellectual Property and Competition Law*, in *IIC*, 2018, p. 452.

al (one might cite the example of EU trademarks), so it would be highly unusual to allow the act and the effects to be treated differently (otherwise what good are any protections if they ultimately provide no benefit)?

1.3.2. Plurality of grounds of jurisdiction based on related actions

The concept of related actions is peculiar, because it may be grounds for both claiming and declining jurisdiction and because it provides a *de facto* method for fighting the fragmentation of intellectual property disputes. This strategy is entirely neutral, and may serve the interests of either the plaintiff or the defendant. However, steps should be taken to verify that national judges are not creating certain trends. At the same time, strategies that rely on related actions are more difficult, because they are only possible when decisions handed down might be in conflict with Article 30.3 of the Brussels I bis Regulation. Thus, any strategy that depends on the concept of related actions will fall under the scope of that Regulation.

A possible alternative might be found under Article 8.1 of the Brussels I bis Regulation (formerly Article 6.1 of the Brussels I Regulation), which provides the option to merge all parties and claims, when two defendants are acting jointly in one or several countries, even if they reside in different countries. Situations may occur wherefore an infringement on a European patent involves two defendants, the producer and the distributor of the counterfeit product. The option that this Article provides is appealing because it can significantly reduce the risk of irreconcilable judgments. Still, there is a limit: until the CJEU finds some solid foundation to anchor the definition of what constitutes "*closely connected*" (the requirement imposed by Article 8.1 of the Brussels I bis Regulation), it falls to national judges to find a balance. Because intellectual property is an area where things move quickly, national judges can make their judgments on a case-by-case basis. If seen from another angle, the above may lead to legal uncer-

tainty, to the extent that some authors have said that it is "*too bad*"[46] that the text of Article 6.1 of the Brussels I Regulation was left completely unchanged. This is even more of an issue because subordinate jurisdictions for intellectual property matters would be beneficial, since there are several different parties involved in most cases. The (voluntary?) flexibility of Article 6.1 of the Brussels I Regulation, maintained under Article 8.1 of the Brussels I bis Regulation contributes to the fragmentation of disputes and undermines the principle of territoriality. With regard to intellectual property, the major benefit of reforming the Brussels I bis Regulation would be opening up the field of subordinate jurisdictions, especially for co-defendants, even though there are some opposing opinions that would not want to usurp the *forum actoris*[47].

1.3.3. Lis pendens and the rise of forum shopping

In international situations of *lis pendens* (i.e. when one of the judges handling a case is not from an EU court), the only option is to remove the case to another court, though there is no obligation to do so. However, Article 29 of the Brussels I bis Regulation refers to an obligation to remove the case to another court in instances involving European litigation. E. Treppoz justifies this by saying, "*these different standards can be explained by the fungibility of jurisdictions within the EU and the significant barriers to divergent lis pendens*"[48].

Somewhat paradoxically, under EU law, this is not an option but an obligation: time pressure may make it possible, for temporal reasons only, to reject the jurisdiction of a national judge working under less

[46] TORREMANS P., *Intellectual Property Puts Article 6(1) Brussels I Regulation to the Test*, CREATe Working Paper, September 2013, No. 2013/8, p. 10.

[47] Judgment of the Court (Second Chamber) of June 16, 2016, Universal Music International Holding BV vs. Michael Tétreault Schilling e.a. Case No. C-12/15, para. 47: "*Article 5(3) of Regulation No. 44/2001 of the Council of December 22, 2000 must be interpreted as meaning that, in a situation such as that in the main proceedings, the 'place where the harmful event occurred' may not be construed as being, failing anyother connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State*.".

[48] TREPPOZ E., *Contrefaçon*, Répertoire de droit international, cit., para. 46.

favorable laws. Lis pendens has therefore long been used by parties to avoid agreements on jurisdiction and contractual obligations in order to frustrate the other party[49]. This most often results in an amicable settlement, which is always better for the guilty party. Although Articles 29 and 31 of the Brussels I bis Regulation provide a framework for *lis pendens*, tactical litigation remains the defining feature of intra-European civil and commercial litigation[50].

This purely utilitarian practice is a threat to intellectual property rights, especially when it results in "*torpedo*" actions (a tactic that aims to knowingly bring a case before a Member State court whose process moves more slowly, while also benefiting from *lis pendens* provisions). In short, the Brussels I bis Regulation is still not the panacea everyone had hoped for, as it has not been able to curb this practice. Only Article 31.2 presents an unequivocal solution. Despite all of these issues, it is difficult to conceive of any reform of the Regulation that would be stricter on this point without inevitably colliding with principle party autonomy. Once again, it is left to the national judges to strike a balance. Would this not, once again, facilitate the fragmentation of disputes by leaving each national judge to choose between laxity and purism?[51]

1.3.4. Declarations of non-infringement

Declarations of non-infringement are a tool for ensuring that a certain activity does not, in any way, infringe on a patent[52]. The Brussels rules would allow the holder of a European patent that has been infringed upon to bring suit in their home jurisdiction, which will rule on the case as a whole. Nevertheless, E. Treppoz has pointed out that it would be in patent-holders interests to "*break up their action across*

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[49] FENTIMAN R., *Jurisdiction, Discretion and the Brussels Convention*, in *Cornell International Law Journal*, 1993, p.59.

[50] NYOMBI C., ORUAZE DIKSON M., *Tactical litigation in the post-recast Brussels Regulation era*, in *E.C.L.R.*, 2017, p. 457.

[51] NYOMBI C., ORUAZE DIKSON M., *Tactical litigation in the post-recast Brussels Regulation era*, cit., p. 457-469.

[52] For more information, see: AZEMA J., GALLOUX J.-C., *Propriété industrielle*, Dalloz, 2006, No. 722.

different countries"[53] in order to limit losses. The goal is therefore no longer to dispute infringements, as victims will tend to seek the highest damages possible, rather than a prompt settlement of the matter (and still suffer heavy losses, despite everything).

Even on a theoretical level, these strategies are full of holes. Although they have been successful in the past, tighter European standards would make it much more difficult for parties to intellectual property disputes to fragment/defragment them.

1.4. What can be expected in cases of infringement?

When it comes to applying the Brussels I bis Regulation, the above is a valid question, since the Regulation itself remains totally silent on the subject, except for the case of provisional measures. Such measures are surprisingly strengthened and developed in Article 35: "*Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*".

National judges are left with little leeway and drastically reduced arsenals. Intuitively, when an infringement is observed, the best plan of action may seem to be issuing a restraining order, or perhaps a payment order. In any case, it is hardly reassuring that the Brussels I bis Regulation barely mentions what procedure should be followed, as this may lead to torpedo and counter-torpedo actions, which could have a serious impact on the quality of the judgments that are issued. Of course, the situation is more complicated, since the category of provisional measures is quite broad: for example, under Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of April 15, 1994, and under Directive 2004/48/EC[54], French procedures for confiscating works infringing copyright and Belgian distraint-description, are both considered provisional measures under Article 35 of the Brussels I bis Regulation. Even though only provi-

[53] TREPPOZ E., *Contrefaçon*, Répertoire de droit international, cit., para. 30.

[54] Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of intellectual property rights, in OJ L 157, 30.4.2004, p. 45.

sional measures are referred to in this Regulation, the margin of appreciation left to judges allows for some freedom.

Furthermore, the CJEU has had the opportunity to provide some answers, albeit in very specific instances - i.e. the issue may not arise in a different context. However, does this area not call for more independent definitions? - e.g., in the *Bolagsupplysningen*[55] decision, where the plaintiff had sought an order for rectification and the suppression of online content. In this case, the CJEU recalled that in no way was it preventing Member State courts from ordering the defendant to cease their infringement on the Member State territory. This would lead to the conclusion that there is no impact on the ability of an intellectual property rights holder to obtain injunctions in the Member State where the infringing content is accessible on the Internet[56].

2. Solutions provided by national jurisdictions

The Brussels I Regulation and the Brussels I bis Regulation only represent the theoretical side of a more general area of the law. Because national judges are judges of ordinary courts, whenever a matter of EU law arises, they are the first responders to any of the theoretical difficulties that arise from such texts[57]. While we have so far only seen the first and most hesitant responses, in the form of CJEU decisions and the various reforms of these Regulations, the imperative of seeking justice for all has led to national judges taking on and handling such difficulties. .

Between 2006 and 2020, national jurisdictions became notably more experienced in matters of jurisdictional conflict. Initially, after

[55] Judgment of the Court (Grand Chamber) of October 17, 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan vs. Svensk Handel AB, Case C-194/16.

[56] LUNDSTEDT L., *Putting right holders in the centre: Bolagsupplysningen and Ilsjan (C-194/16): what does it mean for international jurisdiction over transborder intellectual property infringement disputes?*, in *IIC*, 2018, p. 1022.

[57] For more information, see: BERGE J.-S., PORCHERON D., VIEIRA DA COSTA CERQUEIRA G., *Droit international privé et Droit de l'Union européenne*, in *Répertoire international*, Dalloz, April 2017, para. 62-184.

the Brussels I Regulation came into force, it was not always automatically applied, so that many judgments were reversed for not including it. Once it became more established, the Regulation was applied more consistently when a case raised issues of European law.

Today, disputes focus mostly on the distribution of content over the Internet (see Introduction), and are, therefore, facing the difficulties highlighted above. The decisions handed down by national judges are fairly diverse. These judges first sought to regulate the fragmentation of intellectual property disputes with the principle of territoriality (3.1). Later, they tried to articulate (with some direction) different European texts (3.2) and began using the Brussels Regulations for different purposes (3.3), while still attempting to meet one of the primary objectives of their profession, namely punishing infringements (3.4).

2.1. Regulating the fragmentation of intellectual property disputes with the principle of territoriality

With the rise of content distribution over the Internet, national judges found themselves faced with the increasing fragmentation of intellectual property disputes (see 1.1), leading to multiple claims of jurisdiction, and thereby undermining the quality of any justice that is carried out. There has been a uniform movement within the European Union of national judges actively fighting against this fragmentation of intellectual property disputes. To do so, they adapted the principle of territoriality, the cornerstone of intellectual property matters, based on the type of intellectual property right in question. This can be understood as an economic policy decision, since "*a new balance will be struck, which will no longer only protect those entities [the GAFAM tech giants*[58]*] that are today dominant, but that will also divide the value created on the Internet more fairly*"[59].

It is also interesting to consider the decisions handed down in various Member States separately, since national judges often follow dif-

[58] Acronym for Google, Apple, Facebook, Amazon and Microsoft.

[59] TREPPOZ E., *Chronique de Droit Européen de la propriété intellectuelle – La difficile poursuite de l'harmonisation législative du droit d'auteur en Europe*, in *RTD Eur*., 2019, p. 919.

ferent procedures, even when ruling on the same issues. French decisions are the most abundant in this matter (numbering around one hundred). Italy and Spain have also seen some intense legal activity, while Belgian and Luxembourger courts have only handled a modest number of disputes.

2.1.1. In France

In order to counter the fragmentation of intellectual property disputes, French judges have adopted a didactic approach and generally apply the independent definitions and criteria provided by the CJEU quite strictly.

In matters of copyright and related rights, the criterion of the accessibility of the website (derived from the interpretation of Article 5.3 of the Brussels I Regulation, now Article 7.2 of the Brussels I bis Regulation) is often used in French jurisdictions, and has not seemed to cause any issues since the decision rendered by the Aix-en-Provence Court of Appeal on January 7, 2016[60]. In this case, the Court of Appeal declared the *Tribunal de Grande Instance* (Regional Court) of Marseille competent to hear a claim of infringement for non-authorized use of a character font on websites, by stating that "*This ruling, in breaking with the previous decisions used to support the appellants' position, holds the criterion of the accessibility of the Internet site to be the determining factor in the realization of the harm and therefore in territorial attachment*" and "*the accessibility of an Internet site is consubstantial with the Internet network, no matter its architecture, its language, its popularity, or its target public*". The same goes for Article 7 of the Brussels I bis Regulation in line with the May 9, 2017 judgment of the Paris Court of Appeal[61]. This judgment also provided some nuance with regard to the fragmentation of crimes to which a strict principle of territoriality can no longer be applied, thereby suggesting an adapted principle for intellectual property matters. Since this decision was handed down, "*the jurisdiction [decided based on the criterion of accessibility] is only competent to hear the*

[60] Aix-en-Provence Court of Appeal, 2nd Chamber, January 7, 2016, No. 14/10195.

[61] Paris Court of Appeal, Pole 5, 1st Chamber, May 9, 2017, No. 16/22627.

damages caused within the Member State where it is located". The year 2017 also saw other similar judgments elsewhere[62]. It seems, that in matters of copyright, national judges have taken up the methods and are applying the rules of the Brussels regulations to the letter[63].

When ruling on trademark issues, however, French judges tend to distance themselves from the directives of the CJEU. In practice, the criterion of the target public became part of a more general criterion, namely that of a substantial, sufficient, or meaningful connection (once again derived from the interpretation of Article 5.3 of the Brussels I Regulation, now Article 7.2 of the Brussels I bis Regulation). This phenomenon was already apparent in 2009[64] and has become a constant theme in later case law. For example, in 2016[65] (in a dispute over an EU trademark), the Regional Court of Paris claimed jurisdiction to hear damages caused by website *www.tecnokar.it* in view of the fact that said site also available in a French translated version and provided Internet-users with contact information of the LEGRAS INDUSTRIE company, i.e. its distributor in France. The site had thereby effectively targeted a French public, creating a sufficient and meaningful connection between the site's activity and the French public, due to the economic impact of that activity. Once again, , the French courts have produced consistent case law: in 2018[66], the Court of Cassation asserted that "*The magazine in question, available at the web address www.hm.com/fr and written in the French language, with prices listed in euros, even though Sweden is not part of the Eurozone, targets the French public, creating a substantial connection with France, the country where the alleged criminal acts occurred. […] The Court of Appeal, therefore, had no obligation to decide whether*

[62] Bordeaux Court of Appeal, 1st Civil Chamber, March 14, 2017, No. 16/00424; Versailles Court of Appeal, 1st Chamber, 1st Section, January 21, 2016, No. 13/00226.

[63] On the creative power of case law in matters of copyright: GIRARDET A., *Des standards posés par le législateur en droit d'auteur… à ceux énoncés par la jurisprudence*, in BOISSON A., BRUGUIERE J.-M. (dir.), GAUTIER P.-Y., GIRARDET A., GLEIZE B., KAMINA P., KHIEL H., LOISEAU G., MAFFRE-BAUGE A., PASSA J., PY E., TREFIGNY P., *Les standards de la propriété intellectuelle*, Dalloz, 2018, p. 117-121.

[64] Aix-en-Provence Court of Appeal, 2nd Chamber, October 29, 2009, No. 08/12283.

[65] Tribunal de grande instance (Regional Court) of Paris, 3rd Chamber, 4th Section, January 14, 2016, No. 14/07872.

[66] Court of Cassation, France, 1st Civil Chamber, September 26, 2018, No. 16/18686.

the litigation, given the several countries targeted by the distribution of this magazine, might have closer connections with Sweden." Here again, French judges have carefully applied the Brussels regulations, perhaps going even farther in trademark issues, where their rulings have been more specific. In 2019[67], judges once again highlighted their difficulties in adapting the criterion of accessibility to (international) trademark issues. In particular, the fact that communication tools like *Instagram* or blogs (.fr) used to announce product launches, are accessible from France, were not enough to establish that there was a risk that the rights of the *Kadine* company would be infringed in France or that same would suffer from unfair competition, and that therefore, there was no basis for the French judge to claim jurisdiction.

In light of the principle of independence for patents, there are few disputes over identifying the court of competent jurisdiction in matters of infringements upon national patents. The problem arises in matters of EU patents: French jurisdictions have shrewdly applied Article 7 of the Brussels I bis Regulation to get around this issue. Only a few months ago, on March 3, 2020, the Court of Appeal of Paris claimed jurisdiction under Article 7.2 of the Brussels I bis Regulation in light of a particularly close connection to France, based on a message describing an ongoing legal action in France (involving the infringement of a European patent) and the accessibility in France of the website on which the message in question was published[68].

In response to problems created by the fragmentation of intellectual property disputes, French judges have adopted an integrative approach that involves reshaping the strict definition of the principle of territoriality. The only criticism that can be made at this stage is that of French judges' opportunism when handling issues that are international (and not merely intra-European) in their scope. In national case law, references to international legal texts are not common, and when they appear, they most often concern the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of October 30, 2007, 0.275.12 (Lugano Convention). Choos-

[67] Paris Court of Appeal, Pole 1, 2nd Chamber, June 13, 2019, No. 18/20586.

[68] Paris Court of Appeal, Pole 5, 16th Chamber, March 3, 2020, No. 19/12564.

ing to include such references is not entirely neutral. A case in point is that of reference being made to the Convention by French judges when a case involves multi-national corporations, such as *Christian Dior Couture*[69], *Louis Vuitton Malletier*[70] or *Ebay Inc* and *Ebay AG*[71]. This choice is justified by the fact that "*The Lugano Convention of September 16, 1988 […] essentially summarises the principles of the Brussels Convention of September 27, 1968, which later became the so-called Brussels I Regulation of December 22, 2000*"[72]. This turns the Convention into a further tool used by national judges to take control over international legal disputes, despite applying European Union law in line with an integrative approach.

2.1.2. In Belgium

Belgian judges have handled the fragmentation of intellectual property disputes by mostly adopting the same approach as their French counterparts, especially in trademark disputes, where the simple criterion of accessibility is insufficient. For example, the Brussels Court of Appeal has asserted that: "*The Nouvag companies' website is not simply accessible in Belgium, but it clearly expresses, with its content and its presentation of the Vacuson machines in question, their clear intention to target Belgium with their sales of these machines and to sell them there*."[73] It should be noted that the criterion of activity remains part of the background here, as can be seen in the Court of Cassation judgment of November 29, 2012, where the arguments made against the Belgian judges' having proper jurisdiction were as follows: "*The fact that these websites did not exclude Belgium from their area of availability does not imply any particular attention paid to the Belgian market, when this is the case for the vast majority of other States. Furthermore, they also did not create a .be extension specific to Belgium. […] The number of wagers made by the Belgian public is en-*

[69] Court of Cassation, France, Commercial Chamber, May 3, 2012, No. 11/10507.

[70] Cour de cassation, France, Commercial Chamber, May 3, 2012, No. 11/10505.

[71] Court of Cassation, France, Commercial Chamber, May 3, 2012, No. 11/10508.

[72] Cour de cassation, France, Commercial Chamber, May 3, 2012, No. 11/10505.

[73] Bruxelles Court of Appeal, 9th Chamber, January 30, 2014, No. 2013/AR/1336, para 13.

tirely marginal compared to the total number of wagers recorded by these sites."

Belgian judges, however, have adopted a unique approach to intellectual property rights under EU law, especially where European patents are concerned. The principle of territoriality is strictly limited to the exclusive jurisdiction described under Article 24.4 of the Brussels I bis Regulation. Any cases that fall outside of this scope that "*do not require that the judge be in close contact and that present close ties with the patent law in the Member State in question are subject to the general provisions on jurisdiction given in the (Brussels I) Regulation.*"[74]. Although this approach differs from that used in French jurisdictions, Belgian judges are also properly applying the Brussels I bis Regulation, since they are following Article 24.4 to the letter, and not risking any possible tacit attempts at prorogation of jurisdiction.

2.1.3. In Luxembourg

Intellectual property disputes only receive minimal attention in Luxembourg, with Luxembourger judges not providing any real response to the difficulties created by the fragmentation of intellectual property disputes.

Still, there are examples to be found in the case law, which most often relate to industrial property rights. Any analysis made by Luxembourger judges' leads to a cautious approach that aligns with their European neighbours, as they take an analytic view of these matters which is reflected by their rigorous application of the Brussels I bis Regulation. For example, the Superior Court of Justice has specified that when a case depends on the statuses of the inventor and owner of the invention and patent, the exclusive jurisdiction described under Article 22.4 of the Brussels I Regulation should be set aside, as it does not apply to matters of who holds the rights that derive from a patent[75].

[74] Court of Cassation, Belgium, October 1, 2010, No. C.09.0563.N/1, para 6.

[75] Superior Court of Justice, Luxembourg, Civil, December 14, 2016, No. 188/16 – II-CIV.

2.1.4. In Spain

When Spanish judges address the fragmentation of intellectual property disputes, they tend to take a comprehensive view, and therefore apply a more integrative approach.

Unlike their European counterparts, Spanish judges often refer to specialist texts, rather than attempting to apply the Brussels I bis Regulation in a quasi-systematic manner. This leads to their handling the issue of intellectual property dispute fragmentation through a process of systematisation: according to the *Audiencia Provincial* (Provincial Court) of Alicante applying Article 6.2 of the Brussels I Regulation does not pre-empt Article 97 of Regulation 207/2009, which covers assigning jurisdiction to the court where a third party is domiciled. The same applies to Regulation No 6/2002: Article 6.1 of the Brussels I Regulation does not pre-empt the application of Articles 79 and 82 of Regulation No 6/2002, which cover assigning jurisdiction to a court in a Member State where there is no evidence of close connections when an infringement of community designs has been committed on the territory of a Member State where the defendant is domiciled. The goal here is to avoid irreconcilable judgments and forum shopping[76].

Spanish judges prefer strict readings of the exclusive jurisdiction described by the Brussels I Regulation and the Brussels I bis Regulation. According to the Provincial Court of Madrid[77], jurisdiction in matters of infringements of various international trademarks on the Internet is assigned to the defendant's home court under Article 22.4 of the Brussels I Regulation. This jurisdiction is strictly limited to such instances, since any matter of infringements on community trademarks fall under Articles 96, 97, and 98 of Regulation No 2007/2009. This jurisdiction is also set aside in matters of infringements on national trademarks. In Spain, judges are very pragmatic in their application of the Brussels I Regulation and of the Brussels I bis Regulation,

[76] Supreme Court, Spain, Civil Chamber, 1st Section, January 10, 2017, No. RJ/2017/3. *Adde* Audiencia Provincial (Provincial Court), Alicante, Community trademark specialist section, May 10, 2012, No. AC\2012\1807.

[77] Audiencia Provincial (Provincial Court), Madrid, 28th Section, February 5, 2016, No. AC/2016/268.

using specialist texts to their full extent. The goal here is to provide judgments that are best adapted to each situation.

2.1.5. In Italy

When faced with the fragmentation of intellectual property disputes, much like Spanish judges, Italian judges tend to assign jurisdiction to the defendant's home court. The Court of Turin[78] has specified that there is an exclusive international jurisdiction in claims relating to infringements of community designs when the court in question is either the defendant or the plaintiff's home court. If, on the contrary, the court that has been assigned, jurisdiction is the court where the infraction took place, the judgment will only apply within the territory of that jurisdiction. Italian judges look for efficient and concise responses that will make disputes less contentious.

The Italian Court of Cassation is aware of the principle of specialty, and tries to push efforts to assign jurisdiction to the defendant's home court to their limit. In an interlocutory question submitted to the CJEU[79], the question was raised as to whether, in light of Article 24 of the Brussels I Regulation, preliminary or subsidiary actions contesting the jurisdiction assigned to a national court, presented before that court, could be interpreted as acknowledgements that the court in question actually had proper jurisdiction.

2.2. National judges operating an oriented articulation of European texts

Disputes are divided rather evenly across the various countries of Europe. When national judges take on intellectual property disputes, they find themselves forced to navigate between multiple different texts when determining proper jurisdiction or the applicable rules of recognition. Most of these judges, however, who often come from civil courts, are not specialists, even though intellectual property is a highly complicated issue. Still, such theoretical problems do not al-

[78] Court of Turin, July 15, 2008.

[79] Court of Cassation, Italy, July 27, 2016, n°15539.

ways come up in practice: as a general rule, national judges avoid most of the pitfalls of reconciling the various texts that govern intellectual property, thanks to the disconnection clause in Article 71 of the Brussels I bis Regulation.

The special rigour of German judges was showcased by a decision dated April 30, 2015[80]: jurisdiction over actions related to the infringement of community designs is determined by Articles 81 and 82 of Regulation No. 6/2002, which holds that actions may also be brought before courts in the Member State where the act is committed. Article 5.3 of the Brussels I Regulation is not applied, even if similar criteria are adopted. In the same vein, the Provincial Court of Alicante has adopted a similarly radical stance, recalling that the application of Article 6.2 of the Brussels I Regulation does not pre-empt the application of Article 97 of Regulation 207/2009, when it comes to assigning jurisdiction to the home court of a third party[81]. As the two cased cited above clearly demonstrate, a flexible reconciliation of European texts must rely on shared rules: national judges impose a hierarchy on these texts based on the principle of *Specialia Generalibus Derogant*. The Spanish Supreme Court even added that Article 6.1 of the Brussels I Regulation does not pre-empt the application of Articles 79 and 82 of Regulation No. 6/2002 for the assigning of jurisdiction to a Member State court that has no close connection to the litigation, in order to avoid the risk of irreconcilable judgments resulting from separate proceedings when the infringement of several community designs has occurred in another Member State where the defendant is also domiciled[82]. The thread running through all of these decisions is the desire to prevent forum shopping. This can also be seen in areas that derive from intellectual property, namely, actions that claim abuse of a dominant market position or unfair competition that are introduced after a declaration of non-infringement of a community design. In such a case, the Italian Court of Cassation affirmed that the rules for assigning jurisdiction in Regulation No. 6/2002 pre-empted those under Ar-

[80] Landgericht (District Court), Düsseldorf, April 30, 2015, No. 14cO183/13.

[81] Audiencia Provincial (Provincial Court), Alicante, Community trademark specialist section, May 10, 2012, No. AC\2012\1807.

[82] Supreme Court, Spain, Civil Chamber, 1st Section, January 10, 2017, No. RJ/2017/3.

ticle 5.3 of the Brussels I Regulation[83]. The flexible reconciliation of the Brussels I bis Regulation and other European texts on jurisdiction in intellectual property matters depends mainly on a standardised application of this regulation, in line with the principle of specialty and strict boundaries between functionally different fields. This creates the possibility of a negative application of the Brussels regulations, as was done in the Court of Turin. In its judgment issued on January 17, 2019, this court declared that only positive actions claiming infringement on community designs fell within the scope of the special jurisdictional rules under Articles 79 et seq. of Regulation No. 6/2002, which overrule the Brussels I bis Regulation, while negative declaratory actions were not subject to the special rules in the same Regulation. At first glance, the Brussels I bis Regulation would seem to only be left with residual applications.

If reconciling different texts has proven less difficult in practice than in theory, it is partly because national judges have also used another technique, applying both the Brussels I bis Regulation and a special Regulation jointly, with the goal of rendering predictable and clear judgments. In a decision handed down on April 3, 2015 in Regulation No. 6/2002, the Regional Court of Paris specified that "*it follows that the provisions of Article 6-1 of Regulation No. 44/2001, which in cases with multiple defendants allows for these defendants to be called before one of their home courts, on the condition that the initial complaints are bound together by a close enough connection that there is reason to examine and rule on them together, do apply, and that Regulation No. 6/2002 does not specifically require multiple defendants, but that these conditions must be reconciled with those in Article 83 of the same Regulation, which they complement.*"[84]. In another case with multiple defendants, the Regional Court of Paris also specified that "*As Regulation 6/2002 does not specifically require multiple defendants, the provisions of Article 6.1 of Regulation 44/2001 should apply, unless they have been reconciled with the specific provisions of Articles 97 et seq. of Regulation 207/2009, on in-*

[83] Court of Cassation, Italy, Civil Chamber, 1st Section, November 20, 2017, No. 27441.

[84] Tribunal de grande instance (Regional Court) of Paris, 3rd Chamber, 3rd Section, April 3, 2015, No. 14/13480.

ternational jurisdiction"[85]. This joint application of regulations can even be seen as advantageous for the plaintiff, as it guarantees an extra choice of jurisdiction, as the Regional Court of Paris highlighted in another decision from March 24, 2017. According to the interpretation of Article 5.3 of the Brussels I Regulation (7.2 of the Brussels I bis Regulation) and Articles 81 and 82.5 of Regulation No. 6/2002, the plaintiff may choose to file suit in the defendant's home court, or in matters relating to tort, he/she may also file suit in the jurisdiction where the harmful action occurred, or in the jurisdiction where the harm was done. Joint application of regulations is also used when one of the parties is weaker than the other. When the Provincial Court of Alicante heard a claim by a professional against a consumer in a cross-border case, even though the provisions of Article 3 of Regulation (EC) No. 861/2007 of the European Parliament and of the Council of July 11, 2007 establishing a European Small Claims Procedure (in OJ I 199 of 7.31.2007, p.1) were applicable, the provisions of the Brussels I Regulation should also have been taken into consideration in determining the international jurisdictional competence of the Member State where the consumer was domiciled[86].

Of course, certain areas fall outside the scope of the Brussels I bis Regulation, or even the jurisdiction of national judges, such as the validity or transfer of registration for an international trademark (the World Intellectual Property Organization, or WIPO has jurisdiction over these kinds of claims)[87]. The same goes for infringements of European Union trademarks, since Article 96 of Regulation No. 207/2009 places such matters under an exclusive jurisdiction (here, the European Union Trademark Court, which has jurisdiction over such claims)[88]. In such instances, national judges have no other option but the strict application of the Brussels Regulations.

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[85] Tribunal de grande instance (Regional Court) of Paris, 3rd Chamber, 4th Section, September 21, 2017, No. 15/16287.

[86] Audiencia Provincial (Provincil Court) of Alicante, 5th Section, October 27, 2011, No. JUR\2011\22528.

[87] Tribunal de grande instance (Regional Court) of Paris, 3rd Chamber, 1st Section, February 11, 2016, No. 14/11355.

[88] Audiencia Provincial (Provincial Court) of Alicante, 8th Section, July 11, 2019, No. AC\2019\223.

2.3. National judges' utilization of the Brussels Regulations

Although there have been several fruitless attempts to expand the scope of the exclusive jurisdiction under Article 24.4 of the Brussels I bis Regulation, national judges have found their own solution by turning to concepts over than simple jurisdictional competence. Despite having access, in theory, to a diverse array of tools, national judges do not show great originality in practice. Indeed, French and Spanish judges have shown the most creativity in this matter.

2.3.1. Growing interest in *lis pendens* and related actions

Over the last few years, most intellectual property disputes have focused on concepts of lis pendens and related actions.

When national judges see that another case is pending on an issue, they adapt the scope of Articles 29 and 31 of the Brussels I bis Regulation, whose texts are somewhat vague and require case-by-case interpretation. The French Court of Cassation thus stated that "in its rejection of the request for removal to another jurisdiction, the decision holds that it cannot be asserted that the two claims share the same subject matter and the same cause of action, since the claim of infringement cannot, due to its different basis, be treated the same as the claims brought after their agreement was discontinued, and the regularity of the procedure for confiscating works infringing copyright should be overseen by judges with jurisdiction to rule on the infringement action."[89] National judges have also tried to fight the practice of bringing torpedo and anti-torpedo actions that fragment litigation (an aspect of industrial property disputes that does not follow an integrative approach). This practice has been adopted by the Italian Court of Cassation[90]. Based on Article 5.3 of the Brussels I Regulation, this court has declared that Italian courts have jurisdiction to hear declaration of non-infringement actions involving European patents

[89] Court of Cassation, France, 1st Civil Chamber, January 17, 2006, No. 04/16845.

[90] Supreme Court of Cassation, Italy, United Civil Chambers, The General Hospital Corporation (Massachusetts General Hospital) and Palomar Medical Technologies Inc., June 10, 2013, No. 14508.

that are brought by foreign companies against other foreign companies and that involve non-Italian parties to the European patent.

In terms of related actions, the French Court of Cassation used the lack of copyright harmonisation to justify a group of cases being tried together in an instance where each of the companies party to the litigation were accused separately of infringing on the same clothing designs and of employing the same unfair and parasitic competition practices, meaning that there was a risk of irreconcilable decisions being rendered if the claims were judged separately[91]. National judges therefore tend to identify issues of related actions quickly, in order to avoid dispute fragmentation. The decision issued by the Regional Court of Paris on April 1, 2016 is a very good example of this. Indeed, in the injunction it received against the *4EVERYWARE* company, the *GUY LAROCHE* company itself, established the connection between its claims and the facts revealed by the seizure of counterfeit goods on the premises of the *STOCKOVER* company. Furthermore, the provenance of products from the same initial inventory delivered by the *PROMECO* company was not contested. There were thus issues of related actions between the cases, and it was therefore important to avoid the risk of producing irreconcilable decisions by not hearing them separately. Moreover, national judges are increasingly trying to expand the condition of related actions, thereby giving rise to complex debates and spurring even more intellectual property disputes, resembling what might be called a vicious circle?. To this end, they use Article 6.1 of the Brussels I bis Regulation. Upon applying this article, the French Court of Cassation recalled that, in cases with several defendants, a person domiciled in the territory of one Member State may be called before the home court of one of such defendants, when interrelated claims are bound by a close enough connection that it is in the court's interest to hear them at the same time, in order to avoid potentially irreconcilable decisions. However, any decision, that sets this rule aside because EU legal harmonisation in the domain in question excludes the risk of irreconcilable decisions, while the claims are part of the same situation in fact and in law, must be overturned[92]. To

[91] Court of Cassation, France, Commercial Chamber, February 26, 2012, No. 11/27139.

[92] Court of Cassation, France, Commercial Chamber, April 5, 2016, No. 13/22491.

summarise generally, national judges sometimes follow what might be characterized as rather weak lines of argument to bring legal proceedings within the scope of Article 30 of the Brussels I bis Regulation.

When it comes to designs, Spanish judges have recalled that the use of such strategies is a special case. In a decision dated November 27, 2017, the Provincial Court of Alicante held that it did not have jurisdiction to hear a case on the infringement of national designs, but also that the action could not be associated with another action on the infringement of *European Union trademarks*, as called for in Article 30.3 of the Brussels I bis Regulation, due to the lack of any close connection between them[93]. A year later, the same Provincial Court specified that, when a provisional measure is granted during the main action, there is no way of voiding that measure based on Article 30 of the Brussels I bis Regulation, if that option has already been refused as part of the primary action[94]. National judges therefore have little room to manoeuvre in their efforts to modulate the effects of lis pendens and related actions.

2.3.2. The principle of mutual recognition fades into the background

If Article 36.1 of the Brussels I bis Regulation provides that "*A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*", then why must the fragmentation of disputes be avoided at all costs when the quasi-automatic system of recognition significantly accelerates the process? Because, of course, this recognition faces various difficulties that might render it less automatic. In a February 20, 2007 decision, the French Court of Cassation held that a definitive judgment had already been made in Belgium, based on which, there was no risk of confusion, and therefore no infringement. According to Article 33 of the Brussels I Regulation, decisions by courts in one Member State of

[93] Audiencia Provincial (Provincial Court) of Alicante, 8th Section, November 27, 2017, No. AC/2017/1929.

[94] Audiencia Provincial (Provincial Court) of Alicante, 8th Section, June 8, 2018, No. AC/2018/1661.

the European Union must be recognised in other Member States without any further procedures being required. In this instance, however, the Court asserted that any plaintiff that does not invoke the authority of the res judicata related to the decision they have cited before the trial judges, may not invoke this authority for the first time before the Court of Cassation. As a result, judges tend to moderate the effect of the principle of mutual recognition when they believe they are closer to the situation at hand.

2.4. The tools available to national judges for punishing infringements

Article 35 of the Brussels I bis Regulation only refers to provisional measures, without providing an exhaustive list. Although many such measures may be envisioned, the confiscation of works infringing copyright is the most frequently used. A case in point is one whereby, at the request of the *VOLKSWAGEN* company, the Regional Court of Paris authorized operations to seize counterfeit goods from customs storage facilities where the merchandise was being held[95] on October 13, 2015.). In reality, this is merely a consequence of how little room to manoeuvre national judges actually have, since it is the strategy used in most infringement actions today. National judges are not actively seeking to break this habit, and their actions may be seen as a cautious approach. *De facto*, they prefer to use a commonly accepted practice, rather than turning to measures they have less control over, (and which might lead to dangerous procedural issues that would compromise legal predictability). As a result, very little of the case law on this subject has been used by various Member States.

[95] Tribunal de grande instance (Regional Court) of Paris, 3rd Chamber, 4th Section, September 21, 2017, No. 15/16287.

3. Proposed solutions for improving the application of the Brussels I bis Regulation to intellectual property matters

Although both European and national judges have worked tirelessly to overcome the difficulties of applying the Brussels I bis Regulation to intellectual property matters, there are still several grey areas. It might therefore be useful to propose some solutions that would allow national judges to increase flexibility and simplify their work, notably by helping them to actively fight the phenomenon of fragmentation (3.1), by making it easier to reconcile different European texts (3.2), by reforming the Brussels I bis Regulation itself, rather than the way it is applied (3.3), and by providing them with the tools like anti-suit injunctions (3.4).

3.1. Helping judges to fight the phenomenon of fragmentation

National judges are already actively fighting the fragmentation of intellectual property disputes, especially through the principle of territoriality. However, each national judge has his/her own method . On a European level, this stands in the way of the push for more stable and convergent case law precedents. A solution might be provided by the European Union Intellectual Property Office (EUIPO): this decentralized agency of the European Union manages EU trademark and design rights and works with national offices to harmonise practice through with easy-to-use tools. Although it has its own body capable of issuing judgments, EUIPO is not "*bound by previous judgments on similar issues or by the jurisdictions of member States*"[96]. This particularity was resolved by the General Court of the European Union in 2015[97]. Such a lack of convergence may lead to contradictory judgments that further accelerate the fragmentation of intellectual property disputes. Some work has already been done, insofar as the case law from the designated European Union trademark courts in each Member State

[96] BOUCHE N., *Un an de droit international privé de la propriété intellectuelle*, cit., para. 11.

[97] Judgment of the Court (Second Chamber) of July 15, 2015, Australian Gold LLC vs. Office for Harmonization in the Internal Market, Case T-611/13.

has tended to follow EUIPO's guidelines. At this stage, it might be beneficial to encourage national jurisdictions ruling on national trademarks to try for some homogeneity - although no Member State can be forced to compromise on the unique features that make their national legal system attractive. The most effective route would be for EUIPO to publish official guidelines, not only for the users and staff members in charge of various procedures, but also for judges near and far overseeing intellectual property disputes. The principle of territoriality that is embedded in the core of the issue makes it impossible for EUIPO decisions to take precedence over national jurisdictions. That said, official guidelines, although non-binding, would still offer a solution, since EUIPO benefits from plenty of goodwill on a European (or even World) level, because it has its own political power. Using "soft law" as an alternative solution would help influence judicial practice and perhaps even push Member States to modify their own laws[98].

3.2. Supporting judges' efforts for a smoother articulation of the different European texts

While in practice national judges have only a few pitfalls to avoid when attempting to reconcile different European intellectual property texts, this reconciliation should essentially be as smooth as possible. It should, however, be noted that national judges have the status of judges of ordinary law for EU law, without necessarily being specialists thereon. EU private international law, especially in the area of intellectual property, is complicated because of its interconnections with both national laws and international agreements. Applying this body of law is no easy task, and requires the "*consolidation*"[99] or even the "*specialization*" of judges. Consolidating judges would only further complicate the current situation, so it does not seem like an appropriate choice. It would be better for judges to specialize, based on guide-

[98] For more information, see: BERGE J.-S., *La protection internationale et européenne du droit de la propriété intellectuelle*, Larcier, 2015, p. 21.

[99] FRACKOWIAK-ADAMSKA A., *The Application of European Private International Law by national judges – Challenges and Shortcomings*, in VON HEIN J., KIENINGER E.-M., RÜHL G. (eds.), *How European is European Private International Law?*, Intersentia, 2019, p. 203.

lines from the World Intellectual Property Organization (WIPO) and the Hague Conference on Private International Law (HCCH)[100]. A judge's training might also include greater access to information, especially through the creation of new databases (archiving all judgments under the Brussels rules on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters) and by enriching the existing EUR-Lex database (proposals have been made to include the text of the legislation in force and also to improve the interface to make it easier to understand[101]). Such training would allow national judges to maintain their independence and considerably reduce costs (compared with the planned *European Judicial Training Network*[102]).

3.3. Preferring a reformation of the Regulation rather than its utilization

The Brussels I bis Regulation as it is used today does not prevent the application of a "*mosaic*" of national laws, and the way it is instrumentalized in intellectual property matters, both by judges and by parties to disputes, only risks making the situation worse. At this point, reforming the Regulation seems necessary, since the difficulties highlighted by this study are mostly systemic in nature: from the willing laxity that arises from provisions on *lis pendens* and related actions, to the limited scope of the exclusive jurisdiction under Article 24.4 of the Brussels I bis Regulation, these difficulties are caused by the architecture of the Regulation itself. One solution would be to follow the example of the reform of Regulation (EU) 2019/1111 of June 25, 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (also known as the Brussels II ter

[100] BENNETT A., GRANATA S., *Quand le droit international privé rencontre le droit de la propriété intellectuelle – Guide à l'intention des juges*, cit., 2019.

[101] HELLNER M., *The Application of European Private International Law by national judges – Making the job easier*, in VON HEIN J., KIENINGER E.-M., RÜHL G. (eds.), *How European is European Private International Law?*, Intersentia, 2019, p. 211.

[102] HELLNER M., *The Application of European Private International Law by national judges – Making the job easier*, cit., p. 212.

Regulation), which introduced certain concepts that helped to concentrate disputes, bringing them under one single jurisdiction[103].

While this is a rather general suggestion, if the goal is to limit the focus on intellectual property disputes, the exclusive jurisdiction under Article 24.4 needs to be expanded. This is because any litigation that focuses on anything other than the registration or the validity of patents, trademarks, designs, and other analogous rights involving some kind of filing or registration would fall under special regulations, given the specificity of these matters. The omnipresence of the Internet and of other new technologies makes this one of the most rapidly evolving topics covered by the Brussels I bis Regulation, and therefore requires its own *de facto* regulations.

3.4. Promoting the use of anti-suit injunctions

In order to improve the application of the Brussels regulations by national judges in intellectual property matters, their legal toolkit should be expanded. If national judges had access to effective measures for punishing infringements, there would be no need for further regulations, but rather for a measure that would allow them to resolve disputes. To this end, measures should be put into place to concentrate litigation before one court, and more specifically, to encourage the use of anti-suit injunctions. This practice, adopted from Common Law systems, allows one party to file a request with one court to obtain an injunction that prevents a case from being brought before a foreign court. In other words, such an injunction "*asserts the jurisdiction and the procedures of the local court, especially in cases where foreign legal procedures might disrupt a local pending case or when the foreign legal procedure is abusive*"[104]. Therefore, any reform of the Brussels I bis Regulation would need to seriously consider an article on anti-suit injunctions. Even though some authors have expressed uncertainty about judges' decisions in granting or not granting anti-

[103] CHRISTIE A., *Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements – An Analysis of National Approaches*, Geneva: World Intellectual Property Organization, 2015, para. 4.13, p. 28.

[104] BENNETT A., GRANATA S., *Quand le droit international privé rencontre le droit de la propriété intellectuelle – Guide à l'intention des juges*, cit., p.85.

suit injunctions, such a measure would help to accelerate the process described under Article 31.2 of the Brussels I bis Regulation. Indeed, time would be saved, because the presiding court would no longer have to wait while it considered the matter of its own jurisdictional competence)[105].

[105] NYOMBI C., ORUAZE DICKSON M., *Replacing lis pendens with forum non conveniens: a viable solution to tactical litigation in the EU?*, in *E.C.L.R.*, 2017, p.491.

Reconciling the Brussels Ia Regulation and other European private international law instruments

Chirouette Elmasry, Giulio Cesare Giorgini*

1. Introduction

Based on Article 81 of the TFEU[1], the European Union was authorized the adoption of secondary legislation in private international law (PIL)[2]. The use of generally and directly applicable regulations and acts has led to a profound transformation of our perception of this matter. Establishing a truly European judicial area has thus added a supplementary dimension to an area traditionally divided among national legal systems already subject to international and even transnational normative dynamics. EU regulations standardise PIL in Member States. Among these instruments, the new Brussels Ia Regulation[3], applicable as of January 10, 2015[4], plays an essential role in the con-

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[1] Treaty on the Functioning of the European Union, part three – Union policies and internal actions, Title V – Area of freedom, security and justice, Chapter 3 – Judicial cooperation in civil matters, Article 81 (ex Article 65 TEC), in OJ C 202 of June 7, 2016, p. 78.

[2] Available online at https://www.ipr.uni-heidelberg.de/md/jura/ipr/personen/weller/d_avout_et_al_droit_international_prive_de_l_union_-europeenne_2015.pdf.

[3] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJL 351, December 20, 2012.

[4] Article 66 of Regulation No. 1215/2012 "Brussels Ia".

struction of a European civil and commercial judicial area by creating real European judicial sovereignty and by heightening the attractiveness of European law and courts[5].

However, the effectiveness of the Brussels Ia Regulation as an element of the new system has been called into question. In fact, its scope of material application leaves room for cases where a reconciliation between instruments is necessary. Whereas the Brussels Ia Regulation is applicable *ratione materiae*[6] to civil and commercial disputes, certain matters continue to be excluded[7]: "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration; maintenance obligations arising from a family relationship, parentage, marriage or affinity; wills and succession, including maintenance obligations arising by reason of death." In general, the excluded matters fall under other regulations. More rarely, they remain governed by Member States' common private international law.

In civil matters, 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[8]; Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, also

[5] CAVINET G. [sic: CANIVET], *La construction de l'espace judiciaire européen*, October 3, 2006.

[6] The regulation is applicable *ratione temporis* to all legal actions filed after January 10, 2015 (CJEU November 17, 2011, Hypoteční banka a.s. v. Udo Mike Lindner, Case C-327/10) and *ratione loci* throughout the entire European Union.

[7] CJEU October 14, 1976, LTU Lufttransportunternehmen GmbH & Co. KG versus Eurocontrol, Case C-29/76.

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

known as "Brussels IIa,"[9] which will become Council Regulation (EU) No. 2019/1111 of 25 June 2019, "Brussels IIb"; Council Regulation (EU) No. 1259/2010 of 20 December 2010, "Rome III," implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[10]; and, finally, Regulation (EU) No. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, should be cited among these instruments. Likewise, in commercial matters, Regulation (EU) 2015/848 of 20 May 2015 (European Insolvency Regulation or EIR) is worth taking into consideration[11]. Thus, the various instruments that interact with the Brussels Ia Regulation are numerous. Yet, reconciling these regulations may lead to a breach in the continuity of solutions pursued by PIL[12].

This breach notably emerges in the event of concurrent proceedings, sometimes falling under the objection of *lis pendens*, which is supposed to prevent contradictory solutions[13]. This breach becomes particularly significant when handling insolvency. Traditionally, international insolvency proceedings remain inherently territorial. Such territoriality is based on reality: the international space is divided into sovereign States, and any extraterritorial effect consequently remains subject to acceptance by foreign legal systems. Yet, within the EU, the

[9] Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, also known as "Brussels IIa", repealing Regulation (EC) No. 1347/2000, in OJ L 338, Dec. 23, 2003.

[10] Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III"), in OJ L 343 of December 29, 2010, p. 10.

[11] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, June 5, 2015. This instrument replaced Regulation (EC) No. 1346/2000 of the European Parliament and of the Council on insolvency proceedings.

[12] Notably observed by HENRY C., *Faillite internationale. – Ouverture à l'étranger. – Absence d'exequatur. – Aucun effet de suspension des poursuites individuelles en France*, in *Journal du droit international*, 3, 2012, p. 15.

[13] CLAVEL S., *Droit International privé*, Dalloz, 2001, p. 320, at p. 321.

principle of universality prevails[14], according to which the main insolvency proceedings must have effect wherever the debtor has assets[15]. Thus, the EIR lays out the principle of recognition as of right of the opening judgment handed down by the court with jurisdiction over the centre of main interests. This same principle applies to decisions related to the conduct and closure of proceedings[16]. However, the EIR provides exceptions specific to the recognition and enforcement of certain decisions related to the European debtor's insolvency, and directly references the provisions in the Brussels Ia Regulation[17]. These examples highlight the difficulties in reconciling the Brussels Ia Regulation to other European PIL instruments — difficulties that may result in diverging solutions[18].

Furthermore, the multiplication of instruments in European PIL is not always accompanied by clear reconciliation mechanisms. As a result, even when two instruments should be applied alternatively, it is not uncommon in case law for judges to refer to both simultaneously[19]. The ability to refer a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling is not a completely satisfactory solution to the lack of coordination of the sources of European PIL[20], even though PIL is already a complex subject[21]. While interde-

[14] CJEU, Jan. 21, 2010, Case C-444/07, MG Probud.

[15] NABET P., *Dix ans d'application du règlement européen sur l'insolvabilité : perspectives*, in *Revue de Jurisprudence Commerciale*, 2012, p. 1. But a truly universal effect is still possible subject to acceptance by foreign legal systems outside the EU; see NABET P., *Étude sur le champ d'application matériel direct du règlement européen sur l'insolvabilité*, in *Bulletin Joly Entreprises en difficulté,* January 1, 2015, p. 56.

[16] DAMMAN R., CAROLE-BRISSON D., *Procédures d'insolvabilité, portée du principe d'universalité*, D. 2011, p. 498.

[17] HENRY C., *Faillite internationale. – Ouverture à l'étranger. – Absence d'exequatur. – Aucun effet de suspension des poursuites individuelles en France*, cit., p. 15.

[18] For example, please note 1986 judgment of the House of Lords, Spiliada Maritime Corporation/Cansulex Ltd, 1987, AC 460, spec. p. 476.

[19] For example, the Brussels I Regulation and the Brussels IIa Regulation; see CA Lyon, 2nd chamber, May 30, 2011, RG No.: 10/02739 (*Decision: French judges have the jurisdiction to rule on questions of parental responsibility and maintenance obligations with regard to children according to the provisions in Article 8 of Regulation 2201/2003, Brussels II bis, and Articles 2 and 5-2 of the European regulation of 22 December 2000, Brussels I, from the moment that the parties reside in France, where the children in common also reside*).

[20] DUBOS O., *Les juridictions nationales, juge communautaire*, Dalloz, 2001, p. 73.

pendent, the instruments forging the European judicial area are not always perfectly consistent, especially with regard to the characterisation of situations. Yet, a requirement for such consistency among instruments is written into the instruments themselves, as evidenced by the Rome I[22] and Rome II[23] Regulations, in the seventh recital in their respective preambles, by recalling that their material scopes of application, as well as their provisions, "should be consistent with [the Brussels I] Regulation" and now the Brussels Ia Regulation. The CJEU has attempted to mitigate these inconsistencies: since the *Eurocontrol* decision[24], the Court has thus constantly affirmed that *the interpretation of the rules on conflict of jurisdiction should be teleological and functional*, guided with reference "to the objectives and system" of the 1968 Convention, then the Brussels I Regulation, now the Brussels Ia. These principles of interpretation tend to demonstrate that the rules of European procedural law are, in fact, autonomous[25].

The Brussels Ia Regulation lays out principles related to its reconciliation to other instruments, as per Chapter VII "Relationship with other instruments"[26]. More specifically, Article 67 establishes that "This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments." A translation of the adage "*Specialia generalibus derogant*," this provision is initially in line with the extension of Article 1 of the

[21] VON HEIN J., KIENINGER E.M., RUHL G., *How European is European Private International Law?,* Cambridge, Intersentia, 2019, p. 208, at p. 209. Also see in this *Volume*, "Enforcing and coordinating Brussels Ia and international law: future perspectives".

[22] 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"), in OJ No. L 177, July 4, 2008, p. 6.

[23] 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"), in OJ No. L 199, July 31, 2007, p. 40.

[24] CJEC, October 14, 1976, Eurocontrol, Case C-29/76, in *Rev. crit. DIP*, 1977, p. 772, note DROZ G. ; *JDI*, 1977, p. 707, obs. HUET A.

[25] AUDIT M., *L'interprétation autonome du droit international privé communautaire*, in *Journal du droit international*, 3, 2004, p. 789.

[26] Brussels Ia, Art. 67 to 73.

regulation, which excludes from its scope of material application matters subject to other regulations, such as matrimonial property regimes, maintenance obligations, successions and wills, and insolvency situations —. However, the apparent simplicity of this method gives rise to practical difficulties when it is not a question of matters excluded from the Brussels Ia Regulation's scope of application and when then becomes necessary to identify, in concrete terms, what "particular matter" actually means.

Such difficulties may sometimes be avoided in advance by harmonising solutions[27] or promoting principles that reduce the risks of conflicts, such as the principle of *vis attractiva concursus* with regard to insolvency proceedings[28]. Beyond allocating disputes, the challenge then continues to be the achievement of the justice objectives pursued by the regulation, especially with regard to the protection that is granted to certain categories of litigants. The effectiveness of this protection may be affected by the divergence of European instruments. A pertinent example of such protection is provided by the matter of matrimonial property regimes and maintenance obligations and, more specifically, by child protection arrangements [29]. Likewise, it is possible to cite successions and the protection benefiting heirs and possible heirs, or, at least, certain categories thereof [30]. In a similar manner, this protection is exerted simultaneously in favour of the insolvent debtor and his creditors. This protection gives rise to difficulties in cases of reconciling instruments, which consequently affects the effectiveness of European private law. Likewise, reconciliation cannot satisfy the requirement of economic efficiency.

In this study, and in the light of the case law decisions collected in the context of the European *En2BrIa* project, we are therefore going

[27] COLLART DUTILLEUL F., *L'Harmonisation internationale du droit privé*, in *Revue générale de droit*, 24, 1993, p. 227.

[28] In accordance with this principle, the national court that opened the insolvency proceedings is the only court competent to hear not only the insolvency proceedings but also any dispute arising from the insolvency. See FABOK Z., *Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation*, in *IIR*, 2017, p. 295.

[29] CHALAS CH., *Renvoi à une juridiction mieux placée selon l'article 15 du règlement Bruxelles II bis : les risques de la comparaison*, in *Rev. crit. DIP*, 2020, p. 120.

[30] LAGARDE P., *Les principes de base du nouveau règlement européen sur les successions*, in *Rev. crit. DIP*, 2013, p. 691.

to, firstly, examine the methods of implementing the main reconciliation criterion with reference to the Brussels Ia Regulation (2); secondly, highlight the effects of this reconciliation among European instruments on PIL (3); and, finally, put forward solutions to improve the application of the Brussels Ia Regulation (4).

2. Implementation of special rules arising from European instruments

The Brussels Ia Regulation establishes general rules with regard to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU. Article 1 thereof excludes various matters from its scope of application. The case law collected provides useful indications as to the concrete challenges of reconciling the Brussels Ia Regulation to the special instruments covering matters excluded from its scope of application. Most of the decisions revolve around two subjects: family matters (2.1.) and handling insolvency (2.2.).

2.1. Reconciling the Brussels Ia Regulation with special rules enacted in family matters

In family matters, the collected case law demonstrates that the reconciliation difficulties essentially concern the application of the Brussels Ia Regulation and, respectively, the Brussels IIa Regulation[31] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[32] and the regulation on jurisdiction, applicable law, recognition,

[31] Reg. (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, also known as "Brussels IIa," repealing Regulation (EC) No. 1347/2000, in OJ L 338, Dec. 23, 2003, p. 1.

[32] For example, see CSJ, March 11, 2010, No. 34352, [The divorce between the parties was granted by operation of law, not by virtue of Regulation 44/2001, but by virtue of Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility].

and enforcement of decisions and cooperation in matters relating to maintenance obligations[33]. Until Regulation No. 4/2009 entered into force, maintenance obligations were part of the scope of application of the Brussels I Regulation — this instrument having replaced the numerous bilateral conventions to which several Member States were party. The case law then combined the provisions in the Brussels I and Brussels IIa Regulations[34]. Since the regulation entered into force, case law has revealed difficulties encountered by national judges in applying the instruments in question to the administration of the concept of maintenance obligations. This self-standing concept[35] can, in fact, include lump sum payments, periodic payments, transfers of property, as well as changes in property rights. Consequently, despite the numerous common points between the two instruments[36], national judges must be conversant with reconciliation difficulties[37], especially

[33] Reg. (EC) No. 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJL 7, Jan. 10, 2009, p. 1.

[34] CA Lyon, June 6, 2011, RG No.: 10/02678 [From the moment that each of the two spouses established residence in France and that the child in common also resides there, French judges have the jurisdiction—regardless of the spouses having a different nationality—to rule, applying French law, on an application for divorce and on questions regarding parental responsibility and those concerning maintenance obligations, doing so with reference to the provisions set forth in Article 309 of the French Civil Code; Article 8 of Council Regulation 2201/2003, known as Brussels IIa; Articles 2 and 5/2 of the European regulation of 22 December 2000, known as Brussels I; and Article 4 of the Hague Convention of 2 October 1973]. As well as CA Lyon, April 4, 2001, RG No.: 10/01258.

[35] The maintenance obligation has been defined in a report as being "a duty laid down by law—including in cases where the extent of the obligation and means of complying with it are established by a judicial decision or contract—to provide any form of maintenance or at least means of subsistence in respect of a person currently or previously linked to the debtor by a family relationship"; see Rapp. G. Grabowska, A6-0468/2007, p. 13.

[36] GALLANT E., *Le nouveau droit international privé alimentaire de l'Union : du sur-mesure pour les plaideurs*, in *Europe,* 2012, n° 2, p. 4.

[37] For example, CA Lyon, September 19, 2011, RG No.: 10/04901 [The court declares that French courts have jurisdiction with respect to divorce—which is, incidentally, not called into question by the parties—according to Community Council Regulation No. 2201/2003 of 27 November 2003, also known as "Brussels IIa." In accordance with Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also known as Brussels I), since Regulation No. 4/2009 of 18 December 2008 has not yet entered into force, French judges have the jurisdiction to rule on maintenance obligations with regard to children from the moment that the maintenance creditor is domiciled or resides in France].

as the provisions under Regulation No. 4/2009 do not cover all possible litigation scenarios, since its scope of application remains confined to maintenance obligations defined as "arising from a family relationship, parentage, marriage or affinity" and to certain categories of creditors.

Reconciling the two instruments is nevertheless a complex matter given the fact that legal actions may have different grounds[38]. Regulation No. 4/2009 provides a means of bringing disputes together before a single judge in the event of various claims . This type of provision makes various procedural strategies available to litigants[39], for example when the maintenance claim is related to a legal action pertaining to marital status[40]. Consequently, the forums of jurisdiction promulgated by the Brussels Ia Regulation are avoided[41]. Comparable observations may be made concerning provisions set forth in Regulation No. 4/2009 that provide for the possibility of consolidating actions before a single court, when a maintenance question is related to an action regarding parental responsibility[42]. One might believe these difficulties are limited to civil matters. However, examination of the case law issued with regard to reconciling the Brussels Ia Regulation and the EIR proves the opposite.

2.2. Reconciling the Brussels Ia Regulation with special rules enacted with regard to handling insolvency

While the scope of application of the EIR is not only limited to the insolvency proceedings opened for an economic operator, its provisions are primarily connected with commercial matters. Article 1 of Regulation No. 1215/2012 excludes "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judi-

[38] CJEU, December 18, 2014, Case No. C-400/13.

[39] GALLANT E., *Le nouveau droit international privé alimentaire de l'Union : du sur-mesure pour les plaideurs*, cit.

[40] Art. 3 (c) of Council Reg. (EC) No. 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, January 10, 2009.

[41] CA Paris, June 8, 2017, RG No.: 15/06856.

[42] Art. 3 (d) of Council Reg. (EC) No. 4/2009 of 18 December 2008.

cial arrangements, compositions and analogous proceedings" since these proceedings are traditionally defined "according to the various laws of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor's creditworthiness, which involve the intervention of the courts culminating in the compulsory '*liquidation des biens*' in the interest of the general body of creditors of the person, firm or company, or at least in supervision by the courts"[43]. It was thus logical to reserve the same fate for actions said to be "related" or "connected" to the insolvency proceedings[44], which the Court of Justice recognised very early on for actions and decisions that derive directly from bankruptcy and are closely connected with proceedings for the liquidation of the assets or compulsory liquidation[45]. This solution constituted the first step in favour of delimiting the scope of application of the Brussels Ia Regulation in this matter[46]. This delimitation was then organised around three criteria, namely the origin of the situation; the intervention of a judicial authority; and the extent of its powers, with the clarification that "[t]he decisive criterion […] to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof." These reconciliation criteria have been applied by courts over the years, so as to rectify instances of overlapping and lacunae[47]. At the same time, the Court of Justice stated, on the relations between the previous Regulation (EC) No. 1346/2000 on insolvency proceedings and Regulation (EC) No. 44/2001 (Brussels I), that the scope of application of Regulation (EC) No. 1346/2000 "should not be broadly interpreted", so as to

[43] LAAZOUZI M., *Compétence judiciaire, reconnaissance et exécution des décisions en matière civile et commerciale – Champ d'application*, in *Répertoire Droit international*, 4, 2017.

[44] LE CANNU P., ROBINE D., *Droit des entreprises en difficulté*, Dalloz, 2020, p. 887.

[45] CJEC, Feb. 22, 1979, Henri Gourdain, Case C-133/78 [It concerns a preliminary ruling on the interpretation of Article 1 paragraph 1, No. 2 of the Brussels Convention, pertaining to the exclusion of bankruptcy from the application of said convention].

[46] MASTRULLO TH., *Interdiction de gérer et procédure secondaire d'insolvabilité*, in *Revue des procédures collectives*, 2, 2013, comm. 30.

[47] CABRILLAC M., PETEL PH., *Procédures collectives – Redressement et liquidation judiciaires des entreprises*, in *La Semaine Juridique Edition Générale No. 45*, November 8, 2006, doctr. 185.

limit its application in actions that are related to bankruptcy proceedings; broad interpretation should be reserved for the scope of the regulation governing civil and commercial matters[48]. Far from limiting cases where reconciling the two instruments is necessary, this position resulted in a multiplication of situations[49].

Consequently, it appears that, with regard to proceedings for handling insolvency, the Brussels Ia Regulation and the EIR — far from constituting two instruments that are incompatible with one another — enjoy, on the contrary, a relationship of complementarity, which is, incidentally, confirmed by certain provisions in the EIR that expressly refer to the Brussels Ia Regulation[50] and make broad references to the

[48] CJEC, Sept. 10, 2009, German Graphics, Case C-292/08 [German Graphics, a company established under German law, entered into, as a seller, an agreement for the sale of machines with a company established under Dutch law—the contract containing a retention of title clause in its favor. The latter became insolvent and was designated by a [sic: was designated a] liquidator. Consequently, the German company requested that conservatory measures with regard to a certain number of machines located on the premises of the Dutch company in the Netherlands be adopted on the basis of the retention of title clause. After German Graphics lodged an appeal in cassation, by order, the Dutch company decided to refer questions to the Court for a preliminary ruling. It concerns a request for a preliminary ruling on the interpretation of Article 4 §2 (b), Article 7 §1, and Article 25 §2 of the insolvency regulation and Article 1 §2 (b) of the Brussels I Regulation].

[49] See Bastia Court of Appeal, July 6, 2016, No. 15/00257 [According to the Court's case law, the exception provided for in Article 1 §2 b of Regulation 44/2001 combined with Article 7 §1 of Regulation 1346/2000 must be interpreted—account being taken of the provisions set forth in Article 4 §2 b of this regulation—as meaning that it does not apply to an action brought by the seller based on a retention of title clause against a purchaser that is insolvent when the asset covered by this clause is located in the Member State in which the proceedings are opened at the time of these proceedings being opened against this purchaser]; Constitutional Court of Belgium, July 27, 2011, No. 142/2011 [Regulation 1346/2000 should not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties, and collective investment undertakings. The application of the aforementioned regulation is exclusive of that of the Brussels I Council Regulation "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," which does not concern "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" (Article 1 §2 b)].

[50] Art. 32, Reg. (EU) 2015/848. This was already the case under the authority of Regulation (EC) No. 1346/2000 (see its Article 25), which concerned the Brussels Convention and then, indirectly, the Brussels I Regulation.

principles therein[51]. In its *Seagon* decision, the CJEU formalized the method of reconciling the two instruments[52] with the aim of improving the effectiveness and rapidity of insolvency proceedings that have cross-border effects[53]. Handed down under the authority of Regulation (EC) No. 1346/2000, this solution was set out in Article 6 of the EIR[54]. The power of attraction exercised by the insolvency court—*vis attractiva concursus*—remains limited to actions that derive from the insolvency and that are closely connected with it in accordance with the *Gourdain* precedent. Inversely, the simple fact of a dispute being affected by the insolvency of the parties or of third parties does not, in principle, fall under the jurisdiction of the insolvency court. Within the context of the EU, these disputes remain governed by ordinary law arising from the Brussels Ia Regulation. Despite the criticism and uncertainty regarding the *Seagon* case, both the CJEU[55] and courts in Member States seem to have consistently applied the established solution, while still providing numerous clarifications.

With regard to revocatory actions, whose purpose it is to render acts that are detrimental to the collective interest of the creditors void or unenforceable in insolvency proceedings, it was thus recognised that, in principle, these actions fall under provisions set forth in Regulation (EC) No. 1346/2000[56], and the solution was expressly set out in Article 6 §1 of the EIR. Any other solution would result in a dispersion of the dispute, likely to undermine the pursuit of the objective of efficiency of the EIR. In the same way, the Court of Justice asserted that actions for declaration of the existence of claims declared in collective proceedings derived directly from the insolvency proceedings, were closely connected with these proceedings, and originated in in-

[51] LEGRAND V., Article 19. Principe, in L. SAUTONIE-LAGUIONIE (dir.), *Le règlement 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité – Commentaire article par article*, Paris, Société de Législation Comparée, 2015, coll. TEE, p. 153

[52] CJEC, Feb. 12, 2009, Christopher Seagon v. Deko Marty Belgium NV., Case C-338/07.

[53] MASTRULLO T., *Actions révocatoire,* in *Revue des procédures collectives*, 2009, n° 6, comm. 152, p. 31.

[54] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, June 5, 2015, p. 19.

[55] CJEU, Feb. 6, 2019, Case C-535/17.

[56] CJEC, July 2, 2009, SCT Industri, Case C-111/08. More recently, CJEU, Jan. 16, 2014, Schmid, Case C-328/12 ;CJEU, Nov. 14, 2018, Wiemer & Trachte, Case C-296/17.

solvency law[57] before specifying that Article 29 §1 of the Brussels Ia Regulation, which concerns *lis pendens*, did not apply, even by analogy, to the action in question[58]. Case law reveals that it is the action's legal basis— rather than its procedural context—that is important. This translates into an application of the Brussels Ia Regulation when the source of the litigious right or obligation is found in the common rules of civil and commercial law. Conversely, if the source is in dispensatory rules specific to insolvency proceedings, the action will fall under the EIR. The two instruments' scopes of application are symmetrically related, which the Court of Justice already established under the authority of the Brussels I Regulation and the first insolvency regulation, by deciding that "the actions excluded, in accordance with Article 1 §2 (b) of Regulation No. 44/2001, from the scope of this regulation, as they fall under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,' fall under the scope of Regulation No. 1346/2000". Reciprocally, this means that actions that are not included in the scope of application of the EIR fall under the scope of the Brussels Ia Regulation[59].

Nevertheless, certain situations continue to render the intervention of the CJEU or national courts necessary. Consequently, in 2014, the Court disturbed the general principle, by expanding the scope of application of the EIR. In its *H v. H. K.* decision, the Court held that an action based on a provision in corporate law, whose application does not require that insolvency proceedings be formally opened, but only requires the material insolvency of the debtor, since it contravenes the common rules of civil and commercial law, came under the insolven-

[57] CJEU, September 4, 2014, Nickel & Goeldner, Case No. C-157/13 [The Court seemed to develop a general legal standard—the legal basis of the action: only actions based on dispensatory rules specific to insolvency proceedings falling under the jurisdiction of the court opening the proceedings].

[58] CJEU, Sept. 18, 2019, Case No. C-47/18, D. 2019. 2277, note VALLENS J.-L.; *Rev. crit. DIP*, 2020, p. 139, note PAILLER L.

[59] CJEU, Dec. 20, 2017, Case C-649/16, Valach e.a., in *Europe*, 2018, 2, p. 70, note IDOT L.; in *Procédures*, 2018, 2, p. 14, note NOURISSAT C.

cy regulation[60]. Similarly, case law based on unfair competition actions abounded. According to the Court, unfair competition actions are not based on specific rules set forth in the law on companies in difficulty; thus, these actions do not derive directly from collective proceedings. Likewise, because the action in question is brought against the buyer, rather than the debtor, this action has no direct connection with the collective interest of the creditors and could not be closely connected with the proceedings[61]. The French Court of Cassation drew conclusions from the position of the CJEU stated in its *Tünkers*[62] and *Nickel*[63] decisions and made a similar ruling[64] while emphasizing that "it is the intensity of the connection that exists between a jurisdictional action and the insolvency proceedings that is the determining factor"[65]. More recently, the Court of Justice specified that an action between the authorities of a Member State and professionals established in another Member State in the context of which these authorities seek, first, findings of infringements that constitute allegedly unlawful unfair commercial practices and an order for the cessation of

[60] CJEU, Dec. 4, 2014, H v. H. K., Case C-295/13. In this case, the Court, moreover, confirmed that the insolvency regulation applied to the action in question, even if the manager being sued resided in Switzerland, a State that is party to the Lugano Convention.

[61] GIORGINI G.C., *Vis attractiva concursus et action en concurrence déloyale*, in *Issu de Gazette du Palais*, 2018, 25, p. 52.

[62] CJEU, Nov. 9, 2017, Case C-641/16, Tünkers [The buyer of part of the business of a company that was established under German law and subject to insolvency proceedings had contacted all of the clients of the French subsidiary of the debtor company to solicit their business; however, this subsidiary was the exclusive distributor in France of the goods marketed by the parent company. The subsidiary had then sued the buyer for damages in the French courts for acts of unfair competition. But the buyer had challenged the jurisdiction of the French courts, notably claiming that the action brought actually aimed to dispute the scope of the legal assignment stopped in the context of the foreign collective proceedings].

[63] CJEU, Sept. 4, 2014, Case C-157/13, Nickel & Goeldner Spedition, pts 22 and 23; in *D.*, 2014, p. 1822; in *D.*, 2015, p. 2031, obs. D'AVOUT L. and BOLLEE S.; in *Rev. crit. DIP*, 2015, p. 207, note LEGROS C.; in *RTD com.*, 2015, p. 180, obs. MARMISSE-D'ABBADIE D'ARRAST A.

[64] Com., May 9, 2018, No. 14-23.273, in *Gaz. Pal.* 2018, No. 328x7, p. 52, note GIORGINI G.C.; in *BJE*, 2018, 115y0, p. 228, obs. HENRY L.C.; in *Leden*, 2018, 111s0, p. 2, obs. MÉLIN F.; in *Rev. Sociétés* 2018, p. 415, note HENRY L.C.

[65] MENJUCQ M., *Compétence juridictionnelle en matière d'atteintes délictuelles sur Internet aux droits de la personnalité des sociétés*, [https://menjucq.fr/competence-juridictionnelle-matiere-datteintes-delictuelles-internet-aux-droits-de-personnalite-societes/, Access 26th January 2021].

these infringements, falls under the concept of "civil and commercial matters" within the meaning of Article 1 §1 of the Brussels Ia Regulation[66]. In accordance with this orthodoxy, the criteria of the *Gourdain* decision thus apply cumulatively: the action must have its legal basis in rules specific to insolvency proceedings, and it must have a sufficiently close connection with such proceedings.

3. Effects of reconciling the European instruments on PIL

The conditions for reconciling the Brussels Ia Regulation and the enacted regulations have significant effects on the material objectives pursued by European private international law. We will limit our observations to two issues on this topic: the protection of weak parties (3.1.) and the allocation of transaction costs (3.2.).

3.1. The interests of weak parties

The Brussels Ia Regulation contains various provisions whose purpose it is to ensure the protection of weak parties and, indirectly, material justice. This priority should not be ignored in the context of rec-

[66] CJEU, July 16, 2020, Case C-73/19 [The Belgian authorities brought legal action against companies practicing resale in Belgium before the Belgian commercial court, seeking the cessation of those commercial practices, an order for the decision of the court to be publicized at the expense of said companies, the imposition of a penalty payment of 10,000 euros for every infringement recorded after notification of this decision, and a declaration that future infringements can be recorded simply by means of an official report drawn up by an sworn official of the Directorate-General for Economic Inspection, in accordance with the CEL. The companies in question raised an objection of lack of international jurisdiction of the Belgian courts, maintaining that the Belgian authorities had acted in the exercise of state authority, so their actions did not fall under the Brussels Ia Regulation's scope of application. An appeal was brought, and the Antwerp Court of Appeal decided to refer the question to the CJEU for a preliminary ruling. It is a question of knowing whether a legal action concerning a claim aimed at determining and stopping unlawful market practices or commercial practices towards consumers that is brought by the Belgian authorities against Dutch companies that, from the Netherlands, target a mainly Belgian clientele via websites with the intention of reselling tickets for events taking place in Belgium is a civil and commercial matter within the meaning of the Brussels Ia Regulation and whether a judicial decision in such a case can, for that reason, fall within the scope of that regulation. The CJEU then responded to this question in the affirmative].

onciling regulations. In the Brussels Ia Regulation, consumers, employees, and the insured are described as weak parties[67] and therefore benefit from special rules granting them greater freedom to choose the place where the case will be tried. Whereas the other instruments can take parties deserving special protection into consideration, and essentially target the concept of a weak party, this concept does not have uniform content. Consequently, the regulation on maintenance obligations targets different categories from those in the Brussels Ia Regulation. Although the logic of the two instruments is analogous - i.e. the protection of the weak party - , each is adapted to assorted categories of disputes.

With regard to the EIR, the effects of reconciliation are more difficult to comprehend. In fact, the EIR is an economic instrument that applies to economic operators and directly ignores the concept of weak parties. As a result, when a reconciliation between the Brussels Ia regulation and the EIR is necessary, a conflict in logic is possible, and an undifferentiated application of the *vis attractiva concursus* principle is likely to require parties deserving special protection to always bring their disputes before the State court for opening insolvency proceedings. Albeit already under the authority of the previous insolvency regulation, this question was urgently raised in the case of a dispute on an employment contract. For example, the French Court of Cassation ruled in a dispute concerning the breach of the employee's work contract and wage claims during the employment relationship that [*sic*: this matter] did not come within the competency of the insolvency proceedings organized by the insolvency regulation[68]. The court then applied the Brussels I Regulation and, more specifically, Article 19 of this regulation, which assigns jurisdiction to the court in the place where the worker usually works and, failing that, the place where the establishment that hired him is located. Favourable towards the employee, this decision seems to separate disputes related to work contracts from collective proceedings. By contrast, in another situa-

[67] Recital 18 Brussels Ia: "In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules." V. Sections 3, 4, and 5 of the Brussels Ia Regulation on the rules of jurisdiction applicable to consumers, employees, and the insured.

[68] Cass. soc., Oct. 28, 2015, No. 14-21.319.

tion, the French Court of Cassation ruled in a case concerning an action for damages from the employee, that a non-contractual liability brought against the parent company by an employee let go from the French subsidiary, and based on the opening of the collective proceedings, fell under the application of Regulation (EC) No. 1346/2000[69]. Here the reconciliation resulted in the logic for protection in the Brussels and Brussels Ia Regulations being ignored.

The comprehensive assessment of this question is later made more complex if we consider the provisions under Article 6 of the EIR into consideration. In its first paragraph, this article lays out the principle of *vis attractiva concursus* such as defined in the landmark *Gourdain* decision. However, in its second paragraph, Article 6 offers the insolvency practitioner an option when the action "is related to an action in civil and commercial matters against the same defendant." In this situation, "the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No. 1215/2012." The condition established, which expressly refers to the Brussels Ia regulation, indirectly enables the substantive logic of this instrument to be respected. Even so, the protection of weak parties is called into question. As a re-

[69] Cass. soc., Jan. 10, 2017, No. 19, 15-12.284 [In this case, a British company was placed "in administration" by the High Court of Justice of England and Wales. The claimant, a former employee of the French subsidiary of the British company, submitted the case to the French industrial tribunal in order to challenge his dismissal, which was pronounced after the Versailles commercial court stopped the subsidiary's partial assignment plan. The court of appeal, before which the employee had presented new claims notably against the British company, confirms the jurisdiction of the French court as well as the application of French law. The court of appeal accepted the employee's action, considering that the case concerned an action for damages directed against the British company and independent of the insolvency proceedings opened by the British court. This action thus did not fall under the European regulation on insolvency proceedings but rather the Brussels I Regulation. This position was censured by the Court of Cassation. The latter, based on the CJEU Eurofood precedent, recalled that the French courts were required to recognize the British opening proceedings and could not call into question the jurisdiction of the court that made the ruling. From the moment that the employee's action for damages introduced against the British company aimed to challenge the decisions made in the context of the insolvency proceedings of the French subsidiary, this action fell under the EIR].

sult, the provisions set for in these instruments would need to be improved, so as to avoid such conflicting scenarios.

3.2. The allocation of transaction costs in European private international law

Private international law does not ignore the concept of transaction costs that an economic analysis of law has revealed. Reconciling instruments is likely to upset parties' projections and, more broadly, harm the balance defined in the matter by the Brussels Ia Regulation.

For example, the principle established in the *Seagon* decision and since set out under Article 6 of the EIR may lead to an increase in the costs of proceedings for the defendant, who is obliged to defend himself in another State. If the defendant is a weak party within the meaning of the Brussels Ia Regulation, the solution is open to more criticism, because a consensus exists as to the necessity of ensuring litigants' costs are reduced so as to protect weak parties and pursue economic efficiency. The difficulty is perhaps that, as far as insolvency proceedings are concerned, economic efficiency is not assessed as it is for general disputes. Moreover, the question of costs of proceedings redounds on the procedural rights of the defendant, since the latter is going to have to mount his defence in the related actions brought against him before a foreign court. Furthermore, *vis attractiva concursus* can increase the risk of *forum shopping*. The parties may be tempted to manipulate the place of insolvency or even transfer assets or legal proceedings from one Member State to another, in order to obtain a more favourable legal position. More generally, the exclusion of certain matters from the scope of application of the Brussels Ia Regulation in favour of other instruments (such as that for maintenance obligations, or successions and wills, and other instruments related to special matters) can increase this risk. Well-counselled litigants can try to exploit the cracks that exist between these instruments in order to choose the court that they think is the most suitable. Incidentally, European PIL does not consider such an approach to be, in

and of itself, reprehensible, since it "institutionalizes"[70] forum shopping by encouraging the parties to opt for a favourable court and jurisdiction[71].

In the same vein, it is possible to note a lengthening in the average duration of proceedings when it is necessary to reconcile the Brussels Ia Regulation with other regulations. A study of the case law collected reveals that the questions referred to the CJEU for a preliminary ruling are often indispensable. Incidentally, the same case can sometimes require several referrals to the Court, which consequently leads to a delay in the proceedings and also affects the effectiveness of the matter by interfering with the rapidity of proceedings that have cross-border effects. Moreover, the concentration of certain disputes resulting in methods of reconciling instruments is not likely to increase the effectiveness with which the disputes are handled. The principle of legal certainty may be called into question.

4. Proposed solutions to improve the application of the Brussels Ia Regulation

In the context of European legislation, consistency within the legal systems is a problem that will need to be given a certain amount of attention. Reconciling the Brussels Ia Regulation and other European instruments poses problems that need to be resolved. As a result, solutions that would maintain the effectiveness of the PIL rules and neutralize the conflicting scenarios among instruments should be put forward. Our proposals are grounded in two considerations: 1) facilitating the work of judges charged with applying the Brussels Ia Regulation and 2) reconciling it with other instruments (4.1.) before envisaging a revision of the regulation itself (4.2.).

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[70] CORNUT E., *Forum shopping et abus du choix de for en droit international privé*, in *JDI*, 2007, p. 27, Spec. No. 3, p. 29.

[71] FERRARI F., *Forum shopping : pour une définition ample dénuée de jugements de valeurs*, in *Rev. crit. DIP*, 2016, p. 85, spec. p. 99.

4.1. Solutions that facilitate the work of judges

The various regulations enacted by the EU with regard to private international law fall under an architecture that is complex and not always consistent, notably, on account of their being interrelated. This is why applying European private international law is an arduous task that some legal scholars claim requires the "consolidation" or "specialization" of judges[72]. In our opinion, it would be better to have judges specialize and publish guidelines that make EU legal policy in private international law more accessible, as this would support judges' efforts to better reconcile European texts.

Moreover, the proper application of the Brussels Ia Regulation is achieved through better knowledge and better analysis of the questions raised when decisions that set legal precedent are being made. This could also involve easier access to information, specifically through the widespread creation of national databases extending the initiative of research group En2BrIa and filing all decisions handed down under the Brussels Ia rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In the same vein, enriching the existing EUR-Lex database is also worth considering, as interface changes would render it more intelligible[73]).

4.2. A revision of the Brussels Ia Regulation

The Brussels Ia Regulation together with any other regulations enacted with regard to European PIL do not constitute a truly monolithic ensemble. As found during these developments, the difficulties reconciling them reveal the existence of gaps and grey areas. More generally, these instruments do not come under a uniform philosophy, which is also the result of the different eras in which they were developed.

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[72] FRACKOWIAK-ADAMSKA A., *The Application of European Private International Law by national judges. Challenges and Shortcomings,* in VON HEIN J., KIENINGER E.M., RÜHL G. (eds), *How European is European Private International Law?*, Cambridge, Intersentia, 2019, p. 203.

[73] HELLNER M., *The Application of European Private International Law by national judges – Making the job easier*, in VON HEIN J., KIENINGER E.M., RÜHL G. (eds), *How European is European Private International Law?*, Cambridge, Intersentia, 2019, p. 211–212.

For example, the rules of jurisdiction in the regulation on maintenance obligations, the successions regulation, the matrimonial regulation, and the patrimonial regulation recorded are all universal—that is to say, they apply regardless of the parties' usual place of residence or nationality. However, the rules of jurisdiction in the Brussels I Regulation, with a few important exceptions, only apply if the defendant is domiciled in a Member State. The applicability of the rules of jurisdiction in the Brussels II Regulation can be described as situated somewhere between these two approaches. The inconsistencies between the Brussels Ia Regulation and the other instruments require tenable solutions. At this stage, it appears that a recast of the regulation is necessary in view of the fact that the difficulties mentioned in this study are mostly systemic in nature, i.e. they are caused by the architecture of the regulation itself. We propose that its material scope of application be extended during its next revision. In fact, its first article states various exclusions that are not included because, under certain conditions, the excluded matters can result in the application of the Brussels Ia Regulation. Rewording the text so that it reads more clearly will facilitate the work of judges and will also strengthen legal certainty for litigants.

Likewise, more value must be given to rules protecting weak parties. These special rules are not always as effective as expected when the application of the Brussels Ia Regulation has to be reconciled with other instruments. For that matter, this clarification effort need not be limited to the Brussels Ia Regulation alone, but must extend to all the instruments in European PIL, so it can be organized into a single, harmonious architecture.

EU Law on Package Travel and Different Issues of Coordination with the Brussels Ia Regulation

Rosario Espinosa Calabuig

1. Introduction

The analysis of travel package contracts in Private International Law (PIL) is a fascinating subject, usually forgotten in our discipline regarding issues as important as international jurisdiction. The interest in travel packages comes from several points of view: 1) their relation with two different, yet connected fields of Law in this context, i.e. consumer law and transport law. 2) The consequences of the aforementioned relations regarding international jurisdiction depending on the field concerned. 3) Lastly, from the point of view of the coordination that must be made between all legal instruments existing in this area and, in particular the "connections" and "disconnections" that can be produced in relation with the Brussels Ia Regulation (Regulation EU 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)[1]. The last point is undoubtedly the main pillar of the European Union (EU) Project "Enhancing Enforcement under Brussels Ia" – EN2BRIa- directed by the University of Genoa[2].

These three points are easily observed in the context of tourist cruises that are the best "experiment" to study the rules and principles of PIL and the coordination of rules existing between all the instruments that can be involved in this context, regarding many different matters (e.g. package

[1] OJ L 351, 20.12.2012.

[2] European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018JUST831598.

travel law, consumer law, transport law –by sea, air, road or train-, employment and labour law, and environmental law, beside others). All these questions should be analyzed by taking into consideration the principles of the EU and, as a reference point, art. 67[3] and art. 71 of the Brussels Ia Regulation[4].

Most of the Member States (MS) of the EU are also members of the *International Maritime Organisation* (IMO) and the *International Labour Organisation* (ILO) and have implemented a number of international and EU instruments that apply to the cruise industry. Hence, the approach is not industry-driven, but dependent on the matters at stake, being provisions dealing with consumer, worker and environmental protection of particular significance in this sector. Specific measures can only be found at a port authority level, and mainly seek to promote the industry.

Particularly relevant are those provisions that are not included within the IMO and ILO framework because they deal with consumer protection. The latter overlaps with the IMO and EU regulatory framework for the contract of carriage of passengers, adding an extra level of protection in the event of package travel and linked travel arrangements (as named by Directive (EU) 2015/2302[5]). This distinction between one type of contract and packages has a bearing on the applicable PIL rules.

Although this work analyzes travel packages and their relationship with passenger transport (in particular air travel), its focus is more on the effects on jurisdiction rules and the coordination thereof.

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[3] According to art. 67 of Brussels Ia "*This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*".

[4] Art. 71.1 of Brussels Ia states that "*This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments*". See CARBONE S.M. (ed), *Brussels Ia and Conventions in Particular Matters*, Roma, Aracne, 2017; ESPINOSA CALABUIG R., *Cooperación judicial civil y Derecho marítimo en la UE*, in CARBALLO PIÑEIRO L. (dir), *Retos presentes y futuro de la política marítima integrada de la Unión europea*, Barcelona, 2017, pp. 593-618.

[5] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1–33*)*. See MELGOSA ARCOS J., *Subject matter, scope, definitions and level of harmonisation*, in TORRES C., MELGOSA ARCOS J., JÉGOUZO L., FRANCESCHELLI V., MORANDI F., TORCHIA F. (eds) *Collective Commentary about the new Package Travel Directive*, Estoril, 2020, p. 51-87.

2. Package travel as a consumer matter according to the Court of Justice and Directive 2015/2302 and its relationship with passenger transport

According to EU law, as interpreted by the Court of Justice (*Pammer/Alpenhof* case)[6], travel packages are classified as consumer matters. The same qualification is given by the aforementioned Directive (EU) 2015/2302 on package travel and linked travel arrangements. According to the Directive itself, the harmonisation of the rights and obligations arising from contracts relating to package travel (and to linked travel arrangements) is "*necessary for the creation of a real consumer internal market in that area, striking the right balance between a high level of consumer protection and the competitiveness of businesses*"[7].

As stated by Directive (EU) 2015/2302, most travellers who buy packages or linked travel arrangements are "*consumers within the meaning of Union consumer law*". At the same time, "*it is not always easy to distinguish between consumers and representatives of small businesses or professionals who book trips related to their business or profession through the same booking channels as consumers. Such travellers often require a similar level of protection. In contrast, there are companies or organisations that make travel arrangements on the basis of a general agreement, often made through a travel agency for numerous travel arrangements for a specified period of time. The latter type of travel arrangements do*

[6] A definition of travel package was given by the ECJ in the judgment of 7 December of 2010 in the accumulated cases *Peter Pammer/Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH/Oliver Heller* (C-144/09). See ÁLVAREZ DE SOTOMAYOR S.F., *Viajes combinados y servicios de viaje vinculados [Directiva (UE) 2015/2302]. Cuestiones de ley aplicable*, Madrid, 2018, pp. 75 ff; VAN HOEK A.A.H., *CJEU- Pammer and Alpenhof –Grand Chamber 7 December 2010, joined cases 585/08 and 144/09*, in *European Review of Contract Law*, 2012, p. 93.

[7] See recital 5 of the Directive (EU) 2015/2302. See broadly, BENAVIDES VELASCO P., *La directiva de viajes combinados: perspectivas de futuro*, in AGUADO V., CASANOVAS O. (coords), *El impacto del derecho de la Unión Europea en el turismo*, Barcelona, 2012, p. 135-152; BERENGUER ALBALADEJO C., *Luces y sombras de la nueva Directiva (UE) 2015/2302 del parlamento europeo y del consejo, de 25 de noviembre de 2015, relativa a los viajes combinados y a los servicios de viaje vinculados*, in *International Journal of scientific management and tourism*, 2016, p. 33-49; MUÑOZ MARTÍN J.C., *La directiva sobre viajes combinados y el derecho español*, in *Noticias de la Unión Europea*, 1995, n. 123, p. 85-94; TUR FAÚNDEZ M.N., *La protección del turista en el contrato de viaje combinado*", in TORRES LANA J.A., TUR FAÚNDEZ M.N., JANER TORRENS D. (dir), *La protección del turista como consumidor*, Valencia, 2003; ZUBIRI DE SALINAS M. (dir), *El contrato de transporte de viajeros. Nuevas perspectivas*, Pamplona, 2017.

not require the level of protection designed for consumers. Therefore, this Directive should only apply to business travellers, including members of liberal professions, or self-employed or other natural persons, where they do not make travel arrangements on the basis of a general agreement. In order to avoid confusion with the definition of the term 'consumer' used in other Union legislation, persons protected under this Directive should be referred to as 'travellers' (recital 7)".

In practice, the EU law on package travel coexists with EU and international legislation regarding transport of passengers, leading to the need to distinguish between activities involved in this context. On the one hand, transport of passengers is usually a component of package travel (often by air), and this may impact passengers' damages claims. On the other hand, the transport of passengers is regulated by international uniform law as well as EU law as there are EU regulations for air, sea and rail transport. Therefore, legal operators face a complex legal framework in which the respective areas of application of the existing legislations in this field must be identified[8].

The coordination of the rules on compensation of the traveller/consumer - against the businessman or professional, according to Directive (EU) 2015/2302 on travel packages, and that of the traveller/passenger against the carrier according to the International Conventions - such as the 1999 Montreal Convention in the case of air passengers transport[9] and EU regulations on transport, such as EU 261/2004 Regulation establishing common rules on compensation and assistance to air passengers[10] - is regulated by art. 14.5 of Directive (EU) 2015/2302. Taking into account the EU principle of protection of the weaker parties to the contract, the traveller (when he/she is the claimant) may, depend-

[8] See LÓPEZ DE GONZALO M., *La nuova direttiva sui pacchetti turistici e la normativa internazionale e comunitaria in tema di trasporto di persone*, *Il Diritto marittimo*, 2016, pp. 405-418; WUKOSCHITZ M., *Art. 14. Price reduction and compensation for damages*, in TORRES C., MELGOSA ARCOS J., JÉGOUZO L., FRANCESCHELLI V., MORANDI F., TORCHIA F. (eds) *Collective Commentary about the new Package Travel Directive*, Estoril, 2020, pp. 344-359.

[9] Convention for the unification of certain rules for international carriage by air made at Montreal on 28.05.1999 that entered in force on 4.11.2003. See https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf

[10] In particular, Regulation EC 261/2004 of the European Parliament and of the Council of 11.02.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91 (OJ L46, 17.2.2004).

ing on the circumstances, choose between the most favourable regime (travel package or transport).

Directive (EU) 2015/2302 is more specific than earlier Directive 90/314/EEC as a result of changes on the tourism market, most of which were brought about by the internet[11]. In particular, "package" means "a combination of at least two different types of travel services for the purpose of the same trip or holiday", if certain/some conditions are met under art. 3[12].

In particular, it is necessary that: a) "those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded; or b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:

(i) purchased from a single point of sale and those services have been selected before the traveller agrees to pay,

(ii) offered, sold or charged at an inclusive or total price,

(iii) advertised or sold under the term 'package' or under a similar term,

(iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or

(v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders

[11] As highlighted by Directive 2015/2302, "*Tourism plays an important role in the economy of the Union, and package travel, package holidays and package tours ('packages') represent a significant proportion of the travel market. That market has undergone considerable changes since the adoption of the first Directive 90/314/EEC. In addition to traditional distribution chains, the internet has become an increasingly important medium through which travel services are offered or sold. Travel services are not only combined in the form of traditional pre-arranged packages, but are often combined in a customised way*" (recital 2 Directive).

[12] Regarding the changes introduced by Directive 2015/2302 from an objective and subjective point of view (regarding definitions, liability etc) see ZUBIRI DE SALINAS M., *Conceptos clave y responsabilidad en la nueva regulación de los viajes combinados y los servicios vinculados*, in *Revista Europea de Derecho de la Navegación marítima y aeronáutica*, n 34, 2017, pp. 25-66. The author makes a critical assessment of these changes to determine possible amendments to Spanish Law in order to implement the Directive, as well as the indirect impact on any modes of passenger transport Law. See as well by the same author *Actividad logística y transporte integrado: el problema de su consecución desde el punto de vista jurídico*, in ZUBIRI DE SALINAS M., *Logística y derecho*, Valencia, 2020, pp. 109-150.

is concluded at the latest 24 hours after the confirmation of the booking of the first travel service"[13].

Among the changes introduced by Directive (EU) 2015/2302, and impacting on PIL system rules, is the concept of traveller[14]. For the purpose of the Brussels Ia Regulation, we have opted for the distinction between traveller/consumer in relation to the rules on package travel contracts and the traveller/passenger for transport contracts. The relevant point is the fact that, as before in Directive 90/314/CEE, Directive (EU) 2015/2302, meaningfully overlaps with EU and international regulations regarding transport of passengers, with consequences for the PIL system in the EU.

In both Directive (EU) 2015/2302 and Directive 90/314, the organiser of the travel is responsible for the correct execution of all services included in the travel package, regardless of whether services were provided by the organiser or by a third party, and therefore, especially, for transport services provided by a third carrier[15]. In this respect, compensa-

[13] Together with this definition, Art. 3.2. of the Directive in its last paragraph says some cases that cannot be considered as "packages". In particular, "*a combination of travel services where not more than one type of travel service as referred to in point (a), (b) or (c) of point 1 is combined with one or more tourist services as referred to in point (d) of point 1 is not a package if the latter services: (a) do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination; or (b) are selected and purchased only after the performance of a travel service as referred to in point (a), (b) or (c) of point 1 has started*".

[14] ZUBIRI DE SALINAS M., *Conceptos clave*, cit., pp. 45-50; FRANCESCHELLI V., TORRES C., *Art. 3. Definitions*, in TORRES C., MELGOSA ARCOS J., JÉGOUZO L., FRANCESCHELLI V., MORANDI F., TORCHIA F. (eds) *Collective Commentary about the new Package Travel Directive*, Estoril, 2020, pp. 105-134.

[15] According to art. 14.3 of Directive 2015/2302, the organiser of the travel package could be free from his/her liability if (s)he proves that "*the lack of conformity is: a) attributable to the traveller; b) attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or c) due to unavoidable and extraordinary circumstances*". In this regard, PANIZA FULLANA A., *Viajes combinados y servicios de viajes vinculados: replanteamiento de conceptos y sus consecuencias sobre la responsabilidad*, Madrid, 2017, pp. 25 ff; MARTÍNEZ ESPÍN O., *Impacto sobre la protección del consumidor de la Propuesta de Directiva del Parlamento Europeo y del Consejo relativa a los viajes combinados y los servicios asistidos de viaje, por la que se modifica el reglamento (CE) nº 2006/2004 y la Directiva 2011/83/UE y por la que se deroga la Directiva 90/314/CEE*, in *Revista Doctrinal Aranzadi Civil-Mercantil*, nº 9/2014 BIB203/2366; PEINADO GRACIA J.I., *La protección del pasajero en el contrato de viaje combinado y en la prestación de servicios asistidos de viaje: la responsabilidad del transportista aéreo y de los operadores turísticos*, in GUERRERO LEBRON M.J. (dir), *La responsabilidad del transportista aéreo y la protección de los pasajeros*, Madrid, 2015, pp. 514 ff.

ble damages would include non-patrimonial damages[16]. A comparative study of the directives - applicable to travel packages and transport - shows that the content of the damages caused by the travel package organiser is more rigorous than that of those regulated for the carrier (as far as maritime and air carriers are concerned)[17].

In practice, the coordination between the compensation of the traveller by the organiser according to Directive (EU) 2015/2302 and that by the carrier according to international conventions or EU regulations on transport matters is regulated by art. 14.5 of Directive (EU) 2015/2302. More specifically, claiming under the first shall not affect the rights of travellers under Regulation (EC) 261/2004, Regulation (EC) 1371/2007, Regulation (EC) 392/2009 of the European Parliament and of the Council, Regulation (EU) 1177/2010 and Regulation (EU) 181/2011, and under international conventions. Travellers are entitled to present claims under this Directive and under those Regulations and international conventions. Compensation or price reduction granted under this Directive and the compensation or price reduction granted under those Regulations and international conventions shall be deducted from each other in order to avoid over compensation)[18].

Considering travel packages as consumer contracts and the relation with air transport of passengers has a relevant impact on the PIL system of the Member States and on the application, among others, of Brussels Ia and Rome I Regulations[19]. Under both regulations, travel packages are considered an "exception of an exception", meaning that they are an exception to passenger transport contracts and are considered consumer contracts in EU PIL. In other words, travel packages are considered consumer contracts, and therefore, the most favourable rules apply.

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[16] In this sense see the judgment of the ECJ of 12 march 2002, Case C-168/00, *Leitner c. Tui Deutschland*. See BRIGNARDELLO M., *Danni da vacanza rovinata ed incerteza del diritto*, in *Il Diritto Marittimo*, 2008, p. 564; BRIGNARDELLO M., BOI G.M., *Diritti dei passeggeri nel trasporto marittimo e nelle altre modalità: uniformità e differenze*, in *Il Diritto marittimo*, 2012, pp. 786-797.

[17] See LÓPEZ DE GONZALO M., *La nuova direttiva sui pacchetti turistici e la normativa internazionale e comunitaria in tema di trasporto di persone*, cit., p. 405 ff.

[18] LÓPEZ DE GONZALO M., *La nuova direttiva sui pacchetti turistici*, cit., p. 409-412; SANDRINI L., *La compatibilità del Regolamento (CE) n.261/2004 con la Convenzione di Montreal del 1999 in una recente sentenza della Corte di Giustizia*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 93.

[19] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law applicable to contractual obligations, in OJ L 177, 04.7.2008.

3. Coordination rules between different legal instruments in cases of compensation claims of the traveller/consumer and the traveller/passenger

In compensation claims of the traveller/consumer against the professional or of the traveller/passenger against the carrier, the rules of jurisdiction and the coordination between potentially applied EU Directives, EU Regulations and International Conventions can be different and sometimes complicated. At the same time, this coordination raises very interesting questions of interpretation around the *lex specialis versus lex generalis* principle (or vice-versa) and the application of art. 67 of Brussels Ia Regulation.

Therefore, Brussels Ia Regulation shall not prejudice the application of provisions governing jurisdiction (or recognition and enforcement of judgments) in specific matters (in this case of air transport of passengers), which are contained in instruments of the EU or in national legislation, as harmonised pursuant to such instruments.

First of all, for air transport passengers, the Brussels Ia Regulation should be coordinated with the 1999 Montreal Convention on air transport[20], which includes rules on jurisdiction in art. 33 in order to protect the passenger as the weaker party. In this case, the Montreal Convention is considered *lex specialis* in relation to the Brussels Ia Regulation. Therefore, the EU regulation is "disconnected" from the uniform Convention on air transport[21]. The existence of the so-called *disconnection clause* in the Brussels Ia Regulation is also foreseen in favor of other instruments mentioned under art. 67[22] of the EU regulation.

[20] The Convention for the unification of certain rules for international carriage by air made at Montreal on 28 May 1999 has been ratified by the EU with the 2001/539/CE Decision of the Council of 5.04.2001. On this regard, see TUO C., *Il trasporto aereo nell'Unione europea tra libertà fondamentali e relazioni esterne, Diritto internazionale e disciplina comunitaria*, Torino, 2008; ESPINOSA CALABUIG R., *La competencia externa de la Unión Europea en relación con la ratificación de ciertos Convenios marítimos*, in AA.VV., *La toma de decisiones en el ámbito marítimo*, Bomarzo, 2016, pp. 103-118.

[21] See DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*", *Il Diritto marittimo*, 2020, II, pp. 400-401.

[22] According to the Conclusions of the General attorney Maciej Szpunar of 20.05.2015, in case C-240/14, Eleanore Prüller-Frey c. Norbert Brodnig, Axa Versicherung AG, ap. 51, art. 33 of the Montreal convention would also be applied to the domestic sinister taking into consideration the *disconnection clause* in art. 67 of Brussels Ia. In this regard, SOLETI P.F., *Brussels Ia and Interna-*

Furthermore, through Council Regulation (EC) No 2027/97, later amended by Regulation (EC) 889/2002, the EU has extended the scope of application of the Convention to transport carried out in only a member State (albeit without extending the material scope of application)[23].

The problem is that the Montreal Convention (*lex specialis*) does not apply to the pecuniary compensation claims based on the specific EU Regulation EC 261/2004 on rights of air passengers[24], and for these specific claims, the general rules of Brussels Ia Regulation (*lex generalis*) shall apply. In this sense, the EU Court of Justice has recently clarified the relation between the Brussels Ia Regulation and EU Regulation EC 261/2004 on air passengers' rights in the case of *ZX v. Ryanair*, with a judgment on 11.04.2019[25]. Taking into account art. 67 of Brussels Ia Regulation, the Court underlined that EU Regulation EC 261/2004 establishes no rules on jurisdiction and, therefore, only the Brussels Ia Regulation need be applied in this context.

In this regard, art. 17 of the Brussels Ia Regulation distinguishes between travel package contracts assimilated into consumer contracts, and passenger contracts[26]. The latter are excluded from the provisions foreseen for consumer protection, so that specific rules under art. 7 apply –

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tional Air transport, in CARBONE S.M., (ed), *Brussels Ia and Conventions in particular matters. The case of transports*, Rome, Aracne, 2017, p. 237; MANKOWSKI P., *Art. 67*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels I bis Regulation,* Cologne, 2016, p. 1020.

[23] See DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale*, cit., p. 401.

[24] Regarding the differences in the compensation claims regime in this context see broadly GUERRERO LEBRÓN M.J., *Las últimas reformas en Derecho del transporte aéreo: avances y cuestiones pendientes en la protección de los pasajeros y los terceros*, in *Revista andaluza de derecho del turismo*, n. 3, 2010, pp. 127-157; GUERRERO LEBRÓN M.J., *La normativa aplicable en Europa en materia de responsabilidad de las compañías aéreas por daños en los pasajeros*, in *Derecho de los negocios*, 2003, pp.1-12.

[25] Case C-464/18. See commentary made by S. DOMINELLI, P. SANNA, *Sulla determinazione dell'autorità giurisdizionale*, cit., pp. 398-420.

[26] See, among others, MANKOWSKI P., NIELSEN P., *Art. 17*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Cologne, 2016, p. 504; FERRARI F., RAGNO F., *European Union*, in FERNÁNDEZ ARROYO D.P. (dir), *Consumer protection in International private relationships*, Dordrecht, 2010, p. 581; ESPLUGUES MOTA C., IGLESIAS BUHIGUES J.L., PALAO MORENO G., *Derecho internacional privado*, Valencia, 2020, pp. 641-648; HARTLEY T., *Civil jurisdiction and judgments in Europe. The Brussels I Regulation, The Lugano Convention and the Hague Choice of Court Convention*, New York, 2017, p. 199; BONOMI A., *Jurisdiction over Consumer Contracts*, in DICKINSON A., LEIN E.(eds), *The Brussels I Regulation Recast*, Oxford, 2015, pp. 213-237; AÑOVEROS TERRADAS B., *Extensión de los foros de protección del consumidor a demandados domiciliados en terceros estados*, in *Anuario Español de Derecho Internacional Privado*, Nº. 9, 2009, pp. 285-306; PALAO MORENO G., *Protección del consumidor internacional en tiempos de Covid-19*, in *Actualidad jurídica iberoamericana*, n. 12, 2020, pp. 624-633.

art. 7(2) and (3) on contractual claims and on extra-contractual claims, respectively[27]. These rules apply in the absence of choice of Court agreements (express or tacit) and, alternatively, with the forum based on the defendant's domicile (art. 4).

Secondly, for the traveller/consumer, the fact that there are no other instruments regarding jurisdiction for the specific matter of travel packages, forces the application of the Brussels Ia Regulation where possible and, in the absence of this, the respective national PIL system of the member States shall apply.

4. International jurisdiction in travel packages contracts and passenger transport contracts: scope and limitation

The PIL system of each EU Member State contains provisions on jurisdiction which have international, EU and national origins, depending on the nature of the claim. In this vein, the Brussels Ia Regulation provides for the international heads of jurisdiction in every EU Member State. This instrument co-exists with the Hague Convention on Choice of Court agreements from which consumer and labour contracts, as well as the carriage of passengers and goods are excluded[28]. The latter are not, however, excluded from the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, made in Lugano on 30 October of 2007[29], which applies to members of the European Free Trade Association (EFTA). In the absence of EU or international law, domestic law could be applied[30].

In practice, identifying whether the dispute concerns transport of passengers or travel packages is paramount, as the rules on jurisdiction differ. The latter alone qualify as consumer contracts with the relevant ap-

[27] Regarding the possibilities of applying art. 7.5 of Brussels Ia in this regard, see CARBONE S.M., TUO C., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 149; DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale*, cit., p. 406.

[28] Art. 2(1) and (2)(f) of the 2005 Hague Convention.

[29] OJ L 339, 21.12.2007.

[30] BELINTXON MARTÍN U., FORNER I DELAYGUA J., *La nueva Ley 14/2014 de navegación marítima desde la óptica del Derecho Internacional Privado*, in *Revista Española de Derecho Internacional*, 2015, pp. 340-344; ESPINOSA CALABUIG R., *Brussels Ia regulation and maritime transport*, in CARBONE S.M. (ed), *Brussels Ia and Conventions in particular matters*, cit., pp. 107-141.

plicable limitations. The traveller/consumer who contracts a package travel is considered as a weak party, and therefore, needs rules that are more favorable to his/her interests. However, the traveller/passenger who contracts a form of transport is also considered to be in a weak position in relation to the carrier. Therefore, both parties require a fair level of protection although the rules set out under the Brussels Ia Regulation differ on litigation opportunities granted to both parties.

4.1. Jurisdiction rules in travel package contracts

Considering travel packages as consumer contracts supposes the application of the jurisdiction rules established under in artt. 18 and 19 of the Brussels Ia Regulation.

Firstly, not individually negotiated forum selection clauses included in consumer contracts may be held null and void. Art. 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts lays down that: " *1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair*".

In accordance with letter (q) of the aforementioned Annex, a term may be regarded as unfair when it "*exclude*[es] *or hinder*[s] *the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to*

him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract".

Secondly, a further layer of consumer protection is established under Section 4, Chapter II, of the Brussels Ia Regulation. A forum selection clause may be held existent and valid according to the aforementioned provisions, but still not be effective if it is included in a consumer contract as per art. 17 of the Brussels Ia Regulation[31]. However, art. 17(3) of the Brussels Ia Regulation excludes transport contracts, save the case of travel packages, from Section 4, Chapter II, as already mentioned. The latter are included in this section when the package encompassing travel and accommodation for an inclusive price "*has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities*"[32].

For the sake of consumer protection, art. 19 establishes that choice-of-court agreement will be possible with limitations. In particular, it is admitted only a clause:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Such forum selection clauses shall otherwise be deemed ineffective.

A forum selection clause may hinder the consumer's right to take legal action for which reason it could be held null and void as it was ruled out in the *Costa Crociere* case. The sinking of the *Costa Concordia* cruise

[31] FELIU ÁLVAREZ DE SOTOMAYOR S., *Nulidad de las cláusulas de jurisdicción y ley aplicable a la luz de la ley 3/2014 por la que se modifica el texto refundido de la ley general para la defensa de consumidores y usuarios*, in *Revista electrónica de estudios internacionales (REEI)*, 2015, n. 29, p. 5-36. See also, FELIU ÁLVAREZ DE SOTOMAYOR S., *Art. 23. Imperative nature of the Directive*, in TORRES C., MELGOSA ARCOS J., JÉGOUZO L., FRANCESCHELLI V., MORANDI F., TORCHIA F. (eds) *Collective Commentary about the new Package Travel Directive*, Estoril, 2020, pp.477-490; PALAO MORENO G., *Acceso de los Consumidores a la Justicia en la Unión Europea y Mercado Globalizado*, in *Rev. Fac. Dir. Uberlândia, MG*, 2019, pp. 59-89.

[32] Art. 17(1)(c) of Brussels Ia.

ship in front of the Italian coast on 13 January 2012 triggered a string of litigation[33].

One aspect of the litigation focused on the claim for damages, including material and non-material loss. Regulation (EC) No 392/2009 applied claim leading to higher compensation being established compared to the Sea Diamond case[34]. The Spanish Supreme Court, in judgment 232/2016 of 8 April 2016, concluded, on the one hand, that passengers had to be compensated for any damage, either material or non-material; while on the other, the amount of compensation could be determined taking into account the scale of compensation legally laid down for liability arising out of road accidents[35].

The other aspect of the litigation in the *Costa Concordia* case depended on the characterisation of passengers as consumers. In particular, we must mention the case decided by the Court of Appeals of Madrid, Section 28, judgment 165/2015 on 8 June of 2015. The case involved an injunction action for the protection of consumers' interests brought by a consumer association before the Spanish courts against the Italian company *Costa Crociere SpA*. According to the plaintiff, *Costa Crociere SpA* was including unfair terms in consumer contracts, including electronically-concluded contracts. Choice-of-forum and choice-of-law clauses were listed among terms considered null and void (by Spanish law) meaning

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[33] See DICKERSON T.A., *The cruise passenger's rights and remedies 2014: the Costa Concordia disaster: one year later, many more incidents both on board mega-ships and during shore excursions*, in *Tulane Maritime Law Review*, 2014, pp. 515-581.

[34] Judgment *Audiencia Provincial de Madrid*, Sec. 20, of 21 June 2012, nº 355/2012, rec 549/2011 *(Cruise Sea Diamond)*. After the sinking of the *Sea Diamond* cruise ship in front of the Greek coast, passengers with their residence in Spain claimed for damages before the Spanish courts. The Court of Appeals, Section 20, in Madrid awarded them damages for material and non-material losses in a judgment of 21 June 2012. Noteworthy is that the Spanish courts apply the Supreme Court doctrine on non-material damage, i.e. in accordance with judgment 906/2011 of 20 November 2011, the Spanish Supreme Court understands that damages for non-material loss are included in compensation as legally granted by law. This judgement refers to road accidents whose compensation package is determined by a legal scale. The Madrid Court of Appeals understands in the *Sea Diamond* case that the same case-law is applicable to liability for the carriage of passengers by sea. In other words, this legal scale of compensation has been used by analogy in order to establish due damages to each passenger. See ESPINOSA CALABUIG R., CARBALLO PIÑEIRO L., PÉREZ SALOM R., *Spanish Report on Cruises*, in FRESNEDO C. (ed), *Legal aspects of Cruises*, Springer, 2020 (*forthcoming*).

[35] See Judgment *Audiencia Provincial de Madrid*, sec. 14ª, of 29 April 2014, nº 147/2014, rec. 725/2013 (*Costa Concordia*); Judgment *Audiencia Provincial de Madrid*, sec. 28ª, of 8 June 2015, nº 165/2015, rec. 359/2013 (*Costa Crociere*) and Judgment *Tribunal Supremo*, Sala Primera, of 8 April 2016, nº 232/2016, rec. 1741/2014 (*Costa Concordia*).

that any contractual matters fell under Italian jurisdiction and legislation[36].

It is also important to note that this injunction action was not brought by passengers, but by a consumer association, and did not involve the questioning of travel packages or contracts for the carriage of passengers already concluded; the injunction sought to prevent *Costa Crociere SpA* from using unfair terms in its trade in Spain. Accordingly, the case was not about declaring terms already included in existing contracts as unfair, but about ensuring that such terms be disallowed by the Spanish legal system as a whole. In general, the point is significant because it excludes this type of injunction action from a contractual characterisation and requires that it be characterised as a non-contractual matter[37].

In the absence of a choice of court under above mentioned art. 19, the rules of art. 18 shall apply.

On the one hand, there are two possible hypotheses to establish jurisdiction in cases of litigation derived from package travel contract infringements, depending on whether the traveller/consumer is the plaintiff or the defendant. In the first case, the traveller may bring proceedings against the other party to a contract *either in the courts of the Member State in which that party is domiciled* or, regardless of the domicile of the other party, *in the courts for the place where the consumer is domiciled* (art. 18, paragraph 1). However, when the traveller/consumer is the defendant, proceedings may be brought against him *only in the courts of the Member State in which the consumer is domiciled* (art. 18, paragraph 2).

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[36] ESPINOSA CALABUIG R., CARBALLO PIÑEIRO L., PÉREZ SALOM R., *Spanish Report on Cruises*, in FRESNEDO C. (ed), *Legal aspects of Cruises*, Springer, 2020 (*forthcoming*).

[37] Against this backdrop and although the Spanish courts dealing with the *Costa Crociere SpA* case did not address this issue, their international jurisdiction was to be asserted on the grounds of paragraph 2 of art. 7 of Brussels Ia Regulation on jurisdiction in non-contractual matters This provision covers injunction actions for the protection of consumers' interests that are characterized as a non-contractual matter, thereby they can be brought before the courts of the place where the harmful event may occur. Where that place might be, has been interpreted by the Court of Justice in its judgment of 1 October 2002, *Verein für Konsumenteninformation v Karl Heinz Henkel*, Case C-167/00. As to the applicable law and according to the above mentioned characterization, art. 6(1) of the Rome II Regulation regarding non-contractual obligations indicates that "the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected". Accordingly, and applying to the *Costa Crociere* case both provisions, Spanish jurisdiction and legislation were applicable as a matter of fact. See broadly CARBALLO PIÑEIRO L., *La construcción del mercado interior y el recurso colectivo de consumidores*, in ESTEBAN DE LA ROSA F. (ed), *La protección del consumidor en dos espacios de integración: Europa y América. Una perspectiva de Derecho internacional, europeo y comparado*, Valencia, 2015, pp. 1055-1088.

It is important to remember that the traveller/consumer cannot be protected by the forum in the case of collective actions. The consumer may only bring proceedings individually independently of whether same is the plaintiff or the defendant[38].

Another relevant aspect is the fact that many forms of e-commerce (online) now involve contracts outside of the consumer's domicile, because the e-commerce or Smartphone/Tablet generation promote commerce through mobile devices wherever the consumer is located[39]. This causes further difficulties when determining the place where the domicile of the parties (plaintiff or defendant) is located.

On the other hand, different situations should be taken into consideration in relation to the professional who has entered into a contract with the traveller/consumer, using traditional or modern means of advertising or sales promotion. Travel package professionals sometimes still use traditional means to offer or advertise services (TV, radio, cinema, newspapers, etc.), which are mainly directed towards the State of the traveller/consumer's domicile. On other occasions, said services have been offered to the traveller, considered as an individual, by an agent or seller[40]. With traditional advertising, a seller tends to carry out bigger investments in order to be better known in other States, thereby clearly displaying the "*will of directing* [its] *activity*" to such States[41].

Hence the importance of defining the concept of "*directing the activity to the Member State of the consumer's domicile within the meaning of Article 17.1.c*" of the Brussels Ia Regulation as being crucial to internet-based commerce[42]. As concerns travel packages contracted over the in-

[38] Court of Justice 19.1.1993, case 88/91, *Hutton c. TVB*.

[39] FELIU ÁLVAREZ DE SOTOMAYOR S., *El tratamiento legal del contrato de viaje combinado en el derecho internacional privado*, in *Cuadernos de Derecho Transnacional*, 2012, p. 132; ESPINOSA CALABUIG R., *La publicidad transfronteriza*, Valencia, 1997, p. 150; LUTZI T., *Internet cases in EU Private international Law. Developing a coherent approach*, in *International and comparative Law Quarterly*, 2017, p. 687.

[40] Judgment of the Court of Justice 11.7.2002, Case C-96/00 *Gabriel*. See FELIU ÁLVAREZ DE SOTOMAYOR S., *El tratamiento legal del contrato de viaje combinado en el derecho internacional privado*, cit., p. 132.

[41] Case C-585/08 *Pammer/Hotel alpenhof*, ap. 67.

[42] According to art. 17.1 of Brussels Ia: "*In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if: ... (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, di-*

ternet, the contract is usually concluded with a professional "who pursues commercial or professional activities in the Member State of the consumer's domicile" (i.e. the traveller under Directive (EU) 2015/2302) or "*by any means, directs such activities to that Member State or to several States including that Member State,* [so that] *the contract falls within the scope of such activities*" (art. 17.1, *in fine*). This provision extends the range of possible activities covered by the reference "by any means".

In this sense, Directive (EU) 2015/2302 and as the Brussels Ia Regulation have extended the subjective field of application, as both refer to the active and passive consumer. After the case of *Pammer v. Hotel Alpenhof*, the concept of "directing activities" has been clarified with examples as: the express declaration to attract customers from a particular Member State; the expenses made for directions to web pages on the internet made by an enterprise that uses a search engine to facilitate consumers' access to the website of the seller (consumers located in different Member States); the international character of the activity; the mention of an international prefix, or the use of a neutral domain name (.com), etc.

In the context of travel packages offered over the internet, it is not easy to determine the will of the professional in directing his activities, although the payment of a price for any services that comprise the combined travel do help to determine the will of the organiser or seller of directing his product to a specific Member State. Changes in advertising brought about by technology (such as e.g. new online advertising methods by search engines, social networks, blogs, etc.[43]) should be taken into account when determining the concept of "directing activities".

4.2. Jurisdiction rules in passengers' contracts for air carriage

The Warsaw Convention of 12 October 1929, later modified by the abovementioned Montreal Convention of 28 May 1999 is the applicable instrument in relation to passengers' contracts of air carriage that are a standard component of travel packages. From an EU perspective, Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air car-

rects such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".

[43] FELIU ÁLVAREZ DE SOTOMAYOR S., *El tratamiento legal del contrato de viaje combinado en el derecho internacional privado*, cit., p. 135.

rier liability in the event of accidents[44] and Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91[45] apply.

Over the years, national and EU legislation in PIL has developed principles and rules in an attempt to establish a fair balance between different interests, mainly the protection of weak parties, as is the case with consumers, and also principle of party autonomy in this context. With a focus on air transport of passengers, Regulation (EC) 261/2004 on air passenger rights contains no rule on jurisdiction, meaning that other claims might be presented before the competent national authorities of the State of the airport (origin or destination), and judicial actions to obtain compensation may be presented before the courts competent under the rules of the Brussels Ia Regulation. In order to promote effective and prompt payments of compensation to the traveller/passenger, guidelines might be drafted to evaluate the opportunity of ensuring that national authorities competent under EU Law decide on such claims and be in the position to make investigations on issue sanctions, being also competent for private law actions for payment.

In this context, forum selection clauses included in the general conditions of carriage of passengers are dealt with by art. 25 of the Brussels Ia Regulation. This provision regulates the choice of courts agreements regardless of the country in which both parties to the agreement are domiciled, providing the claim is lodged in the jurisdiction of an EU Member State such as Spain. In principle, choice of court must be made in writing, albeit by electronic means, unless pre-existing party practices and usages apply in the relevant area of international trade or commerce. As to its substantive validity, the applicable law is that of the chosen jurisdiction, including its conflict rules[46]. The status and legal capacity of the parties

[44] OJ L 140, 30.5.2002.

[45] OJ L46, 17.2.2004. See GUERRERO LEBRÓN M.J., *El contrato de transporte aéreo de pasajeros*, in MENÉNDEZ MENÉNDEZ A. (dir), FANEGO OTERO J.D. (coord), *La regulación de la industria aeronáutica*, Navarra, 2016, pp. 303-354; ESPINOSA CALABUIG R., *El contrato internacional de transporte aéreo, terrestre y multimodal*, en ESPLUGUES MOTA C., PALAO MORENO G., ESPINOSA CALABUIG R., *Derecho del comercio internacional*, Valencia, 2020, p. 350; GUERRERO LEBRÓN M.J., *La responsabilidad del transportista aéreo y la protección de los pasajeros*, Madrid, 2016, pp. 255-298.

[46] Recital 20 of Brussels Ia.

to the agreement are not covered by the Brussels Ia Regulation, so that such shall be dealt with under internal law.

If the choice-of-court agreement submits the carriage of passengers to a third country, i.e. not an EU Member State, art. 25 of Brussels Ia Regulation is no longer applicable, as it only refers to the jurisdiction of a Member State. . In view of this gap, and for the sake of the party autonomy principle, the most plausible interpretation is that this case is not addressed by the uniform rules on international jurisdiction under Brussels Ia Regulation, Chapter II, but rather by the relevant domestic rules of each Member State[47].

The gap in art. 25 of Brussels Ia Regulation could, however, be filled in accordance with other interpretations. One holds that art. 25 may be applied by analogy and by taking into account the party autonomy principle. Nevertheless, the fact that the EU was aware of the gap upon reviewing earlier Brussels I Regulation, is a powerful argument against this interpretation. Another interpretation relies on the normal operation of the Brussels Ia Regulation, meaning that if art. 25 is not applicable because the agreement points to a Non-Member State jurisdiction, then other heads of jurisdiction under Chapter II of the Brussels Ia Regulation may apply, such as, for instance, the defendant's domicile. In other words, should Chapter II be non-applicable based on the defendant's domicile being in a Non-Member State, then national heads of jurisdiction are applicable under art. 6 of the Brussels Ia Regulation. Clearly, the weakness in the above interpretation lies in the disregarding of the party autonomy principle - a well-established principle in the EU international jurisdictional framework. Accordingly, the aforementioned interpretation whereby the existence, validity and effects of third country forum selection clauses are submitted to domestic legislation is the most adequate in view of the underlying conflicts of interests[48].

Briefly, should one choose the jurisdiction of a Member State, then art. 25 of the Brussels Ia Regulation establishes the existence, validity and effects of the agreement; alternatively, domestic rules ultimately apply as regards the selection jurisdiction of a Non-Member State.

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[47] Recital 20 of Brussels Ia. See ESPINOSA CALABUIG R., *Brussels Ia regulation and maritime transport*, cit., pp. 107-141.

[48] ESPINOSA CALABUIG R., CARBALLO PIÑEIRO L., PÉREZ SALOM R., *Spanish Report on Cruises*, in FRESNEDO C. (ed), *Legal aspects of Cruises*, Springer, 2020 (*forthcoming*).

When the transport contract, that is not a travel package, does not contain any forum selection clause, or alternatively, when same must be considered null and void due to its abusive nature, the passenger can choose between the general forum of the defendant's domicile[49] and the special forum of the place where the services were, or should have been, provided[50], as access to the protective heads of jurisdiction under art. 17 of the Brussels Ia Regulation is ruled out[51].

The domicile of the carrier as defendant may raise problems of interpretation in practice, in particular as concerns the exact place in which actual and main activities are performed. On the one hand, the country where company management resides is usually deemed the place where the main activities are performed and major decisions are taken[52]. Practice leads , on the other hand, to the distinction between contractual and actual carrier, after a distinction first introduced by the 1961 Guadalajara Convention on air transport, and later taken up, among others, by the 1974 Athens Convention as regards the carriage of passengers and their luggage by sea and the 1978 Hamburg Rules on carriage of goods by sea (besides the yet-to-be-enforced Rotterdam Convention)[53]. Said distinction may also lead to issues in determining the location of the real domicile of the carrier.

Together with the forum based on the domicile of the defendant, art. 7 of Brussels Ia Regulation establishes the place of performance of the obligation in question. If the defendant shipping company is domiciled in an EU Member State and unless otherwise agreed, "*the place* [would be] *in a Member State where, under the contract, the services were provided or*

[49] Art. 4(1) of Brussels Ia.

[50] Art. 7(1)(b) of Brussels Ia.

[51] Art. 17(3) of Brussels Ia.

[52] That means in fact the place where the "characteristic performance" is carried out in the terms used by the original 1980 Rome Convention for transport contracts. See SCHULTSZ, J.C. *The Concept of Characteristic Performance and the effect of the EEC Convention on carriage of goods in contract conflicts*, in NORTH P.M. (ed), *Contract Conflicts - The E.E.C. convention on the law applicable to contractual obligations: a comparative study*, Amsterdam 1982, p. 185, at p. 196; LIPSTEIN K., *Characteristic Performance -- A New Concept in the Conflict of Laws in Matters of Contract for the EEC*, in *Northwestern Journal of International Law & Business*, 1981, p. 402; ESPINOSA CALABUIG R., *El contrato internacional de transporte marírtimo de mercancías. Cuestiones de ley applicable*, 1999, Granada, pp. 230-237.

[53] Regarding this distinction see CARBONE S.M., *Le Regole di Responsabilità del vettore marittimo. Dall'Aja ad Amburgo attraverso la giurisprudenza italiana,* Milano, 1984, pp. 40-42; ESPINOSA CALABUIG R., *El contrato internacional de transporte marítimo*, cit., p. 270; MANKABADY S., *The Hamburg Rules on the Carriage of Goods by Sea*, Leiden, 1978, pp. 35-37.

should have been provided". If the defendant's domicile is located outside the EU, remaining jurisdiction rules of the domestic PIL system apply.

In practice, the place of performance of a passenger transport contract can be located in the country of origin or destination of the transport. Under terms agreed between the parties, the only places of performance of the contract which have a direct link with the services of the air transport are that of departure and arrival of the plane. When lodging a claim against an air company[54], the claimant can choose between the two places.

In case of collective actions, the competent court should be determined according to art. 7.2. of the Brussels Ia Regulation relating to non-contractual obligations[55]. The claimant might therefore lodge a claim against an air company domiciled in a Member State before the courts of the place where the harmful event occurred or may occur[56].

Should the travel have several stages, including the EU, but with a final destination in a third State, then passengers retain the right to compensation against the European carrier if the flight is delayed in European space[57]. Although this would lead to the contractual forum being outside of the EU according to criteria under the Brussels Ia Regulation, it would

[54] According to the Judgments of the ECJ of 9.07.2009, C-204/08, Peter Rehder c. Air Baltic Corporation (p. 40), and that of 7.03.2018, *Flightright GmbH et al. C. Air Nostrum, Líneas aéreas del mediterráneo SA, Roland Becker c. Hainan Airlines Co.Ltd and Mohamed Barkan et al c. Air Nostrum, Líneas aéreas del mediterráneo SA.* Cases C-274/16, C-447/16 and C-448/16 (p. 68 et..). See LOPEZ DE GONZALO M., *Qualli (e quanti) fori per le controversia in materia di trasporto?*" in *Diritto del commercio internazionale*, 2018, p. 161; DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale*, cit., p. 406; HARTLEY T., *Civil Jurisdiction*, cit., p. 120.

[55] See CARBALLO PIÑEIRO L., *La construcción del mercado interior y el recurso colectivo de consumidores*, in ESTEBAN DE LA ROSA F. (ed), *La protección del consumidor en dos espacios de integración: Europa y América. Una perspectiva de derecho internacional, europeo y comparado*, Valencia, 2015, pp. 1055-1094; JIMÉNEZ BLANCO P., *Acciones de cesación de actividades ilícitas transfronterizas*, in *Anuario Español de Derecho Internacional Privado*, 2011, vol. XI, p. 120.

[56] Regarding the meaning of place of the harmful event see the Judgment of the ECJ of 1.10.2002, C-167/00 (*Verein für Konsumenteninformation*). See PUETZ A., *Problemas de ley aplicable y tribunal competente en relación con compañías de bajo coste extranjeras*", in DEIANA M. (ed), *Profili giuridici del trasporto aereo low cost*, Cagliari, 2013, pp. 433-472.

[57] Judgment of the ECJ of 7.3.2018, *Flightright GmbH et al. C. Air Nostrum, Líneas aéreas del mediterráneo SA, Roland Becker c. Hainan Airlines Co.Ltd and Mohamed Barkan et al c. Air Nostrum, Líneas aéreas del mediterráneo SA.* Cases C-274/16, C-447/16 and C-448/16.

also suppose the absence of a direct contractual relation between the passenger and the European carrier[58].

[58] Judgment of the ECJ of 11.07.2019, CS et al. c. Ceské aerolinie a.s., Case C-502/18. See DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale*, cit., p. 399; PERONI G., *In caso di cancellazione di un volo 'privato', spetta al passeggero aereo la compensazione pecuniaria*, in *Il Diritto marittimo*, 2017, p. 1099.

Diverse Unities of Law: Coordination, Application of Heads of Jurisdiction, and Enforcement of Policies for the Protection of Weaker Parties*

Stefano Dominelli

CONTENTS: 1. Fragmentation of approaches and rules in the Brussels I bis Regulation: framing the issue of the enforcement of the instrument in light of diverse rules, and of autonomous EU substantive law. – 2. Material and private international law: "dependency", "autonomy" and "indirect effect". – 2.1. Disconnecting material law from private international law. – 2.2. Material law shaping relevant private international law conducts: effects and consequences of a "reversed disconnection clause". – 3. Fragmentations within EU private international law, and the application and enforcement of the Brussels I bis Regulation. – 4. Gaps in protection: disconnections between principles and rules in the Brussels I bis Regulation. – 5. Ensuring protection of weaker parties in the application and enforcement of the Brussels I bis Regulation: remarks and suggestions.

1. Fragmentation of approaches and rules in the Brussels I bis Regulation: framing the issue of the enforcement of the instrument in light of diverse rules, and of autonomous EU substantive law

Over the last years, the European Union intervention in private law for the protection of disadvantaged parties has significantly grown[1], while still creating diverse unities of law. There is a number of substantive law provisions, regulations on international and local jurisdiction, and choice of law rules. There is no surprise in saying that at the EU level, there is

* The present work builds upon and rationalises different previous reseach published in RUPP C. (Hrs), *in Gemeinschaft mit* ANTOMO J., DUDEN K., KRAMME M., LUTZI T., MELCHER M., PFÖRTNER F., SEGGER-PIENING S., WALTER S., *IPR zwischen Tradition und Innovation*, Mohr Siebeck, 2019, pp. 49-65, and in *"Geolocalizzazione" e tutela dei "consumatori di servizi online": prime riflessioni di diritto internazionale privato e processuale uniforme*, in DOMINELLI S., GRECO G.L.(eds), *I mercati dei servizi fra regolazione e governance*, Torino, 2019, pp. 191-214.

[1] Cf HONDIUS E., *The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis*, in *Journal of Consumer Policy*, 2004, p. 245 ff; LAZIC V., *Procedural Justice for Weaker Parties in Cross-Border Litigation under the EU Regulatory Scheme*, in *Utrecht Law Review*, 2014, p. 100 ff; POCAR F., *Protection of Weaker Parties in the Rome Convention and the Rome I Proposal*, in BASEDOW J., BAUM H., NISHITANI Y. (eds), *Japanese and European Private International Law in Comparative Perspective*, Tübingen, 2008, p. 127.

no experience of a "code"[2] in its "continental" sense[3], in that provisions are not collected into one single act. This holds true for both EU substantive private law, and EU conflict of laws and international civil procedure[4]. Yet, the proliferation and fragmentation of laws can come at the expense of methodological consistency, as practitioners and private actors are obliged the take on the task of bringing such diverse elements into a unitary, coherent system.

From a practical perspective, fragmentation of substantive and private international law in the absence of a clear, common methodological approach poses complexities in the application of the relevant rules scattered across different acts, with the consequence that the coordination of principles and rules, as well as the enforcement of the policies they incorporate, can become less effective to the detriment of the weaker parties as one is disconnected from the other.

With regard to the complex of rules adopted by what is now the European Union, it could be advocated for the non-neutrality of heads of jurisdiction and connecting factors: these are functional to the realisation of the internal market and, as such, seek to "externalise" European policies[5]

[2] «*Codification makes all* […] *rules readily accessible … increases legal certainty*» (KADNER GRAZIANO T., *Codifying European Union Private International Law: The Swiss Private International Law Act – A Model for a Comprehensive EU Private International Law Regulation?*, in *Journal of Private International Law*, 2015, p. 587).

[3] On the decline on the civil code due to the emergence of "*Nebengesetze*", see ROPPO V., *Istituzioni di diritto privato*, Torino, 2008, p. 22.

[4] On which see LEIBLE S., UNBERATH H. (eds), *Brauchen wir eine Rom 0-Verordnung?*, Sipplingen, 2013; LEIBLE S., MÜLLER M., *The Idea of a "Rome O Regulation"*, in *Yearbook of Private International Law*, Volume XIV 2012/2013, p. 137; BIAGIONI G., DI NAPOLI E., *Verso una codificazione europea del diritto internazionale privato? Una breve premessa*, in *Quaderni di SIDIBlog*, 2014, p. 125; SALERNO F., *Possibili e opportune regole generali uniformi dell'UE in tema di legge applicabile*, in *Quaderni di SIDIBlog*, 2014, p. 129; ESPINELLA A., *Some Thoughts on a EU Code of Private International Law*, in *Quaderni di SIDIBlog*, 2014, p. 135; CRESPI REGHIZZI Z., *Quale disciplina per le norme di applicazione necessaria nell'ambito di un codice europeo di diritto internazionale privato?*, in *Quaderni di SIDIBlog*, 2014, p. 143; FULLI-LEMAIRE S., *Il futuro regolamento «Roma 0» e la qualificazione*, in *Quaderni di SIDIBlog*, 2014, p. 150, and KRAMER X., *European Private International Law: The Way Forward (in-depth analysis European Parliament, JURI Committee)*, Brussels, 2014.

[5] It is generally the case that private international law reflects "on the outside" internal policies, in the sense that there should be consistency with substantive law – which thus turns out as a collector of principles for the initial development of domestic private international law (cf KROPHOLLER J., *Internationales Privatrecht*, Tübingen, 1990, p. 30 ff; CARBONE S.M., *Autonomia privata e commercio internazionale: principi e casi*, Milano, 2014, p. 13 ff; MUNARI F.M., *La ricostruzione dei principi internazionalprivatistici impliciti nel sistema comunitario*, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 913 ff; DAVÌ A., *The Role of General Principles in EU Private International Law and the Perspectives of a Codification in the Field*, in *Federalismi.it*, n. 17,

of the founding treaties and of substantive law. Yet, in a historical perspective, the construction of the 'system'[6] has not taken advantage of a holistic approach or of a highly developed substantive regime[7]. In the first place, to the detriment of an overreaching regulation, uniform solutions were initially adopted in defined civil and commercial matters, only as regards two of the private international law issues, i.e. allocation of jurisdiction and recognition of decisions with the so-called 1968 Brussels Convention[8]. In the second place, "European substantive law" was not necessarily sufficiently developed back in the days to be transposed on the private international law plane. At the beginning, relevant notions of private international law were reconstructed, rather than with regard to substantive EU law, in light of the general approach of the Member States, and – in time – of the emerging substantive rules adopted by the Communities. As a mere example, the disconnection between private international law and substantive classifications could have been identified in the qualification of "social security matters", excluded from the scope of application of the 1968 Brussels Convention. Such exception was not

2018, p. 1, at p. 4 f, and DÜSTERHAUS D., *Does the European Court of Justice Constitutionalise EU Private International Law?*, in *Cambridge International Law Journal*, 2017, p. 159 ff).

[6] On whether EU rules on judicial cooperation in civil matters can be reconstructed as being part of a 'system', see LUZZATTO R., *Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato*, in VENTURINI G., BARIATTI S. (a cura di), *Nuovi strumenti del diritto internazionale privato, Liber Fausto Pocar*, Milano, 2009, p. 613 ff.

[7] When it comes to infer the *trait d'union* in international civil procedure and conflict of laws, the task might be simplified at the domestic level. Legislators *can* i) develop a "PIL holistic policy", whilst ii) being assisted in their efforts by substantive law (cf for the Principality of Monaco, LAGARDE P., *La codification du droit international privé monégasque (Loi no 1.448 du 28 juin 2017)*, in *Revue critique de droit international privé*, 2018, p. 753). However, some States, such as France, only recently have adopted conflict of laws rules in sectorial areas, following substantive laws reforms, whilst doing little on the procedural side other than what was necessary for implementing (current) EU law (CUNIBERTI G., *France*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, Vol. III, p. 2079 ff). Some States, such as Sweden and Spain, have rules on international civil procedure and on connecting factors divided across a number of domestic laws, being the interests of unity of the subject matter overwhelmed by other elements (see respectively DE MIGUEL ASENSIO P., *Spain*, in *idem*, p. 2523 ff, and HELLNER M., *Sweden*, in *idem*, p. 2535 ff). Others, such as Germany and Austria, provided for a comprehensive codification on conflict of laws rules, treating aside the matter of jurisdiction and recognition of foreign decisions (see VON HEIN J., *Germany*, in *idem*, p. 2101 ff, and HEISS H., *Austria*, in *idem*, p. 1886 ff), whereas some – such as Italy and Switzerland – have followed the path of codification of all PIL aspects within their legislations, preferably in one single act, or "code" (see BONOMI A., BALLARINO T., *Italy*, in *idem*, p. 2207 ff, and KLEINER C., *Switzerland*, in *idem*, p. 2548 ff).

[8] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in OJ L 299, 31.12.1972, p. 32.

defined by the convention, and the scope of the definition was tentatively described by way of a comparative research into domestic and international legislations[9]. Similarly, the 1968 Brussels Convention enshrined rules on jurisdiction in insurance matters, without defining the concepts of either "insurance contract" or "insurance matters"[10]. The "original" lack of substantive law upon which rules of private international law could have been developed, affects the 1968 Brussels Convention, when it comes to the *rationale* behind the rules. The normative text of the Convention lacks introductory recitals offering any justification or explanation of the principle. The Report to the convention (hereinafter, Jenard Report) quotes a number of domestic mandatory rules on jurisdiction in insurance matters for the purposes of protecting the weaker party, but offers no further justification[11] (a "gap" that has, over the years, been filled by the case law of the Court of Justice of the European Union[12]). The situation has not significantly changed if one looks at the currently applicable statutory law, as the Brussels I bis Regulation appears to be satisfied[13] with "*blanket references positing that certain persons are particularly vulnerable such that resort to specific protective measures is required*"[14].

[9] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in OJ C 59, 5.3.1979, p. 1, at p. 12.

[10] On the interpretation of "insurance matters", see Judgment of the Court (Sixth Chamber) of 13 July 2000, Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC), Case C-412/98, para 64 ff; Mapfre Mutualidad Compania De Seguros Y Reaseguros SA & Anorv Keefe [2015] EWCA Civ 598 (17 June 2015), para 34 ff, and BGH, Urteil vom 15. 2. 2012 – IV ZR 194/09, para 28. In the scholarship, see for all HEISS H., *Article 10*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law – Volume I: Brussels Ibis Regulation*, Köln, 2016, p. 410, at p. 411 f.

[11] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, cit., p. 28 ff.

[12] See already Judgment of the Court (Sixth Chamber) of 13 July 2000, Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC), Case C-412/98, and Judgment of the Court (First Chamber) of 26 May 2005, Groupement d'intérêt économique (GIE) Réunion européenne and Others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans), Case C-77/04, para 17 ff.

[13] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1, recital 18. Cf also 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), in OJ L 177, 4.7.2008, p. 6, recital 23, and 32.

[14] In these terms, RÜHL G., *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, in *Journal of Private International Law*, 2014, p. 335, at p. 343.

Following the above, one could preliminarily argue that the European 'system' sometimes appears to be rather vague as to the principles for protection of contractually weaker parties; however, rules are now numerous, contained in different acts, influenced by substantive law, and prejudiced – as it will be shown – by the lack a methodological consistency, to the detriment of the application of the rules themselves. This raises two questions.

The first one relates to the applicability and enforcement of the Brussels I bis Regulation in light of "*other relevant provisions of EU law*". EU substantive law has now grown and does not usually contain express heads of jurisdiction or rules concerning recognition and enforcement of judgments. This means that the "EU disconnection clause" under art. 67 of the Brussels I bis Regulation is generally not triggered. According to the provision at hand, the rules of the Brussels I Regulation are *lex generalis*, and overlapping provisions contained in other EU instruments take precedence in light of the *lex specialis* principle[15]. With specific regard to contractually weaker parties, the most notable exception that does trigger art. 67 Brussels I bis, thus opening for the application to other for a than those provided for in the general instrument, is Directive 96/71/EC concerning the posting of workers in the framework of the provision of services[16]. Under such an instrument, where an undertaking established in a Member State posts a worker in another Member State in the framework of the transnational provision of services, "*judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*" (art. 6). The Posting of workers Directive clearly creates an additional head for jurisdiction, giving the parties the right to choose whether to ground their action on the general provision of the Brussels I

[15] On the provision, see MANKOWSKI P., *Art. 67 Brüssel Ia-VO*, in RAUSCHER T. (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Köln, 2016, p. 1215; ID, *Article 67*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 1020, and SCHLOSSER P., HESS B., *Eu-Zivilprozessrecht*, München, 2015, p. 279.

[16] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in OJ L 18, 21.1.1997, p. 1, as amended. For recourse to art. 6 of the Posting of workers Directive in concurrence with the general rules on international civil procedure, see in the case law ArbG Wiesbaden vom 15.04.1998 Aktenzeichen 3 Ca 1970/97, and Bundesarbeitsgericht Urteil vom 15.02.2012, 10 AZR 711/10.

bis Regulation, or on the special provision of the Directive, should this identify in practice any additional competent court[17].

Nonetheless, in spite of some clear rules on jurisdiction that are indeed able to trigger art. 67 Brussels I bis Regulation, EU substantive law developed for the protection of contractually weaker parties addressed in the Brussels I bis Regulation does not generally contain comparable rules.

Even more – on the contrary, such EU substantive acts claim they wish to "disconnect" from the Brussels I bis Regulation. Through some recitals and specific provisions, they clarify that they do not intend to impact on the regime of the rules on jurisdiction and free movement of decisions; yet, it is undeniable that this new *corpus* of EU substantive law "interferes" with the interpretation and application of the heads of jurisdiction contained in the regulation, thereby exerting a certain degree of influence which calls for proper contextualisation. In this sense, the proposed "disconnection" that should "savage" the general regime could be characterised, as shall be seen, as a "false" and "reversed" disconnection, in that it does not appear to be without consequences, so being "false", on the side of the "other" EU law act that wishes to preserve the general regime (in that sense, being "reversed").

A matter that has already called for some attention, and that has led the Court of Justice of the European Union to rule on the "dependency" and "autonomy" of concepts in private international and substantive laws – even though the first should as already mentioned, be, an external projection of material law.

The second general question relates to the adopted methodological approach, which treats protection-worthy categories differently thereby paving the way to "limping situations", i.e. cases where the same contract is "granted protection" only on one of the three sides of private international law.

The aim of the present work is to outline coordination issues that have emerged in the application and enforcement of the Brussels I bis Regulation, so as to possibly offer guidelines to practitioners in the application of the instruments. A secondary aim hereto is to highlight the opportunity for institutions to shed some light on the same matters.

[17] See Brussels I bis Regulation, art. 21.

2. Material and private international law: "dependency", "autonomy" and "indirect effect"

Provided that a unilateral coordination of the Brussels I bis Regulation with other instruments under art. 67 is only due where concurring instruments set mandatory[18] heads of jurisdiction or rules for the free movement of judgments in overlapping matters[19], and that such cases are not particularly high in numbers[20], material and private international law deploys specific terminology to set their respective scope of application.

Consumer legislation has shown the relevance of the coordination, or lack thereof, of the two areas of law in the application of the Brussels I bis Regulation. For the purposes of the latter, according to its art. 17, a consumer is a *natural* person that concludes a contract for a purpose re-

[18] Optional instruments, rather that facultative heads of jurisdiction, determine the non-applicability of art. 67 Brussels I bis Regulation. In this sense, instruments – even regulations – whose applicability is dependent upon the choice of a party of proceedings, are not able to fall within the scope of application of art. 67 Brussels I bis Regulation in strict terms (even should the first contain heads of jurisdiction).

[19] For the specialty clause of art. 67 Brussels I bis Regulation, it is necessary that the two relevant instruments both pretend to find application *ratione materiae*. In this sense, art. 67 must necessarily be read in conjunction with art. 1 of the regulation, that sets its material scope of application. The problem of the coordination of heads of jurisdiction in light of the material scope of application of the instrument was, at a certain point, evident under the Brussels I Regulation following the adoption of the Maintenance obligation Regulation (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, in OJ L 7, 10.1.2009, p. 1). Under the former Brussels I Regulation, maintenance obligation had their own special for a, and, following the adoption of the specific instrument, the disconnection of art. 67 Brussels I Regulation allowed for a swift and automatic coordination between the two instruments – up until the Recast where the material scope of application of the Brussels I bis Regulation was changed to exclude such matters, so as to make coordination (i.e., disconnection), no longer necessary.

[20] Cf, for example, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, cit., art. 6; Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, in OJ L 309, 29.11.1996, p. 1, and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, in OJ L 3, 5.1.2002, p. 1, artt. 79 ff for jurisdiction, and art. 30 on enforcement; Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in OJ L 227, 1.9.1994, p. 1, art. 24 on enforcement, and artt. 94 ff on jurisdiction; Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, in OJ L 154, 16.6.2017, p. 1, art. 30 ff, and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, in OJ L 119, 4.5.2016, p. 1, art. 79(2).

garded as being outside his trade or profession[21]. This provided that (a) it is a contract for the sale of goods on instalment credit terms; (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a professional who pursues his activities in the Member State of the consumer's domicile.

Amongst a number of diverse issues raised by the provision, two related to the coherent application and enforcement of the Brussels I bis

[21] For mixed contracts, it is generally argued that these might still be treated as "consumer contracts" where the trade component is so limited as not to be predominant in the overall context of the contract (in these terms, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in OJ L 304, 22.11.2011, p. 64, recital 17). Cf, on rules of jurisdiction, Judgment of the Court, 20 January 2005, Johann Gruber v Bay Wa AG, Case C-464/01, para. 42 (on which see MANKOWSKI P., *"Gemischte" Verträge und der persönliche Anwendungsbereich des Internationalen Verbraucherschutzrechts*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2005, p. 503, and CRESCIMANNO V., *I "contratti conclusi con i consumatori" nella Convenzione di Bruxelles: autonomia della categoria e scopo promiscuo*, in *Europa e diritto privato*, 2005, p. 1135). Nonetheless, the most recent case law of the Court of Justice has touched again on the matter, dealing with consumers of social media, arguing that the protection for consumer contracts in the Brussels I regime is granted "*only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety*" (Judgment of the Court, 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 32; on internet and private international law, see MUIR WATT H., *Facebook face au consommateur "professionnel"*, in *Revue critique de droit international privé*, 2018, p. 595; LUTZI T., *"What's a consumer?" (some) clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation*, in *Maastricht Journal of European and Comparative Law*, 2018, p. 374; ID, *Internet Cases in EU Private International Law – Developing a Coherent Approach*, in *International and Comparative Law Quarterly*, 2017, p. 687; MILLS A., *The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in 'Facebookistan'?*, in *Journal of Media Law*, 2015, p. 2; FRIGO M., *Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast of the Brussels I Regulation*, in POCAR F., VIARENGO I., VILLATA F.C., (eds), *Recasting Brussels I*, Milan, 2012, p. 341; BOGDAN M., *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case*, in *Yearbook of Private International Law*, vol. XIII, 2011, p. 483; CARREA S., *L'individuazione del forum commissi delicti in caso di illeciti cibernetici: alcune riflessioni a margine della sentenza Concurrence Sàrl*, in *Diritto del commercio internazionale*, 2017, p. 543; GARDELLA A., *Diffamazione a mezzo stampa e Convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1997, p. 657; GÖSSL S., *Internetspezifisches Kollisionsrecht? - Anwendbares Recht bei der Veräußerung virtueller Gegenstände*, Baden-Baden, 2014; STADLER A., *Die Crux mit der Mosaiktheorie*, in *Juristenzeitung*, 2018, p. 94; VAN HOEK A.A.H., *CJEU - Pammer and Alpenhof - Grand Chamber 7 December 2010, joined cases 585/08 and 144/09*, in *European Review of Contract Law*, 2012, p. 93; ZARRA G., *Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo Internet*, in *Rivista di diritto internazionale*, 2015, p. 1234).

Regulation with material law are noteworthy, and could pose challenges to practitioners.

2.1. Disconnecting material law from private international law

In the *Pillar Securitisation Sàrl*[22] judgment, the Court of Justice of the European Union has addressed a coordination matter between substantive law, and corresponding notions in the Brussels I bis Regulation. From the judgment, it becomes apparent how the terms of the relationship between the Brussels I bis Regulation and other instruments of EU law impact the application of the *acquis* on judicial cooperation in civil matters, and how this relationship is crucial to improving the current framework.

In the case at hand, a natural person took a loan of over 1.000.000,00 euro to buy shares of the company where she was employed. Consistently with a choice of court agreement contained in the contract, Pillar Securitisation started proceedings before courts in Luxembourg following default in repayment. Domestic courts argued that they lacked jurisdiction over the natural person, as actions against a consumer may only be started before the court of her domicile according to the Brussels rules[23], hence the Supreme Court referral.

Pillar Securitisation advocated that the notion of "consumer" in the Brussels regime (*rectius*, the Lugano Conventions), should refer to the same notion contained in Directive 2008/48 on credit agreements for consumers[24]. Such an instrument is applicable to credit agreements below 75.000,00 euro, unless the domestic law transposing the directive sets a

[22] Judgment of the Court, 2 May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17.

[23] Brussels I bis Regulation, art. 18(2) ("*Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled*"). By provision of law, art. 19, a choice of court agreement, also to the detriment of the consumer, is only valid if it is concluded by the parties once the dispute has arisen (being of course disputed what "*has arisen*" means for the purposes of similar provisions, on which may be allowed the *renvoi* to DOMINELLI S., *Party Autonomy and Insurance Contracts in Private International Law. A European Gordian Knot*, Rome, 2016, p. 322 ff); if concluded at any time when it is in favor of the weaker party only in that it extend the number of for a otherwise available; or when the agreement is concluded by the parties, both domiciled or habitually resident in the same Member State and the agreement has the effect of giving jurisdiction to the court of that Member State (provided that this is not contrary to the law of that Member State).

[24] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, in OJ L 133, 22.5.2008, p. 66, art. 2(2)(c).

higher threshold. As the applicable law did not foresee a higher level of protection, Pillar Securitisation argued that the specific contract was not a "consumer loan" under substantive law.

As a consequence, the contract should have been treated accordingly under private international law terms. Thus, the specific sections for the protection of weaker parties in the Brussels and Lugano rules should have not been applicable, thereby rendering EU substantive law consistent and coherent with EU international civil procedure.

In the Court's view, the relevant concept of consumer "*is defined in broadly identical terms in both instruments*". However, no limitation to the scope of application similar to the one provided for in the credit agreements directive is to be found in the rules on international jurisdiction. In this sense, the definition in the Brussels and the Lugano regime is autonomous from that of material law, even though some consistency and coordination between the branches of law must be assured[25]. As recently reaffirmed by the Court, "*Although the concepts used by Regulation No 44/2001, in particular those which appear in Article 15(1) of that regulation, must be interpreted independently, by reference principally to the general scheme and objectives of that regulation, in order to ensure that it is applied uniformly in all Member States (...), account must, in order to ensure compliance with the objectives pursued by the legislature of the European Union in the sphere of consumer contracts, and the consistency of EU law, also be taken of the definition of 'consumer' in other rules of EU law*"[26].

To distinguish between the two concepts, the Court has emphasised the different goals of the directive and of the Brussels and Lugano regime. As the directive seeks to ensure effective protection of consumers against the irresponsible granting of credit agreements that are beyond their financial capacities and that may bankrupt them, and considering that the rules on jurisdiction provide for protective fora without harmoni-

[25] Judgment of the Court (Ninth Chamber), 5 December 2013, Walter Vapenik v Josef Thurner, Case C‑508/12, para 23 ff. On the decision, see MANKOWSKI P., *Europäischer Vollstreckungstitel für unbestrittene Forderung aus Verbrauchervertrag („Vapenik")*, in *Entscheidungen zum Wirtschaftsrecht*, 2014, p. 371, and STADLER A., *Die Einheitlichkeit des Verbrauchervertragsbegriffs im Europäischen Zivil- und Zivilverfahrensrecht – Zu den Grenzen rechtsaktübergreifender Auslegung*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2015, p. 203.

[26] Judgment of the Court, 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para 28.

sation of substantive law[27], in the Court's view the scope of application of EU material law cannot contribute in determining the scope of application of rules on the allocation of jurisdiction.

This leads to the disconnection between material and private international law. Where a credit agreement is not a "consumer contract" under the directive, the same contract might still be treated as a contract concluded by a weaker party as per heads of jurisdiction, provided that the other requirements set forth in the Brussels I bis Regulation are fulfilled.

The same disconnection, with identical consequences in terms of relationships between concepts in material and private international law, has been the subject matter of other cases.

In *Nogueira et al*[28], the Court of Justice of the European Union was called to settle the relationship between heads of jurisdiction in the Brussels I bis Regulation and Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation[29], the latter providing in its consolidated version that air carrier operators "*shall nominate a home base for each crew member*"[30]. The cases concerned actions brought by aircraft personnel (crew members) against Irish companies. Employees were of different Member States, and had signed working contracts in their home countries. Contracts were written in English, con-

[27] Judgment of the Court, 2 May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17, para 37 ff.

[28] Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, on which see MANKOWSKI P., *Zur internationalen Zuständigkeit in Arbeitssachen bei fliegendem Personal ("Nogueira u.a.")*, in *Entscheidungen zum Wirtschaftsrecht*, 2017, p. 739; WINKLER M., *Internationale Zuständigkeit für arbeitsrechtliche Klagen von Flugpersonal - Gewöhnlicher Arbeitsort und Begriff der Heimatbasis*, in *Europäische Zeitschrift für Arbeitsrecht*, 2018, p. 236; JAULT-SESEKE F., *De la compétence du juge du lieu d'exécution habituel du travail pour le personnel navigant des compagnies aériennes*, in *Revue critique de droit international privé*, 2018, p.279, and TUO C.E., *La nozione di "luogo di abituale svolgimento dell'attività lavorativa" ancora al vaglio della Corte di giustizia UE: il caso degli assistenti di volo*, in *Il diritto marittimo*, 2018, p. 403.

[29] Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, in OJ L 373, 31.12.1991, p. 4, as amended.

[30] Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, in OJ L 377, 27.12.2006, p. 1, Annex III, Subpart Q, point 3.1.

tained choice of court agreements in favor of Irish courts, and provided for the application of Irish law. Proceedings were started in Paris, as the employees were assigned to the Charleroi Airport, which thus became their "*home base*", where, by contract, they had an obligation of nearby residence. The Court concluded for the formal autonomy of the definitions employed in the Brussels I (bis) Regulation, namely the concept of "*place where activities are habitually carried out*", from that of "*home base*" used in other EU acts, despite the fact that the latter may exercise an indirect influence, as they can constitute an *indicium* courts must address on a case by case approach[31].

The same approach has been adopted by the Court of Justice in the context of the MIFID Directive[32], the directive on Market in financial instruments, whose art. 4 establishes three categories of clients: retail and professional investors, and eligible counterparts. The definition of "*consumer*" takes into consideration elements such as previous financial operations of the weaker party. In *Petruchová*[33], the case concerned actions brought by a Czech private investor against a company in Cyprus, whose courts were subject to a choice of court agreement. Proceedings were commenced in Czechia, the place of domicile of the weaker party. Considering the number and entity of the online financial trading operations, the weaker party would not have been classified as such in the context of the MIFID. Yet, the Court argued for the autonomy of the notion of "*consumer*" for the purposes of the Brussels I bis Regulation – thus being irrelevant the knowledge of the party in a given case, being relevant only the contraposition between economic operator and non-professional purpose in concluding a contract[34].

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[31] Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, para 61 ff.

[32] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, in OJ L 145, 30.4.2004, p. 1, as repealed by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, in OJ L 173, 12.6.2014, p. 349.

[33] Judgment of the Court (First Chamber) of 3 October 2019, Jana Petruchová v FIBO Group Holdings Limited, Case C-208/18.

[34] Judgment of the Court (First Chamber) of 3 October 2019, Jana Petruchová v FIBO Group Holdings Limited, Case C-208/18, para. 41 ff, on which see LEHMANN M., *Consumer vs. Investor: Inconsistencies between Brussels I bis and MiFID*, in *EAPIL Blog*, 17 February 2020.

A similar line of argument has been followed in *Reliantco Investments LTD*[35], where the Court concluded that "*Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a natural person who, under a contract such as a* [contracts for difference] *concluded with a financial company, carries out financial transactions through that company may be classified as a 'consumer' for the purposes of that provision, if the conclusion of that contract does not fall within the scope of that person's professional activity, which it is for the national court to verify. For the purposes of that classification, first, factors such as the fact that that person carried out a high volume of transactions within a relatively short period or that he or she invested significant sums in those transactions are, as such, in principle irrelevant, and secondly, the fact that that same person is a 'retail client' within the meaning of Article 4(1) point 12 of Directive 2004/39 is, as such, in principle irrelevant*".

Where art. 67 of the Brussels I bis Regulation seeks to promote coordination by disconnection in that it favors the application of the *lex specialis* rule providing provisions have the same scope of application, the matter here is different, yet inconsistency and prejudice to coherent application of rules on judicial cooperation cannot be attained. Given that the relationship between the relevant "EU acts" falls outside the scope of application of art. 67, the specialty principle that has been followed by the Court of Justice of the European Union shows all its downsides: the compartmentation of different fields of law that are so intrinsically connected leads to results that are irreconcilable. The same contract is not a consumer contract under substantive law.

Yet, for the purposes of the rules on international jurisdiction, the very same contract is still regarded as being concluded by a weaker party, thus with all limitations not only in terms of passive fora for the protection of said weaker party where this is the one sued before a court of law, but also in terms of possibility to include a pre-emptive choice of court agreement in the contract.

Of course, the task of "bringing to unity" the different elements of the system falls upon practitioners, who must now be aware of the fact that, in principle, concepts in substantive and private international law are, to a large extent, defined in the same terms, but may differ so to determine a disconnection between the two branches of law – even though, in theory,

[35] Judgment of the Court (Fourth Chamber) of 2 April 2020, AU v Reliantco Investments LTD and Reliantco Investments LTD Limassol Sucursala Bucureşti, Case C-500/18.

private international law should conceptually be an external projection of internal private law policies and approaches.

2.2. Material law shaping relevant private international law conducts: effects and consequences of a "reversed disconnection clause"

Not only a principle of coordination between concepts in material and private international law might be derogated from (even though material law still exerts consequences for the interpretation of the Brussels I bis Regulation – as argued by the Court of Justice in *Nogueira et al*[36]), thus establishing a "disconnection" between relevant notions with the problems in terms of relationships between EU acts over judicial cooperation that have just been mentioned above. Under certain circumstances, where rules on international jurisdiction rely on factual conducts for their scope of application, the pre-condition for the applicability of the Brussels I bis Regulation may be influenced by substantive law. In other words, material law exerts (at least) an indirect interference or coordination with the Brussels I bis Regulation.

The scenario above is the very opposite of what is taken into consideration by art. 67 Brussels I bis Regulation, yet it does not remain without practical and applicative consequences. Where the provision at hand unilaterally saves the application of special rules contained in other provisions, "other EU acts" sometimes tend to clarify that they do not seek to influence rules on international jurisdiction contained in the general applicable instrument. It could be said that they also contain their very own "reversed disconnection clause" in favour of the general regime.

One of the most common examples in this sense, is the Directive on electronic commerce[37]. According to its recital 23, the "*Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts*"[38]. The

[36] Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, para. 65.

[37] 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, in OJ L 178, 17.7.2000, p. 1.

same is confirmed by its art. 1(4), where the passage is re-phrased in imperative terms.

Nonetheless, whereas some acts purposely declare that they "*do not wish to deal*" with jurisdiction, the statement, appears to be worthy of consideration in that the effect, in spite of formal effects on heads of jurisdiction, appears to be far from irrelevant or without consequences. As their *real relationship* with the Brussels I bis Regulation is far more intricate and complicate, professionals and practitioners are called to make a wiser connection and coordination of relevant bodies of laws in order to ensure proper application of rules surrounding judicial cooperation in civil and commercial matters.

A recent apt case study appears to be given in this sense by the now multilayered legal framework given for online professional activities directed towards the State of domicile of the consumer. The issue of "passive consumers" being reached by websites of professionals has emerged in the *Pammer* case[39], where the Court of Justice of the European Union

[38] On the discourse on whether the directive, introducing the principle of the country-of-origin does not have any impact on the conflict of laws (even though the matter here is analyzed under the focal lenses of jurisdiction – and on the juxtaposition of the term "jurisdiction" and "applicable law" in the directive cf FALLON M., *The Law Applicable to Specific Torts in Europe*, in BASEDOW J, BAUM H., NISHITANI Y. (eds), *Japanese and European Private International Law in Comparative Perspective*, Tübingen, 2008, p. 261, at p. 289), see OSTER J., *European and International Media Law*, Cambridge, 2017, p. 225.

[39] Judgment of the Court (Grand Chamber) of 7 December 2010, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09), Joined cases C-585/08 and C-144/09, on which see D'AVOUT L., *Internet. Accessibilité ou focalisation: la Cour de justice tranche mais ne convainc pas*, in *La Semaine Juridique* Edition Générale - 31 Janvier 2011 - n° 5, p. 226; SALERNO F., *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)*, Milano, 2015, p. 227; CARBONE S.M., TUO C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 194; GILLIES L., *Clarifying the 'Philospohy of Article 15' in the Brussels I Regulation: C-585/09 Peter Pammer v Reedere Karls Schulter GmbH & Co and C-144/09 Hotel Alpenhof GesmbH v Oliver Heller*, in *International and Comparative Law Quarterly*, 2011, p. 557, at p. 563; VAN HOEK A.A.H., *CJEU - Pammer and Alpenhof - Grand Chamber 7 December 2010, joined cases 585/08 and 144/09*, cit., p. 103; MANKOWSKI P., NIELSEN P., *Article 17*, in MAGNUS U., MANKOWSKI P. (eds.), *European Commentaries on Private International Law, Volume I: Brussels Ibis Regulation*, Köln, 2016, p. 456; LEANDRO A., *Trasporti marittimi: nella formula tutto compreso non basta un sito per dirigere l'attività all'estero*, in *Guida al Diritto*, 2011, 2, p. 111; MANKOWSKI P., *Internationaler Gerichtsstand, Verbrauchervertrag, Ausrichten unternehmerischer Tätigkeit / "Pammer, Hotel Alpenhof"*, in *Entscheidungen zum Wirtschaftsrecht*, 2011, p. 111; ID, *Autoritatives zum "Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2012, p. 144; CLAUSNITZER J., *Gerichtsstand bei Verbraucherverträgen via Internetangebot*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2011, p. 104; WITTWER A., *Das «Ausrichten» der Geschäftstätigkeit des Unter-*

argued that the mere accessibility of a web page is *per se* not sufficient to advocate that the activity is directed towards a given Member State. Such element of direction must be grounded on the will of the professional to somehow direct his/her activities. A will that can be demonstrated by a number of concurring elements, such as language, the active nature of the website, the value used, the extension of the domain, among others. In other words, the mere accessibility is *per se* not a sufficient element to prove that the entrepreneur was in fact willing to conclude a contract with the persons that had the possibility to see the website from a given member State. In some scenarios, the solution is rather straightforward: e.g. the webpage is in Italian; the seller only delivers in Italy; contacts are only typically Italian in nature, re. telephone number, email extension, etc.. In such a case – independently of where the website is accessible – there is little doubt as to the will of the entrepreneur to specifically target the Italian market and Italian consumers. For the perspective of private international law, the entrepreneur would, in no way, take into consideration being sued before the courts of another State or cope with the application of a different law. Nonetheless, the element of the intention to direct online activities is specific to businesses, as this is not requested, for example, in the context of online defamation. Here, the accessibility of the website and of the information that violates personality rights is relevant to ground jurisdiction under the Brussels I bis Regulation, as the intention to direct said information to a determined State becomes irrelevant[40].

Nonetheless, online and digital markets have sensitively changed, and clear-cut scenarios are less likely. Most recently, the abovementioned element of "direction of websites" must be juxtaposed to EU material law, namely the geo-blocking Regulation[41]. This instrument bans unjustified

nehmers in den Wohnsitzstaat des Verbrauchers i. S. d. Art. 15 EuGVVO, in *European Law Reporter*, 2011, p. 2; STAUDINGER A., STEINRÖTTER B., *Verfahrens- sowie kollisionsrechtlicher Verbraucherschutz bei Online-Geschäften*, in *Europäisches Wirtschafts & Steuerrecht*, 2011, p. 70, and MARINO S., *I contratti di consumo on line e la competenza giurisdizionale in ambito comunitario*, in *Contratto e impresa / Europa*, 2011, p. 247.

[40] Cf Judgment of the Court (Grand Chamber) of 25 October 2011, eDate Advertising GmbH and Others v X and Société MGN LIMITED, Joined Cases C-509/09 and C-161/10, and Judgment of the Court (Grand Chamber) of 17 October 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, Case C-194/16. On the point, be it allowed a *renvoi* to DOMINELLI S., *Sulla tecnica della «focalizzazione» nel contesto della notifica transfrontaliera a persone giuridiche*, in *Rivista di diritto internazionale privato e processuale*, 2019, p. 127, at p. 136.

[41] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers'

geo-blocking and is meant with no prejudice to the Brussels I bis Regulation[42]. With a similar line of argument to the E-commerce Directive, the geo-blocking Regulation prescribes that compliance with the geo-blocking Regulation shall not be construed as implying that a trader directs activities to the Member State of the consumer's habitual residence or domicile within the meaning of point (c) of Article 17(1) of the Brussels I bis Regulation[43].

The idea that compliance with substantive law has no effects in terms of jurisdiction is yet another way of creating a disconnection clause. At a closer look, it appears unsatisfactory, as the innate relationship between substantive law and factual heads of jurisdiction contained in the Brussels I bis Regulation cannot be ousted by a simple prescription as the above.

The geo-blocking Regulation, for a number of online products and services, forbids redirecting to national pages based on the habitual residence of persons. Sometimes, geo-blocks are the only way for entrepreneurs to create "borders" in a "borderless" market, hence the only practical instrument to make sure their non-physical products or services are only directed to the consumers they intend to reach. Compliance with the geo-blocking Regulation *might have* an impact on point (c) of Article 17(1) of the Brussels I bis Regulation, regardless of the intended disconnection of the geo-blocking Regulation. For example, where digital content within the scope of application of the geo-blocking Regulation is sold online, and access to the website cannot be prevented by the professional, it could become difficult to determine if a German website is not directed at Austrian consumers[44].

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nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, in OJ L 60I, 2.3.2018, p. 1. For a first reading, LOACKER L.D., *The Rise and Fall of the Defining Criterion? The Targeting of Digital Commercial Activities as a Factor Establishing Consumer Jurisdictions Before and After the Geo-Blocking Regulation*, in MANKOWSKI P. (ed), *Research Handbook on The Brussels Ibis Regulation*, Cheltenham, 2020, p. 207; VON HEIN J., *Geo-Blocking and the Conflict of Laws: Ships that Pass in the Night?*, in *Conflictoflaws.net*, 31st May 2016; CAMPO COMBA M., *The New Geo-Blocking Regulation: General Overview and Private International Law Aspects*, in *Nederlands Internationaal Privaatrecht*, 2018, p. 512, a p. 515, and DOMINELLI S., *"Geolocalizzazione" e tutela dei "consumatori di servizi online": prime riflessioni di diritto internazionale privato e processuale uniforme*, cit.

[42] Regulation (EU) 2018/302, recital 13, and art. 1(6).

[43] Regulation (EU) 2018/302, art. 1(6).

[44] On similar problems, see BOGDAN M., *Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation*, in *Masaryk University Journal of Law and Technology*, 2011, p. 1, at p. 8 f ("*Imagine a consumer who, just like the author of these lines, is a Czech-speaking habitual resi-*

The relationship between substantive law and international civil procedure becomes blurred, and paves the way to possible abuse[45], which court and institutions may be called to settle in the future to ensure the proper functioning of the internal market and the protection of consumers, other than the correction application of the rules surrounding judicial cooperation in civil and commercial matters. In the example, professionals could expressly state their intention not to trade with Austrian consumers, even though the latter cannot be prevented from accessing the website. This with an evident *vulnus* in the protection of weaker parties, if such declarations are fraudulently made.

3. Fragmentations within EU private international law, and the application and enforcement of the Brussels I bis Regulation

Diverse unities of law that might prejudice the coherent application and enforcement of the rules contained in the Brussels I bis Regulation are also a feature *within* the private international law of disadvantaged parties[46].

Whereas the *expressis verbis* statutory justification for a regime of protection at the private international law level, or the lack thereof, is highly unsatisfactory[47], there is little doubt on the *ratio* permeating the rules. Limitations to party autonomy, to be narrowly interpreted, can serve a variety of interests[48].When it comes to contractually disadvantaged parties, the Court of Justice of the European Union has identified a

dent of Sweden. In anticipation of a trip to Prague, he books, from his Swedish home, some theatre tickets through the Prague theatre's website, which is totally in the Czech language and oriented towards Czech consumers only but does not refuse to sell tickets to anyone possessing a valid credit card. It seems far-fetched to consider the theatre to direct its activities to Sweden in the sense of Article 15(1)(c), thus subjecting it to the jurisdiction of Swedish courts").

[45] See LOACKER L.D., *The Rise and Fall of the Defining Criterion? The Targeting of Digital Commercial Activities as a Factor Establishing Consumer Jurisdictions Before and After the Geo-Blocking Regulation*, cit., p. 226, and DOMINELLI S., *"Geolocalizzazione" e tutela dei "consumatori di servizi online": prime riflessioni di diritto internazionale privato e processuale uniforme*, cit., p. 214.

[46] On the use of the term, CRAWFORD E.B., CARRUTHERS J.M., *International Private Law: A Scots Perspective*, Edinburgh, 2010, p. 452.

[47] Brussels I bis Regulation, recital 18.

[48] On which, see in detail HILL J., NÍ SHÚILLEABHÁIN M., *Clarkson & Hill's Conflict of Laws*, Oxford, 2016, p. 12.

number of justifications[49]. However, if these are singularly taken, they pave the way for inconsistencies and critique[50].

On the grounds inferred from the rules by the Court of Justice to justify protection, it seems that the most relevant refer to the lack of substantive bargaining power upon the "adhesive" (rather than "weaker") party, who cannot influence the content of the contract, the choice of law or the choice of forum clauses. A circumstance where contracts become tools by which the "advantaged parties" can impose their own contractual will[51].

The regime of protection currently established by the Brussel I bis Regulation is tailored upon the idea that the weaker party can choose between a number of active fora where proceedings can be brought[52], whilst being protected as for passive ones – meaning that the weaker party can only be brought before a specific "near" court[53]by the stronger party. The Brussels I bis Regulation reduces party autonomy to avoid choice of court clauses being imposed by way of contract.

Yet, a similar proximity criterion is not always employed at the conflict of laws level, thus raising inconsistencies between the different instruments for protection, as different methodologies are deployed. Whereas insurance matters and contracts governing the transport of pas-

[49] See for all, Judgment of the Court of 19 January 1993, Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, Case C-89/91, para 18 f.

[50] One of the grounds upon which limitations to party autonomy in favor of disadvantaged parties rests is the reduced legal knowledge the weaker party has in comparison to its counterpart. Nonetheless, reduced or lack of legal knowledge should be connected to the consequences following the acceptance of a choice of law or choice of forum agreement. "Knowledge" should not be understood as precise understanding of the substantive selected law (*contra* RÜHL G., *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, cit., p. 343). Indirectly, on the relevance or non-relevance of the element of "knowledge" to grant private international law protection see Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para 39 f. The second ground to afford protection, in particular where jurisdiction is at stake, concerns the reduced economic resources of the weaker parties in case of cross-border litigation where the value of the single claim is so low to make a proceedings abroad excessively unattractive (even though the aggregate value of all claims could be significantly high for the stronger party).

[51] ROPPO V., *Diritto Privato. Linee essenziali*, Torino, 2012, p. 807, and FALCONI F., *La legge applicabile ai contratti di assicurazione nel regolamento Roma I*, Roma, 2016, p. 100.

[52] See Brussels I bis Regulation, art. 11 for insurance matters; art. 18(1) for consumer contracts, and art. 21 for employment matters.

[53] See Brussels I bis Regulation, art. 14 for insurance matters; art. 18(2) for consumer contracts, and art. 22 for employment matters.

sengers contain similar limitations to party autonomy intended to prevent the "imposition" of an "exotic" law[54], consumer and employment contracts allow for the pre-emptive choice of foreign law without particular limits, save the application of non-derogable rules of the law governing the contract by way of objective connective factors (expressing a proximity evaluation[55]).

In this sense, the principle of proximity is construed differently in the relevant rules, as it acquires a diverse mandatory value, non-derogable in absolute terms or derogable save some substantive protection afforded by the "closest law", thereby creating difference in treatment that can hardly be reconciled with the general assumption of protecting the weaker parties.

It should be highlighted that there appears to be a disconnection in values and policies between instruments that are supposed to create a "unitary system"[56], i.e. the Brussels I bis Regulation and the Rome I Regulation on the law applicable to contractual obligations, to the detriment of coordination in protection. Whereas institutions are aware of such interplay and such a relationship that, together with the following point, might hinder a smooth application of rules concerning judicial cooperation in civil and commercial matters, the burden of reconciliation of the law on the books and the law in action falls to practitioners, whilst the risks of gaps in protection rest upon those who need it.

Following on from the above, due to true/ false, direct/ indirect disconnection in substantive and private international law, weaker parties might be treated as such only under one of said branches of law, or even under one single sub-branch, namely international civil procedure rather than conflict of laws. All in a scenario where substantive law can help strong parties to forge factual elements for the purposes of "playing with" heads of jurisdiction, showing how strong the unilateral influence of material law has over international civil procedure.

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[54] Rome I Regulation, art. 5(2) for contracts on transport of passengers, and art. 7(3) for mass risk insurance contracts.

[55] Rome I Regulation, art. 6(2) on consumer contracts, and art. 8(1) for employment contracts.

[56] Cf Rome I Regulation, recital 7, and, in the scholarship, CRAWFORD E.B., CARRUTHERS J.M., *Connection and Coherence between and among European Instruments in the Private International Law of Obligations*, in *International and Comparative Law Quarterly*, 2014, p. 1, and LEIN E., *The New Rome I / Rome II / Brussels I Synergy*, in *Yearbook of Private International Law*, 2008, p. 177.

4. Gaps in protection: disconnections between principles and rules in the Brussels I bis Regulation

In light of the principles for protection, and accepting the differences in treatment as for the proximity principle and party autonomy in relation to different categories of contracts and applicable law, the absence of clear and settled blueprint and methodology for the protection of disadvantaged parties becomes apparent when taking into consideration gaps in protection. If it is true that the adhesive nature of the contract determines the need for protection, the following exclusions find no rational grounding in the current legal framework. This reinforces doubts surrounding the smooth application of the rules concerning judicial cooperation in civil and commercial matters, and therefore the enforcement of the Brussels I bis Regulation.

The first category that faces a predetermined contract, with possible less legal experience and economic resources in comparison to its counterparts, is that of passengers, who are subject to a "limping" regulatory framework. EU private international law is well aware of their need for protection, to the point that a specific conflict of laws rule is drafted in the Rome I Regulation on the law applicable to contractual obligation, under art 5[57]. There is, however, no corresponding provision on the side of international civil procedure, leading to the consequence that art 5 Rome I, being *lex specialis* to art 6 concerning consumer contracts, will govern the applicable law, whilst protective fora will only apply to the

[57] On the protection of "passengers" as weak parties, see CELLE P., MUNARI F., *Tutela del passeggero e concorrenza nella prospettiva comunitaria*, in *Diritto del commercio internazionale*, 2006, p. 25; TUO C.E., *Il trasporto aereo nell'Unione europea tra libertà fondamentali e relazioni esterne. Diritto internazionale e disciplina comunitaria*, Torino, 2008; LOPEZ DE GONZALO M., *La tutela del passeggero debole nel regolamento CE 261/2004*, in *Rivista italiana di diritto pubblico comunitario*, 2006, p. 203; FRAGOLA M., *Prime note sul regolamento CE 261/2004 che istituisce nuove norme comuni in materia di "overbooking" aereo*, in *Diritto comunitario e degli scambi internazionali*, 2005, p. 129; PERONI G., *In caso di cancellazione di un volo "privato", spetta al passeggero aereo la compensazione pecuniaria*, in *Il Diritto marittimo*, 2017, p. 1099; SANDRINI L., *La compatibilità del regolamento (CE) n. 261/2004 con la convenzione di Montreal del 1999 in una recente pronuncia della Corte di giustizia*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 93, and LA MATTINA A., *Il passeggero quale parte debole del contratto di trasporto*, in QUEIROLO I., BENEDETTI A.M., CARPANETO L.(eds), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 65 ff.

extent that the number of conditions for the applicability of the rules on jurisdiction for consumer contracts are respected[58].

However, the legal framework of consumer-passengers is particularly interesting and complicated in terms of disconnection clause of the Brussels I bis Regulation. This instrument excludes passengers from the scope of application of its rules on consumers[59] under the basic assumption[60] that – at the international level – there already is a satisfactory level of protection to which the Brussels I bis Regulation should give way (i.e., the international framework should constitute *lex specialis*). Nonetheless, such a coordination paves the way to doubts, if one takes into consideration specific fields, such as the field of air transport. Action for damages against the air carrier are governed by the 1999 Montreal Convention on air carrier liability.

Among others, the convention covers matters of international jurisdiction[61]; hence the necessity for the European Union (which had already exercised its competences) *and* the Member States to both accede and ratify the instrument[62]. The European Union has extended the scope of application of the convention to include internal flights by way of a separate regulation[63]. The first question is thus whether or not the proper discon-

[58] According to art. 17(3) Brussels I bis Regulation, first sentence, protective heads of jurisdiction do not find application for contracts of transport, unless such a contract are those commonly defined as "package travel" that for an inclusive price provide for a combination of travel and accommodation. On the exception and re-exception for package travels, see for all MANKOWSKI P., NIELSEN P., *Article 17*, cit., p. 504 ff.

[59] Brussels I bis Regulation, art. 17(3).

[60] Cfr. SCHLOSSER P., *Relazione sulla convenzione di adesione del Regno di Danimarca, dell'Irlanda e del Regno Unito di Gran Bretagna e Irlanda del Nord alla convenzione concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale, nonché al protocollo relativo alla sua interpretazione da parte della Corte di giustizia, del 9 ottobre 1978*, in OJ C 59, 5.3.1979, p. 71, at p. 119, point 160.

[61] In the scholarship, on the coordination, see CARBONE S.M., *Criteri di collegamento giurisdizionale e clausole arbitrali nel trasporto aereo: la soluzione della Convenzione di Montreal del 1999*, in *Rivista di diritto internazionale privato e processuale*, 2000, p. 5; ROSAFIO E.G., *Il problema della giurisdizione nel trasporto aereo di persone e nei pacchetti turistici*, in *Rivista del diritto della navigazione*, 2016, p. 107.

[62] 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air, in OJ L 194, 18.7.2001, p. 38.

[63] Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, in OJ L 285, 17.10.1997, p. 1, as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, in OJ L 140, 30.5.2002, p. 2.

nection clause is art. 67 or art. 71 of the Brussels I bis Regulation. Part of the case law addresses[64] the issue of coordination under art. 71, as the instrument is an international convention. Yet, it could, to some extent, be argued that the convention is "contained" in an EU law instrument for the purposes of art. 67 – i.e. the Council decision on the conclusion of the convention. The applicability of art. 67 appears fundamental: Member States ratified the 1999 Montreal Convention in 2004. At that date, the Brussels I Regulation was already in force and its own provisions which regulated its relationships with international conventions entered into by Member States (art. 71), did not allow for the conclusion of new treaties (unlike art. 57 of the 1968 Brussels Convention). Some domestic courts[65], some scholars[66], and (possibly) Advocate Szpunar[67] have taken the view that the 1999 Montreal Convention should fall within the scope of application of art. 67 of the Brussels I bis Regulation. This should be the case for all international conventions to which all Member States and the European Union are parties – as such international instruments become "European Union law"[68].

What is certain, is that the relationship between the Brussels I bis Regulation and the 1999 Montreal Convention is to be assessed under art. 67 Brussels I bis Regulation, and not under art. 71, where the convention is applied to internal flights: the convention only finds application to similar cases due to an extension of its scope of application made by an EU act, which incorporates by way of *renvoi* the rules of the international instrument[69].

Having mentioned the complexity of the legal framework, the air carrier liability convention is not exhaustive. Some rights of air passengers are not covered by the convention, but are rather granted by EU law, as is the case of the right to pecuniary compensation in cases of flight delays

[64] Cf Cassazione civile sez. un., 13/02/2020, n. 3561, in *En2Bria database*.

[65] LG Bremen 3 S 315/14, Urt. vom 05.06.2015, para. 30, in *En2Bria database*.

[66] Cf PUETZ A., *Rules on Jurisdiction and Recognition or Enforcement of Judgments in Specialised Conventions on Transport in the Aftermath of TNT: Dynamite or Light in the Dark?*, in *The European Legal Forum*, 2018, p. 117, at p. 214.

[67] Cf Opinion of Advocate general Szpunar delivered on 14 January 2020, Case C-641/18, *LG* v *Rina SpA, Ente Registro Italiano Navale*, para. 134, fn. 91.

[68] *Idem*.

[69] Cf Opinion of the Advocate general Maciej Szpunar 20 May 2015, Case C‑240/14, *Eleonore Prüller-Frey* v *Norbert Brodnig, Axa Versicherung AG*, para. 51 ff.

under art. 7 of Regulation (EC) No 261/2004[70]. Here, jurisdiction is not covered by the Montreal Convention, but rather by the general applicable instrument – which excludes passengers from the scope of application of the protective rules by assuming there is an applicable international treaty (unless there is a travel-pack, by way of which protective rules apply). The Court of Justice of the European Union has excluded that the Air Passenger Rights Regulation, which enshrines the right to "*complain to any body designated*" (art. 16), also contains a rule on jurisdiction able to trigger the disconnection clause in art. 67 Brussels I bis[71]. Hence, this last instrument solely governs jurisdiction. The passenger are left with the option of the domicile of the defendant or the forum of the contract of service – which the Court of Justice has interpreted, in light of the principle of proximity, to be not where the air carrier organises its activities, but where the flight takes off and arrives[72]. In other words, passengers may start proceedings at the place of departure or arrival – most probably (but not necessarily), a forum that is particularly close to that person.

There are also additional categories of parties that could be considered to be weak, such as tenants, distributors and commercial agents[73]. Their non-protection seems even more unjustified, or – better still – unexplained, with a methodological inconsistency between the principle and the (non)rule. If commercial agents are taken as a case study, it appears that their specific (non)treatment in private international law and interna-

[70] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, in OJ L 046, 17.02.2004, p. 1.

[71] See most recently, Judgment of the Court (Sixth Chamber) of 11 April 2019, ZX v Ryanair DAC, Case C-464/18, para. 24. In the Italian case law, see Cassazione civile sez. un., 13/02/2020, n. 3561, cit.

[72] Judgment of the Court (Third Chamber) of 7 March 2018, flightright GmbH v Air Nostrum, Líneas Aéreas del Mediterráneo SA, Roland Becker v Hainan Airlines Co. Ltd and Mohamed Barkan and Others v Air Nostrum, Líneas Aéreas del Mediterráneo SA, Joined Cases C-274/16, C-447/16 and C-448/16, para. 68 ff, on which see LEIBLE S., *Zuständiges Gericht für Entschädigungsansprüche von Flugpassagieren*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 571; STAUDINGER A., *Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2010, p. 140; WAGNER R., *Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO - unter besonderer Berücksichtigung der Rechtssache Rehder*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2010, p. 143, and ROSAFIO E.G., *Contrattazione on line, trasporto low cost e tutela del consumatore*, in *Rivista del diritto della navigazione*, 2013, p. 667, at p. 681.

[73] Clearly in this sense, RÜHL G., *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, cit., p. 343.

tional civil procedure follows a deliberate choice, as substantive EU law is well-aware of their need for protection *viz* the principals[74]. Nonetheless, specific connecting factors as for the applicable law or competent court remain ungiven without any further explanation.

In these terms, difficulties encountered by practitioners become quite clear, as on the one side they have set of protective rules, while on the other, no specific provision on international jurisdiction or applicable law may be consistently and coherently applied with the first.

Insurance contracts also offer cases of inconsistency in treatment. The EU legal framework in private and procedural international law has little concern for non-European weaker parties. The regime for protection rests upon the rift between "large" and "mass" risks[75] – the first being traditionally (but not necessarily) connected to international commerce and, therefore, pre-emptively excluded from any kind of (PIL) protection. However, art. 7 Rome I Regulation provides for protective connective factors only in so far as the risk is located in a Member State. Under the Solvency II Directive, most often the place of localisation of the risk corresponds to the place of habitual residence of the policyholder[76]. Therefore, the reason why the same type of mass risk, i.e., the condition of contractual weakness from which protection follows, depends upon the "European" habitual residence of the disadvantage party themselves[77] is still unclear. At the same time, on the side of jurisdiction, pre-emptive choice of court agreements, even to the detriment of the protection of the weaker

[74] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, in OJ L 382, 31.12.1986, p. 17 ff. Cf in the case law Judgment of the Court (Third Chamber), 17 October 2013, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, Case C‑184/12, para 39 ff.

[75] The classification was first adopted in the late 80's by the Second Generation Directive (Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, in OJ L 172, 04.07.1988, p. 1), which was introduced in the 1968 Brussels Convention when the United Kingdom acquired membership. See *ex multis* BASEDOW J., SCHERPE J., *Das internationale Versicherungsvertragsrecht und „Rom I"*, in LORENZ S., TRUNK A., EIDENMÜLLER H., WENDEHORST C., ADOLFF J. (eds), *Festschrift für Andreas Heldrich zum 70. Geburtstag*, München, 2005, p. 511.

[76] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), in OJ L 335, 17.12.2009, p. 1, art. 13(13).

[77] On the matter, see extensively for all HEISS H., *Insurance Contracts in Rome I: Another Recent Failure of the European Legislature*, in *Yearbook of Private International Law*, 2008, p. 261, at p. 279 f.

parties, can already be inserted in the contract (of adhesion) if the policyholder is not domiciled in a Member State[78]. Similar rules are not given for consumer or employment contracts[79].

5. Ensuring protection of weaker parties in the application and enforcement of the Brussels I bis Regulation: remarks and suggestions

As outlined above, in the field of protection of contractually weaker parties, the application and enforcement of the Brussels I bis Regulation is directly or indirectly influenced both by substantive laws concepts – that ought to be interpreted consistently or independently under different circumstances –, and by internal inconsistencies, in particular where the "unitary" regime of protection is to be coordinated with conflict of laws rules.

The coordination, application, and enforcement of heads of international jurisdiction for the protection of disadvantaged parties with other binding rules contained in additional EU law acts, even though same "escape" the scope of application of art. 67 Brussels I bis Regulation, raise evident issues for practitioners, lawyers and judges, who are called to "systematise" the provisions and settle diverse unities of law.

Practitioners, in light of the most recent case law, are called to determine, on a case-by-case approach and in consideration of the different scenarios regulated in the Brussels I bis Regulation, whether or not their domestic law on consumer rights parallels the regulation. This might not be the case where, following transposition of Directive 2008/48, domestic law does not treat the contract as "consumer", but this still falls within the scope of (independent) protection afforded by art. 17(1) Brussels I bis Regulation.

Additionally, practitioners shall have to consider the effects of obligations imposed by material law on the interpretation and application of the Brussels I bis Regulation, as in the case of the geo-blocking Regulation.

[78] Brussels I bis Regulation, art. 15(4), according to which protective fora "*may be departed from only by an agreement ... which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State*".

[79] Brussels I bis Regulation, art. 19 for consumer contracts, and art. 23 for employment contracts.

Where international civil procedure rests upon material elements to identify the competent court, such as the "direction of activities requirement" in art. 17(1)(c), the interplay and connections between the two disciplines must be carefully evaluated in light of the specific features of the single case.

At the same time, on this very last point, guidance from the Court of Justice of the European Union or from the institutions is welcome.

It is true that the geo-blocking Regulation wishes to unilaterally coordinate itself with Brussels I bis Regulation. Such coordination is pursued by clarifying that a professional who does not block or limit consumers' access to an online interface is not "*on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile*"[80] for the purposes of international jurisdiction. Yet, this tentative unilateral coordination appears unsatisfactory in such instances as websites using the German language, a commercial domain, euro as currency for payment and offering e-products or e-services (i.e. no material delivery). In this sense, European institutions could issue further clarifications for the coordination of the two instruments.

Lastly, to ensure the proper enforcement of the Brussels I bis Regulation and its underlying policies for the protection of weaker parties, "limping situations" could be subject to further policy reasoning. Similarly, as per the disconnections between material law and international civil procedure, the different treatment of the same contract under the Brussels I bis and the Rome I Regulation could be better justified within the text of the instruments themselves. As already mentioned, this becomes apparent for contracts on the transport of passengers. Where the choice of law rules limit party autonomy for the protection of the passenger, this is not always the case on the side of international jurisdiction when the Brussels I bis Regulation does not "disconnect" itself in favour of another instrument (either of EU or of international law, respectively under art. 67 or art. 71). In such scenarios, contracts for the transport of persons do fall within the general rules of jurisdiction of the Brussels regime, or the special rules for service contracts, unless this is an "all-inclusive" contract, falling within the scope of application of the rules on consumer contracts.

[80] Regulation (EU) 2018/302, art. 1(6).

Enforcing and Coordinating Brussels I bis and International Law: Future Perspectives

Jessica Sanchez, Jean-Sylvestre Bergé*

1. Introduction

The purpose of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the "Brussels I bis Regulation") is to facilitate the free circulation of legal decisions in civil and commercial matters, to improve access to justice, and to promote the unification of the internal market. The existing body of European Union (EU) law on civil judicial cooperation developed rapidly in the 1990s during the process of "Communitarisation". These new rules needed to be integrated into both national and international bodies of law, so that both levels could coordinate and reconcile their work. While the relationship between European law and the private international law that arises from States has long been defined by rivalry and competition, the EU is now a member of the Hague Conference (as of 2007) and participates fully in the creation of new instruments, making it an essential player in private international law.

The studies conducted for this project, and more specifically, the work done for this chapter, focus on the application and the coordination of the Brussels I bis Regulation with instruments of international

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law. We will analyze the intersections between the Brussels I bis Regulation and the relevant international agreements and principles. An examination of how problems are resolved will allow us to study the effectiveness of the regulation and of EU law, more generally.

The effectiveness of the Brussels I bis Regulation has often been questioned and debated by jurists and legal practitioners, especially in professional European projects and studies. For example, a comparative study of how the Brussels I bis Regulation is applied, conducted by eight judicial officers and notaries from several Member States revealed improvements in the practice of cross-border enforcement of judgments after the Brussels I bis Regulation came into effect[1]. The same group did, however, acknowledge their merely approximate knowledge of the regulation, due to a lack of training in European law provided by Member States and of communication about the objectives of these laws. They also report that there were few instances overall of cross-border enforcement of authentic instruments that fell within the scope of the regulation[2].

Although the rules of European private international law are still evolving, EU law and private international law "exist as two distinct bodies of law"[3]. The goal of the EU is not to eliminate the existing structures of private international law. On the contrary, the suitability of EU law for governing private international relationships cannot be contested. These two bodies of law, though distinct, coexist side by side. The relationships between international sources and European sources are problematic: are they based on competition, on commingling, on overlapping, or on contradiction? In this context, the Brussels I bis Regulation is a particularly interesting topic of study, because of its fundamental role in the establishment of European private international law.

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[1] CEHJ et CNUE, *Étude comparative sur l'application du règlement Bruxelles I bis – Rapport final du projet*, 2017, p. 19, 2.1. [http://www.notaries-of-europe.eu/files/publications/Rapport-BruxIBis.pdf, access January 21st 2021]

[2] CEHJ et CNUE, *Étude comparative sur l'application du règlement Bruxelles I bis – Rapport final du projet*, 2017, p. 20, 2.1.

[3] BERGE J-S., *La double internationalité interne et externe du droit communautaire et le droit international privé*, p.15 B- §1.

The Brussels I bis Regulation[4] partially covers these issues in Articles 67 et seq. These Chapter VII provisions discuss the relationship between the regulation and other instruments, either agreements that existed before the regulation went into effect, or special conventions and other instruments involving Third States. They do not, however, provide the full range of solutions needed to handle the intersection of European private international law and international law. Some issues have not as yet been resolved.

After studying the official general guidelines for reconciling the Brussels I bis Regulation with international agreements (2), we will then address their practical application in national case law (3). Finally, the future of the regulation and possible improvements will be discussed (4).

2. General guidelines

Any reconciliation between the Brussels I bis Regulation and international agreements is governed by certain general principles, with different rules for internal relationships, i.e. between Member States (2.1.), and for external relationships, i.e. when Third States are involved (2.2.).

2.1. Internal relationships

Within internal relationships, the application of the Brussels I bis Regulation raises several issues, first among them being how to reconcile the general rules set forth in the regulation and the special rules in international agreements. Intra-European litigation might be subject to both the regulation and an international agreement associating two Member States.

[4] Most of the judgments on this topic have cited Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the "Brussels I Regulation"). Because some judgments precede the Brussels I bis Regulation coming into effect, our analysis of judgments on this topic will be based both on the Brussels I Regulation and on the Brussels I bis Regulation.

The general guidelines for resolving such situations are based on the Treaty of the Functioning of the EU (2.1.1.), on the Brussels I bis Regulation itself (2.1.2.), on disconnection clauses contained in international agreements (2.1.3.), and finally on solutions proposed by the Court of Justice of the EU (2.1.4).

2.1.1. Issues in the relationship between EU law and international law arising from Article 351 of the TFEU

The first question we should ask, before we even begin to analyse the interaction between the Regulation and international agreements, is what the general position of EU law is with regard to international law. The question of the relationship between these two sources of law is important because it allows us to understand the relationship between international and European instruments - in this case the Brussels I bis Regulation. If one body of law has primacy over the other, it will allow us to create a hierarchy for standards that arise from different sources, and therefore help us to better understand how one standard is applied compared to the other. The hierarchy between EU law and international law is notably described in the provisions of Article 351 of the Treaty on the Functioning of the European Union (hereafter, "TFEU"). These provisions are critical for determining whether or not international agreements might apply when they conflict with the fundamental principles of the EU, and therefore for measuring the scope of application of the Brussels I bis Regulation's.

Paragraph 1 of this Article seems to make an exception to the principle of the primacy of EU law. It adheres to the principle of international law "*pacta sunt servanda*"[5], stipulating that all rights and obligations deriving from agreements made before Member States joined the Union are not affected by the provisions of the treaty. However, his apparent effacement of the primacy of EU law in favour of Member States honouring their international agreements is undercut by paragraph 2, which requires compliance with EU law, if there are any conflicts between the agreements and the Treaty. This paragraph basi-

[5] *Les accords internationaux conclus par l'Union européenne : une source de droit particulière*, Thesis by L. Dupont, Université catholique de Louvain, 2016-2017.

cally requires that any international agreements made by Member States before they entered the Union (or before January 1, 1958 for the founding States) comply with the provisions of the Treaty. The Court of Justice of the EU has affirmed this position with some rigour, condemning two Member States for continuing to honour international investment agreements that had been deemed incompatible with EU law[6].

While admitting that international law may take precedence, the Treaty also clarifies that everything must be done to apply EU law.

In a case where an international instrument applies, the question may arise as to whether or not the supremacy of international law over EU law is limited. In terms of judicial cooperation, if an international instrument takes precedence over EU legislation, and is applied in place of corresponding regional rules, it may be useful to ask whether the authorities in a Member State must ensure that in applying this instrument, all of the fundamental principles of EU law are preserved. If such compliance is even possible, let alone required, that would mean that the international instrument in question is limited in its supremacy. In such a case, the provisions of the international instrument would have priority in their application over European instruments, providing their application does not violate any EU policies or prevent the pursuit of EU objectives.

2.1.2. Principles laid out in Articles 67 to 71 of the Brussels I bis Regulation

According to Article 69 of the Brussels I bis Regulation, the regulation replaces any agreements between Member States that cover the same topics as those covered by the regulation. According to Article 70, in matters in which the regulation is not applicable, conventions and agreements continue to produce their effects. This is also the case for court judgments, authentic instruments formally recorded or served and judicial transactions approved or concluded before the Brussels I Regulation went into effect . Finally, Article 71 states that,

[6] CJEU, March 3, 2009 (Commission vs. Austria) Case C-205/06; CJEU, March 3, 2009 (Commission vs. Sweden), Case C 249/06.

for other Member State conventions or agreements, or national legislation that has been harmonised to comply with these instruments, the regulation does not prevent their application in matters of jurisdiction, recognition and performance for decisions on specific matters. In the same way, decisions are recognized and enforced by Member States when they have been issued by a court in a Member State whose jurisdiction is based on a convention and not on the regulation itself.

While these principles may seem simple in theory, their practical application undeniably gives rise to various difficulties. The question may arise as to what does or does not constitute a "particular matter". In what circumstance would a convention on jurisdiction or recognition and enforcement of judgments need to be applied, other than in matters covered by this regulation? The Brussels I bis Regulation discusses jurisdictional competence in a general manner, and any other instrument that covers jurisdictional issues in specific areas could be considered to cover a particular matter, as in the regulation. This means that a particular matter exists whenever litigation enters into specialized areas like transport law, intellectual property, pensions, maintenance obligations, etc. If a solution is found in a substantive rule from a convention in a specific domain, this rule will fall under Article 70 of the Brussels I bis Regulation.

Reconciliations between specific and general rules may come in different forms. According to legal scholars, there are three ways to handle interactions between private international law and European Union law[7]. Firstly, there is subordination: when there is a conflict between several sources of law, it is easiest to choose one to be applied. Secondly, reconciliation may come in the form of some kind of combination or convergence. Combination means treating a specific international instrument as a basic manifestation of private international law, to be applied at the regional level and complemented with provisions that cover specific Intra-EU situations. Convergence occurs when EU legislation is deliberately drafted to align with the provisions of a specific international agreement, or when this legislation references, imitates, or simply provides a certain degree of compliance

[7] FRANZINA P., *How European is European Private International Law ?*, Intersentia, 2019, p.26 to 42.

with such an agreement. Thirdly, reconciliation between international law and EU law may lead to a confrontation between these two sources. Subordination and confrontation may occur between special international conventions and the Brussels I bis Regulation. However, instances of convergence may also be observed.

When reforming the Brussels I Regulation, the European Commission proposed eliminating the regulation's reference to national jurisdiction rules in Member States, in order to promote the success of international negotiations as part of the Hague Conference to adopt a global convention on jurisdiction. This suggestion was not followed.

2.1.3. The disconnection clause mechanism

Disconnection clauses in multilateral agreements signed by Member States and/or by the EU exist to stipulate that "in their mutual relations, Member States apply the rules of the Union and do not apply the rules of international agreements, to the extent that such a community rule exists"[8]. This clause is an option for Member States, allowing for the exclusion of international law from their relationships in favour of EU law.

In order to avoid undermining the general objectives of the instrument, disconnection clauses must identify, more or less strictly, the situations in which regional rules will apply in place of the corresponding provisions of the international instrument in question. These may be situations that involve a special relationship between States and the organization targeted by the clause. Thus, international conventions may, initially appear to take precedence over the Brussels I bis Regulation. However, if there is a disconnection clause included in an agreement, its full application may come into question, as such a mechanism disrupts the relationships between the regulation and other international instruments.

[8] NEFRAMI E, *La répartition intra-communautaire des compétences et les États tiers sous le prisme de la clause de déconnexion*, in *R.H.D.I.*, 2008, p. 478.

2.1.4. Clarifications from European case law

The decisions of the Court of Justice of the EU (CJEU) have shed light on these general guidelines on several occasions. The Court notably interpreted several articles from the Brussels I and I bis Regulations, as well as from the TFEU to clarify how EU law should be applied. The Court has frequently been asked to decide whether or not the provisions of an international agreement take precedence under the provisions of Article 71, which differentiates general matters from particular matters.

The dispute involving the application of the Convention on the Contract for the International Carriage of Goods by Road of May 19, 1956 (hereafter, the "CMR Convention") is particularly informative here. The CMR Convention falls into the category of conventions mentioned in Article 71 of the Brussels I bis Regulation - a convention that governs jurisdiction or the recognition and enforcement of judgments in particular matters. Even before the Brussels I bis Regulation went into effect, the Court of Justice of the European Communities (CJEC) had decided that "the court of a Contracting State, before which the defendant, domiciled in another Contracting State, is called, may base its claim of jurisdiction on a special convention, to which the first State is a party, and which includes specific rules for assigning jurisdiction, even if the defendant is not allowed to express themselves on the merit of the case in such a procedure". In principle, coordinating the effects of these two instruments should be simple: when the Brussels I bis Regulation and the CMR Convention both apply, the provisions of the latter take precedence.[9]

However, some uncertainty remains. The CJEU has notably specified that a correct interpretation of Article 71 paragraph 1 would understand the rules laid out in the CMR Convention to apply to cross-border procedures, while the rule of lis pendens in Article 31 paragraph 2 and the rule on legal enforceability in Article 31 paragraph 3 only apply to Member States insofar as they align with the fundamental principles of the Brussels I regime. In practice, according to the court, the provisions of the CMR Convention should only be applied

[9] CJEC October 28, 2004, C-148/03.

to Member States in circumstances where they have been proven to be highly predictable, so that they will facilitate the proper administration of justice and where they can minimize the risk of concurrent procedures, and when it has been demonstrated that "*they guarantee, under conditions that are at least as those in the Brussels I Regulation, the free circulation of judgments in civil and commercial matters, as well as mutual confidence in the administration of justice throughout the European Union (favor executionis)*"[10]. This solution was confirmed by a judgment from the CJEU on December 19, 2013[11]. The supremacy of special international conventions over EU law, and thereby over the Brussels I bis Regulation, is therefore not without limits. European Union law has the advantage because international instruments may not be applied in place of the Brussels I bis Regulation if they do not conform with the fundamental principles of the EU, as stated in the regulation.

In several decisions, such as that of September 4, 2014[12], the CJEU has specified that Article 31 paragraph 1 of the CMR Convention does not compromise the fundamental principles of the EU. For reference, Article 31 paragraph 1 allows the plaintiff to choose between the courts in the country where the defendant normally resides, those in the country where goods were taken over by a carrier, and those in the country designated for delivery. This solution is substantially similar to that prescribed by EU law, under which transport contracts, which fall into the category of service provision contracts, are subject to the jurisdiction of the Member State where, pursuant to the contract, the services were provided, or should have been provided. EU law, which only refers to a single place of fulfilment, offers the plaintiff fewer options than Article 31 paragraph 1 of the CMR. This fact alone, however, is not enough to disrupt the compatibility of this provision with the principles that underlie judicial cooperation in civil and commercial matters in the EU. The Court thus accepted that in certain circumstances involving transport contracts, the plaintiff may have a choice between the courts of the point of departure, and those of the destina-

[10] CJEU, May 4, 2010 (TNT Express Nederland) Case C-533/08.

[11] CJEU December 19, 2013 C-452/12.

[12] CJEU September 4, 2014 C-157/13.

tion. Providing plaintiffs with such an option satisfies the requirement of predictability, apart from the criterion of proximity.

The CJEU has also offered its interpretation of the provisions of Article 71 of the Brussels I Regulation in a 2016 judgment[13]. The way Article 71 is written suggests that only agreements made by all Member States fall within the scope of this article, with the use of language like "any conventions to which the Member States are parties". The wording of paragraph 2.a, however, implies that the conventions in question also include those that have not been signed by some Member States. Based on a joint reading of Articles 69 and 71 of the regulation, the Court therefore decided that the latter article should not be interpreted to mean that it only applies to conventions linking several Member States on the condition that one or several third-party countries also be parties to these conventions. The conventions intended for inclusion were those linking Member States, or Member States and Third States. Alternatively, these provisions do not give Member States the possibility of creating new rules that would take precedence over those in the regulation by signing new conventions or modifying those already in force.

Finally, in a July 14, 2016 decision[14], the judges of the CJEU converged Article 71 of the Brussels I Regulation and Article 350 of the TFEU. The latter article discusses the reconciliation of EU law with instruments from the regional union between Belgium, Luxembourg, and the Netherlands. According to the CJEU's analysis, when read in light of Article 350 of the TFEU, Article 71 of the Brussels I Regulation does not prevent Article 4.6 of the Benelux Convention from being applied to litigation involving Benelux trademarks and designs to decide jurisdiction. Article 350 of the TFEU therefore allows Luxembourg, Belgium, and the Netherlands to break with EU rules and maintain their own rules within the framework of their regional union, under two conditions. First, that this regional union be ahead of schedule on its implementation of the single market, and second, that any such breaks with EU law be justified as essential for the proper functioning of the Benelux system. Because these conditions had been

[13] CJEU July 14, 2016, C-230/15.

[14] CJEU July 14, 2016, C-230/15.

met, the Benelux Convention can be given precedence over the Brussels I Regulation. This solution makes sense, since Article 4.6 of the Convention conforms to the principles underlying judicial cooperation in civil and commercial matters in the EU, such as the principles of legal certainty and of the proper administration of justice, referred to in the eleventh and twelfth recitals of the Brussels I Regulation.

2.2. External relationships

The prospect of creating a rift in European private international law rules, whenever a case with international elements involves locations both inside and outside the EU, creates constant difficulties. If European Union law impacts international situations both internal and external to the EU, then it would seem that the EU legal order reveals its double nature on the international level. To better understand this idea, we must first examine the effects of the Brussels I bis Regulation on relationships between Third States and Member States (2.2.1.) before turning our focus to reconciliations between European and international instruments in situations involving Third States (2.2.2).

2.2.1. Effects of the Brussels I bis Regulation on relationships between Third States and Member States

The question may arise as to whether European private international law instruments, adopted with provisions for internal jurisdiction in situations that affect the "proper functioning of the single market", may apply to situations that arise in third-party countries. This problem notably arose with European texts that have a "universal" scope, and therefore do not require that the situations they govern arise within Europe's territory or are subject to the laws of a particular Member State. Indeed, the Brussels I bis Regulation applies to the entire EU when the litigation in question is European in nature, that is to say, if the defendant resides in a Member State, if a choice-of-forum clause designates a Member State, if one of the exclusive jurisdictions is located in a Member State, or when there is universal jurisdiction (consumers and employees, for example). The regulation is thus not directly designed to apply to Third States, but situations that are "European

in nature" may include a wide range of instances to which the regulation might apply.

In its 2006 judgment on the Lugano Convention[15], the Court of Justice asserted that the Brussels I Regulation included a set of rules that applied not only to relationships between different Member States, but also to relationships between a Member State and a non-Member State. This meant that relationships outside of the EU might also be covered by the rules of European private international law. In principle, regional legislation may cover both intra-EU and extra-EU issues. The goal of harmonising solutions within the EU prevents each State from inventing its own solution when defining its relationships with third-party countries, as such a situation would result in the creation of separate legal systems within the European area. To prevent this, the EU needed to define its relationships with third-party legal entities. The Court of Justice therefore agree that the internal jurisdiction should be pre-empted by an exclusive external jurisdiction. In instances where there is a risk of several European and international rules being applied cumulatively to intra- and extra-European situations, the rules are generally written to differentiate between situations that should fall under European regulation from those subject to international regulation. This was the case, for example, for Article 26 of the 2005 Hague Convention on Choice of Court Agreements.

The recognition, within the EU, of judgments, actions, and situations arising in Third States, as well as the issue of the effectiveness, in Third States, of judgments, actions, and situations arising in a Member State are subject to the ordinary mechanisms of private international law. The solutions specific to the European area are based on the principle of mutual recognition, among others, and are not valid for Third States, unless they are extended through a convention or decision, as was the case, for example, of the Lugano Convention which governs the relationships between the EU and Member States of the European Free Trade Association (EFTA).

[15] CJEU, Febr. 7th, 2006, (*Competence of the European Community to conclude the new Lugano Convention on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters*), Opinion n° 1/03.

These solutions have led some authors to consider the creation of a new discipline, somewhere between private international law and public international law - some kind of "external relations law". This expression is not, however, a generally accepted disciplinary category[16].

2.2.2. Reconciling European and international instruments in situations involving Third States

Efforts to reconcile the Brussels I bis Regulation with certain Hague conventions (i), with bilateral conventions (ii), and finally, with the Lugano Convention (iii) have produced interesting solutions in situations involving Third States.

2.2.2.1. The Brussels I bis Regulation and certain Hague Conventions (2005 and 2019)

The EU has been a member of the Hague Conference since 2007, and also participates in the negotiation of international conventions on jurisdiction and the recognition and enforcement of judgments. Several conventions have been signed in this area over the last few years. One such example is the June 30, 2005 Hague Choice of Court Convention, which entered into force on October 1, 2015. The relationship between the rules given in the 2005 convention and the Brussels I and Brussels I bis Regulations is laid out in Article 26 of the convention. This Article states that the 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*". The convention's rules of jurisdiction therefore pre-empt those in the regulation, unless both parties are domiciled in a Member State, or if they come from a State that has not ratified the Convention. This means that, if the parties are from Member States or from States that have not ratified the convention, reconciliation is not an issue . However, the convention would overlap with the scope of the

[16] The question is not often asked in Europe. See. MCLACHLAN C., *Entre le conflit de lois, le droit international public, et l'application internationale du droit public : le droit des relations externes des États*, in *Rev. crit DIP*, 2, 2018, p.192.

regulation if, for example, the litigation involved a Member State and a Third State, with both States having ratified the convention. In this fairly uncommon case, , the two instruments would be in direct conflict. In terms of the recognition and enforcement of judgments, the regulation takes precedence when the court that issued a ruling and the court bound to recognize and enforce it are located in a Member State. The convention essentially limits the Brussels I Regulation's scope of application, narrowing it to governing external relationships outside of the EU, i.e. cases involving Third States. This narrowing of the regulation's scope of application is limited, and it is checked by the greater autonomy given to the parties and by greater legal certainty for European companies that do business with parties outside of Europe.

Recently, the July 2, 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was concluded, although it has not yet entered into force in the EU. Beyond any risk of conflict between this convention and the June 30, 2005 Hague Choice of Court Convention, this new instrument may also create reconciliation issues with the Brussels I bis Regulation. Its actual scope of application, however, remains quite limited, since it includes many exceptions. For the moment, no judgments have been issued in European case law on reconciling these two instruments. While legal scholars worried about potential friction when the 2005 convention went into force, the problem has never come before the CJEU. This lack of disputes on the matter seems to confirm that the conflicts feared by legal scholars have not arisen in practice.

2.2.2.2. Bilateral conventions

In public international law, when new EU legislation is adopted, any effects on agreements between one or several Member States on the one hand, and one or several Third States on the other, are governed by Article 30 (4) of the May 23, 1969 Vienna Convention on the Law of Treaties and by the TFEU. Under these provisions, when two instruments that do not involve the same States come into conflict, the existing instrument continues to govern the reciprocal obligations between the States bound by it and the countries in question. In other words, European legislation does not affect the functioning of existing

international instruments that govern relationships between Member States and particular Third States. As a result, in practice, reconciling the bilateral international conventions between a Member State and a Third State does not present any problems. Such situations will not be included in the reflections that follow in Part II.

2.2.2.3. The imperfect alignment between the Brussels I bis Regulation and the Lugano Convention

The Lugano Convention is a parallel agreement reached between EU Member States and EFTA States, whose purpose it is to expand the judicial cooperation regime in place for Member States to include these Third States. This is an example of convergence between EU law and private international law, as the Lugano Convention was deliberately designed to align with the provisions of the Brussels I Regulation. Thus, the provisions of the Brussels I and I bis Regulations are indirectly applied to certain Third States. However, despite the way that the rules in the Brussels I Regulation were copied for EFTA countries, the alignment between the regulation and the Lugano Convention is imperfect[17]. In fact, the parallel nature of these two instruments was disrupted when the Brussels I Regulation was revised in 2012. Since the Brussels I bis Regulation came into force, these two formerly parallel instruments have come into conflict on several points, notably the exclusion of maintenance obligations from the practical scope of application, the elimination of the decision enforcement procedure, the priority given to clauses on assigning jurisdiction, and the new lis pendens regime for Third States[18].

Furthermore, in order for this alignment to be effective, it must extend not only to how both instruments are applied, but also to how they are interpreted. That is why the States party to the convention agreed on Protocol 2, a specific mechanism for guiding interpretation,

[17] *Le Règlement Bruxelles I bis et la Convention de Lugano : conséquences juridiques d'un alignement incomplet*, Thesis by C. Mammino, under the supervision of A. Bonomi, Université de Lausanne, November 13, 2018.

[18] *Le Règlement Bruxelles I bis et la Convention de Lugano : conséquences juridiques d'un alignement incomplet*, Thesis by C. Mammino, under the supervision of A. Bonomi, Université de Lausanne, November 13, 2018. 5 (Introduction), §3.

with a double purpose: both ensuring the uniform application of the convention among Contracting States and maintaining interpretational uniformity with the Brussels instruments. This mechanism raises certain issues. In its revised version, the Brussels I bis Regulation changed the lis pendens rules, stipulating that when a court is seised based on a choice-of-jurisdiction clause, any other court must defer its judgment, no matter the chronological order in which the courts were seised. The Lugano Convention, however, under Protocol No. 2, continues to apply the old *Gasser* precedent, which admits that "*a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction*"[19].

It is therefore important to understand whether this imperfect alignment poses an issue in national practice. The question may arise whether judges are applying these instruments correctly, or if, on the contrary, the convergence between EU law and international law causes confusion. From this point of view, studying the relationship between the Brussels I bis Regulation and the Lugano Convention would help us to better understand how effective the regulation really is. In the second part of this chapter, we will examine the confrontation between these two texts that, in principle, should not cause any problems, although we will uncover various practical inconsistencies.

3. Applications in national case law

Professor Franco Ferrari's analysis helps us gain a general view of the relationships between private international law and the substantive rules in international conventions[20]. International substantive law conventions are no longer considered self-sufficient and these conventions and private international law are no longer considered to be antagonists, but rather to exist in a symbiotic collaborative relationship. This new understanding is reflected in more recent international sub-

[19] CJEU, Déc. 9th 2003, (Erich Gasser GmbH vs. MISAT Srl), Case C-116/02, § 54.

[20] FERRARI F., *A New Paradigm for International Uniform Substantive Law Conventions*, in *Uniform Law Review*, 2019, p. 467.

stantive law conventions. No uniform substantive law convention can provide solutions for all of the issues related to the specific relationships that it governs. This explains why recent international substantive law conventions have included rules for conflict resolution, thereby identifying which body of law applies to matters that fall outside the scope of the convention in question. After examining the reconciliation between the Brussels I bis Regulation and specialist international conventions (3.1.), we will also need to study conventions involving Third States (3.2.).

3.1. Applying special international conventions between Member States

In researching judgments on the Brussels I bis Regulation and its reconciliation with international law, we were able to make several observations. Firstly, we might note that there is a quantitative imbalance: our research identified a much higher number of judgments from Francophone jurisdictions on the topic of reconciling the Brussels I bis Regulation with international instruments. We have no explanation for this phenomenon, as it simply appears that judgments from other Member States included in the database were simply less numerous. Next, in general, the regulation seems to be applied fairly well, with most judges applying the provisions of this instrument quite strictly, especially Articles 68 et seq., whose interpretation has been clarified by previous CJEU case law. There are, however, several conventions that interfere with the regulation, special bilateral or multilateral conventions, and sometimes even conventions whose focus is not on jurisdiction and the recognition and enforcement of judgments, but whose provisions are taken into consideration during the decision-making process. We will need to further analyse national precedents in transport law (3.1.1.) and the international sale of goods (3.1.2.). Finally, some more specific information about bilateral international conventions between Member States will round out our observations (3.1.3.).

3.1.1. In matters of transport law

There are several international conventions on transport matters whose relationship with the Brussels I bis Regulation it might be interesting to analyse. We will look at the CMR Convention (3.1.1.1.), COTIF (3.1.1.2.), the Montreal Convention (3.1.1.3.), the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) (3.1.1.4.) as well as the Warsaw Convention (3.1.1.5.).

3.1.1.1. The Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)

There is already existing case law that lays the foundation for reconciling these two instruments. In 2004, the CJEC interpreted Article 57 of the Brussels Convention as asserting the supremacy of special rules over general rules. That is why, in most rulings on transport contracts, judges now apply Article 31 of the CMR Convention on jurisdiction, without even mentioning the possibility of applying the Brussels I or I bis Regulations. One interesting example is the judgment issued by the Versailles Court of Appeal in February 2006. In this case, the judges did not refer to the regulation, even when the parties mentioned it in their arguments. While this may appear to indicate a problem with the judges' motivations, it may also be understood as the product of a time-tested solution that needs no further justification.

Judgments have been consistent again and again: parties may not object to the jurisdictional rules in Article 31 of the CMR Convention on the grounds of Articles 2 and 5.1.b. of the Brussels I Regulation. The CMR Convention takes precedence over the Brussels I Regulation if the parties have agreed to apply this convention in their contract. In order to refuse to apply the provisions of the CMR Convention on determining a court of competent jurisdiction and to apply Article 2 of the Brussels I Regulation, Courts may not, say that the parties have agreed to subject certain aspects of their contractual relation-

ship to the provisions of the CMR Convention without this convention applying to their contractual relationship as a whole[21].

This solution should eliminate any uncertainty for trial judges[22]. At the same time, the decision to apply either the CMR Convention or the Brussels I bis Regulation also depends on when exactly a case is brought. When the harm occurs after the performance of the transport contract has been completed, that is to say, during goods handling and after delivery, in a contractual context other than that of a ground transport contract, jurisdiction is determined by the Brussels I bis Regulation.[23]

Finally, the case law reveals another issue. Should the CMR Convention be applied when the parties have agreed on a choice-of-jurisdiction clause that designates a specific court of competent jurisdiction? According to a recent French judgment[24], the CMR Convention must be set aside when there is a choice-of-jurisdiction clause in place. Alternatively, Belgian courts have asserted that, when the CMR Convention can be applied, but there is a choice-of-jurisdiction clause in place, plaintiffs may still bring a case before other jurisdictions mentioned under Article 31 paragraph 1 of the CMR Convention[25]. Belgian courts have thus held that even when there is a choice-of-jurisdiction clause in place, the parties may still bring their case before any of the jurisdictions mentioned in the Convention. French courts, on the other hand, tend to apply choice-of-jurisdiction clauses quite strictly, providing the clause meets the requirements given in the Brussels I bis Regulation.

[21] This was the opinion of the Court of Cassation in its judgment of September 25, 2019.

[22] In a 2017 judgment, the judges of the Amiens Court of Appeal found that the parties' choice to subject certain aspects of their contractual relationship to the provisions of the CMR Convention, namely damages and insurance coverage, does not mean that their entire contractual relationship is subject to this convention. As a result, the court of competent jurisdiction to hear any liability action brought by a forwarding agent against a sub-contracting transporter is determined by applying the provisions of the Brussels I Regulation.

[23] Douai Court of Appeal, No. 19/03697.

[24] Paris Court of Appeal, January 31, 2019, No. 18/21256.

[25] Court of Cassation of Belgium, December 8, 2006, C.06.0005.N.

3.1.1.2. The Convention concerning International Carriage by Rail (COTIF)

Our research turned up few judgments on reconciling COTIF with the Brussels I bis Regulation. In a November 29, 2016 judgment, the French Court of Cassation did, however, clarify some details about the legal effects of COTIF existing before the Regulation, as well as about its suppletive status[26].

While COTIF was already in place before the Brussels I and I bis Regulations, we should recall that this convention was modified by the Vilnius Protocol that came into effect in 2006, i.e. after the Brussels I Regulation went into force. As a result, the question may arise as to whether Article 71 of the Brussels I Regulation also covers any modifications to the Convention. Because, unlike the Brussels Convention, the Brussels I Regulation and the Brussels I bis Regulation do not stipulate that their provisions apply to conventions to which States "will be" party, we must assume that any new special conventions or modifications to conventions already in force, to which EU Member States are party, will not take precedence over the provisions of the Brussels I or Brussels I bis regulations. Thus, any provisions of COTIF that were modified after the Regulation was adopted, will not take precedence over this instrument, even though it is a special convention under Article 71 of the regulation.

As for COTIF's non-peremptory status, a judgment by the French Court of Cassation affirmed the supremacy of European Union rules over rules laid out in special conventions. The French judges rejected COTIF's appeal because of the disconnection clause in Article 2 of the membership agreement when the EU acceded to COTIF[27]. The judges concluded that the international jurisdiction rules in the Brussels I Regulation pre-empted those in COTIF. This interpretation of

[26] Court of Cassation, November 29, 2016, No. 14-20172.

[27] Because of this disconnection clause, "without prejudice to the object and the purpose of the Convention…in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned".

the membership agreement is debatable, and has been criticized by legal scholars.

This judgment can be called into question because setting aside the convention's rules of jurisdiction would seem inappropriate for several reasons. Firstly, such an action would violate the membership agreement, since the purpose of the listed reservations is to protect European transport policy and the substantive laws that arise from it. The specific nature of these reservations does not allow for their implicit expansion to areas such as jurisdictional conflicts. It would be difficult to assert that the Brussels I Regulation should be included as a "Union rule governing the particular subject concerned" under the disconnection clause. Furthermore, this isolation of the convention's rules also makes it more complicated to reconcile private international law and EU law. This complexity is a source of legal uncertainty, while still providing no real benefit in terms of protecting European transport policy. The multitude of rules of jurisdiction in international conventions and their complicated interactions with other rules has led to "forum shopping", which goes against all of the EU's objectives. The situation is even more regrettable because it has arisen in an area as international as transport.[28]

3.1.1.3. The Montreal Convention

Article 3.1 of Regulation (EC) No 2027/97 of October 9, 1997 (modified by Regulation (EC) No 889/2002) stipulates that "*The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability*". Based on Article 71 of the Brussels I Regulation, which gives precedence to special conventions, French courts have held that the Montreal Convention pre-empts the Brussels I Regulation[29]. In a similar manner, only based on Article 67 of the Regulation, German courts affirmed in a 2015 judgment that jurisdiction in matters of flights is governed by Article 33 of the 1999 Mon-

[28] Journal du droit international (Clunet) No. 4, October 2017, 16, Commentary by C. Legros, LexisNexis.

[29] Liège Trial Court, October 1, 2010 06/5646/A.

treal Convention for the Unification of Certain Rules for International Carriage by Air[30].

This solution does not, however, resolve all of the issues at hand. Applying the Montreal Convention is expressly prohibited when the claim for compensation is based on Regulation EC No. 261/2004[31] and according to repeated precedents from the Court of Justice[32], lump-sum compensation claims for flight delays do not fall under the Montreal Convention and its special rules for international jurisdiction. Instead, the Montreal Convention is set aside in favour of the provisions of Regulation 261/2004[33]. Because this regulation does not have any rules for jurisdiction, such matters fall under the Brussels I bis Regulation.

The matter of determining jurisdiction for an action for payment of a lump-sum claim is therefore fairly complicated. Some authors believe that it is now the responsibility of EU legislators to modify Regulation No. 261/2004 to include a rule for jurisdiction that accounts for the specific nature of each dispute and that provides passenger plaintiffs with the option of suing the air carrier in the jurisdiction where its head office is located, in the jurisdictions where the plane departed and arrived, or in their own home court. This solution would make it easier to resolve jurisdictional conflicts in transport law, while also simplifying the relationship between the provisions of the Brussels I Regulation and those of Regulation No. 261/2004. Ultimately, protections provided to passengers would also be strengthened[34].

[30] Bremen Regional Court, June 3, 2015, 3 S 315/14.

[31] Angers Court of Appeal, April 26, 2016 No. 15/03287, Court of Cassation, February 22, 2017, No. 15-27809. Adde Versailles Court of Appeal, March 31, 2016 No. 15/06525.

[32] V. not. CJEC, July 9th 2009, (Rehder) Case C-204/08.

[33] This instrument creates an independent standardized mechanism for lump-sum claims when flights are canceled or when a passenger is not allowed to board (extended to late passengers). This mechanism should not be confused with the Montreal Convention liability regime.

[34] HEYMANN J., *Du juge compétent pour connaître de la demande d'indemnisation pour un vol retardé*, in *Rev. crit. DIP*, 2, 2018, p. 264, §8.

3.1.1.4. The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)

For parties that choose to apply the Budapest Convention, the Brussels I bis Regulation will apply when determining jurisdiction, since the CMNI does not have its own rules on the matter[35]. The precedents that we reviewed did not indicate that there are any reconciliation issues with this convention.

3.1.1.5. The Warsaw Convention

In principle, foreign air carriers may not be summoned alongside aircraft manufacturers before the latter's home court if this court is not one of the jurisdictions listed under Article 28 of the Warsaw Convention of October 12, 1929. There is, however, one situation that might still raise issues. As there are no relevant provisions in the Warsaw Convention on jurisdiction in cases with multiple defendants, when one of them is not an air carrier, should EU law then apply? In 2007, the Orléans Court of Appeal held that the Brussels I bis Regulation could not be given priority over the convention in this special case[36].

3.1.2. In matters of the international sale of goods

The United Nations Convention on Contracts for the International Sale of Goods (CISG) does not contain any rules for deciding jurisdiction or for the recognition and enforcement of decisions. Our analysis of the existing case law, however, revealed that its provisions can influence the way in which the Brussels I bis Regulation is applied.

One example of this influence is the inclusion of choice-of-jurisdiction clauses, especially when the validity of such clauses is contested. In a recent case[37], the Court of Cassation refused to recog-

[35] Court of Cassation of Belgium, March 14, 2017 No. 2015/RG/364.

[36] Orléans Court of Appeal, December 14, 2007, No. 06/02777 and No. 06/03130.

[37] Court of Cassation, April 17, 2019 No. 18-14240. One company had submitted a purchase offer to another with its terms and conditions on the back, which designated the commercial court in its home jurisdiction as the court of competent jurisdiction for any legal issues. The seller confirmed the order and attached her own terms and conditions, which stipu-

nize a clear conflict between the terms and conditions for two parties to a sales contract and chose to apply the choice-of-jurisdiction clause in line with the Brussels I bis Regulation, side-stepping any analysis based on the CISG.

A second example arises from the concept of the "place of delivery". The existing case law, especially in Belgium, considers the CISG to not apply in the determination of the place of delivery, since the Brussels I Regulation defines this concept independently as an easily identifiable place that is not dependent on the provisions agreed to by the parties[38]. The Belgian Court of Cassation[39] has asserted that trial judges who determine the "place of delivery" based on the 1980 Vienna Convention, rather than by using the linking factor criterion defined independently by the Regulation, had violated Article 5.1.b of this instrument. This solution inevitably pushes for the unification of jurisdiction rules, with the goal of improving predictability.

3.1.3. Bilateral conventions between Member States

The principle in Article 71 by which special conventions are given precedence is applied by national judges to bilateral conventions between Member States. In a Belgian judgment[40], the judges of the Court of Cassation applied Articles 1.1 and 6.1 of the June 30, 1958 Convention between Belgium and Germany on reciprocal recognition and enforcement in civil and commercial matters for legal judgments, arbitration decisions, and authentic instruments, corresponding to Articles 33.1 and 38.1 of the Brussels I Regulation. The choice to apply the convention's rules rather than the regulation is not justified explicitly, but it seems clear that the solution is based on the provisions of Article 71 of the Brussels I bis Regulation.

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lated that the Belgian courts would have jurisdiction. The seller later contested the jurisdiction of the French court, basing her arguments on the Vienna Convention, holding that sending her contradictory terms of sale to the other party constituted a counter-offer, and not her acceptance of the initial terms.

[38] CJEC, May 3rd 2007, (*Color Drack*), Case C-386/05.

[39] Court of Cassation of Belgium, December 5, 2006, No. C.07.0175.N.

[40] Court of Cassation of Belgium, October 29, 2015, C.14.0386.N.

3.2. Situations involving Third States: the Lugano Convention

The Lugano Convention and the Brussels I and I bis Regulations are often applied jointly in practice, with judges basing their decisions on both instruments. For example, in a September 13, 2006 judgment, the Paris Court of Appeal referred to Article 5.1 of the Brussels Convention and to Article 5.1 of the Lugano Convention in authorizing the plaintiff, in contract matters, to summon a person domiciled in one Member State to another Member State, before the local court where the obligation at the heart of the appeal was performed or will be performed. The existing case law also shows that some jurisdictions use provisions from the Lugano Convention to neutralize those of the Brussels I or I bis Regulations, thus claiming jurisdiction for themselves[41] [42].

The Lugano Convention, however, can be used to transpose the provisions of the Brussels I bis Regulation onto the relationships between EU countries and EFTA countries. Judges should therefore either apply the Regulation when litigation is intra-European in nature and involves one or several EU Member States, or apply the convention when litigation involves one or several EFTA countries and, depending on the case, an EU country. The Brussels I Regulation only applies to litigation involving the relationship between two Member States[43]. These joint applications are probably a manifestation of judges' desire to base their decisions on other existing orders, as well as on their unfamiliarity with the Brussels I bis Regulation's scope of appli-

[41] Lyon Court of Appeal, January 23, 2012 No. 10/06958. The case, involving maintenance obligations, involved two French parties, one of whom was living in Switzerland. The Brussels I bis Regulation was applied to assign jurisdiction to the Swiss courts. However, in matters involving maintenance obligations, Article 5.2 of the Lugano Convention stipulates that a defendant domiciled in one Contracting State may be called to another Contracting State before the court of the place where the maintenance creditor is domiciled or has their permanent residence, or, if the matter is ancillary to an action involving the status of those appearing before the court, which according to its own law, has jurisdiction to entertain such proceedings, unless this jurisdiction is based solely on the nationality of one of the parties. For another application of the Convention, See: Rouen Court of Appeal, September 25, 2008, 08/1001.

[42] Paris Court of Appeal, September 13, 2006, ct0184.

[43] Rouen Court of Appeal, May 14, 2008.

cation, and more generally, with instruments of European and international law.

4. Prospects and solutions

Our analysis of the existing case law can provide several indications about the future of the Brussels I bis Regulation (4.1.). It can also lead to several hypotheses about the future relationship between the EU and Member States on the one hand, and a post-Brexit United Kingdom on the other (4.2.). Finally, the results of this study shed new light on the issue of codifying European private international law (4.3.).

4.1. Important lessons about the Regulation's future

Certain international conventions were not included in this study, for the simple reason that no judgments, or at least no relevant judgments, have mentioned them. For example, there are practically no decisions on reconciling the Brussels I bis Regulation with the 2005 Hague Choice of Court Convention. However, there are numerous concerns about reconciling this convention with the Brussels I bis Regulation. This dearth of judgments is probably due to the fact that the 2005 Convention does not have any significant overlap with the Brussels I bis Regulation's scope of application. As for the 2019 Hague Convention, it is so recent that it has not had enough time to spark any disputes.

Despite a few points that merit further investigation, the judgments in this study, show how the practical application of the Brussels I bis Regulation does not cause any insurmountable difficulties when it overlaps with international conventions. Most of the time, the conventions include special rules for jurisdiction, which are given precedence over the Brussels I bis Regulation. This general harmony, however, should not mask the fact that some jurisdictions in Member States, including judges of ordinary law under EU law, sometimes hand down conflicting opinions. We will need to continue monitoring future

judgments to see whether these contradictions become more common or tend to disappear.

The existing case law also shows us that the interactions between the Brussels I bis Regulation and international conventions are not limited only to instruments that discuss jurisdiction, recognition, and enforcement of judgments. In these circumstances, the regulation and the instruments in question can only be satisfactorily reconciled by applying the provisions of Articles 69 to 71 of the regulation, or the principles laid out in the TFEU. Beyond the simple matter of reconciling these instruments with the regulation, legal practitioners are also called to ensure that the fundamental principles of the EU, enshrined in both European treaties and in the Brussels I bis Regulation, are respected.

As for the future of the Brussels regime, three main areas deserve the full attention of legislators, judges, and legal scholars: firstly. how the regulation is currently interpreted and applied; secondly , the external dimension of the Brussels I and I bis regime, and finally, how this regime may be adapted to technological and social changes. Several provisions in the Brussels I bis Regulation remain difficult to interpret. For example, in its twelfth recital, the regulation states that it does not affect the 1958 New York Convention, although itis not clear how this would play out in practice. In the same way, the external dimension of the regulation also remains incomplete. The Commission intended to expand the Brussels regime to all proceedings involving Third States, but the opportunity was not taken to do so[44]. One way of resolving this issue is to negotiate new bilateral and multilateral agreements. Despite the concerns expressed by some legal scholars, such agreements could supplement the system set up by the regulation.

Finally, the Brussels regime should be able flexible enough to adapt to fundamental changes in society. For example, while jurisdiction is often based on points of physical contact, new and increasingly common technologies, such as blockchain, are of a completely differ-

[44] GARCIMARTIN F., *Les instruments de Bruxelles : le passé, le présent et… l'avenir*, in *Rev. crit. DIP*, 3, 2018, p. 476.

ent nature. We must question whether the Brussels regime will be able to adapt[45].

4.2. New issues related to Brexit

In 2016, the United Kingdom (hereafter "UK") voted in a referendum to withdraw from the EU. This withdrawal has created several issues in private international law, especially with regard to what will become of the EU standards that are currently integrated into UK domestic law. The consequence for judicial cooperation would be that the Brussels I bis Regulation would not apply to the UK, so an alternative solution must be found to protect its relationship with the EU and its Member States[46]. There are several possible solutions, based either on existing international instruments (Hague Conventions, Lugano Convention, etc.) or on new ones[47].

The UK may choose to re-join the Lugano Convention as a non-Member State under Article 72, in order to maintain the rules for jurisdiction already in place. Article 72 includes the condition that in order to re-join, the requesting State's legal system and private international law must meet the standards set by the Convention, and all Contracting States must give their unanimous approval. This second condition may become a problem, given the lack of understanding between the UK and EU. Furthermore, one of the UK's motivations for leaving the EU was the desire to recover its full national sovereignty, allowing it full legislative autonomy. This would conflict directly with the UK agreeing to abide by any new standards that it has not helped to write, and which are nearly identical to those it has abandoned. At the same time, this option has the advantage of ensuring reciprocal application within the legal relationship with the EU, which would not be possible if the Brussels I bis Regulation were simply copied into

[45] GARCIMARTIN F., *Les instruments de Bruxelles : le passé, le présent et… l'avenir*, cit., at p. 478, II.

[46] Rapport sur les implications du Brexit dans le domaine de la coopération judiciaire en matière civile et commerciale du Haut Comité Juridique de la Place Financière de Paris, January 30, 2017.

[47] RUHL G., *Judicial cooperation in civil and commercial matters after Brexit: which way forward?*, in *I.C.L.Q.*, 2018, p. 99.

UK domestic law. Nevertheless, the incomplete alignment of the Lugano Convention, which was not properly adapted to the Brussels I bis Regulation, may conflict with the law that the UK has been applying to date. Essentially, the UK would be applying rules that are less advanced than those it had followed previously.

Some authors are wondering whether it might be possible to return to the 1968 Brussels Convention. Article 68 of this convention may be read as a provision that simply ensures the supremacy of the regulation over the convention. In such a case, the termination of the effects of the regulation for the UK would lead to the convention being applied between the UK and the other States party to the convention. This would be a difficult position to maintain, since the UK cannot be considered to be a "non-European territory" under the EU treaties. This could lead to discrimination between two categories of EU Member States. So, a return to the 1968 Brussels convention does not appear to be a viable option.

Alternatively, the UK might choose to follow the Danish model and continue applying the Brussels I bis Regulation. Denmark has signed an agreement with the EU which, with some exceptions, extends the regulation's scope of application to include Denmark,. This option still assumes that the UK will agree to abandon certain political claims related to Brexit, such as the advantages of complete legal and jurisdictional independence, which would need to be compromised. The UK could also place itself under the regime of the 2005 and 2019 Hague Conventions to ensure better reconciliation between their own private international law and that of other EU Member States. Another option would be for the UK to negotiate bilateral or multilateral agreements on the recognition and enforcement of court judgments with certain EU Member States, especially with its primary economic partners.

To date, there is no plan to include a conflict resolution mechanism in the agreements being negotiated between the UK and the EU. While these negotiations began on March 5, 2020, the exceptional measures imposed by the COVID-19 public health crisis have serious-

ly derailed the original timeline[48]. Independently of the solution the UK chooses to adopt with regards to private international law on jurisdiction, the effects produced by the Brussels I and Brussels I bis Regulations will not disappear overnight. Judgments handed down over the years ruling on these regulations will still be in effect. These regulations will continue to produce their effects in terms of issued judgments, formally recorded or served authentic instruments, and judicial transactions approved or entered into before the UK's withdrawal from the EU (Article 67 of the UK Withdrawal Agreement)[49].

4.3. Potential codification of European private international law

Reconciling the Brussels I bis Regulation with international conventions on private international law naturally leads to the matter of codifying European private international law. This issue is regularly debated by legal scholars in its more speculative aspects. Any codification would certainly take the form of a regulation with legally binding provisions. It is difficult to know what the consequences of such a codification might be, but for the moment a few predictions can be made.

Creating a code of European private international law would show the political will to go beyond a simple harmonisation of rules, defining the particular goals of a European private international law policy. This would result in European private international law taking on a distinct identity from other sources of law, whether national or international. No matter what form it takes, any codification would need to meet the requirements of the internal market in order to contribute to its proper functioning. It must respect the principles enshrined in existing treaties, such as the principles of subsidiarity and proportionali-

[48] MAUBERNARD C., *Le règlement des différends entre l'Union européenne et le Royaume-Uni après son retrait : un voyage vers l'inconnu*, in *Rev. UE*, 2020, p. 417, II.

[49] DA SILVA ROSA M-C., BEN AVED A., *Brexit : point d'attention au moment de signer un contrat – la juridiction compétente en matière contractuelle*, in *Journal, Squire Patton Boggs*, April 24, 2020.

ty, as well as the goals of these treaties[50]. These general principles in EU law will influence the codification process itself. One advantage of codification would be the correction of any faults in European private international law, notably arising from the plurality of existing instruments, as well as from any gaps, redundancies, and inconsistencies in these instruments[51]. Codification would need to ensure that several principles are followed: "access to justice, mutual trust and recognition, equality of arms, procedural autonomy, sincere cooperation, proportionality, autonomy of intent, proximity, the protection of weak parties, the importance of European citizenship, the universality of the rules of conflict, and legal certainty"[52]. A unilateral European approach to resolving conflicts between legal systems would be allowed under this new codification, while also guaranteeing the applicability of both derived substantive laws and of the substantive laws of European States. As a result, "*codification may clash with the reluctance to universalize solutions and also cover relationships with Third Countries, insofar as they affect the European area*"[53].

There are certainly difficulties that must be overcome in order to bring such a project to fruition, difficulties in terms of geographic area and above all, in terms of resources. Ideally, codification would be as broad as possible, encompassing as many foreseeable matters as possible. The decision must then be made as to whether it is preferable to try and put some kind of comprehensive codification into place, or whether it would be better to break it down by area. This new challenge seems to be an idea that has become more and more appealing,

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[50] FALLON M., LAGARDE P., POILLOT PERUZZETTO S., *Quelle architecture pour un code européen de droit international privé ?*, in *Euroclio* n°62.

[51] VON HEIN J, RÜHL G. (eds), *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union*, Tübingen, 2016; CZEPELAK M., *Would we like to have a European Code of Private International Law ?*, in *ERPL*, 2010, p. 705; RAUSCHER T., *Ein «Code of EC-Conflict Law»?*, in *Rechtsschutz gestern – heute – morgen : Festgabe zum 80. Geburtstag von Rudolf Machacek und Franz Matscher*, Wien, 2008, p. 665 ; . – G. RÜHL ET J. VON HEIN, article préc., p. 713 s.

[52] BERGE J-S., PORCHERON D, VIEIRA DA COSTA CERQUEIRA G., *Droit international privé et droit de l'Union Européenne*, Répertoire Dalloz, p. 33 point 129.

[53] BERGE J-S., PORCHERON D, VIEIRA DA COSTA CERQUEIRA G., *Droit international privé et droit de l'Union Européenne*, Répertoire Dalloz, p.45 point 184.

all that remains to be seen is whether any concrete attempts at codification will be made in the next few years.

The *Partial Universal Effectiveness* for the Individual Employment Contract of Brussels I *Bis* Regulations and its Effects in the EU Regulatory Context

Isabel Reig Fabado

1. Introduction

In the current globalised socio-economic context, international labour relations have experienced a remarkable increase. Moreover, the free movement of workers and enterprises has contributed to an even greater dynamism[1] that has led not only to a proliferation of cross-border labour relations in quantitative terms, but also, qualitatively, in their greater complexity. Under this framework, it should also be added that in this type of contract the worker is presented as the weaker party in the relationship, which is why he/she requires special legal protection. In this paper, we analyse how the European legislator offers this legal protection to the worker, thereby attempting to compensate for the imbalance in the employment relationship between the employer and the worker in determining the international jurisdiction of the courts.

This combination of complex elements, which brings together the proliferation of cross-border labour relations, the free movement of workers and employers, and the protection of workers, poses new legal challenges in the field of employment in the light of Regulation (EU) No 1215/2012[2], now Brussels I *bis* Regulation. This regulation is the key instrument for determining international jurisdiction in transnational labour

[1] See Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on the free movement of workers within the Union (OJ L 141, 27.5.2011, p. 1), although this regulation does not regulate international jurisdiction.

[2] See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1.

relations within the EU. Thus, of the various key questions of private international law which it is essential to address in relation to individual international employment contracts, the determination of international jurisdiction is the necessary starting point. This system aims to balance the asymmetry of the relationship between the worker and the employer under the protection of *favor laboratoris*.

However, as we shall see, in practice, this instrument may also apply to employment relations with third countries, so that, prior to this procedural question, it is necessary to specify certain aspects of the definition of the scope of the application of the Regulation, which, as we have already said, favourably affects the working party's desire for protection. This is because, from a regulatory perspective, the legal nature of this European Union Regulation (hereinafter the EU) places it, if applicable by the classic defining criteria, hierarchically above the international conventions which bind the Member States and the model of state origin of the Organic Law of the Judiciary[3] (hereinafter the LOPJ). Precisely for these reasons, the latter has a subsidiary effectiveness that implies that only the autonomous system of state origin will be applied in the absence of the application of the rules of the applicable European Regulation or international convention, and therefore, the operability of the LOPJ is merely residual[4]. Hence the importance of influencing the criteria for defining the scope of the Brussels I *bis* Regulation.

In short, this work aims to address the *partial universal effectiveness* implicitly introduced in labour matters in the latest version of the Regulation, which - in addition to displacing other regulatory instruments - is, as we shall see, but an expression of the consolidation of this regulatory instrument in the EU and, by extension, of the legally binding procedural protection of workers.

[3] Organic Law 6/1985, of July 1, 1985, of the Judicial Power, published in the BOE, of July 2, 1985.

[4] Article 96.1 of the EC, Article 21 of the LOPJ and Article 36.1 of the LEC.

2. Regulatory framework and conceptual definition

2.1. Regulatory framework

The Brussels I *bis* Regulation is set within the context of the procedural framework for the processing of the *forum* and the recognition and enforcement of judgments. It originates from the 1968 Brussels Convention[5] and its subsequent conversion into a Regulation[6], with its successive amendments and inclusion in the legal basis of Article 81[7] of the Treaty on the Functioning of the European Union (TFEU). In particular, the Brussels I *bis* Regulation determines international jurisdiction over contractual obligations in general, but also provides for what may be called special forums of protection for individual employment contracts under Section 5 of Chapter II. Furthermore, this regulation of a procedural nature must be complemented by Regulation (EC) No 593/2008[8], known as *Rome I*, of a conflictual nature and *erga omnes* effectiveness. The latter deals with the determination of the law applicable to contractual obligations in general, and also has a specific regulation for the protection of

[5] Brussels Convention of 27 September 1968 on International Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Consolidated version, in OJ L 299, 31.12.1972, p. 32.

[6] *See* IGLESIAS BUHIGUES J.L., *Espacio de libertad, de seguridad y de justicia*, in *Cuadernos de Integración Europea*, 2006, p. 34 ff.

[7] See Article 81 TFEU, under the title: Judicial cooperation in civil matters: "*1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judicial and extrajudicial decisions. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, and in particular where necessary for the proper functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to ensure (a) the mutual recognition between Member States of judicial and extrajudicial decisions and their enforcement; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (f) the elimination of obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*". Article 81(2) of the TFEU forms the legal basis for what it calls the "communitisation of the third pillar " and the new EU private international law. See IGLESIAS BUHIGUES J.L., *La cooperación judicial internacional en materia civil*, in *Cooperación jurídica internacional*, Madrid, 2001, pp. 47-58; BORRÁS RODRÍGUEZ A., *Derecho internacional privado y Tratado de Ámsterdam*, in *Revista Española de Derecho Internacional*, 1999, pp. 383-426, and FERNÁNDEZ ROZAS J.C., *El espacio de libertad, seguridad y justicia consolidado por la Constitución Europea*, *Revista jurídica española La Ley*, 2004, pp. 1867-1881.

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

workers as a weak party in the relationship for the determination of the law applicable to the individual employment contract.

In short, international labour relations within the EU have their own set of rules, both for the forum and for the *ius* in the Brussels I *bis* and Rome I Regulations, respectively. All of this without forgetting the importance of issues relating to the recognition and enforcement of judicial decisions, also regulated in the Brussels I *bis* Regulation and which fully affect the labour sphere in what has become known as the *fifth Community freedom*[9], that is, the free circulation of judicial decisions in the EU , also in matters relating to individual employment contracts - a key issue but one that goes beyond the scope of this work. There are also outstanding issues, such as the treatment of the regime of the 2007 Lugano Convention, the 2005 Hague Convention on Choice of Court Agreements, Article 25 of the LOPJ and the special regime for displaced workers, although these are mentioned in terms of their relationship of applicability to the Brussels I *bis* Regulation. The same applies to the exclusion of *lis pendens* and international related actions, although the importance of certain aspects relating to the *ex officio* control of international jurisdiction should be stressed for the same reason, i.e. its impact on the exercise of labour jurisdiction in Regulation (EC) No 1215/2012.

In this context, it should be noted that the interaction between Brussels I *bis* and Rome I as necessarily complementary instruments further safeguards the system of protection in that the fact of unifying the conflict rule (Rome I) avoids *forum shopping*, which may occur when trying to find a competent court (Brussels I *bis*), whose applicable law would be more favourable. Thus, the protection barrier is twofold, so that, from the outset, employers already encounters the first legal-litigation limitation that prevents them from trying to avoid the rules of better labour protection.

[9] See IGLESIAS BUHIGUES J.L., *La quinta libertad en marcha. La libre circulación de títulos ejecutivos en la UE*, in PARDO IRANZO V., *Jurisdiction, Recognition and Enforcement of Foreign Judgments in the European Union*, Valencia, 2016, pp. 49-100. Also, see IGLESIAS BUHIGUES J.L., DESANTES REAL M., *La quinta libertad comunitaria: competencia judicial, reconocimiento y ejecución de resoluciones judiciales en la Comunidad Europea*, in GARCÍA DE ENTERRÍA E., GONZÁLEZ CAMPOS J.D., MUÑOZ MACHADO S. (dir), *Tratado de Derecho comunitario europeo (estudio sistemático desde el derecho español)*, Madrid, 1986, pp. 711-752.

2.2. Conceptual Definition

As a starting point, it is necessary to determine what is meant by both "individual employment contract" and "worker" for the purposes of applying these regulatory instruments. Neither the Brussels I *bis* Regulation nor the Rome I Regulation offer an independent concept of that contractual term.

The Court of Justice of the European Union (ECJ), whose work in this area is key and comprehensive, has not only contributed to the necessary interpretation and uniform application of the various European legislative instruments. Indeed, aware of the importance for the proper functioning of the system and for the sake of legal certainty, the ECJ has contributed independent concepts as decisive as the notion of worker or individual employment contract[10] as yet not included in the legislation. This circumstance becomes decisive insofar as the jurisdiction to interpret EU legislation is attributed to the ECJ and, therefore, the national judges of the Member States are subject to the uniform interpretation offered by this Court. Uniform interpretation undoubtedly ensures uniform application of the rules, which, in the context of the different national labour laws of the Member States, promotes legal certainty and, in the case of labour relations, the protection of workers.

In this sense, the European Court's case law and doctrine[11] understand "worker" to mean a person who performs for a period of time a series of paid services in favour of another person and under his/her direction[12]. And with regard to the notion of "individual employment contract", the

[10] The continuity of the interpretation work of the ECJ over the last few decades is clear. The same Court has repeatedly stated that the case-law on the Brussels Convention can be transposed, *mutatis mutandis*, to its successor, the Brussels I Regulation, and that is how it should be understood for Regulation 1215/2012, The *Brussels I bis* , according to its own Recital 14, by all, the J of the ECJ of 18 July 2013 in Öfab, 147/12; see, inter alia, the J of the ECJ of 10 September 2015 in *Holterman Ferho Exploitatie* and Others C-47/14.

[11] VIRGOS SORIANO N., *El Convenio de Roma de 19 de junio de 1980 sobre la ley aplicable a las obligaciones contractuales*, in GARCÍA DE ENTERRÍA E., GONZÁLEZ CAMPOS J.D., MUÑOZ MACHADO S. (dir), *Tratado de Derecho comunitario europeo (estudio sistemático desde el derecho español)*, Madrid, 1986, Vol. III, p. 811; CARRASCOSA GONZÁLEZ J., *Contratación laboral internacional*, in CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J. (dir), *Derecho internacional privado*, Vol. II, 16ª ed. Granada, , 2016, p. 1157.

[12] See the J of ECJ of 3 July 1986 in *Lawrie-Blum*, 66/85, of 11 November 2010 in *Danosa*, C-232/09 and of 10 September 2015 in *Holterman Ferho Exploitatie and Others*, C-47/14 Also, see PALAO MORENO G., *Los grupos de empresas multinacionales y el contrato individual de trabajo*, Valencia, 2000, p. 130 ff.

ECJ has also specified that the relationship must be lasting and the worker must be placed under the authority of the employer within the framework of a business organisation[13].

These instruments will therefore not apply to self-employment or to disputes arising from collective agreements. They do, however, include void contracts and de facto employment relationships[14].

3. Definition of the scope of application of Brussels I bis Regulation

At this point, it is essential to specify the scope of the Brussels I *bis* Regulation, as this is the only way to know to which conflicts it applies. This question takes precedence over the development of its jurisdictions, which, although it may be considered to be of general application, has given rise to doubts in case-law practice[15] and, as has been said, remains a preliminary question which is not entirely clear to legal practitioners. Such difficulties are reflected in the interplay of applicability with conventional instruments and with the State system of international jurisdiction, basically set out in Article 25 of the LOPJ.

As regards *temporary* scope, Regulation 1215/2012, the Brussels I *bis* Regulation applies from 10 January 2015[16]. Its previous version, Regulation 44/2001, known as *Brussels I*, is thus repealed[17]. Although it retains much of its structure and wording, it introduces some changes in the area of international jurisdiction.

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[13] See the J of the ECJ of 10 September 2015 in the case of *Holterman Ferho Exploitatie* and others, C-47/14.

[14] See the GIULIANO M., LAGARDE P., *Report on the Convention on the law applicable to contractual obligations*, in OJ C 282, 31.10.1980, p. 1 (in Spanish, in OJ C 327, 11.12.1992, p. 3).

[15] In this respect, See Spanish case law cited as *wrong, with dubious criteria or with confusion* in CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J., *Derecho internacional privado*, vol. II, Granada, 2016, in particualr at p. 1151.

[16] The dates of entry into force and implementation are different and do not coincide, the latter being operational from 10 January 2015. In this respect, See DE MIGUEL ASENSIO P.A., *El nuevo Reglamento sobre competencia judicial y reconocimiento y ejecución de resoluciones*, in *Diario La Ley*, 2013, 8013, pp. 1-4.

[17] Both Regulation 1215/2012 and its predecessor Regulation 44/2001 involved a conversion of the original Brussels Convention of 27 September 1968, which involved the *communitisation of the third pillar* with the entry into force of the Treaty of Amsterdam of 1997 and the legal basis of Article 81 of the TFEU introduced after the Treaty of Lisbon.

Both texts were a conversion of the original Brussels Convention of 27 September 1968, which involved the communitisation of the third pillar with the entry into force of the Treaty of Amsterdam in 1997 and the legal basis of Article 81 of the TFEU introduced after the Treaty of Lisbon. Despite the replacement of this conventional text by the regulatory one[18], it should be made clear, from a spatial perspective, that the Brussels Convention remains in force with respect to the French overseas departments[19]. Moreover, precisely because of the specific features of the legal basis of Article 81, the Brussels I *bis* Regulation does not apply in Denmark, but does apply in the United Kingdom and Ireland, which have exercised their power of transposition (opt-in). Denmark's exclusion has been resolved by the signing of an agreement extending the effects of the Regulation in relations between the Member States and Denmark[20].

But, without a doubt, the real difference between the two versions of the Brussels I Regulation (44/2001 and 1215/2012) lies in the recognition and enforcement regime, as it incorporates the abolition of *exequatur*. Thus, although it is beyond the scope of this paper, we cannot lose sight of the enormous importance, in terms of extraterritorial effectiveness and the free movement of judgments and documents, of the combination of automatic recognition (which has existed since the 1968 Brussels Convention) and the abolition of *exequatur* (since Regulation 1215/2012). In relation to the latter aspect, a system known as certification by the judge of origin has been incorporated, which, rather than eliminating checks on *exequatur*, transfers it from the requested judge to the judge of origin, based on the principle of trust among judges in EU Member States[21].

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[18] Article 68 of Regulation 1215/2012.

[19] Article 355 of the TFEU excludes overseas territories from the scope of Regulation 1215/2012. However, Article 69(7) of the 2007 Lugano Convention could change this situation. See IGLESIAS BUHIGUES J.L., *La competencia judicial internacional: el modelo español de competencia judicial internacional de origen institucional*, in ESPLUGUES MOTA C., IGLESIAS BUHIGUES J.L., PALAO MORENO G., *Derecho internacional privado*, Valencia, 2016, 10ª ed., p. 117.

[20] This feature, which does not apply to all the Regulations drawn up on this legal basis, means that the stumbling block of Denmark's exclusion could be overcome by the signing of an international Convention between the EC and Denmark to agree on the application of the rules to relations with that country. In particular, the Agreement was signed between the then EC and Denmark in 2005, validated by a Council Decision, and entered into force in 2007 for the Brussels I Regulation, 44/2001. In 2012, Denmark notified the Commission of its intention to apply the Brussels I *bis* Regulation, 1215/2012, in the same way, so that Denmark has been applying it as an international convention since its entry into force on 10 January 2015.

[21] However, this is not the first time that *exequatur* has been abolished in an EU regulation. This is not even the first time it has been removed in Regulation 805/2004 on the European En-

It is interesting to make some clarifications regarding different *exequatur* regimes, in line with what has been said in relation to the last two versions and their temporary operation, and also for the labour field. Thus, judgments given before the date of entry into force of the Brussels I *bis* Regulation, that is to say, before 10 January 2015, are recognised and enforced by Regulation 44/2001, Brussels I, that is to say, the previous version, and under a regime of abbreviated *exequatur* proceedings. By contrast, judgments given after that date of entry into force will be recognised and enforced under Regulation 1215/2012, Brussels I *bis* - the latest version - which, by abolishing the *exequatur* procedure, provides for a model for certification by the judge of origin.

From a spatial or territorial perspective, in practice, the Regulation applies throughout the territory of Brussels, including the United Kingdom, Ireland and even Denmark. In particular, as far as the United Kingdom and Ireland are concerned, the reason for its application is that they have exercised their power of transposition (opt-in). Denmark's exclusion from the whole process of Europeanisation of private international law under the Treaty of Amsterdam - in force since 1 May 1999 - and therefore from this legislative instrument, was resolved by the signing of an agreement extending the effects of the 19 October 2005 Agreement [22] between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, thereby applying Regulation 44/2001 to relations between the Member States and Denmark.

In this context, and in accordance with Article 3(2) of the abovementioned Agreement, it is stipulated that, "*Denmark shall not take part in the adoption of amendments to the Brussels I Regulation and such amendments shall not be binding upon or applicable in Denmark. When amendments to the Regulation are adopted, Denmark shall notify the Commission of its decision whether or not to implement the content of*

forcement Order. The first time that *exequatur* was abolished was previously and pioneeringly in Regulation 2201/2003, known as *Brussels II* bis, in its original version of 1999, which already established a special procedure without *exequatur* for some very specific judicial decisions relating to rights of access and some relating to the international abduction of children and their immediate return (specifically, for return decisions under the Brussels II *bis* Regulation which are preceded by a decision not to return the child or children under the 1980 Hague Convention on the Civil Aspects of International Child Abduction).

[22] Agreement between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 182, 10.7.2015, p. 1.

such amendments. The notification shall be made at the time of adoption of the amendments or within 30 days thereafter"[23].

Under this provision, the Brussels I *bis* Regulation also applies to Denmark by virtue of the letter sent to the Commission on 20 December 2012 notifying it of its decision to implement the content of Regulation (EU) No 1215/2012[24].

By reason of the subject matter, the Regulation applies to all proceedings arising from external legal transactions in civil and commercial matters. However, Article 1 expressly excludes a number of matters from its scope of application. The list of excluded matters may be oriented towards the area of property, obligations and company law, including individual employment contracts, for which it also provides specific regulations.

With regard to labour matters, it is interesting to note that the Regulation expressly excludes social security from its material scope of application, albeit with nuances[25]. This is because this exclusion only affects public social security, so that complementary social security remains within its scope. That is, those improvements granted by the employer on a voluntary basis or arising from the application of a collective agreement, directly or through an insurance contract. Implicitly, most of the doctrine also excludes conflicts arising from collective labour relations[26].

From a personal point of view, the application *ratione personae* of the Brussels I *bis* Regulation is the most interesting. This is due, inter alia, to the amendment made by that Regulation to the second paragraph of Article 21 on labour matters, which, despite referring to a forum with special jurisdiction in the matter, nevertheless directly affects the personal scope of the Regulation. It is precisely this amendment that is the subject of this paper, as we shall see below.

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[23] Art. 3.2 of the Agreement of 19 October 2005 between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, DOUE of 10 July 2015. L 182/1.

[24] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 79, 21.3.2013, p. 4.

[25] Except for those aspects relating to this matter included in the individual employment contract.

[26] LOPEZ TERRADA E., *Las relaciones laborales internacionales: jurisdicción competente y ley aplicable al contrato*, in *Course given at the University of the Basque Country*.

Thus, by way of introduction, the intention is to demonstrate that this change increases the operability of the Regulation and thus strengthens the procedural protection of the worker. In that regard, following the reform, the regulation applies in any event where the plaintiff is the employee, irrespective of the domicile and nationality of the parties, and is specifically provided for where the employer is not domiciled in a Member State. This circumstance alters the model so far enforced as explained *infra*, and entails the *partial universal effectiveness* of the regulation. In other words, if the plaintiff is the employee, the regulation will always apply, and will therefore operate in the same way as the exclusive jurisdiction or the express or implied submission under Section 2.

3.1. The universal effectiveness of the system in labour matters and its ratione personae definition

From a personal point of view, the Brussels I *bis* Regulation is generally applicable when the defendant is domiciled in a Member State (Article 4) regardless of the defendant's nationality or the nationality or domicile of the plaintiff. As well known, the criterion of nationality is practically irrelevant for the purposes of applying the rules emanating from the European Union. It is also irrelevant whether the defendant is the employer or the employee. Although we shall see how, from the point of view of its personal application, the Regulation provides for a different *ratione personae* definition from Section 5 - specific to the individual employment contract - depending on who the plaintiff is.

Consequently, and as a general rule, where the defendant is domiciled in a Member State and the matter is one of employment law covered by the Regulation, the jurisdiction of the courts of a Member State will be determined in accordance with the rules laid down therein. In other words, if the defendant is domiciled in a Member State, the Regulation applies irrespective of the domicile of the plaintiff and the rules of international jurisdiction of a State are not applicable[27].

Contrary to this, and as a general rule, where the defendant is not domiciled in a Member State, the rules of jurisdiction provided for in each Member State must be applied, as clear under Article 6(1) of the Regulation, "*if the defendant is not domiciled in a Member State, juris-*

[27] See the decision of the Court of Justice of the European Union in *Corman-Collins*, case C-9/812, 19 December 2013.

diction shall be governed, in each Member State, by the law of that State, without prejudice to Articles 18(1), 21(2), 24 and 25". However, in accordance with the abovementioned provision, this general rule is excepted in the cases of exclusive jurisdiction in Article 24, the express submission of Article 25, the tacit submission of Article 26, in matters of consumer contracts in Article 18(1) and, also in the case of Article 21(2) for the individual employment contract[28].

In other words, if the defendant is not domiciled in a Member State, international jurisdiction is governed, in each Member State, by its domestic law, unless one of the exceptions provided for therein applies. Of all the exceptions contained in Article 6.1, we shall focus on the one that directly affects labour matters[29].

The second paragraph incorporated into Article 21 by Regulation 1215/2012 is a new feature of the Brussels I Regulation (1215/2012)[30], compared with the previous version (Regulation 44/2001, Brussels I), which makes it necessary to distinguish between workers and employers who are not domiciled, since the system is different. It provides that: "*(2) Employers who are not domiciled in a Member State may be sued in the courts of a Member State in accordance with paragraph 1(b)*". Consequently, this exception operates under very specific circumstances, namely that the employer is not domiciled in a Member State when he is sued by an employee, under which conditions there is no reference to national rules, but the Brussels I *bis* Regulation applies.

As a general rule, where the defendant is domiciled in a Member State, he can only have jurisdiction pursuant to the jurisdiction rules of the Regulation, thus excluding State rules on international jurisdiction[31]. And, exceptionally, where the employer being sued is not domiciled in the EU, it may also apply if the plaintiff is the employee. In fact, in the latter case, the Regulation operates in exactly the same way as in the case of exclusive jurisdiction - Article 24 - and submission of the parties - Articles 25 and 26 - in relation to contractual obligations in general, *i.e. the*

[28] Article 6(1) of Regulation 1215/2012 provides that "*if the defendant is not domiciled in a Member State, jurisdiction shall be governed, in each Member State, by the law of that State, without prejudice to Articles 18(1), 21(2), 24 and 25*".

[29] As we have seen, the provision also concerns consumer contracts (Article 18(1)), the exclusive competence of Article 24, the express submission of Article 25 and the tacit submission of Article 26 of Regulation 1215/2012.

[30] See the second paragraph of recital 14 of the Brussels I *bis* Regulation.

[31] See J of the ECJ of 19 December 2013 in the Corman-Collins case, C-9/812.

Regulation always and in any event applies regardless of the domicile of the parties.

Thus, Spanish international privatisation doctrine has affirmed that the regulations on labour matters are *universally effective*[32], although it should be pointed out that they are partial, that is, only in some cases. It is therefore applicable irrespective of the nationality and place of residence of the parties. However, that effectiveness is subject to the condition that the plaintiff is the worker, regardless of his nationality or domicile, and that the defendant is the employer, who, moreover, is not domiciled in a Member State. Employers who are not domiciled in a Member State may therefore be sued by a worker in the courts of a Member State[33]. This is subject to the special international jurisdiction on the grounds of the matter referred to in Article 21(1).

However, when this power - of a *universal* nature - has been referred to, its partial validity has been stressed. This is because there are cases in which international jurisdiction over individual contracts of employment can be derived from other rules - state or conventional - as indicated in the Brussels I *bis* Regulation itself.

Thus, firstly, the case may be that of a defendant worker not domiciled in an EU State, where international jurisdiction would be determined by reference to State law, as indicated in the Regulation, i.e. in application of Article 6(1).

Secondly, and by way of a by-product of this same case, the Regulation itself directs international jurisdiction to other possible applicable instruments. Thus, if the defendant worker were domiciled in Switzerland, Norway or Iceland, the 2007 Lugano Convention would apply, in accordance with Article 64 thereof[34].

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[32] See CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J., *Derecho internacional privado*, cit., p. 1147.

[33] Art. 21.2 in conjunction with art. 21.1.b Regulation 1215/2012.

[34] The Lugano Convention of 30 October 2007 (better known as Lugano II), which replaces the previous Convention signed on 16 September 1988 "*on jurisdiction and the enforcement of judgments in civil and commercial matters and on the enforcement of judgments in civil and commercial matters*" between the members of the EEC and the EFTA countries. Article 64 states in Title VII and under the heading: *Relationship with Regulation* (EC) No 44/2001 and other instruments that "*(1) This Convention shall not prejudice the application by the Member States of the European Community of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and any amendments thereof, of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968, and of the Protocol on the interpretation of that Convention by the Court of Justice of the European Communities, signed in Luxembourg on 3 June 1971, as amended*

And, finally, bearing in mind that should the worker be domiciled in another third country with which there is no multilateral or bilateral agreement, the jurisdiction of the Spanish judge would derive from the international jurisdictional jurisdictions in labour matters established in Article 25 of the *LOPJ*[35] (note that, among these jurisdictions, for example, the common Spanish nationality of the employer and the worker could grant international jurisdiction to the Spanish judge). This is a reference made by Article 6(1) of the Brussels I *bis* Regulation which, firstly, applies and, secondly, defines the scope of application of its own uniform rules of jurisdiction. Thus, even if another instrument were to apply, it would be so by virtue of the Regulation, in a set of operational arrangements originally envisaged by the 1968 Brussels Convention between the integrated procedure of the Regulation and international State procedures (which include both conventional and State rules of origin)[36]. It should be noted that, on this point, the definition of the scope of the Regulation itself coincides with the only jurisdiction provided for in the Regulation for the employer as plaintiff, i.e. the domicile of the defendant.

Ultimately, it is that possibility of referring to the State rules in Article 6(1), for when the defendant worker is not domiciled in a Member State, which prevents the *general* universal effectiveness of Section 5 from being affirmed, as it is only partially applicable in the case of a plaintiff worker, under which the regulation will always be applied, regardless of the domicile and nationality of the employer and in place of the national rules on the matter[37].

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by the Conventions of Accession to that Convention and to that Protocol of the States acceding to the European Communities, as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Brussels on 19 October 2005. 2. However, this Convention shall apply in all cases: (a) in matters of jurisdiction, where the defendant is domiciled in a State where this Convention applies and none of the instruments referred to in paragraph 1 apply, or where Articles 22 or 23 of this Convention confer jurisdiction on the courts of such a State; (b) in cases of lis pendens or related actions referred to in Articles 27 and 28, where the proceedings are instituted in a State where the Convention applies and none of the instruments referred to in paragraph 1 apply, and in a State where the Convention and an instrument referred to in paragraph 1 apply".

[35] See IGLESIAS BUHIGUES J.L., *La competencia judicial internacional: el modelo español de competencia judicial internacional de origen institucional*, cit., p. 125.

[36] IGLESIAS BUHIGUES J.L., *La competencia judicial internacional: el modelo español de competencia judicial internacional de origen institucional*, cit., p. 125.

[37] REIG FABADO I., *La competencia judicial internacional en materia de contrato individual de trabajo en el Reglamento Bruselas I bis*, in LÓPEZ TERRADA E. (dir), *La internacionalización de*

Thus, the international jurisdiction of the Spanish judge - and therefore of any other judge in a Member State - can be systematised and as far as matters relating to individual contracts of employment are concerned, under the Brussels I *bis* Regulation, can be derived:

1.- from the jurisdictions for protection in labour matters provided for in the Regulation if the defendant's domicile is in a Member State, according to Article 4, or if he is an EU citizen and his domicile cannot be proved in a third State. This is the general criterion for defining the scope of the Regulation.

2.- in any event, in the case of Article 21(2) of the Regulation, that is to say, where the employer being sued is not domiciled in a Member State in accordance with the jurisdiction set out under Article 21(1)(b). This point affirms the universal effectiveness of the Regulation, together with other cases[38].

3.- from the jurisdiction provided for by the national conventional rules of the LOPJ, by reference to Article 6(1) of the Regulation, when the defendant worker is not domiciled in a Member State[39].

In conclusion, the specific case in which the employee acts as plaintiff in relation to the defendant employer, who is not domiciled in a Member State, is established as a court of jurisdiction and, in turn, acts as a criterion defining the personal scope of application of the regulation inasmuch as, in the event of such a case – i.e. a defendant who is not domiciled - it does not refer to State legislation, as would be the case, in general, if it did not cover this specific case in labour matters. In other words, in these situations, the application of the LOPJ is ruled out.

Thus, the Brussels I *bis* Regulation provides for this enhanced protection of new recruits for plaintiff workers, which implies the application, in all such cases, of the jurisdictional forums in *Section 5*, regardless of whether or not the employer is domiciled in a Member State.

Therefore, if the defendant does not appear, the court is obliged to review its jurisdiction under Article 28 of its own motion[40]. This perspec-

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las relaciones laborales, Principales cuestiones procesales, laborales y fiscales, Valencia, 2017, p. 22.

[38] These cases are the exclusive jurisdiction of Article 24, the express and tacit submission of Articles 25 and 26 and other cases concerning consumers (Article 18(1)) and patents (Article 71 *ter*).

[39] See, in general and not, as here, adapted to the labour level, IGLESIAS BUHIGUES J.L., *La competencia judicial internacional: el modelo español de competencia judicial internacional de origen institucional*, cit., p. 125 f.

tive on regulatory standards is crucial to this argument. Thus, the *ex officio* review of jurisdiction implies that the court will verify its own jurisdiction and declare itself ex officio incompetent for the case in which the defendant does not appear.

In addition, it should be noted that the case law of the ECJ has also resolved some aspects relating to the personal scope of the Regulation. Firstly, it clarifies that the Regulation also applies where the defendant is domiciled in a Member State, even if the parties are of the same nationality and domiciled in the same Member State, even in the State of which they are a national, provided that the internationality of the dispute derives from any other circumstances[41]. Secondly, it clarifies that the specific jurisdictions of the Regulation also applies in the case of an EU citizen who cannot prove domicile in a third State[42]. This jurisprudential orientation of the ECJ may also be interpreted as favouring the extensive application of the Regulation in the interests of greater protection in two senses. Firstly, it refers to the greater legal certainty that the application of the regulation's rules may entail, in view of the possible diversity of the different state rules on the matter. And, secondly, with regard to guaranteeing the standard of procedural protection provided for by the text in labour matters, that is, in its protective effect.

However, and as a final critical approach, the assertion of the protective nature of the *partial universal application* of the regulation in the field of employment, as set out above, may prove to be controversial. This occurs because part of the international doctrine of privatisation has maintained the opposite and has advocated maintaining the possibility for plaintiff workers to have recourse to State courts when they are established as an alternative to those provided for in the regulation for suing employers domiciled in a third State[43]. The procedural options for plaintiff workers would thus be extended, and their protection would therefore be at least quantitatively increased. However, it is questionable whether

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[40] See IGLESIAS BUHIGUES J.L., *La competencia judicial internacional: el modelo español de competencia judicial internacional de origen institucional*, cit., p. 123.

[41] See the decisions of the Court of Justice of the European Union of 19 December 2013 in *Corman-Collins*, case C-9/812, and the decision of 1st March 2005 in *Owusu*, case C-281/02.

[42] See the decision of the Court of Justice of the European Union of 1st March 2005 in *Owusu*, case C-281/02.

[43] See GARCIMARTÍN ALFÉREZ F.J., SÁNCHEZ FERNÁNDEZ S., *El nuevo Reglamento Bruselas I: qué ha cambiado en el ámbito de la competencia judicial*, in *Revista Española de Derecho Europeo*, 48, 2013, pp. 9-35.

state legislation can sustain, in its diversity, the qualitative standards, in terms of procedural labour protection, that are observed in the Brussels I *bis* Regulation.

3.2. The importance of specifying the defendant's domicile

The importance of the specification of the parties' domicile in the definition and jurisdiction under the Brussels I *bis* Regulation can be deduced from the above. To this end, the Regulation incorporates the determination of the domicile of the parties by distinguishing between natural persons in Article 62, and legal persons in Article 63. The distinction is based, on the one hand, on a solution involving a reference to national law for the determination of a party's domicile in a Member State with regard to natural persons; and on the other hand, on a direct solution based on the establishment of an autonomous concept for considering a company or other legal person as domiciled.

With regard to the domicile of natural persons, Article 62(1) and (2) provides for two scenarios. The first concerns the verification of the domicile of a natural person in the State of the court seised in the event of failure of the defendant to appear (in relation to Article 28), in which case *lex fori* applies. Secondly, in the event of a challenge to international jurisdiction through international declaration, where the judge must establish that the natural person is domiciled in another Member State, he/she will apply the internal law of that other Member State[44]. If, under these circumstances (failure of the defendant to appear or contesting international jurisdiction), Spanish law is applicable, the determination of domicile (either by the Spanish judge himself/herself or by a judge of a Member State to determine the domicile of the natural person in Spain) will be governed by the criteria set out in Article 40 of the Spanish Civil Code. It should be specified here that, if no appearance or objection is made - when, for example, the defendant defends the claim - the judge will not apply domestic law (his/her own or that of others), in order to determine the criterion of domicile, but will limit him/herself to reviewing his jurisdiction under Article 28. This means that in practice the judge only veri-

[44] See JENARD P., *Informe del Sr. P. Jenard sobre el Convenio de 27 de septiembre de 1968 relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, in OJ C 189, 28.7.1990, p. 122, at p. 136 ff.

fies *ex officio* the criteria for the domicile of the defendant set out in the cases referred to, where a conflict arises in this respect.

However, as regards the determination of the domicile of companies or legal persons, Article 63 of the Regulation establishes, as has been anticipated, an autonomous concept. Thus, the provision considers that a company or other legal person is domiciled at the place where, without distinction, its statutory seat, its central administration or its principal place of business is located. This is a broad concept in that the concurrence of any of these criteria gives the possibility of filing the lawsuit before any of these judicial bodies[45].

Another important aspect of the Regulation, in relation to the determination of the domicile of the defendant, affects the situations known as *universally effective* (Article 21.2 on labour matters, as well as for other cases mentioned *supra*, such as, among other, the case of the exclusive jurisdictions of Article 24 of the Regulation). The *attractive* nature of these jurisdictions, which operate independently of the domicile of the parties, may give rise to factual issues for the judge as regards the determination of the domicile of the defendant in order to serve the claim.

In any event, the interaction and importance of considering the defendant's domicile with the procedural aspects of service implies a necessary reference to Regulation (EC) No 1393/2007 on the service of documents[46].

4. Conclusions

As we have seen, the current proliferation of international labour relations in a social framework of globalisation is part of a European Union that needs to find a stable balance between complex elements of social and political development - fundamentally, between the free movement

[45] It should be noted that the criterion specifying the domicile of companies and legal persons within the scope of the exclusive competence of Article 24(2) regarding the validity, nullity or dissolution and the validity of the decisions of their organs is different. In this case, the solution is indirect and conflictual; it refers to the rules of private international law of the court exclusively competent to determine its domicile.

[46] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, repealing Council Regulation (EC) No 1348/2000, in OJ L 324, 10.12.2007, p. 79.

of workers and enterprises and the basic principle of protection of workers as the weakest part of the individual employment contract.

In a clearly protective spirit, the EU legislator has developed a normative model of labour protection in the complementary Brussels I *bis* and Rome I Regulations (for the *forum* and the *ius*, respectively). As regards, in particular, the procedural level for the individual employment contract, the Brussels model presents a specific system of international jurisdiction in labour matters that, establishes distinct rules for this matter.

The existence of a European regulatory system of international jurisdiction in labour matters is key to the protective objective of the worker as the weaker party in legal actions arising from the individual employment contract. Articles 20 to 23 of Section 5 of the Brussels I *bis* Regulation contain a special model of jurisdiction in this area, which differs from the general one, which contribute to this aim and which, not only has been consolidated over half a century since its original formulation at the 1968 Brussels Convention, but has been progressively strengthened.

Thus, a model is established that guarantees the procedural options of the worker and, therefore, relevant standards of labour protection. In addition, successive amendments to the Regulation, without being too far-reaching for the text or the model established, have implicitly strengthened worker protection. Such elements may be interpreted as a tendency - no doubt against the grain - to guarantee legal protection on a procedural level.

Since its enforcement, the Regulation itself has reinforced this primacy, besides others in labour matters by attributing an increasingly minor, if not residual, significance to the Spanish system of international judicial jurisdiction provided for in the LOPJ. In fact, it has been observed that throughout the evolution of the Brussels jurisdiction model, the effectiveness of the Regulation is progressively increasing, also in labour matters, which is considered universal, as we have seen, for the cases of employer defendants. This is in keeping with the amendment incorporated into the latest version of the Regulation (the Brussels I *bis*, 1215/2012), which establishes *ex novo* the second paragraph of Article 21, establishing another criterion of two conditions: limitation and jurisdiction. This means that the Regulation will apply in all cases where the worker is the plaintiff, thereby overtly increasing the protection of the worker. In other words, there is no possibility of applying the state model contained in the Spanish case in the LOPJ when the worker is the plaintiff.

In short, the Brussels model presents a system of jurisdiction in labour matters which can be considered, in its formulation and in its evolution, to be threefold strengthened in the interests of the objective of protecting workers. On the one hand, it consolidates and ensures the application of this regulation in all and any case, and in substitution of the internal regulations on the matter, as a consequence of its consideration as being of universal or *erga omnes* effectiveness. On the other hand, it reinforces the protection of workers in procedural labour matters, from the perspective of the procedural options guaranteed to them by the system of the Brussels I *bis* Regulation, as well as from the perspective of legal certainty through greater predictability of legal solutions. And finally, it draws strength from the fact that the abolition of *exequatur* at the level of effectiveness of decisions closes the circle of procedural security.

Concluding, in a context of political crisis in the European Union (in addition to migratory and demographic crises with the shadow of economic recession and its labour consequences), where *post concept*s such as labour *flexisecurity* come into play, it is encouraging that the European legislator should firmly maintain such values as procedural protection of the worker in labour matters.

Enhanced Employee Protection in the Brussels I *bis* Regulation and its Relations with other European Instruments

Rosa Lapiedra Alcamí

1. Introduction

One of the four freedoms enjoyed by European citizens is the freedom of movement for workers, which includes the right of the worker to move to and reside in another Member State, as well as the right to work in any country within the European Union and to be treated equally with the nationals of that State. This principle is also extended to EU-based businesses. One of the direct and inevitable consequences of this freedom of movement is the increasing cross-border labour relations, which inevitably means the increase of labour disputes.

Labour disputes are characterised by the presence of the employee as a weak party in the contractual relationship. This circumstance requires specific regulation at the EU law level to guarantee special protection to this vulnerable group. This paper shows how this protection has been progressively reinforced by the European legislator, from a procedural perspective and from the perspective of the applicable law to cross-border labour relations.

From a procedural perspective, the first part of this work will address the jurisdictional model of the labour regulation contained in Regulation 1215/2012, commonly known as the *Brussels I bis* Regulation. This is the key regulatory instrument in contractual matters for determining international jurisdiction, which has provided for a special international jurisdic-

tion regime for this type of conflict in view of the worker as a weak party in the relationship. *Section 2* of Chapter II is devoted to contractual obligations in general, while *Section 5* of the same chapter introduces special rules of international jurisdiction for individual contracts of employment.

From the point of view of applicable law, the second part of this work will focus on Regulation 593/2008[1], commonly known as Rome I, which provides the applicable law for employment contracts. The determination of the *ius* in labour matters enjoys a special regime due to its own characteristics and is also inspired and organised by the protection of the employee as the weaker party to the contract. This instrument combines the elements of protection with the freedom of the parties which allows the parties to choose the applicable law to the international labour contract. To this end, it establishes a minimum standard of employee´s protection that limits the choice of law, as we shall see.

2. International jurisdiction in international employment contract: Regulation 1215/2012, Lugano convention 2007 and Directive 96/71/CE according to art. 67 Brussels I bis Regulation

2.1. Introduction

It should be noted that we find fora of international jurisdiction in matters of individual employment contracts in Regulation 1215/2012, the Lugano Convention 2007[2] and also in the Directive 96/71/CE as amended by Directive (EU) 2018/957[3] on the posting of workers in the framework of the provision of services. The Lugano Convention, apart from some minor differences referred to in this paper[4], provides for exactly the same fora

[1] Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, in OJ L 177, 4.7.2008, p. 6.

[2] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007, in OJ L 147, 10.6.2009, p. 5. See in this regard PALAO MORENO G., *La competencia judicial internacional en materia de contratos individuales de trabajo en el Convenio de Lugano*, in *Revista de Trabajo y Seguridad Social*, 2019, p. 115.

[3] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, in OJ L 173, 9.7.2018, p. 16.

[4] See Section 2.4.1 of this paper highlights one of the most important differences in international jurisdictions between the 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 en-

as the Brussels I *bis* Regulation. Directive 96/71/CE offers a single forum of jurisdiction in art. 6[5] for a very specific case, such as the temporary posting of workers in the framework of the provision of services, presenting itself as an alternative forum in addition to those already provided for in the other regulatory instruments above mentioned.

For all this reasons, I will focus my work on the Brussels I *bis* Regulation which contains in *Section 5* of Chapter II under the heading "*Jurisdiction over individual contracts of employment*" specific rules of international jurisdiction for the individual contract of employment which constitute what can be called "special protection forum" (artt. 20-23).

It should be noted that international jurisdiction in matters of employment contracts is governed exclusively by this *Section 5*, without prejudice to any interaction that occurs exceptionally with the general contracting regime contained in *Section 2*. This is the case, in the first place, of the operations of agencies, branches or other establishments in art. 7.5 - *Section 2* - and, in the second place, the case relating to the plurality of defendants[6]. Assumptions that we will address throughout this paper.

The labour jurisdiction model of the Brussels I *bis* offers special protection rules. However, it should be noted that these special fora of protection are not only provided for workers[7], but for insured[8] (*Section 3*, artt. 10 to 16) and the consumer[9] (*Section 4*, artt. 17 to 19) as well. Although, logically, in this work we will focus only on the fora included in labour matters.

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forcement of judgments in civil and commercial matters OJL 351, 20.12.2012, p. 1) and the 2007 Lugano Convention.

[5] Art. 6 Directive 96/71/CE (Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in OJ L 18, 21.1.1997, p. 1): "*In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*".

[6] Art. 8.1 of the Regulation 1215/2012: "*A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings* (…)".

[7] Art. 23 of the Regulation 1215/2012: *"The provisions of this Section may be departed from only by an agreement: (1) which is entered into after the dispute has arisen; or (2) which allows the employee to bring proceedings in courts other than those indicated in this Section*".

[8] Art. 15 of Regulation 1215/2012.

[9] Art. 19 of Regulation 1215/2012.

In short, the fora for jurisdiction in labour matters provided for in *Section 5* of the Brussels I a Regulation are structured on a hierarchical basis:

1**.** In the first place, it is necessary to comply with the parties' agreements of prorogation of jurisdiction, whether express or implied, foreseen in art. 23 Brussels I *bis* Regulation.

2**.** In the absence of prorogation agreement between the parties, recourse must be had to the labour.

2.2. Prorogation of jurisdiction expressly or impliedly: Requirements for the validity of the submission agreement

Artt. 20 to 23 - *Section 5* - reflect the protection fora that escape to the general model of international jurisdiction - *Section 2* - given the presence of a weak party that deserves special protection. This system aims to balance the asymmetry of the relationship between the employee and the employer under the protective purpose of *favor laboratoris* by strengthening the situation of the worker in the seat of international jurisdiction[10]. To this end, and as will be seen, it limits, on the one hand, the freedom of choice on a procedural level and, on the other, reduces the employer's fora for attack with the clear objective of protecting the weaker party of the relationship - the employee[11].

As mentioned above, the grounds of jurisdiction in art. 20 to 23 are hierarchical. Therefore, in accordance with art. 23 of the Brussels I *bis* Regulation, the courts of the Member State to which the parties have expressly or tacitly agreed to submit their dispute shall have jurisdiction in preference to the other criteria[12]. In other words, as a first option, the jurisdiction of the courts of a Member State may be determined on the basis of the principle of party autonomy in procedural matters. However, it should be noted that there is a sensitive difference in the possibility of

[10] See ZABALO ESCUDERO E., *La competencia judicial internacional de los tribunales españoles en materia de contrato de trabajo*, in *REDI*, 1986, p. 620 ff; REIG FABADO I, *La competencia judicial internacional en materia de contrato individual de trabajo en el Reglamento Bruselas I bis*", in LÓPEZ TERRADA E. (dir), *La internacionalización de las relaciones laborales*, Valencia, 2017, pp. 34 ff.

[11] See ESPLUGUES MOTA, C., PALAO MORENO G., *Jurisdiction over Individual Contracts of Employment*, in MAGNUS U., MANKOWSKI P. (eds.), *Brussels Ia Regulation*, Munich, 2016, p. 327.

[12] Art. 23 of Regulation 1215/2012 provides "*The provisions of this Section may be departed from only by an agreement: 1) which is entered into after the dispute has arisen; or 2) which allows the employee to bring proceedings in courts other than those indicated in this Section".* This implies that if the agreements comply with point 1 or 2, they shall prevail over all other jurisdictions.

submission of the parties for contracts in general under art. 25 as opposed to in employment matters.

In the case of labour disputes, party autonomy has been limited, in accordance with the provisions of art. 23. This limitation is due to the presence of a weak party in the contractual relationship that deserves special protection. This possibility offered by Art. 23 to submit expressly or tacitly can be used by both the employer and the employee[13], unlike the other special subsidiary fora that differ depending on who is the plaintiff, the worker or the employer.

However, the European legislator, in line with the protective spirit of the Regulation and aware of the imbalance between the employer and the employee, has introduced a safeguard clause in art. 26.2 for the case of tacit submission by the employer. In fact, when there is the possibility of an agreement of tacit submission, with the employee as the defendant, the court before which the claim is brought, which *a priori* is not competent, - unless the employee accepts it - must ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance. The validity of an agreement of submission, whether express or tacit, in the context of an individual contract of employment will depend on whether it meets the conditions expressly provided for in Art. 23, namely that such agreement "*(1) is entered into after the dispute has arisen; or (2) allows the employee to bring proceedings in courts other than those indicated in this Section*". These conditions are alternative and not cumulative, since the legislator uses the disjunction "or". Therefore, compliance with one of them will be sufficient to have a valid agreement that prevails over the rest of the fora. Failure to comply with either of these two conditions renders the agreement null and void and, consequently, the special fora for protection under artt. 20 and 21 of the Brussels I *bis* Regulation would operate. This is also stated in art. 25.4 Brussels I *bis*, which expressly cancels agreements that are contrary to the requirements established in art. 23 Brussels I *bis*. In short, only those agreements that respect at least one of these two conditions will prevail over the other forums of jurisdiction in *Section 5*.

a) As regards the first of those conditions, "agreements subsequent to the dispute arising", it goes without saying that it relates to express agreements, since when we are dealing with an instance of tacit submission, by definition, the action is brought once the dispute has arisen.

[13] STS of 24 April 2000, Rec. 3341/1999, Ref. Aranzadi RJ 20000/5504.

It is necessary to explain what is meant by a post-contractual agreement. Under these circumstances, it is presumed that the employee is not forced to accept an express agreement of submission contained in his contract of employment. So much so that the Spanish courts have on more than one occasion considered clauses of express submission in favour of foreign courts to be null and void because they were agreed in the same contract[14]. The expression used "*after the dispute has arisen*"[15] must be interpreted in a broad sense, not corresponding to the commencement of the legal proceedings. Thus, from the moment that there is a clear difference between the parties on some aspect of the contract, the agreement of express submission will be valid.

b) With regard to the second of the conditions "*which allows the employee to bring proceedings in courts other than those indicated in this Section*"[16], it should be noted that submission agreements are valid if, irrespective of whether they were agreed before or after the dispute arose, they extend the possibilities of defence of the worker provided for in the special jurisdictions of artt. 21 and 22 Brussels I *bis* Regulation[17]. As we have seen, agreements on submission prior to the dispute would be null and void. However, the worker may enforce them if they allow him to sue in courts other than those provided for in the special jurisdictional fora. This possibility requires the employee to assess, *a priori*, the special jurisdictions to consider whether or not the agreement expands his or her possibilities.

2.3. The interaction between Section 5 and Section 2 in labour matters: some procedural issues

In this section of the paper we will address two issues that pose problems in practice. Firstly, we will address certain protective deficiencies that are detected in some labour conflicts contained in the general regime of *Section 2*. Secondly, reference will be made to the controversial admission of the forum of plurality of defendants in labour matters, which

[14] See for all, SS.TS of 24 April 2000, N. Rec. 3341/1999, Ref. Aranzadi RJ 2000/5504 or STS of 12 June 2003, N.Rec. 4231/2002, Ref. Aranzadi RJ 2003/4585.

[15] Art. 23 of Regulation 1215/2012.

[16] Art. 23 *in fine* of Regulation 1215/2012.

[17] See Judgment of the Court (Grand Chamber), 19 July 2012, Ahmed Mahamdia v People's Democratic Republic of Algeria, Case C‑ 154/11, paragraphs n. 66 and 67.

is precisely where the European legislator has amended the position of the Court of Justice of the European Union -ECJ- acting as a corrective.

With regard to the first of the questions to be addressed, it should be pointed out that we are dealing with a controversial subject that has raised many problems in practice and which forces us to reinterpret this model from the international perspective. Specifically, we will refer to some protective shortcomings that exist in some labour conflicts. These shortcomings arise in relation to disputes concerning the operation of an agency or establishment when they concern an individual employment contract. art. 20(1) of the Brussels I *bis* Regulation expressly provides that international jurisdiction over individual contracts of employment is to be determined in accordance with *Section 5*. This Section, as is well known, is devoted exclusively to regulating international jurisdiction in disputes arising from the individual employment contract. Paradoxically, however, art. 20.2 below draws from this special *Section 5* some specific disputes also concerning labour matters which refer them to the provisions of artt. 7.5 and 8.1 of Section 2. It should be remembered that *Section 2* regulates international jurisdiction for contractual obligations in general. Hence, in some cases there is an interaction between the two sections of the Brussels I *bis* Regulation.

These provisions refer to different cases: firstly, art. 7.5 refers to disputes concerning the operation of branches, agencies or any other establishments[18]. And secondly, art. 8(1) refers to multiple defendants in labour disputes where the defendants are several employers[19].

For practical purposes, this express reference of the regulation of international jurisdiction for disputes arising from the exploitation of agencies, branches or establishments in labour matters to art. 7.5 - *Section* 2 - of the Regulation means that the criteria for express or tacit submission of artt. 25 and 26 of the Regulation would operate without any type of limitation for this type of dispute, despite the presence of a weak party. This situation is highly criticisable because in this particular case it leaves the worker unprotected. That is why we consider that, in practice, the conditions or limitations imposed by art. 23 should also be required for agreements of express and tacit submission for this type of contract in

[18] Art. 7.5 of Regulation 1215/2012.
[19] Art. 8.1 of Regulation 1215/2012.

cases involving an employee[20]. In other words, the validity of submission agreements should depend on whether they are agreed after the dispute has arisen or whether they extend the worker's possibilities of defence.

We have now seen how art. 20.1 extracts from Special *Section 5* some specific conflicts that also refer to labour matters, including the *co-party defendant litigation* that refers to the provisions of art. 8.1 - *Section* 2. For this reason, reference will be made below to the controversial admission of the forum of plurality of defendants of -art. 8.1- in labour matters, which is also incorporated *ex novo* into the Brussels I *bis* Regulation.

In short, the legislator contradicts the line of jurisprudence followed by the Court of Justice of the European Union (ECJ) in that the European Court had previously interpreted restrictively the operation of the forum of plurality of defendants, stating that it could not be applied to a dispute arising from the contract of employment[21]. It should be noted that this is not the first time that the legislator has amended the position of the ECJ by acting as a corrective.

In this case of multiple defendants under art. 8(1), an employer domiciled in the European Union may be sued, if there are several defendants, in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that, in the interests of the proper administration of justice, it is advisable to hear them together[22]. This possibility is of great benefit to the employee who usually uses this criterion in the case of groups of companies. This allows him to sue the employer in the European judicial space in relation to both the parent and the subsidiary company. Here too, of course, the legislator's desire to strengthen the employee's position can be seen.

Consequently, what the European legislator is ultimately doing is adding another procedural tool in favour of the worker, which is *co-party defendant litigation* when the employer is sued. This possibility was previously denied, as we have seen. Once again, this shows the progressive evolution of the protective measures that the legislator has designed in the jurisdictional model in labour matters.

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[20] REIG FABADO I, *La competencia judicial internacional en materia de contrato individual de trabajo en el Reglamento Bruselas I bis*", cit, p. 34 f.

[21] See Judgment of the Court (First Chamber) of 22 May 2008, Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard, Case C-462/06, paras. 23 and 36.

[22] Art. 8.1 *in fine* of Regulation 1215/2012.

2.4. Special forums for protection in labour matters

In the absence of an express or tacit agreement to submit jurisdiction, or in the event of its invalidity, recourse must be had to the special fora provided for in artt. 21 and 22 of the Brussels I *bis* Regulation. These grounds of jurisdiction will vary depending on whether the action is brought by the employer or[23] on the contrary, by the employee[24]. Thus, it extends the possibilities of defence of the employee, while limiting those of the employer when he acts as plaintiff. This differentiated treatment again takes account the reasons of protection of the weaker party, that is to say, it seeks to balance the relational asymmetry which characterises this type of contract. It should be noted that this favourable treatment is common to the other fora for the protection of weaker parties in the Regulation, such as insurance[25] and consumer contracts[26].

Consequently, when it is the employee who brings the action against the employer, he has several active fora, as provided for in art. 21 of the Brussels I *bis* Regulation as opposed to a single forum available to the employer in art. 22.

2.4.1. The employee's active fora

We will now determine, in those cases where it is the worker who brings the lawsuit, the options available to him. In the first instance, the worker may bring the case before the courts of the country of the employer's domicile (art. 21.1.a). This is the traditional procedural forum which is generally accepted in all systems as it is the natural forum of the parties insofar as it benefits both the plaintiff and the defendant. This forum undoubtedly provides greater legal certainty for both parties and offers better possibilities for the defence of the defendant and greater certainty of compliance with the judgment for the plaintiff.

In order to determine international jurisdiction in the light of this labour jurisdiction forum when the employee is the plaintiff and the employer the defendant, we must take into account the provisions of art.

[23] Art. 22 of Regulation 1215/2012.
[24] Art. 21 of Regulation 1215/2012.
[25] Art. 11 to 14 of Regulation 1215/2012.
[26] Art. 18 of Regulation 1215/2012.

20.2 of the Regulation[27]. In this sense, an employer is considered to be domiciled in a Member State if, although domiciled in a third country outside the European Union, he has an agency, branch or establishment in Brussels. Consequently, and for the purposes of being able to bring proceedings, the employer is deemed to be domiciled in that State for all disputes arising out of the operation of the branch, agency or establishment. Once again, art. 20(2) applies as a correction to art. 7(5) in favour of the employee, in that in this type of dispute the employer is considered to be domiciled in a Member State even though he does not have an agency, branch or establishment, "*hence the fact that the employer's domicile is taken into account extensively and the employee may sue him in the Member State in which any one of them is domiciled*"[28].

Secondly, as an alternative, the worker may bring the action before the courts of the Member State where the worker habitually carries out his work or would have carried out his work last (art. 21(1)(b)(i)). And finally, in cases where the worker does not carry out his work in a single State, he may sue the employer in the courts of the country where the establishment which engaged him is situated (art. 21.1.b.ii).

A number of clarifications are needed in relation to these competent fora. On the one hand, these fora operate independently of the domicile of the employer. In other words, where the employee is the plaintiff, these criteria of international jurisdiction will apply whether the employer is domiciled in a Member State or in a third country (art. 21(2))[29]. It should be noted, however, that this second subparagraph of art. 21 has been incorporated into the latest version of the Brussels I *bis* Regulation so that this possibility does not exist under the application of the 2007 Lugano Convention. In short, the Brussels I *bis* Regulation provides for this enhanced protection, which implies the application of the jurisdictional fora in *Section 5*, regardless of whether or not the employer is domiciled in a Member State.

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[27] Art. 20(2) of the *Brussels Ia* Regulation provides "*Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State*".

[28] REIG FABADO I, *La competencia judicial internacional en materia de contrato individual de trabajo en el Reglamento Bruselas I bis*", cit., p. 38.

[29] Art. 21.2 Regulation 1215/2012: "*An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1*".

On the other hand, these criteria of jurisdiction act in a subsidiary manner, that is to say, if it is not possible to specify the only place where the worker performs or has performed his work, the competent jurisdiction will become that of the country where the establishment that hired him is located.

At the same time, we must not lose sight of the fact that the worker is the weaker party and deserves special protection. Consequently, the forum where the employee habitually carries out his work plays a key role in determining international jurisdiction because it will most often coincide with his home and will therefore certainly be the forum that can guarantee the worker the greatest protection in terms of proximity. On the other hand, the subsidiary criterion of the place of establishment which hired him will in most cases does not present any proximity or connection with the worker, and therefore the worker will be unprotected. The latter forum for competition will therefore rarely act[30].

At this point, we should preferably opt for the forum where the work is usually working, although the specification of this place is not always easy. In many cases, this place is clearly determined because the worker has a fixed place of business. However, this forum is very difficult to specify when the worker is constantly moving from one country to another in the course of his work, pilots, transporters, commercial agents, etc. The Court of Justice of the European Union has established a number of criteria for determining the place where the worker carries out his activity. These criteria are basically the place where he spends most of his time or where he carries out the main part of his duties, the place where he receives instructions on his assignments, the place from which he organises his work or the place where the tools or means of work are located, the place where or the place from which the worker habitually carries out his work, the place where the worker returns after completing his work[31]. This is why it should be specified on a case-by-case basis.

It should also be noted that the Court of Justice of the European Union has made it clear that the concept of the habitual place of work must be

[30] IRIARTE ÁNGEL J.L., *La precisión del lugar habitual de trabajo como foro de competencia y punto de conexión en los Reglamentos europeos*, in *Cuadernos de Derecho Transnacional*, 2018, p. 480.

[31] See Judgment of the Court (Grand Chamber) of 15 March 2011, Heiko Koelzsch v État du Grand Duchy of Luxemburg, Case C-29/10, paragraphs n.49 y 50; See IRIARTE ÁNGEL J.L., *La precisión del lugar habitual de trabajo como foro de competencia y punto de conexión en los Reglamentos europeos*, cit., p. 487, and p. 492.

interpreted broadly, that is to say, it is valid both to specify international jurisdiction and the applicable law to the individual employment contract[32].

2.4.2. The employer's active forum

If the employer brings the action against the employee, he may only bring it before the courts for the employee's place of residence, in accordance with art. 22(1)[33]. The employer is faced with this procedural limitation and has only one active forum in the interests of protecting the employee as the weaker party.

However, these limitations in *Section* 5 of the Brussels I *bis* Regulation do not prevent the employer from filing a counterclaim in accordance with art. 22(2) of the Regulation[34].

3. Applicable law to the individual employment contract: Regulation 593/2008

Regulation 593/2008, commonly known as the Rome I Regulation, is the complement to the Brussels I *bis* Regulation. Where the latter determines the competent jurisdiction in disputes arising from obligations and contracts, the former specifies the applicable law in respect of the same matters.

The Roma I Regulation provides for conflict of laws rules to determine the law applicable to obligations and contracts in general in artt. 3 and 4. However, these rules apply only partially in the case of individual international labour contracts, as they contain a specific rule for this type of contract. The reason for the existence of a special rule is that this type of legal relationship involves a weaker party, such as the worker, and therefore requires special protection. Thus, the determination of the law applicable to an individual international employment contract is set out in art. 8 of the Rome I Regulation.

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[32] IRIARTE ÁNGEL J.L., *La precisión del lugar habitual de trabajo como foro de competencia y punto de conexión en los Reglamentos europeos*, cit., p. 485.

[33] Art. 22(1) of the Brussels Ia Regulation provides: "*An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled*".

[34] REIG FABADO I, *La competencia judicial internacional en materia de contrato individual de trabajo en el Reglamento Bruselas I bis*", cit., p. 46.

3.1. The freedom of choice of the parties

In this sense, art. 8 Rome I Regulation constitutes a specialised and materially oriented conflict of laws rule[35], as we will see, in that it determines the applicable law to a particular contract, such as international labour. It is a conflict of laws rule containing several connecting factors arranged in a hierarchical order. It is therefore not possible to move from one connection to the next unless the previous one fails. To specify the applicable law, despite the fact that there is a weak party in the relationship, the rule allows as a first connection the freedom of choice, although limited. According to art. 8.2, "*The individual employment contract shall be governed by the law chosen by the parties*". This freedom of choice may be exercised in accordance with the general conditions set out in art. 3 Rome I Regulation. Thus, parties may exercise this freedom either expressly or tacitly, choose multiple applicable laws to the same contract, change their choice – within the limits of a choice a "law" promulgated by a State (thus excluding *Lex mercatoria* as law governing the contract; yet there is nothing to prevent its application by way of material autonomy).

3.1.1. Limits imposed to the freedom of choice

The possibility offered by the legislator to agree on the law regulating the individual employment contract is not recognised in absolute terms, but has some restrictions. In fact, and unlike the general regime of contracts where the parties enjoy almost absolute freedom, in this case limited freedom of will is provided for. This barrier imposed by the legislator aims precisely at safeguarding the interests of the weaker party in the relationship -the employee-. It is a response to the legislator's protective intent. There is no doubt that the establishment of a very broad freedom in the choice of applicable labour law could lead to abusive behaviour by the employer[36].

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[35] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, in CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J. (dir.), *Derecho del comercio internacional*, Madrid, Colex, 2012, p. 1272.

[36] PALAO MORENO G., *La Comunidad europea y el contrato individual de trabajo internacional: aspectos de jurisdicción competente y de ley aplicable*, in *Revista Seqüencia*, 52, 2006, p. 49; ZABALO ESCUDERO MªE., *La Convención CEE sobre la ley aplicable a las obligaciones contractuales y el contrato de trabajo*, in *Revista de Instituciones Europeas*, 1983, p. 535.

In the exercise of this freedom of choice, it is possible for the parties to choose -or rather for the employer to impose on the employee- a law other than the one that *a priori* applies. We refer to the law that would have applied in the absence of choice, namely the law of the place where the worker habitually carries out his work -art. 8.2 Rome I Regulation. The validity of this choice will depend on whether the law governing the individual employment contract respects the labour rights contained in the mandatory rules of the law that would be objectively applicable in the absence of choice. This possibility offered by the European legislator for the parties to agree on the law governing the contract could in practice lead to several workers within the same company having different working conditions because their contracts are governed by different legal systems[37].

In practice, this means that, from the outset, the parties are given the freedom to choose the law governing their contract or to have the employer impose the regulatory law. However, this is subsequently limited if the employee's interests are prejudiced by this choice.

Nevertheless, the fact that the European legislator seeks to protect the weaker party does not in any way mean that the Regulation determines as applicable law the one most beneficial to the employee[38]. In fact, this protection afforded by the legislator consists of preventing employers, who are generally better advised, from imposing on workers a lower protection than the one that would normally apply. However, there is nothing to prevent the law chosen by the parties from providing for working conditions that are different from -not inferior to- those set for in the objectively applicable law.

To conclude, it should be noted that in general terms the choice of the applicable law by the parties in an individual international labour contract presents some advantages, on the one hand, it will provide greater legal certainty to the relationship since the parties will know the regulatory law in advance. And, on the other hand, it will mean the application of a predictable legal system, known to the parties and, in most cases, linked to the relationship[39].

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[37] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., p. 1280.

[38] *Idem*, p. 1156.

[39] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., p. 1280.

3.2. The applicable law in the absence of choice

3.2.1. Law of the place where the employee habitually carries out his work

In the absence of choice or where the agreement is void, paragraphs 2 and 3 of the conflict of laws rule provide for subsidiary objective connecting factors. The order of precedence expressly provided for by the legislator must therefore be followed. In the first place, the law of the country in which the employee habitually carries out his/her work ("*lex loci laboris*") will apply.

In order to determine the place where the work is usually performed, all the circumstances surrounding the cross-border employment relationship must be taken into account. To this/her end, the Court of Justice of the European Union considers that several criteria must be assessed, although all relate to the fulfilment of the main obligations, namely "*the place where he receives his work instructions, where he organises his/her work, where the tools for his/her work are located, the place where the worker returns after completing his/her work and, in some cases, where he spends most of his/her time*"[40]. In short, the legislator is seeking to locate the law most closely linked to the individual international labour contract, and to do so must take into account both substantial and temporary criteria. Although it has already been seen that depending on the type of work, the temporary criterion becomes subsidiary[41].

As noted above, in practice it may be that the worker is geographically mobile and provides services in different States. At this point, "posting" must be differentiated from "transfer". In the case of posting because it is temporary, it "*leaves the usual place of work intact because of its short duration*"[42] as opposed to a transfer involving a change of place of usual work provision. Therefore, these continuous posting of the worker *per se* need not change the place where he is deemed to habitually perform

[40] Judgment of the Court (Grand Chamber) of 15 March 2011, Heiko Koelzsch v État du Grand Duchy of Luxemburg, Case C-29/10; CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., p. 1282.

[41] FOTINOPOULOU BASURKO O, *La movilidad internacional de trabajadores: Novedades normativas y jurisprudenciales en materia de contratos de trabajo plurilocalizados*, in *Revista del Ministerio de Empleo y Seguridad Social,* n. 122, p. 121.

[42] PALAO MORENO G., *La Comunidad europea y el contrato individual de trabajo internacional: aspectos de jurisdicción competente y de ley aplicable*, cit., p. 48.

his/her work since they are of short duration and, moreover, the worker's wish is to return to his/her place of origin[43]. Hence the law of the country where the worker habitually carries out his/her main activity, that is to say, where he does most of his/her work[44], will also apply, without in any way affecting the legal regime applicable to occasional posting that the worker may make in the course of his/her work. This is expressly provided for in art. 8(2) *in fine* of the Rome I Regulation (*"The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country"*).

3.2.2. Law of the place of the contracting establishment

In the event that it is not possible to identify the place where the worker habitually carries out his/her work, following the criteria established in art. 8 Rome I Regulation, resort to the subsidiary connecting factor provided for in paragraph 3 is necessary. According to the provision, "(...) *the contract shall be governed by the law of the country where the establishment through which the worker has been hired is located*". In short, the law of the country where the office, branch, subsidiary or delegation where the interview was conducted and the employee was hired may also apply. The ECJ specifies that this place refers exclusively to the establishment that hired the worker and not the one to which he is linked by his/her actual occupation[45].

It is not necessary for the seat of the company to have legal personality[46], it is sufficient for the establishment to have a stable structure[47]. Consequently, not only subsidiaries and branches, but also other units, such as offices of a company, may constitute establishments within the meaning of the institutional text within the meaning of art. 8(3)(b) of the Rome I Regulation.

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[43] PALAO MORENO G., *La ley aplicable al contrato de trabajo internacional por los tribunales españoles y su problemática procesal*, in *Derecho internacional privado. Trabajadores extranjeros. Aspectos sindicales, laborales y de seguridad social, Cuadernos de Derecho Judicial,* Consejo General del Poder Judicial, Madrid, 2001, p. 553.

[44] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., p. 1283.

[45] Judgment of the Court (Fourth Chamber) of 15 December 2011, Jan Voogsgeerd v Navimer SA, Case C-384/10, paragraph, n 66.

[46] Judgment of the Court (Fourth Chamber) of 15 December 2011, Jan Voogsgeerd v Navimer SA, Case C-384/10, paragraph, n 21.

[47] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., pp. 1290 y 1291.

3.2.3. The escape clause

Art. 8.4 Rome I Regulation includes the so-called "escape clause" which is systematically included in the last paragraph of the conflict of laws rule. This clause has raised problems of interpretation in practice, hence the need to specify the cases in which it applies. The rule provides as follows: "*Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply*". There are several issues surrounding this clause.

Firstly, it is necessary to determine the relationship between this clause and the other points of connection of the provision[48]. This is, on the one hand, whether we are dealing with a "closing connection" or an "exception clause" to the general rule contained in the previous criteria of art. 8 Rome I Regulation. And, on the other hand, how the escape clause affects the freedom of choice provided for in paragraph 1 of art. 8. Secondly, it is questioned whether it is possible to introduce material considerations when applying the escape clause. And thirdly, it is necessary to specify the essential criteria for determining the most closely connected law.

With regard to the first of the above doubts, if we understand that we are dealing with a "closing connection", this will mean in practice that it will be applied on a subsidiary basis, so that recourse to it will be limited to those situations in which the previous connections fail. That is, either there is no regular place of work or the contract was signed in the presence of a company representative in a country where the company has no stable establishment or delegation[49]. Instead, we can choose to qualify it as an "exception clause" or as a connecting factor that is on an equal footing with the rest. It should be clarified that when we speak of an exception clause we call it like this because we understand that it applies as an exception to the general rule contained in paragraphs 2 and 3 of the Regulation. Consequently, it does not mean that it will be applied exceptionally or restrictively, that is to say, only when the connections which precede it fail. The court should apply it whenever, in view of the cir-

[48] PARADELA AREÁN P., Ley applicable al contrato individual de trabajo y determinación de los vínculos más estrechos (Comentario a la STJ de 12 September 2013), in *Ley Unión Europea*, 2014, pp. 43-45.

[49] CARRASCOSA GONZÁLEZ, J., *Contratación laboral internacional*, cit., p. 1276.

cumstances surrounding the employment relationship, the contract is undeniably most closely connected with a country other than the one identified under paragraphs 2 and 3 of the rule. Thus, if the circumstances provided for in the escape clause are met, it would be applied in preference to all other connections. However, a generalised application may also lead to a lack of legal certainty and unpredictability of solutions[50]. It should therefore only apply where the law is in fact clearly more closely linked to the legal relationship[51]. In fact, this seems to be the spirit of the rule, both in terms of its wording and the jurisprudence of the ECJ. Precisely, the European Court in its Ruling of 12 September 2013[52] addresses this issue by closing the interpretative circle on the matter and making it clear that the law most closely connected with the relationship must be applied, discarding the subsidiary nature of the escape clause in art. 8.4 Rome I Regulation[53].

The relationship between the connection of art. 8.4 Rome I Regulation and freedom of choice remains to be resolved. The escape clause which derogates from the general solution in artt. 8.2 and 8.3 Rome I Regulation in no way affects the freedom of choice in paragraph 1 which remains intact. Thus, when the parties have validly chosen the law governing their contract of employment, this chosen law will take precedence over all other connecting factors, including the escape clause. And, let us remember, regardless of whether the law chosen is more or less linked to the relationship, in view of the *erga omnes* effectiveness of the European instrument.

Very briefly, the facts which gave rise to that judgment[54] are as follows: a worker of German nationality, resident in Germany, was employed by the German company *Anton Schlecker* to provide services, first in Germany and then in the Netherlands, where they worked for the Ger-

[50] PALAO MORENO G., *La "nueva" regulación europea en materia de ley aplicable al contrato individual de trabajo: el artículo 8 del Reglamento Roma I*, in *Trabajo, contrato y libertad. Estudios jurídicos en memoria de Ignacio Albiol*, Valencia, 2010, p. 438; FOTINOPOULOU BASURKO O, *La movilidad internacional de trabajadores: Novedades normativas y jurisprudenciales en materia de contratos de trabajo plurilocalizados*, cit., p. 129.

[51] OREJUDO PRIETO DE LOS MOZOS P., *Nota a la STJCE 6 oct. 2009*, in *REDI*, 2009-II, p. 521.

[52] Judgment of the Court (Third Chamber), 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, Case C‑64/12.

[53] PARADELA AREÁN P., *Ley applicable al contrato individual de trabajo y determinación de los vínculos más estrechos (Comentario a la STJ de 12 September 2013)*, cit., p. 45.

[54] Judgment of the Court (Third Chamber), 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, Case C‑64/12.

man company for more than 12 years without interruption. The German firm subsequently decided unilaterally to change the place of supply of its services. Following that decision, the worker brought an action before the Netherlands courts seeking annulment of the contract and, in addition, damages.

The Netherlands Court referred a question to the ECJ for a preliminary ruling on whether in this case, and in accordance with art. 6(2) of the Rome Convention of 1980, the law of the place where he habitually works should be applied, which would mean applying Dutch as activities were performed for twelve years in the Netherlands. Or, conversely, the German law was to be applied in so far as it concerned a contract concluded by a German company with a German worker in Germany in order to provide services first in Germany and then in the Netherlands. The Court concluded that, even if the worker habitually carried out his/her work in a particular country, the escape clause can rule out the application of the law of that country in favour of a different one if it appears that the contract is more closely connected with another country. And the Court considered that it follows from the circumstances of the case that the contract is more closely connected with Germany.

Consequently, it should be understood that the escape clause is not a clause closing the system which acts in the absence of the previous connection points, but that it can be applied in preference to the other connections if, as in this case, the contract is more closely linked to a law other than the one which was in principle objectively applicable.

From a practical point of view, the truth is that the ECJ in the *Schlecker*[55] case ends up applying the solution contained in the Spanish workers' Regulation art. 1(4) ET. On the basis of an analogous application of the provision, in the case under consideration, "*a (German) worker employed in (Germany) in the service of a (German) business abroad*", the Court concluded that the contract was more closely linked to the German legal system[56].

The second issue addressed by the European Court of Justice in this judgment concerned the possibility of taking material considerations into account when applying the escape clause in art. 8(4). That is, whether, in

[55] Judgment of the Court (Third Chamber), 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, Case C‑64/12.

[56] Judgment of the Court (Third Chamber), 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, Case C‑64/12, paragraphs n. 62 y 71.

order to protect the employee, the court, in choosing the law most closely connected with the contract of employment under art. 8(4), should tend to apply the law that is most favourable to the employee's interests. The Court clearly stated that the law most closely connected to the legal employment relationship must be applied, regardless of the law that is most advantageous to the employee. In fact, in the *Schlecker* case this situation was of particular interest in that Dutch law provided a higher level of protection for the worker. However, the Court concluded that German law should be applied because it was more closely linked to the employment contract even though, in that particular case, it was less beneficial to the worker[57].

However, this tendency of the Court of Justice of the Union does not seem to have been the tendency followed before by many of the courts of the Member States. In fact, the Spanish, French or even Dutch courts have used the escape clause as a protection mechanism for workers and have taken advantage of that to apply the most favourable law to them[58]. Fortunately, this ruling by the ECJ puts an end to the different application and interpretation of art. 8(4) Rome I Regulation by some courts in the Member States.

Finally, it would remain to be addressed what are the circumstances surrounding the specific case that allow the determination of which law is most closely linked to the employment relationship. The ECJ also sheds light on this issue in the *Schlecker* judgment. The determining factor in the Court's opinion will not be so much the number of connections in the legal relationship with a given country, but rather the relevance of the existing connections from the perspective of their employment nature. It is for that reason that connections such as the country in which the worker is affiliated to the social security system, the country in which he pays his taxes in respect of his income from work, etc., take precedence. However, elements such as the nationality or habitual residence of the party or place of conclusion of the contract are, in the view of the European Court

[57] PARADELA AREÁN P., *Quince años de aplicación en España del Convenio de Roma sobre ley applicable a las obligaciones contractuales*, in *Anuario Español de Derecho Internacional Privado AEDIPR*, N. 8, 2008, p. 477.

[58] PARADELA AREÁN P., *Quince años de en España del Convenio de Roma sobre ley applicable a las obligaciones contractuales*, cit., p. 478.

of Justice, relegated to a secondary plane when it comes to identifying the most closely connected law[59].

This solution contrasts with the tendency maintained by some Spanish courts prior to this ruling, which had also been criticised by the doctrine[60]. In fact, when determining the most closely connected law, they considered residence, nationality of the parties, place of payment, etc. as determining elements[61].

In short, it seems that the ultimate purpose of the escape clause is to act as a localising instrument[62], in the sense of determining as applicable the legal system that is best placed or most connected to the international employment relationship. In addition, this clause also allows for flexibility in the solution contained in art. 8 Rome I Regulation in accordance with the circumstances of the specific case[63].

4. Conclusions

The Brussels model presents a system of international jurisdiction in labour matters which, throughout its reforms, has progressively strengthened the protection of the worker as a weak party in legal actions arising from the individual employment contract. Although, despite this protectionist eagerness of the European legislator, some protective deficiencies have been detected that affect some labour conflicts contained in the general regime of *Section 2*.

From the point of view of the applicable legal regime, the conflict of laws system of the Rome I Regulation for the individual employment contract is a challenge that balances a conflict of interest of the highest legal level. This is because it values two main principles, the autonomy

[59] Judgment of the Court (Third Chamber), 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, Case C‑ 64/12, paragraph. n. 70.

[60] REQUEJO ISIDRO M., *Ley aplicable a la relación contractual: STSJ Canarias, de 24 de noviembre de 2004*, in *REDI,* 2005-I, pp. 416; GARDEÑES SANTIAGO M., *Ley aplicable al contrato de trabajo de los empleados de la administración española en el exterior y prueba del derecho extranjero*, in *AEDIPr*, T. VI, 2006, p. 911.

[61] PARADELA AREÁN P., *Quince años de aplicación en España del Convenio de Roma sobre ley applicable a las obligaciones contractuales*, cit., p. 39.

[62] PARADELA AREÁN P., *Quince años de aplicación en España del Convenio de Roma sobre ley applicable a las obligaciones contractuales*, cit., p. 40.

[63] PALAO MORENO G., *La Comunidad europea y el contrato individual de trabajo internacional: aspectos de jurisdicción competente y de ley aplicable*, cit, p. 52.

of the conflicting will and the necessary protection of the worker as the weakest party in the contract. In effect, it is configured as a regime that attempts to balance the legal asymmetry of labour relations by protecting the employee and preventing the employer from exercising an abusive position in the choice of the law regulating the contract.

In short, and to conclude, workers in the European Union have a comprehensive regulation of the aspects related to the *forum* and the *ius*.

Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in Albania

Flutura Kola Tafaj, Silvana Çinari

1. Introduction

Judgments, as an expression of state sovereignty, in principle, have effect in the territory of the states in which they are rendered. They might also extend their effect abroad, if they are granted recognition in the foreign territory. In respect of certain international legal principles, such as reciprocity, mutual trust, legal certainty and judicial economy, different states enter into bilateral or multilateral agreements to facilitate the procedures for recognition and enforcement of foreign judgments. For instance, among the Member States of the European Union (EU), Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation) applies, which provides that "*a judgment given in a Member State shall be recognized in the other Member States without any special procedure being required*"[1].

Unlike the EU Member States, which treat a judgment given by the courts of another Member State as if it had been given in the Member State addressed[2], the Republic of Albania (RoA) does not treat foreign

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, art. 36.

[2] Brussels I bis Regulation, recital 26.

judgments as directly enforceable. In order to be enforceable, they must be subject to the procedure of recognition. The process of recognition and enforcement of foreign judgments in Albania is regulated under the Code of Civil Procedure[3], which establishes that in the absence of international agreements on recognition and enforcement of foreign judgments, the provisions of the Code of Civil Procedure shall apply[4].

Albania is part of several international agreements and an EU candidate country. Against this background, the aim of the present work is to provide an analysis of the Albanian legal framework and case law on recognition and enforcement of foreign judgments, by also focusing on the interplay between the different legal instruments applicable, in order to provide guidelines on their application to practitioners. In addition, it aims to set the scene for the following work on the impact of Brussels I bis Regulation on recognition and enforcement of foreign judgments in Albania.

2. The legal framework on recognition and enforcement of foreign judgments in civil and commercial matters in Albania

The legal framework on recognition and enforcement of foreign judgments in Albania consists of multilateral and bilateral international agreements signed and ratified by the RoA and the Albanian Code of Civil Procedure (ACCP).

As far as international legal instruments are concerned, it should be first noted that Albania is not yet an EU Member State, therefore, the Brussels I bis Regulation is not applicable for the recognition and enforcement of judgments rendered in EU Member States. Also, Albania has not ratified the HCCH 2005 Choice of Court Convention, which provides rules for recognition and enforcement of judgments given by a court of a contracting state designated in an exclusive choice of

[3] The Code of Civil Procedure of the Republic of Albania approved with the Law no. 8116, dated 29.03.1996, amended, articles 393- 398. (ACCP).

[4] *Ibid*, art. 393. All translations of the legal instruments from Albanian into English are by the authors of the present work unless otherwise noted.

court agreement[5]. Albania has acceded to The Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters[6] by way of Law No 10 194 dated 10.12.2009[7] (The 1971 Hague Convention). This international instrument, however, was not successful. Besides having only five contracting parties[8], Article 21 of the Convention requires the conclusion of a Supplementary Agreement between the Contracting States in order to make the Convention applicable[9]. Albania has not concluded any such Supplementary Agreement. Therefore, the Convention is, in practice, not applicable.

The recently adopted Judgment Convention[10], as yet not in force, addresses this issue. The Judgment Convention, however, despite not providing a similar rule to the one stipulated under Article 21 of the 1971 Hague Convention, allows for a number of declarations. Interestingly, it provides for a mechanism of "bilateralization"[11] by allowing states under Article 29 (2) "*to notify the depositary, (...), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention*". Therefore, concerns about its effectives in achieving uniformity and predictability seem justified[12].

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[5] The Convention of 30 June 2005 on Choice of Court Agreements (HCCH 2005 Choice of Court Convention), chapter III.

[6] Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

[7] Law no. 10 194, dated 10.12.2009 "On the accession of the Republic of Albania to the Convention 'On the recognition and enforcement of foreign judgments in civil and commercial matters'".

[8] Albania, Cyprus, Kuwait, Netherlands, Portugal available online.

[9] Art. 21 "*Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect*".

[10] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

[11] LIAKOPOULOS D., *The Convention of the Hague of 2 July 2019 on Recognition of Foreign Sentences: Approaches and Comments*, in Acta *Universitatis* Danubius *Juridica*, 2019, p. 18.

[12] TEITZ L.E., *Another Hague Judgments Convention: Bucking the Past to Provide for the Future*, in *Duke Journal of Comparative & International Law*, 2019, pp. 505-506.

Albania has also signed bilateral agreements which contain provisions on recognition and enforcement of foreign civil and commercial judgments. Some of these agreements are:

1. Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters, signed in Sofia on 17 November 2003, ratified by the law no. 9348, dated 24 February 2005.

2. Agreement between the Government of Albania and the Government of Macedonia on Legal Assistance in Civil and Criminal Matters, signed in Skopje on 15 January 1998, ratified by the law no. 8304, dated 12 March1998.

3. Convention on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters between the RoA and the Republic of Turkey, signed in Tirana, on 15 March 1995, ratified by the law no. 8036, dated 22 November 1995.

4. Protocol on the Exchange of Instruments of Ratification of the Convention on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters between the RoA and the Republic of Turkey, signed on 20 February 1998.

5. Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, signed in Athens on 17 May 1993, ratified by the law no. 7760, dated 14 October 1993.

6. Agreement between the RoA and the Russian Federation "On Legal Assistance and Legal Relations in Civil, Family and Criminal Matters" ratified by the law no. 8061, dated 08 February 1996.

7. Convention between the People's RoA and People's Republic of Romania "On the Provision of Legal Assistance in Civil, Family and Criminal Matters" signed in Tirana on 12September 1960, ratified by the Decree no. 3250, dated 17 April 1961, GZ no. 6/1962, p. 125

8. Convention between the People's RoA and People's Republic of Hungary "On the Provision of Legal Assistance in Civil, Family and Criminal Matters", signed in Tirana on 12 January 1960, ratified by the Decree no. 3119, dated 06 June 1960, GZ no. 3/1961, p. 75.

9. Convention between the People's RoA and the Czechoslovak Republic "On the Provision of Legal Assistance in Civil, Family and Criminal Matters", signed in Prague on 16 January1959, entered into force on 28 May 1960.

10. Convention between the People's RoA and the German Democratic Republic "On the Provision of Legal Assistance in Civil, Family and Criminal Matters", signed in Berlin, on 11 January 1959.

In addition to the above mentioned international legal instruments, the ACCP also contains rules on recognition and enforcement of foreign judgments. Under the ACCP, the process of recognition of a foreign judgment is a special process, in which along with the rules of the common civil process, the special rules expressly provided for under Articles 393-398 also apply. Under said rules, a foreign judgment may be enforced in Albania only after it is recognized by an appellate court[13], which does not decide on the merits of the case[14], but reviews whether any grounds for refusal of recognition exist.

3. The interplay between the different legal instruments applicable on the recognition of foreign civil and commercial judgments in Albania

The identification of the applicable legal instrument/s is the very first step the competent appellate court should take when reviewing a request for recognition of a foreign judgment. This becomes especially relevant when a judgment requiring recognition is given in one of the states with which Albania has a bilateral agreement. In such cases, the analysis of the relationship between the provisions on recognition and enforcement of foreign judgments of the bilateral agreement and the ACCP provisions is of importance. Article 393 of the ACCP stipulates that "*Judgments of foreign courts are recognized and enforced in the Republic of Albania under the rules provided for in this Code or in special laws. When for this purpose there is a special agreement between the Republic of Albania and the foreign state, the provisions of the agreement shall apply*".

Under this article, the provisions on recognition and enforcement of foreign judgments of international agreements take priority and prece-

[13] ACCP, art. 398.

[14] *Ibid*, art. 397.

dence over the rules of the ACCP. Such stipulation is in conformity with the hierarchy of norms set forth in the Constitution of the Republic of Albania, which recognizes the supremacy of the ratified international agreements over domestic laws[15]. Most of the bilateral agreements do not contain any provision that regulates their relationship with other international or domestic legal instruments. Exceptions can be found in the bilateral agreements with Bulgaria and Macedonia. The former stipulates in Article 29 that: "*This Agreement shall not affect the rights and obligations guaranteed by existing agreements entered into with other Contracting States*". Whereas Article 36 of the latter provides that: "*This Agreement shall not affect the obligations deriving from multilateral agreements*". Under these considerations, if a foreign judgment is rendered in one of the countries with which Albania has a bilateral agreement, the provisions of the latter shall apply, when the judgment falls under the material and temporal scope of application of the agreement.

The review of around fifty judgments of the Appellate Courts of Tirana and Durres, however, showed that even when a bilateral agreement was applicable, the parties requesting recognition of a foreign judgment did not base their request on the provisions of the agreement, but rather on the provisions of the ACCP[16], and very rarely on both[17]. In the latter cases, the Albanian courts did not take into consideration the provisions of the bilateral agreement, and the reasoning of their judgment is based entirely on the provisions of the ACCP[18]. It is difficult to understand the rationale behind judgments that completely disregard the application of bilateral agreements.

The bilateral agreements contain rules determining the type of judgments that may be recognized and enforced in the territory of the other contracting party; where and how a request for recognition of a foreign judgment may be submitted; the documents that should be enclosed to it; and the grounds for the refusal of recognition. With re-

[15] Constitution of the Republic of Albania, approved by the law no. 8417, dated 21.10.1998, art. 116.

[16] Judgment of the Tirana Court of Appeal no. 7, dated 28.01.2019 (decisions by court of appeals collected during the project rest in hardcopy with the authors).

[17] Judgment of the Tirana Court of Appeal no. 10, dated 24.01.2018.

[18] *Ibid*.

gard to the procedure to be followed in reviewing a request for recognition of a foreign judgment, the bilateral agreements in respect of the principle *"lex fori regit processum*", provide that same shall be governed by the domestic law of the enforcing court. Some of them also explicitly provide that the enforcement court shall not review the merits of the case[19]. The correct application of the bilateral agreements would lead to appellate court judgments that would grant or refuse recognition to a foreign judgment on grounds of refusal provided for in the bilateral agreements themselves rather than the ACCP. Whether doing otherwise - i.e. applying the ACCP provisions - has a practical impact on the decision of the appellate court on the request for recognition of a foreign judgment, shall depend on how divergent the provisions of the ACCP and the bilateral agreements are. A short analysis of this is provided in the following sections.

4. The procedure for the recognition of foreign judgments in Albania

A foreign judgment can be enforced in Albania only after it is recognized by an appellate court[20]. With regard to competent territorial court, Article 395 of ACCP provides that: "*The request for recognition of a foreign judgment shall be filed at the Appeal Court*…". This provision does not expressly establish a competent court of appeal. Reading the provision in connection with Article 49 of the ACCP and, under a purposive interpretation, the competent court is the court of appeal of the place where the foreign judgment is intended to be enforced[21]. The Albanian case law follows the same line of reasoning[22].

Besides being lodged directly to the competent court of appeal, the request for recognition of a foreign judgment can also be submitted

[19] See e.g. Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters, art. 21; Convention on Mutual Assistance in Civil, Commercial and Criminal Matters between the RoA and the Republic of Turkey, art. 23.

[20] ACCP, art. 398.

[21] KOLA TAFAJ F., VOKSHI A., *Procedurë civile, Pjesa II, Botim II*, Tirana, 2018, p. 154, para. 4.

[22] Judgment of the Tirana Court of Appeal, no. 180, dated 12.12.2017.

through diplomatic channels, when it is permissible by international agreements and on the basis of reciprocity[23]. As cited above, most of the bilateral agreements signed by the Republic of Albania provide for the opportunity to lodge the request for recognition of a foreign judgment either directly at the court of enforcement or at the court of the first instance that rendered the judgment to be enforced abroad[24]. In the latter case, the request for recognition, along with any documents required under the bilateral agreement, is sent to the enforcement court using the channels of communication as provided in the bilateral agreements. Most of the bilateral agreements provide that the foreign judicial authorities shall communicate through the Ministries of Justice of their respective state. Some bilateral agreements also recognize the possibility of using diplomatic channels[25]. In such cases, according to the provisions of the ACCP, when the interested party has not appointed a representative, the chair of the Court of Appeals appoints a lawyer[26]. These cases are very rare in practice because the proceedings take considerable time.

In accordance with Article 396 of the ACCP, "*The request for recognition of a judgment of a foreign state must be accompanied by: a) A copy of the judgment to be enforced and its translation into Albanian, notarized; b) A certificate from the court that issued the judgment that it has become final, translated and notarized. Both the copy of the judgment and the certificate that the judgment has become final must be certified by the Ministry of Foreign Affairs of the Republic of*

[23] ACCP, art. 395 (2).

[24] See, for instance, Agreement between the Government of Albania and the Government of Macedonia on Legal Assistance in Civil and Criminal Matters, art. 22; Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, art. 26; Convention between the People's RoA and People's Republic of Romania "On the Provision of Legal Assistance in Civil, Family and Criminal Matters", art. 45. The Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters provides only for the opportunity to lodge the request at the court that rendered the judgment to be enforced abroad, art. 20.

[25] See, for instance, the Convention on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters between the RoA and the Republic of Turkey, art. 2; Agreement between the Government of Albania and the Government of Macedonia on Legal Assistance in Civil and Criminal Matters, art. 4; Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, art. 3.

[26] ACCP, art. 395(3).

Albania; c) The power of attorney, in case the request is submitted by the representative of the interested party, translated and legalized by a notary".

Bilateral agreements signed by the RoA also contain provisions concerning the documents that should be enclosed to the request for recognition of a foreign judgment. In addition to the request for submission of a copy of the judgment and a certificate confirming its finality, which is also stipulated under Article 396 of the ACCP, bilateral agreements require the submission of a document that certifies that the defaulting defendant was duly notified or represented in case of lack of legal capacity to act[27]. This document is necessary for the court to verify the existence of one of the grounds for refusal of recognition of a foreign judgment, i.e. the party was not duly notified[28]. It seems that under the bilateral agreements, the burden of proof with regard to the lack of this specific ground for the refusal of recognition lies with the requesting party, while under the ACCP, it would be on the party against whom the judgment is rendered.

For many years, the issue of whether the party against whom the judgment is rendered should participate in the recognition proceedings before the Albanian courts has been problematic. The problem has arisen due to the fact that the ACCP provides that the competent court is set in motion with a "request" and not a "lawsuit" for recognition of a foreign judgment. As a result, the party against whom the judgment is rendered cannot be summoned as a defendant in the recognition proceedings. However, its participation is necessary in assessing the existence, or not, of any of the grounds for the refusal of recognition. The issue was finally settled with the Unifying Judgment of the Joint Panels of the Albanian High Court No 6, dated 01.06.2011, in which it was held that the court is obliged to summon the person against whom

[27] See for instance Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, art. 26 (2)(b); The Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters, art. 20(2)(c).

[28] ACCP, art. 394 (b). Such a ground is also provided in all the bilateral agreements signed by the Republic of Albania.

the judgment is rendered in the quality of a third party/interested person in accordance with Article 193 of the ACCP[29].

In reviewing the request for recognition of a foreign judgment, the court of appeal applies *mutadis mutandis* the rules of adjudication at first instance. Among others, the court of appeal verifies in advance the fulfillment of the formal conditions for filing a request for recognition of a foreign judgment. If the request for recognition of the foreign judgment is defective, the court shall set a reasonable deadline for their completion and correction. The court of appeal shall then return the request without taking any action, if the requesting party does not complete and correct the formal deficiencies of the request within the deadline set by the court. If the request for recognition of a foreign judgment meets the formal conditions, the court of appeal shall schedule the hearing the purpose of which is only to assess the existence, or not, of any of the legal obstacles provided by Article 394 of the ACCP, or any other special provision for this purpose *(in cases where international agreements apply)*[30]. Hence, the court of appeal shall not decide on the merits of the case[31].

5. The grounds for refusal of recognition of foreign judgments

The grounds for refusal of recognition of a foreign judgment in Albania depend on its origin. If the foreign judgment is rendered in a state with which Albania has concluded a bilateral agreement, in principle, the grounds for refusal of recognition stipulated in the latter shall be applicable. If there is no bilateral agreement with the state of origin of the judgment, the grounds for refusal of recognition set forth in the ACCP shall apply. It is noteworthy, that the provisions of the ACCP on recognition of foreign judgments do not require the application of

[29] ACCP, art. 193: "*Where the Court considers that the judicial proceedings should take place in the presence of a third party, which finds that it has interests in the case, the court shall summon it as long as the order for setting the judicial hearing has not been issued, under Article 158/c of this Code. The secretary notifies him by summons*".

[30] Unifying Decision of the Joint Panels of the High Court no 6, dated 01.06.2011 (decisions by the High court are available on the official website of the court).

[31] ACCP, art. 397.

the principle of reciprocity. This means that a foreign judgment can be enforced in Albania regardless of its state of origin and regardless of whether Albanian judgments are recognized or not in that foreign state.

5.1. The grounds for refusal of recognition of foreign judgments under the Albanian Code of Civil Procedure

In accordance with Article 394 ACCP, the foreign judgment is not given effect (i.e. it is not recognized and enforced) in the Republic of Albania when:

a) According to the provisions in force in the Republic of Albania, the dispute cannot be in the competence of the court of the state that rendered the judgment;

b) The claim and the summons to the court have not been notified to the defendant *in absentia*, in a regular and timely manner, to give him the opportunity to defend himself;

c) Between the same parties, for the same object and for the same cause, a different judgment has been given by an Albanian court;

d) A lawsuit that is filed before the foreign judgment has become final is being adjudicated by an Albanian court;

e) It has become final in violation of its legislation;

f) It does not comply with the basic principles of Albanian legislation.

a. According to the provisions in force in the Republic of Albania, the dispute cannot be in the competence of the court of the state that rendered the judgment

Despite the term "competence", it is clear that the provision refers to the jurisdiction of the foreign court. In those cases where the foreign court would lack jurisdiction under the rules of Albanian Law No 10428 dated 2.6.2011 "On private international law" (PIL), the foreign judgment shall be refused recognition. One such example would be a foreign judgment concerning rights *in rem* over an immovable property located in the Republic of Albania: in conformity with Article 72 of the PIL, Albanian courts have exclusive jurisdiction.

b. The claim and the summons to the court have not been notified to the respondent in absentia, in a regular and timely manner, to give him the opportunity to defend himself

This provision relates to the concept of due process. If it is proven that the respondent in absentia was not aware of the claim or the summons, then such a fact is considered a violation of the basic constitutional guarantee of due process, and consequently the foreign judgment is not recognized in the Republic of Albania.

c. Between the same parties, for the same object and for the same cause, a different decision has been given by an Albanian court

This legal obstacle relates to the concept of "*res judicata*". If a dispute resolved by a final judgment of a foreign court has been previously resolved by a final judgment of an Albanian court, the latter shall be enforced in the Republic of Albania and the foreign judgment is not granted recognition. The aim of this provision is to prevent the enforcement of two judgments for the same dispute. In fact, even in the absence of this legal obstacle, based on the principle of *res judicata*, the judgment that first acquires this status (*res judicata*) is the one that can be enforced. The application of this provision deserves considerable attention in terms of defining "*the same parties*", *"the same object*" and "*the same cause*". The courts should not interpret these elements strictly; otherwise the aim of the provision would be disrupted.

While assessing this ground the courts may face an issue which has generated debate among the Albanian legal doctrine and practice. It concerns the question: When do Albanian judgments acquire the status of *res judicata?* Article 451 of the ACCP provides that: "*A judgment becomes final/irreversible when: a) it cannot be appealed; b) no appeal (at the Appellate Court) has been made against it within the time limit determined by law or when the appeal has been withdrawn; c) the appeal submitted has not been accepted; ç) the judgment (of the first instance) is upheld, is changed or the case is dismissed in the court of the second instance (appeal court)*". It is also stipulated in Article 451/a of the ACCP that: "*A judgment that has become fi-*

nal/irreversible has effect over only what has been decided between the same parties, on the same subject (petitum) and for the same cause (causa petendi). A dispute that has been resolved with a final/irreversible judgment cannot be adjudicated again unless the law provides otherwise". In accordance with these two provisions, a judgment of the first instance court or a court of appeal may become *res judicata*. However, the ACCP grants the parties the right to exercise recourse at the High Court of the Republic of Albania, which is an ordinary means of appeal[32].

Despite being considered final/irreversible and enforceable under Articles 451 and 510 of the ACCP, Albanian legal doctrine has held that the judgment of the Appellate Court, only becomes *res judicata* once the High Court has either rejected or adjudicated the recourse, thereby upholding the judgment of the Appellate Court or the judgment of the first instance court[33]. The Joint Chambers of the Albanian High Court[34] have also held that the judgment of an appeal court is enforceable, but does not constitute *res judicata,* since a judgment can be enforced without necessarily having the status of *res judicata*. In other words, every judgment that is *res judicata* is always enforceable, but not the other way around.

In this context, another related issue is the extent of the *res judicata* effect that a foreign judgment may have in Albania. Once the foreign judgment is recognized in Albania, the Albanian courts, upon request of the interested party, must take into consideration its *res judicata* effect. Generally, the *res judicata* effect covers the operative part of the judgment. However, it is not the same for the reasoning part of the judgments. Some jurisdictions do not extend the *res judicata* effect of the judgment to its reasoning part. In Albania, referring to the jurisprudence of the Constitutional Court, *res judicata* includes not only the operative part of the judgment, but also the findings of fact and the application of law set out in the reasoning part of the judgment[35]. The

[32] Judgment of the Albanian Constitutional Court no. 6/2003 (decisions by the Constitutional court are available on the official website of the court).

[33] KOLA TAFAJ F., VOKSHI A., *Procedure Civile, Pjesa II,* Tirana, 2018, p. 308.

[34] Unifying Judgment of the High Court no. 2, dated 03.11.2014, para. 31.

[35] Judgment of the Albanian Constitutional Court no. 24/08; Judgment of the Albanian Constitutional Court no. 14/17; Judgment of the Albanian Constitutional Court no. 36/13;

question that may arise in this context is whether the Albanian courts will accept the *res judicata* effect of the reasoning part of a foreign judgment recognized in Albania and issued in a country, the legislation of which extend the *res judicata* effect only to the operative part of the judgment. There is no case law on this issue. However, discussions in different forums have shown that some judges and lawyers are more inclined to the view that once a foreign judgment is recognized in Albania, it should be equated in effect to the Albanian judgments and thus extend the *res judicata* effect to the reasoning part as well. There is another opinion, which is also shared by the present authors, that a foreign judgment cannot be given more "power" than it has in its country of origin. In the latter case, the Albanian courts will be bound by the operative part of the recognized foreign judgment, without taking into consideration its reasoning part.

d. A lawsuit that is filed before the foreign judgment has become final is being adjudicated by an Albanian court

This legal obstacle aims at avoiding parallel proceedings. However, to avoid any abuse of rights by the parties, it should be interpreted carefully and in conjunction with Article 38 of the ACCP, which governs international *lis pendens.* An abuse of right may happen in case the interested party, anticipating the loss before the foreign court, lodges the same claim before the Albanian courts, just before having obtained a final judgment by the foreign court, thus artificially creating an obstacle for the recognition of the final judgment of the foreign court. To prevent such a situation, the interested party should apply for a stay of the proceedings before the Albanian court under Article 38 (1) of the ACCP[36]. If the party does not make such an application,

Judgment of the Albanian Constitutional Court no. 41/16; Judgment of the Albanian Constitutional Court no. 87/16; Judgment of the Albanian Constitutional Court no. 71/17; Judgment of the Albanian Constitutional Court no. 62/15; Judgment of the Albanian Constitutional Court no. 44/14; Judgment of the Albanian Constitutional Court no. 36/10; Judgment of the Albanian Constitutional Court no. 21/10.

[36] ACCP, art. 38: "*When the same claim, between the same parties, with the same cause and object is being considered simultaneously by a court of a foreign country and the Albanian court, the latter may stay the proceedings on this dispute when: a) The lawsuit has been filed before in time in the court of a foreign country; b) The judgment of a court of a foreign*

the court cannot be aware of the other parallel proceedings outside the territory of the Republic of Albania. Thus, it will become impossible to recognize such foreign judgment in Albania. The same would still be should the Albanian court, after reviewing the request of the interested party for a stay of the proceedings, decide, based on certain justified reasons, to reject it and continue with the proceedings.

If, based on the request of the interested party under Article 38 (1) of the ACCP, the Albanian Court should decide to stay the proceedings, then, in accordance with Article 38 (3) of the CPC, when the court of the foreign state resolves the dispute with a final judgment, which can be recognized and/or enforced in the Republic of Albania, the Albanian court shall dismiss the case. In such case, the legal obstacle provided for in Article 393 ç) of the ACCP shall be considered exceeded and the final judgment of the foreign court may be granted recognition, if no other grounds exist.

e. It has become final in violation of its legislation

Article 394(d) of the ACCP refers to the legislation of the state of origin of the foreign judgment. If the judgment has become final in violation of the relevant provisions of the foreign legislation, then it cannot be recognized in Albania.

f. Does not comply with the basic principles of Albanian legislation

The best interpretation of this ground that is stipulated in Article 394(dh) of the ACCP would be to limit its application to those fundamental legal principles that fall under the notion of public policy,

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country can be recognized and/or enforced in the Republic of Albania; c) The Albanian court is satisfied that the stay is necessary for the proper administration of justice. 2. The Albanian court may continue the proceedings at any time if: a) The possibility of having two irreconcilable judgments disappears; b) The proceedings in the court of a foreign country have been stayed or discontinued; c) The Albanian court is satisfied that the proceedings in the court of a foreign country will not be concluded in a reasonable time; or ç) The continuation of proceedings is required for the proper administration of justice. 3. The Albanian court shall dismiss the proceedings, when the court of a foreign country resolves the dispute by a final judgment, which can be recognized and/or enforced in the Republic of Albania".

which in itself should be interpreted narrowly, by including principles such as the constitutional principles of avoiding discrimination on the basis of race, sex, social status, political or religious belief, due process, etc. However, in a judgment of the Civil Panel of the Albanian High Court, this provision is interpreted as meaning that "*the substantive law applied in the specific case by the foreign court that has issued the judgment (in the case at hand, the Italian court) does not to conflict with the substantive law that applies to the same issue in the Republic of Albania. ... [I]t is meant that the judgment of the foreign court shall not be contrary to the Albanian law. The legal norm of the foreign law is not important; only the eventual effects that arise from the recognition of the foreign judgment and their compatibility with the basic principles of the Albanian law are. The legislator, by basic principles of the Albanian law, intends not only the principles of the code of civil procedure, (such as the principle of impartiality of the judiciary, of equality, the principle of contradictory procedure, access to courts etc.), but also all the basic principles that are provided for in the substantive norms that regulate the dispute*"[37].

In another judgment[38], the Tirana Court of Appeal refused the recognition of a judgment of a court of Texas, USA, granting a provisional measure against an Albanian company arguing that the judgment had not become final in conformity with the basic principles of Albanian legislation, as provided for in Article 394(dh) of the ACCP.

Another example of the wide interpretation of Article 394(dh) of the ACCP is the refusal of recognition of a "default judgment[39]" rendered by a court in North Macedonia (at the time of the judgment, re-

[37] Judgment of the Civil Panel of the High Court, no. 342, dated 27.10.2009. With regard to the reasons on refusing the recognition of the foreign judgment the court held that: "*The judgment no.596/99, dated 17 July 1999 taken by the Court of Macerata, Italy contradicts the norms of our law cited above, and specifically the applicant at the time of adoption was not a minor.… Our Family Code does not recognize the adoption of adults, this is due to the fact that the main purpose of adoption is to provide a family for a minor child, when he does not have one, as well as the opportunity to grow up and be educated like other children. This protection that the minor enjoys is based on the universal principle that in adoption we see the highest interest of the child. It would be pointless to adopt a person who is an adult, able to start a family at that age, able to work, etc.*"

[38] Judgment of the Tirana Court of Appeal no. 32, dated 01.03.2012.

[39] A judgment in favor of the plaintiff when the defendant has not responded to a summons or has failed to appear before a court.

ferred as the Former Yugoslav Republic of Macedonia). The Tirana Court of Appeal reasoned, *inter alia*, that a default judgment does not comply with the procedural principles of the Albanian legislation[40].

Despite the abovementioned case law, the Tirana Court of Appeal[41] granted recognition to an electronic payment order issued by the Court of Bergamo in Italy, despite the fact that such procedure is not provided for in the Albanian procedural law. The court reasoned that: "*It is true that the Albanian Civil Procedure Code does not provide explicitly for the procedure of issuing electronic payment orders, as it is the case in many European countries, and as it is envisaged to be included in our Code, ..., but the decision that resulted at the end of this procedure has the character of a judgment of a court with respect to the obligation of the debtor to make the payment according to the contractual obligation*"[42].

The referred case law shows that the case law is not settled on the interpretation of the notion "basic principles of Albanian legislation" as a ground for refusal of recognition of foreign judgments.

5.2. Grounds for refusal of recognition of foreign judgments under bilateral agreements

As previously mentioned, in case a foreign judgment is rendered in a state with which Albania has concluded a bilateral agreement containing provisions on recognition and enforcement of foreign judgments the grounds for refusal of recognition stipulated in the latter shall, generally, be applicable. However, the research of the case law showed that the provisions of the bilateral agreements were not applied, even in those cases where there was an applicable bilateral agreement.

Be it as it may, most of the bilateral agreements have similar grounds for refusal of recognition to those provided for in the ACCP. Accordingly, lack of court's jurisdiction, lack of notification to the ab-

[40] Judgment of the Tirana Court of Appeal no. 7, dated 28.01.2019. Another ground, which the court relied upon to refuse recognition was that the 15 day time-limit to respond to the summons was found insufficient for the defendant to effectively defend his case.

[41] Judgment of the Tirana Court of Appeal no. 40, dated 23.02.2017.

[42] *Ibid*.

sent defendant, *res judicata* and *lis pendens*, lack of finality of the judgment and violation of public policy are the common grounds of refusal found in the different bilateral agreements concluded by Albania[43].

The bilateral agreement with Turkey has quite a peculiar ground for refusal of recognition, which is not found in the other bilateral agreements. It stipulates that where, under the laws of the Contracting Party in the territory of which the judgment is to be recognized and enforced, the laws of that Party should have been applied, the judgment shall be recognized and enforced only when the laws are effectively applied or when the laws of the other Contracting Party are applied, they do not differ substantially from the laws of the Contracting Party in the territory of which the judgment is to be recognized and enforced[44]. Such a ground for refusal is problematic, as it may lead the enforcing court to review the merits of the case.

Unlike Article 394(dh) of the ACCP, most bilateral agreements use the term "public policy" as a ground for refusal of recognition. Interestingly, the bilateral agreement with Greece, in addition to the violation of public policy also refers to the violation of the basic principles of the legislation of the Contracting Party in the territory of which the judgment is to be recognized and enforced[45].

Considering the broad similarity of the grounds of refusal between the ACCP and the bilateral agreements, the non-application of the latter by the Albanian courts does not appear to have any significant practical impact.

[43] See e.g. Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters, art. 22; Agreement between the Government of Albania and the Government of Macedonia on Mutual Legal Assistance in Civil and Criminal Matters, art. 21; Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, art. 24.

[44] Convention on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters between the RoA and the Republic of Turkey, art. 20 (g).

[45] Convention between the RoA and the Republic of Greece on Judicial Assistance in Civil and Criminal Matters, art. 24 (d).

6. Concluding remarks

Taking into account the lack of the reciprocity requirement, the Albanian Code of Civil Procedure, is a legal instrument that effectively guarantees recognition and enforcement of foreign judgments. The practice of the Albanian courts shows that the process of recognition of foreign civil judgments is not lengthy and complicated. The Albanian courts are not inclined to make the recognition of the foreign civil and commercial judgments arduous. They tend to interpret the provisions of the Code of Civil Procedure exhaustively[46]. In practice, the most frequent grounds for refusal of recognition are lack of notification of the defendant[47], failure to prove that the judgment is final[48], the type of judgment (civil or administrative)[49], and lack of jurisdiction of the court that has rendered the foreign judgment[50].

Nevertheless, the existing legal framework has certain limits. It only offers the opportunity to recognize and enforce foreign judgments and no other enforcement titles issued outside Albania, such as authentic instruments. Also, it neither enables the enforcement of provisional measures issued outside the territory of the Republic of Albania[51], nor does it allow for the enforcement of settlement agreements, which constitute an enforcement title under a foreign law.

[46] Judgment of the Tirana Court of Appeal no. 60, dated 07.06.2011; Judgment of the Tirana Court of Appeal no. 10, dated 24.01.2018; Judgment of the Tirana Court of Appeal no. 40, dated 23.02.2017; Judgment of the Tirana Court of Appeal no. 18, dated 28.02.2008.

[47] Judgment of the Tirana Court of Appeal no. 7, dated 28.01.2019.

[48] *Ibid*.

[49] Judgment of the Tirana Court of Appeal no. 30, dated 27.07.2018.

[50] Judgment of the Tirana Court of Appeal no. 93, dated 20.07.2011.

[51] Exceptionally, the Agreement between the RoA and the Republic of Bulgaria on Mutual Legal Assistance in Civil Matters provides in art. 19 that the term "judgment" capable of recognition and enforcement means final and interim judgments as well.

Impact of Brussels I bis Regulation on Recognition and Enforcement of judgments in Albania

Aida Gugu Bushati

1. Introduction

Along with other countries of the Western Balkans, Albania has been part of the EU accession process since 2000. A Stabilisation and Association Agreement (henceforth SAA) was concluded with the EU in 2006, and entered into force in 2009[1]. In 2009, Albania also submitted a formal application for EU membership, and has been a candidate for EU membership since June 2014. Harmonisation of legislation with the EU acquis is considered a priority under SAA and the EU accession process. Article 70 of SAA requires Albania to approximate its legislation with EU *acquis*, starting with internal market legislation.

EU regulations in the field of private international law and international procedure law had a considerable impact on the 2011 reform of private international law[2], in particular with regard to the law applicable to contractual and non-contractual obligations, which was modelled on the Rome I[3] and Rome II Regulations[4]. Issues of international

[1] European Council and Commission, 'Council and Commission Decision of 26 February 2009 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (2009/332/EC, Euratom)', in OJ L 107, 28.04.2009, p. 166.

[2] Law 10 428 of 2 June 2011 on private international law, in OJ no. 82, 17.06.2011, p. 3319.

[3] 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), in OJ L 177, 4.07.2008, p. 6.

jurisdiction of the Albanian courts were also influenced by Brussels I bis Regulation[5], although the legislator opted for a simplified version of jurisdiction rules compared to the jurisdiction rules contained in Brussels I bis Regulation. The 2011 private international reform did not change the rules on recognition and enforcement of judgments, which continued to be part of the Civil Procedure Code (ACCP)[6]. The Code was only amended in 2017, when the international *lis pendens* rules[7] were first introduced in Albania. Such rules were adopted based on the Brussels I bis solutions, with close reference to Article 33 of Brussels I bis Regulation[8].

The approximation of the legislation with Brussels I bis Regulation not only provides for good legal solutions, it also prepares legal practitioners for the future application of Brussels I bis Regulation[9]. The future application of Brussels I bis Regulation and other instruments of EU law will place Albanian legislators and practitioners into many labyrinths. The process will require a profound understanding of position of EU law and the interplay with exiting multilateral, bilateral and national private international law rules.

This work addresses the future impact of the Brussels I bis Regulation on the Albanian legal regime of recognition and enforcement of judgments, highlighting potential challenges. Same limited to the main aspects without entering into details of the recognition and enforcement process. The possible scenario mentioned in this part of the work takes into consideration the current EU legal framework. Since EU

[4] Regulation (EC) No 864/2007 of the European Parliament an of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199, 31.07.2007, p. 40.

[5] Regulation (EU) No 1215 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L351, 20.12.2012, p. 1.

[6] Law no.8116 of 29 March 1996 on the Code of Civil Procedure of the Republic of Albania, OJ 9,10,11 12.05.1996.

[7] Law no.38/2017 of 30 March 2017 on some amendments to the Civil Procedure Code, OJ no.98 5.05.2017, p. 5493.

[8] KOLA F., *Lis pendens-a ndërkombëtare në juridiksionin gjyqësor shqiptar si risi në ligjin procedural shqiptar*, in *Jeta Juridike, Shkolla e Magjistraturës no. 3*, 2017, p. 50-71.

[9] MESKIC Z., *Regional convention on jurisdiction and the mutual recognition and enforcement of judgments in civil and commercial matters (Sarajevo convention) – a perspective of Bosnia and Hercegovina*, 2016, p. 248 available online.

private international law is an evolving area of law, one has also to consider what the future will bring the EU.

2. Position of EU law in the national context

The experience of EU Member States shows that effectiveness and functioning of the European framework of private international law is closely connected to the coexistence of national legislation and the relevant EU regulation. On the one hand, national legislation governing the interplay between the national legal system and the European framework, as well as international conventions, may significantly contribute to an effective application in practice. On the other hand, the national legislation assimilating European instruments into national procedures may hinder the *effet utile* of European law in general and the EU PIL regulations in particular.

Once Albania becomes a member of the EU, it will be entirely exposed to the EU *acquis*. As a general principle, the exiting Albanian Private International Law (henceforth PILA) shall not affect the EU laws or special laws (*lex specialis*), which shall prevail over it, in matters covered by PILA. As EU law overrides national law, national rules conflicting EU law must be disapplied[10]. Although judges tend to approach the application of national legislation, and especially Codes in a rather conservative manner, the future requires that the Brussels I bis Regulation be applied based on EU principles of supremacy and direct effect. The direct effect and supremacy of regulations is indisputable in the EU legal order. Since EU PIL largely consists of regulations, implementing national legislation will not be necessary. An immediate outcome of the EU accession would be the revision of the PIL Act, and other national acts, in order to avoid possible conflicts with Brussels I bis Regulation[11]. In the future, current provi-

[10] DOMEJ T., *Recognition and enforcement of Judgments (civil law)*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), in *Encyclopedia of Private International law*, Cheltenham, 2017, p. 1471.

[11] A recent study from Croatia related to private international law on family matters show that in the situation when national legislator failed to let aside the national law, and allow the coexistence with the same EU law, judges were confused by the mosaic of many sources of

sions set out under the national laws shall also have to be reviewed where family law issues are concerned. The harmonisation of EU law rules in this area is also progressing[12].

In the relationship between international treaties and national law, the favourable recognition principle may apply[13]. The question remains open as to whether the same favourable principle applies in relationships between EU law and national law. Some of the exiting EU acts provide for and answer this question by stating that the provisional measures issued *ex parte* provided for in the Regulation, should not preclude the recognition and enforcement of such a measure under national law[14].

According to Article 71 of the Brussels I bis Regulation, conventions dealing with jurisdiction or recognition and enforcement of judgments in specific matters continue to apply in principle between Member States. The European Court of Justice holds that provisions set out in such conventions *'only apply provided that they ensure, under conditions at least as favourable as provided by the regulation, the free movement of judgments in commercial and civil matter and mutual trust in the administration of justice in the European Union'*[15]. Albania has bilateral agreements with Greece, Rumania, Hungary and Bulgaria. Both the scope and the contents of such agreements cannot

private international law and as a result they applied the national law instead of EU law. See EUFAMS II facilitating cross-border family life: *Towards a common European understanding report on national implementation laws* EUFAMS ii consortium 27 February 2020.

[12] The following represents the EU legislation applicable to family matters. Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility in OJ L 338, 23.12.2003, p. 1. Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation, OJ L7, 10.01.2009, p. 1. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.07.2012, p. 107.

[13] This is also the position taken by the new Hague Convention on Recognition and Enforcement of Judgments (2009) available online.

[14] Recital 33 of Brussels I bis Regulation, see *supra* note 5.

[15] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08.

provide for mutual recognition in the same way as by the Brussels I bis Regulation. They are rarely applied in practice[16].

3. EU rules on recognition and enforcement of judgments in civil and commercial matters

When Albania is part of the EU, the recognition and enforcement of foreign judgments in civil and commercial matters, shall be primarily regulated by the Brussels I bis Regulation, as its status will change from a third state to a member state. As emphasised above, national legislation will exist to the extent that it shall create the grounds for the proper application of EU law. Particular attention should also be given to article 67 of the Brussels I bis Regulation which foresees that Brussels I bis Regulation shall not prejudice the application of governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments. Besides the Brussels I bis Regulation, there are several EU regulations which contain rules on the recognition and enforcement of judgments in civil and commercial matters[17].

For relations between EU Member States and Norway, Iceland and Switzerland, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the new Lugano Convention)[18] applies. This convention will become legal source for Albania as well.

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[16] See KOLA F., ÇINARI S., in this *Volume*.

[17] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19. Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, as amended, in OJ L 143, 30.4.2004, p. 15. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended, in OJ L 399, 30.12.2006, p. 1. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, as amended, in OJ L 199, 31.7.2007, p. 1.

[18] Convention on recognition and the enforcement of foreign judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3.

The Brussels I bis Regulation remains the cornerstone of recognition and enforcement of judgments and will affect the recognition and enforcement of judgments between Albania and EU Member States. In one way or another, it will, to a certain degree, guide the relationship between Albania and third states. Indeed, the relationship with third states will depend on the future development of EU law, and the possible adherence of EU to the Hague Judgments Convention[19]. For a uniform application of recognition and enforcements rules, many scholars suggest that the EU should regulate the disputes with third states and not leave it to prospect of national laws or international agreements (the Hague Judgments Convention)[20].

4. Impact of Brussels I bis Regulation on the recognition and enforcement

The Brussels I bis Regulation will affect and change the recognition and enforcement of civil and commercial judgments between Albania and other EU Member States in several ways. Brussels I bis Regulation will be the legal framework for regulating the free circulation of judgments and Albanian judgments will not be considered as judgments rendered in a third state. Also, it will abolish the principal of reciprocity applicable in few Member States, and simplify the procedures for recognition and enforcements and expand the list of executive titles by including authentic instruments and court settlements.

4.1. Abolishment of reciprocity

The recognition and enforcement of foreign judgments in Albania does not depend on reciprocity requirements. Reciprocity is applicable in few EU Member States. For example, under Austrian private international law rules, it is not enough for a foreign country to recognise and enforce judgments rendered in Austria, as a formal certificate of

[19] Hague Judgment Convention, see *supra* note 13.

[20] BONOMI A., *European Private International Law and Third State*, in *IPRax*, 2017, p. 184.

mutuality must exist. Such a certificate may be in the form of an international treaty of governmental regulation[21]. Moreover, Germany is another EU Member State in which the reciprocity principle applies[22]. Overall, reciprocity will not be an issue once Albania has joined the EU.

4.2. Automatic recognition and exequatur

The ACCP provides a formal process for the recognition and enforcement of foreign judgments. Foreign judgments are recognised and enforced by way of an exequatur procedure, wherefore the judgment must first be recognised (i.e., it must obtain full legal effect not only in the issuing state, but also in Albania). Once the judgment has achieved enforceable status through the declaration of enforceability by the Court of Appeal, enforcement proceedings can begin (Article 398 of the ACCP). Enforcement is a separate process regulated by Title IV of the ACCP. The creditor may submit the execution requests to private or state bailiffs. There is no special form on how to prepare the request, providing it is clear and accompanied by any necessary documents (Article 515 of the ACCP). The debtor has the right to be notified and to address the court for the invalidity of executive titles under Article 609 of the ACCP.

In the European Union, the common area of freedom, security and justice requires that rules on recognition be based on the principle of mutual trust. Because of this principle, a foreign judgment in civil and commercial matters is generally recognised *ipso jure* in other Member State, with no special procedure being required. The Brussels I bis Regulation provides for the automatic recognition. For judgments that the creditor does not seek to enforce, no application for recognition is necessary, even though such application is possible (Article 36 of the Brussels I bis Regulation).

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[21] HEISS H., *National Report (Austria)*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International law*, Cheltenham, 2017, p. 1893.

[22] VON HEIN J., *National Report (Germany)*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International law*, Cheltenham, 2017, p. 2111.

The exequatur proceeding is abolished under the Brussels I bis Regulation. A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required (Article 39 of the Brussels I bis Regulation). The declaration of enforceability, previously granted by a court of the Member State where enforcement was sought, emanates from a court of the Member State of origin. The creditor only needs to provide the enforcement authorities with a copy of the judgments and the certificate provided for under Annex I of said Regulation. The certificate must be notified to the defendant prior to enforcement (Article 43 of the Brussels I bis Regulation).

If the Brussels I bis Regulation regime applies, the Albanian courts will treat judgments, originated in the EU Member States as if they were judgments of their owns. The simplified procedures provided for under the Brussels I bis Regulation will contribute to the free circulation of judgments. However, a lot will depend on the performance of execution authorities and, in particular, on the application of Article 54 of Brussels I bis Regulation[23] and their effectiveness in the notification process[24].

4.3. Grounds for review

The wording "give effect to the foreign judgment" in Article 394 of the ACCP does not distinguish between recognition and enforcement. The refusal grounds listed under Article 394 of the ACCP apply to both the recognition and the enforcement processes[25]. The court acts *ex officio* and reviews the judgments vis-a-vis the grounds for refusal[26]. The distinction between recognition and enforcement is made in the Brussels I bis Regulation. Nevertheless, the grounds for review listed under Article 45 of the Brussels I bis Regulation will be the basis for review in both procedures. It is important to mention that courts

[23] REQUEJO ISIDRO M., *Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast): The Abolition of Exequatur*, 2014 www.ejtn.eu.

[24] HESS B., LENAERTS K., RICHARD V., *The 50th Anniversary of the European Law of Civil Procedure*, 2020 Brussels I (convention and regulation).

[25] See *supra* note 16 KOLA F., ÇINARI S., in this *Volume*.

[26] KOLA F., VOKSHI A., *Komentari i Kodit të Procedurës Civile*, Tirana, 2018.

may not invoke the grounds for non recognition/enforcement *ex officio*.

Refusal grounds among private international law rules are roughly the same. The grounds for review provided by the ACCP are similar but not identical to the ones listed in Brussels I bis (see table below). If Brussels I bis Regulation applies, parties can invoke national grounds for review to the extent that they are not incompatible with the grounds for review under the Brussels I bis Regulation (Article 41/2 of the Brussels I bis Regulation).

Grounds for review	
Article 45 Brussels I bis Regulation On the application of any interested party, the recognition of a judgment shall be refused:	**Article 394 ACCP** The decision of a court of a foreign state does not become effective in Albania when:
a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed	a) in conformity with the provisions in effect in the Republic of Albania, the dispute cannot be within the competence of the court which has issued the decision
(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;	b) the statement of claim and the writ of summons to court has not been notified duly and in time to the absent defendant in order to give him the possibility to defend;
(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;	c) between the same parties, on the same subject and on the same cause has been issued another, different decision by the Albanian court; action
(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;	ç) a lawsuit, which has been filed before the decision of the court of the foreign state has become irrevocable, is being considered by an Albanian court;
e) if the judgment conflicts with: (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or (ii)	d) the decision of the court of the foreign state has become final in violation of its legislation;

Section 6 of Chapter II.	
	dh) it does not comply with the basic principles of the Albanian legislation.

a) Jurisdiction review

Under Article 394/a, of ACCP the recognition of foreign court decision shall be denied if the court of the state to which the foreign judgment belongs, lack jurisdiction under Albanian law ('mirror principle'). Jurisdiction review will not be an issue between Albania and EU Member States, as the mutual trust principle will apply. Nevertheless, particular attention should be given to judgments rendered in violation of jurisdiction rules provided for under Section 3, 4 and 5 "protection of weaker parties" and Section 6 "exclusive jurisdiction" of the Brussels I bis Regulation. At present, Albanian PIL Act does not contain special rules of jurisdiction for weaker parties, while exclusive jurisdiction rules are similar to the ones contained in the Brussels I bis Regulation.

b) Public policy

Public policy as ground for refusal is regulated under letter ((dh) basic principles of Albanian legislation) of Article 394 of the ACCP, though the word "public policy" is not mentioned in this provision. Albanian case law provides a broad definition of public policy by including issues of substantive and procedural law. According to the Albanian jurisprudence the substantive public policy grounds give no importance to the contents of the foreign law, but to eventual effects that arise from the recognition of the foreign judgments and their compatibility with the basic principles (provided in substantive norms) of the Albanian law.

Procedural public policy grounds are covered by letter (b) (default judgments) and letter (d) (judgments that become final in violation of foreign national legislation) although the latter is not very clear[27].

[27] For a detailed analysis on the Albanian court's jurisprudence on public order see KOLA F., ÇINARI S., in this *Volume.*

The interpretation of public order in the EU Member States context is rather strict and substantive public order is rarely used for two main reasons. First there are no fundamental differences between the legal system of the Member States in civil and commercial matters that could trigger the application of substantive public policy. Second the substance of the foreign judgments may not be reviewed[28]. Procedural public policy is also rarely applied in the EU Member States context. Indeed, procedural public policy was traditionally linked to procedural deficiencies. However, particular attention was given to the relationship between letters (a) and (b) of Article 45 of the Brussel I bis Regulation. In general, the interested party may invoke more than one ground for refusal as listed under Article 45 of the Brussels I bis Regulation. Again, the use of public policy ground cannot be invoked should any other specific ground for refusal apply[29].

c) Irreconcilable judgments

Letter c of Article 394 of the ACCP addresses the issue of *res judicata* with the aim of avoiding two judgments being issued for the same dispute. Letter (ç) of Article 394 of the ACCP represents the situation of parallel proceedings and should be applied in line with *lis pendens* rules provided under ACCP[30]. Under the jurisprudence of the European Court of Justice, an irreconcilable judgment is a judgment entailing mutually exclusive legal consequences[31]. The Brussels I bis Regulation distinguishes between two possible situations: judgments already issued between the same party (there is no need for same cause of action) in the state addressed. In such a case, domestic judgments (Article 45(1)(c) BR I bis Regulation) prevail, regardless of priority. In the second scenario, (irreconcilable earlier judgments between same party, same cause of action Article 45(1)(d) BR I bis

[28] SCHRAMM D., *Enforcement and the abolition of exequatur under the 2012 Brussels I Regulation,* in *Yearbook of Private International Law*, Vol XV, 2013-2014, p.163.

[29] KERESTEŠ T., *Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow*, in *Lexonomica*, Vol. 8, No. 2, December, 2016, p. 77-91.

[30] KOLA F., ÇINARI S., in this *Volume.*

[31] Judgment of the Court of 4 February 1988 Horst Ludwig Martin Hoffmann v Adelheid Krieg, Case 145/86.

Regulation) the conflict between the judgments is solved according to the principle of priority, so that the earlier judgment prevails.

4.4. Authentic instruments

As stated in the first part of this study, Albanian legislation does not provide for the recognition and enforcement of other titles, such as authentic instruments even though Article 510 of the ACCP includes a long list of executive titles in addition to court judgments[32]. The concept of 'authentic instrument' is defined by the European Court of Justice in the Unibank Decision[33]. According to EU law, an authentic instrument is an instrument which has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates. The instrument should be in the required form and the authenticity must relate not only to the signatures, but also to the contents of the instrument[34].

4.5. Third state judgments

At present, Albanian judgments have third state judgments status *vis a vis* EU Member States, so that recognition and enforcement are based on Member States legislation and bilateral agreements. None of the EU legal instruments, including the Brussels I bis Regulation, provide for the recognition and enforcement of judgments issued in a third state[35]. Member States rules on the recognition and enforcement of judgments are in general friendly with judgments coming from a third state. However, issues remain with those systems that directly or indirectly deploy reciprocity as a covert tool to block judgments from

[32] Article 510 of the ACCP stipulates that notary documents containing monetary obligations as well as documents for the award of bank loans, bills of exchange, cheques, and order papers equivalent to them, other documents according to specific laws, are executive titles and authorise the bailiffs to carry them out.

[33] Judgment of the Court (Fifth Chamber) of 17 June 1999 Unibank A/S v Flemming G. Christensen, Case C-260/97.

[34] See Article 4 of the Regulation (EC) No 805/2004, cit.

[35] BONOMI A., *European Private International Law and Third States*, see *supra* note 20, p. 190.

jurisdictions with doubtful standards concerning rule of law and judicial independence[36]. In the intermediary phase (i.e., during the EU accession phase), the free circulation of judgments between Albania and the EU may also be governed by the Hague Judgments Convention. This, however, is as yet uncertain, given the fact that Hague Judgments Convention has not entered into force[37].

When Albania joins the EU, the ACCP and other international rules will be applicable for the recognition and enforcement of third state judgments in Albania. However, another possible scenario would be that third state judgments are enforced and recognised in Albania based on EU harmonised rules.

5. Concluding remarks

It seems that Albania has a long way to go before joining the EU. EU legislation is not, as yet, binding to Albania. There is a general obligation deriving from the SAA and EU accession process that Albania should align its legislation with EU *acquis*. Albanian private international law is largely influenced by EU *acquis*, in particular with regard to applicable law and determination of international jurisdiction of the Albanian courts. With the exception of international *lis pendens*, Albanian rules of recognition and enforcement are not harmonised with the Brussels I bis Regulation. Albanian judgments have the status of third state judgments vis-a-vis EU Member States. Thus, the free circulation of judgments between Albania and EU Member States is governed by Member States legislation and bilateral agreements that some of EU Member States have concluded with Albania.

Once Albania becomes an EU Member State, EU private international rule will apply and recognition and enforcement of Albanian judgments in civil and commercial matters will be governed by the Brussel I bis Regulation and other EU specific rules as stated also by the Article 67 of Brussels I bis Regulation. The application of the

[36] DE MIGUEL ASENSIO P., CUNIBERTI G. et al, *The Hague Conference on Private International law Judgments Convention Study* requested by JURI Committee, available online.

[37] See article 29 of Hague Judgments Convention, see *supra* note 13.

Brussels I bis Regulation will bring many changes to the free circulation of judgments between Albania and the EU. It will provide for automatic recognition of judgments and no reciprocity principle will apply. The role of the Albanian courts will be reduced in the recognition process while the grounds for review will be applied in strict manner and in line with the European Court of Justice case law.

In the intermediary phase, it is important that Albania not only improve its judicial performance, which is a precondition for mutual trust, but also continue progressively the process of alignment of legislation with the EU *acquis*. The reference to the rich case law of the European Court of Justice will contribute to the better understanding of the EU *acquis*.

Coordination between *Lex Generalis* and *Lex Specialis*: Principles, Recommendations and Guidelines (with comments)

Stefano Dominelli

Introduction

One the goals of the En2Bria Research project was to develop recommendations and guidelines to improve the legal framework concerning judicial cooperation in civil and commercial matters where concurring rules on jurisdiction or recognition and enforcement of decisions are contained in the *lex generalis*, the Brussels Ia Regulation, and in other instruments of EU law acquiring the status of *lex specialis*.

The following recommendations and guidelines have been drafted based on the main criticalities examined. Most of these exigencies can be approached either as a policy-making issue, in the sense that political institutions, most likely at the EU law level, can directly address such problems at the legislative level, or as interpretative questions, which courts and legal practitioners at large may come across and seek to settle in course of their professional activities. On the contrary, only few of the subsequent recommendations and guidelines that follow may be addressed to one single target group, be it political or practitioner in nature.

For the purpose of the present work, to the extent theoretical and operative suggestions are deemed to be directed to some degree at both political institutions and practitioners, these suggestions will fall under the heading of "principles".

If suggestions are more likely directed at political institutions as the content mainly tackles legislative drafting and policy questions, these suggestions will fall under the heading of "recommendations".

Lastly, if due to their content suggestions are mostly directed at legal practitioners, i.e. courts and lawyers, these will fall under the heading of "guidelines".

To the extent possible, and with the goal the keep this instrument accessible, transparent and flexible, each principle, guideline, and recommendation is accompanied by a comment, offering a direct succinct explanation from a theoretical and practical perspective that grounds the corresponding suggestion, and by an indication of a possible action to be adopted by the relevant targeted group to settle the main criticalities encountered.

Principle 1: Overlap of concurring provisions (and falsely "clearly disconnected regimes")

Courts and practitioners should carefully determine if another EU law provision triggers art. 67 Brussels Ia Regulation. Similarly, attention should be paid to other regulations whose scope of application might point towards incorrect conclusions on their scope of application.

Comment:
The *lex specialis* principle enshrined in art. 67 Brussels Ia Regulation is only triggered to the extent another EU law act overlaps with its material scope of application.
A number of elements increase the complexity for practitioners in the reconstruction of this first preliminary step. There is in recent times a growing number of concurring acts (growth in fragmentation and specialization of PIL rules in general, and of specific PIL rules in non-PIL acts).
The issue of excessive fragmentation and specialization of rules in diverse acts can in particular be seen in the field of intellectual property; the Brussels Ia Regulation has rules on exclusive jurisdiction in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered. Other proceedings fall under the general torts heads of jurisdiction, unless one of the special heads of jurisdiction (Regulation 2100/94; Regulation 6/2002; Regulation 1257/2012; Regulation 2017/1001; Directive 2019/790) either exclude the application of the exclusive head of jurisdiction under Brussels Ia or of the special head of jurisdiction under Brussels Ia.
International patents courts have been established, yet some Member States have frozen their functioning due to constitutional grounds, raising problems on the coordination of the general and special regimes (see BvR 739/17).
Moreover, when the EU accedes to international conventions containing rules on jurisdiction and free movement of decisions, only some the rules may take precedence whilst other international rules may be excluded from the accession process of the EU (cf the case of the Athens Convention relating to the Carriage of Passengers), to

"save" the *lex generalis*, making it complicated for courts and practitioners to clearly identify the correct legal regime.
Along the same line, also special acts of EU law contain in the first place specific heads of jurisdiction that oust the *lex generalis*, but which also make applicable *some* rules of the Brussels Ia Regulation, making it excessively complicated to reconstruct in immediate, clear and transparent terms the relationships between applicable and derogated provision (see always in intellectual property, Regulation 6/2002 and Regulation 2017/21001).
In other circumstances fragmentation and proliferation of private international law acts does not trigger art. 67 Brussels Ia Regulation, as this becomes of relevance only to the extent there is an overlap in the material scope of application between the concurring instruments. However, also this determination might turn out to be complicated. The Maintenance Regulation (4/2009) is an apt case study. Regulation 44/2001 contained a rule on jurisdiction in maintenance matters; in 2009 the Maintenance Regulation was adopted, the two instruments overlapping in their scope made art. 67 Brussels I applicable. The Brussels Ia Regulation (Recast) excluded maintenance from its scope of application – excluding the operability of art. 67. However, not all maintenance obligation do fall within the scope of application of Regulation 4/2009. Under Italian law, maintenance obligations can be established by contract – these fall outside the scope of application of Regulation 4/2009, but are nonetheless civil and commercial matters, for which the Brussels Ia Regulation remains applicable. In this sense, the establishment of a specific special regime still requires careful consideration of its material scope of application.

Possible actions:
A consolidation of concurring rules, to the extent possible, could be a first solution. Yet, the political relevance of this very specific choice could easily be superseded by creating an easy-to-access list of concurring provision, which could be adjourned every time a concurring rule on jurisdiction or free movement of decisions is adopted. The list could be published as an annex to the Brussels Ia Regulation, even mentioned in art. 67, and made available on the e-justice portal.

Principle 2: The meaning of 'instruments of the Union'

Art. 67 Brussels Ia Regulation provides for the applicability of special rules contained in 'instruments of the Union'. These should be understood as encompassing "EU secondary law", and, more specifically, binding "provisions" (rather than acts) of EU secondary law. Rules on jurisdiction contained in the founding treaties should prevail *proprio motu*, rather than due to the disconnection clause contained in art. 67 Brussels Ia Regulation. Customary international law rules binding for

the EU should also fall outside the scope of application of the provision at hand.

Comment:
The wording of art. 67 Brussels Ia Regulation is not widely used in the founding treaties. Interpretative questions have arisen in the case law whether rules on exclusive jurisdiction for the Court of Justice of the European Union in tort matters are to be applied based on a hierarchy approach, or based on the disconnection clause contained in the Brussels Ia Regulation. The case law is not conclusive on this point – yet art. 67 Brussels Ia Regulation, if it is interpreted in the sense that it refers to "acts adopted by the EU", it would exclude from its scope of application all rules binding for the EU that are not adopted by the EU itself, such as the founding treaties that are adopted by the Member States, or by international customary law (eventually entailing negative heads of jurisdiction) that are binding upon the Union but are formed "outside" the legislative procedure of the Union.

Possible actions:
The term "acts" of the Union instead of "instruments" is suggested. This would be consistent with other linguistic versions. Regulation 44/2001 had a recital supporting the reading of the corresponding provision (also art. 67). Recital 24 of Regulation 44/2001 read that "*... for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*". In a possible recast of Brussels Ia, a recital to support the interpretation and application of art. 67 could be added, to specify what "instruments of the Union" (or rather "provisions"), include.

Principle 3: The "survival" of the lex generalis

Provided that certain matters are governed by a special regime which prevails due to art. 67 Brussels Ia Regulation, the latter instrument should still find application for aspects of international civil procedure not covered by the special instrument – to the extent the general rules are not inconsistent with the special rules.

Comment:
Special regimes whilst they might overlap with some aspects of the Brussels Ia Regulations they might not deal with all aspects of international civil procedure. In this sense, it has been widely acknowledged that the *lex generalis* should play a "fill the gap" role. For example, rules on *lis pendens* or connected and related actions, choice of court agreements, as well as rules on free movement on decisions of the Brussels Ia Regulation should still find application if the special regime entails no special rule

on this point. The limit being *consistency* of these general rules with the concurring special regime.

Possible actions:
Courts and practitioners should carefully examine the concurring regime and, once identified the special rule on jurisdiction ousting the general rule on jurisdiction, in pleadings or judgments they should also either identify other rules (choice of court, connected actions), or advocate that general rules not expressly ousted are inconsistent with the system of the special regime. On its side, EU acts might be more clear on the point, also in recitals. The EU lawgiver might expressly instruct courts and practitioners with clear wording whether provisions not clearly ousted by the special head of jurisdiction are intended to survive in the application.

Principle 4: Terminology in concurring acts

Courts and practitioners should carefully evaluate the terminology used in other EU law instruments. Terminology employed in acts concurring with the *lex generalis* has proven sometimes complicated, misleading or inconsistent.

Comment:
In some circumstances, articles are referred to as to dealing with "enforcement" – though dealing with domestic enforcement of agreements, rather than dealing with cross-border aspects of recognition and enforcement (mediation Directive 2008/52, art. 6). In some cases rules on jurisdiction fall under the heading of "jurisdiction" (cf Regulation 6/2002, art. 79 ff, and art. 6 Directive 96/71/EC), other under the heading of "right to an effective remedy" (Regulation (EU) 2016/679, art. 79(2)). In other cases, rules on jurisdiction are expressly qualified as such only at the end of a complex act – this being the case of art. 8(16) Council Regulation 2157/2001 on the Statute for a European company, which is clearly qualified as a jurisdiction clause only in its art. 69(c). In other set of cases again, provisions fall under the heading of "jurisdiction", but in no way set rules for the allocation of international jurisdiction (see art. 6 European order for payment procedure, Regulation 1896/2006).

Possible actions:
The EU lawgiver should adopt a consistent terminology throughout the different concurring acts – possibly referring to international jurisdiction, territorial or local competence, and to cross-border recognition and enforcement of decisions, to make clear these are concepts that are competing with the *lex generalis* of the Brussels Ia Regulation.

Principle 5: Terminology in concurring acts – titles of acts and their contents

Courts and practitioners should carefully evaluate consistency between the terminology used in titles of concurring regimes (their *name*) and their contents.

Comment:
At least in one case the title of an instrument appears to be confusing – Council Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, whilst it set rules to avoid recognition and enforcement of decisions of third countries (art. 4) does not trigger art. 67 Brussels Ia Regulation, as there is not overlap in the material scope of application, art. 6 of Regulation 2271/96 also speaks of "jurisdiction" in relations to actions for compensation. Here again there is no true substantive overlap in the scope of application between the *lex generalis* and the *lex specialis* in jurisdiction matters as Regulation 2271/96 makes a renvoi to the 1968 Brussels Convention to determine jurisdiction and thus does not trigger art. 67 Brussels Ia Regulation. However, it should also be noted that Regulation 2271/96 has been amended in 2018 and the reference to the Brussels Convention has not been changed, obliging the reader to make recourse to art. 68(2) Brussels Ia to interpret the amended Regulation 2271/96, which uses a heading "jurisdiction" for a rule devoted to coordination, rather than on "jurisdiction" *stricto sensu*. No indications at all are given in the recitals on the rule on coordination on jurisdiction.

Possible actions:
Titles of normative acts could introduce specifications that they also contain indications – directly or indirectly – on international jurisdiction; alternatively, recitals could extensively address the issue.

Principle 6: Breach of lex specialis on jurisdiction and lex generalis on free movement of decisions

Courts and practitioners should pay particular attention on the possibility a special non-exclusive head of jurisdiction is breached, as this raises issues in terms whether the list of grounds to refuse recognition and enforcement under the *lex generalis* – generally interpreted as a *numerus clausus* – can be integrated with additional grounds not expressly foreseen (neither in the *lex generalis* and in the *lex specialis*).

Comment:
Concurring heads of jurisdiction in *lex specialis* usually pursue specific policy goals and interests – the protection of weaker parties or the protection of intellectual property. To the extent such rules are not exclusive, thus are additional to the ordinary regime, issues might arise. The General data protection regulation (GDPR), at art. 79(2) provides that actions can be started at the place of establishment of the data controller, data processor or at the place of habitual residence of the data subject – the weaker party the instrument wishes to protect. If the data processor starts a negative declaratory action against the data controller at the place of establishment of the latter, this might activate the rules on coordination of proceedings contained in the GDPR, preventing the weak party to start proceedings at his own *forum actoris*. The rule on jurisdiction is unclear whether it is applicable also to actions started by non-weak parties; however, if not, such action might not be unlawful and, if excluded from the scope of application of the GDPR it might still fall under the scope of application of Brussels Ia. The question thus becomes: if a special rule on jurisdiction is breached, either because of procedural tactics employed in the context of an unclear normative scenario, or simply because the seised court wrongfully assumes to be the court identified by the special provision, can art. 45 Brussels Ia Regulation be read also as including the respect of special grounds of jurisdiction, at least to the extent these protect a weaker party or provide a given court with exclusive jurisdiction? On the one side, the possibility to add grounds to refuse recognition and enforcement not listed in art. 45 Brussels Ia seems inconsistent with the general approach that this provision should be narrowly constructed and no further ground other than those expressly provided for can be invoked by the requested court: the free movement of decisions is the rule, the refusal remains the exception. On the other side, adding *lex specialis* rules on jurisdiction for the protection of weaker parties or conferring exclusive jurisdiction to the list already existing under art. 45 Brussels Ia Regulation *might* be in some limited circumstances theoretically consistent with the existing legal framework.

Possible actions:
Special instruments, when adopting additional or exclusive rules on jurisdiction should expressly and clearly give indications to courts and practitioners as per the consequences in terms of art. 45 Brussels Ia Regulation if the relevant special head of jurisdiction is breached. Such guidance could also be given by way of an explicative recital.

Principle 7: "Additional" or "Exclusive" lex specialis on jurisdiction

Courts and practitioners are called to pay particular attention on whether *lex specialis* heads of jurisdiction are a facultative forum concurring with those of the *lex generalis*, or rather is exclusive. Provi-

sions are framed differently, and inconsistency in wording paves the way to uncertainties.

Comment:
Some rules are quite clear in creating exclusive special heads of jurisdiction which exclude any residual application of the general rule expressly ousted [but see *Principle 3* for the questions of survival on general rules not expressly ousted]. This is the case of rules contained in intellectual property regulations to the extent they specifically use a terminology such as "exclusive jurisdiction". In the same vein, art. 6 of the Posting of workers directive is quite clear in creating a mere *additional* head of jurisdiction, as it specifies that actions "*may* be brought" before a given court. Other provisions, such as art. 79 of the General data protection regulation are less clear in that the provision argues that actions "shall be brought" before given courts, yet recitals of the same instrument (recital 147) seems to pave the way to the contextual applicability of special and of general rules to the extent the latter do not prejudice the specific policy goals of the former.

Possible actions:
Consistency in wording should be ensured throughout all *lex specialis*. If the EU lawmaker wishes to create exclusive rules of jurisdiction ousting any other rule in the Brussels Ia Regulation, the special rule should clearly state that the court identified in the special rule holds *exclusive jurisdiction*. If the EU lawmaker wishes to create an additional fora, the terminology used by the Posting of workers directive ("may") is highly advisable and should be replicated in other acts.

Recommendation 1: Mutual trust, favor executionis, and international conventions

Political institutions should monitor the possible implications of the TNT case law (Case C-533/08), following the entry into force of the Brussels Ia Regulation and its disconnection systems.

Comment:
In TNT, the Court of Justice of the European Union argued that amongst the principles that condition the applicability of special conventions between Member States, there is the principle of free movement of judgments and mutual trust in the administration of justice (*favor executionis*) (para. 54). This, in particular, raises the issue of the disconnection clause under the current Brussels Ia Regulation, whose "abolition" of the *exequatur* might be more favorable than the regime contained in a number of treaties concluded outside the European judicial space.

Recommendation 2: Lack of proper disconnection clause

At the current times, there appears that at least one additional disconnection clause could still be drafted and inserted in the Brussels Ia Regulation. This relates to international conventions in specific matters to which the EU becomes party to. The disconnection clause may be used for international treaties to which member States were already party to, or eventually also for new international treaties directly ratified by the EU only.

Comment:
Art. 71 provides for the prevalence of conventions in special matters to which Member States are parties to. Art. 67 provides for the prevalence of provisions contained in other EU law instruments. When the EU accedes to an international treaty to which EU Member States are party to, both disconnection clauses may be relevant, as there is an international treaty (art. 71), and a Council decision (art. 67). The domestic case law has shown inconsistencies – some Italian courts have followed the pathway of the disconnection clause under art. 71; some German courts have applied art. 67. At this stage, no significant indications can be found in the case law of the Court of Justice of the European Union – which, when dealing with the 1999 Montreal Convention, has based its conclusions on both articles 67 *and* 71 (cf *Guaitoli et al*, Case C‑213/18, para. 44). Yet, art. 67 seems more consistent with art. 216 TFEU, as international conventions become part of EU. The consequences of choosing the venue for coordination might be relevant if one accedes to the idea that the TNT case law rendered on art. 71 should not be transposed *sic et simpliciter* on art. 67 [see *Guideline 1*].

Possible actions:
To properly valorize the mixed nature of the act – the external origin of the international convention which becomes EU law though a Council decision that may set limits to such rules, a possible third disconnection clause may be developed at the normative level.

Recommendation 3: "Optional" second generation regulations after Brussels Ia

The reforms in the field of *exequatur* established by Brussels Ia Regulation should be no reason to abolish "second generation regulations".

Comment:
As second generation regulations generally presuppose a more favorable regime of free movement of decisions based on harmonized and uniform standards and rules of civile procedure (and not simply of *international* civil procedure), and since these optional instruments contribute in the promotion of reducing the number of grounds to refuse recognition and enforcement in the requested Member States, the reform in the field of *exequatur* introduced by Brussels Ia should not induce European political institutions to abandon these optional instruments as they may contribute in the continuous development of uniform rules of (domestic) civil procedure – as well as contribute reducing grounds to refuse recognition and enforcement in the requested Member State.

Recommendation 4: Continuous alignment to EU acquis for acceding States

Consistently with Accession Agreements, Candidate countries should ensure continuous alignment to the European acquis, in particular as per the rules on free movement of decisions.

Comment:
Research has shown that, whilst domestic rules on the recognition and enforcement of decisions in Candidate countries may be applied with approaches that are consistent with the EU case law, some grounds to refuse recognition and enforcement contained under municipal law are still incompatible with the Brussels Ia regime. Even though the direct applicability of an EU regulation would solve the order of priority, an alignment of domestic law with proper discern of the scope of application of the different rules could possibly help the construction of mutual trust in the process of accession.

Recommendation 5: Consistency in Jurisdiction for EU Agencies

The EU should ensure consistency in rules contained in regulations establishing EU Agencies and addressing the issue of jurisdiction in non-contractual matters.

Comment:
A comparative research has shown that most instruments establishing European agencies contain rules on jurisdiction by virtue of which, consistently with the idea that these are "bodies and agencies of the Union" for the purposes of art. 340 TFEU, the Court of Justice of the European Union is explicitly identified as the sole court having exclusive jurisdiction for non-contractual liability as well. It has however

emerged that for the *European Union Agency for Criminal Justice Cooperation* (Eurojust) a different solution has been adopted, in that "*national courts of the Member States competent to deal with disputes involving Eurojust's liability as referred to in this Article shall be determined by reference to Regulation (EU) No 1215/2012 of the European Parliament and of the Council*" .

Possible actions:
Even though the current solution is consistent with the previous normative framework of Eurojust, it could be advisable to ensure that all agencies are subject to the same approach, i.e. their non-contractual liability is reserved to the exclusive jurisdiction of the Court of Justice of the European Union.

Guideline 1: Art. 67 and 71 Brussels Ia – Two different lex specialis

The case law of the Court of Justice of the European Union interpreting art. 71 should not *sic et simpliciter* be transposed to art. 67.

Comment:
The Court of Justice of the European Union has limited the possibility for Member States to apply international conventions in special matters in lieu of the Brussels regime. The condition is that the convention must respect the founding principles of the Brussels rules. Such a condition is not envisaged in art. 71, which governs the relationship of the regulation with international conventions in special matters. Such a case law should not be applied automatically to art. 67 as well – this appears not only because art. 67 does not require any additional condition for the special rule to be applied, but also because the special rule is part of EU law itself. It should be for the EU lawgiver himself to ensure consistency of the special rule with the "quasi-constitutional" values of civil procedure, not for courts and practitioners on a case by case approach. In course of the research, it has been raised the question whether if there is a *lex specialis* pre-dating a *lex generalis*, should the first always prevail where the general regime introduces significant legislative changes? If the new general rules aim at "modernizing" the system – should these still be ousted by a pre-existing *lex specialis*? For example: provided that under the Brussels I Regulation a *lex specialis* rule creates an expedited *exequatur* procedure in favor of a contractually weaker party, after the applicability of the Brussels Ia Regulation – which "abolishes" *exequatur* tout court, should the *lex specialis* – which has meanwhile become theoretically inconsistent with the *lex generalis* – still be applicable? As mentioned, the example is artificially constructed – yet the problem of the "survival" and automatic precedence of pre-existing provisions (on jurisdiction or enforcement) over an updated legal framework (which evidently promotes certain values) should be kept into account by the lawmaker. In such circumstances, however, no automatic limitation to art. 67 Brussels Ia Regulation should be introduced, either for special rules on (mandatory) jurisdiction or free movement of decisions, being advisable for the

court to raise a preliminary question to the Court of Justice of the European Union. However, this should also refrain to replicate the model of art. 71, given that – as argued – it should be for the EU lawgiver the control of its own legal system.

Guideline 2: Severability of actions

Provided that the proper special instrument concurring with the Brussels I regime is identified, this ousts the *lex generalis* only within its own material scope of application. Connected actions (most likely, rules on jurisdiction) might thus be governed at the same time by the special instrument and by the *lex generalis*.

Comment:
This has happened for example in the context of claims for delayed or cancelled flights. To the extent passengers seek compensation for their right to a lump sum standardized compensation under the Air passengers rights regulation, as this does not govern jurisdiction, the competent forum is entirely govern by the Brussels Ia Regulation. Any additional claim for compensation falls within the scope of application of the 1999 Montreal convention, acceded by the Union by way of Council decision. Even though the possibility to apply the Brussels rules on related and connected actions (art. 30, most notably, art. 30(2)), has not been addressed by the Court of Justice of the European Union, the Advocate General Saugmandsgaard Øe pointed towards the possibility of making use of art. 30 Brussels Ia (AG Opinion in *Guaitoli et al*, Case C‑213/18, para. 51). However, it should be reminded that the provision at hand presupposes that the two courts before which two proceedings are pending are in different Member State (whilst some courts apparently appear ready to make use of the provision also when the connected proceedings are instructed before two courts of the same Member State).
Similar, and more significant problems, have emerged in the field of intellectual property where the fragmentation of rules has led domestic courts, to some extent, to interpret heads of jurisdiction so as to reconcile them one with the other, or to pursue specific policy goals. This appears to have been true to a certain degree in the case of online intellectual property infringement, where in some cases courts have sought to readapt general approach in this specific field to overcome the negative outcomes connected to the territoriality approach followed in some *lex specialis* in intellectual property matters (whereas there might be the possibility to follow universality approaches under art. 7 Brussels Ia ousted by art. 122 Regulation 2017/1001).
The main criticalities in similar circumstances appear to be at least two: avoid forum shopping, and avoid inconsistent decisions being delivered by courts.

Possible actions:
If domestic courts determine the Court of Justice has not delivered yet any clear decision on the possibility to concentrate proceedings (as in cases of air passenger rights), domestic courts and practitioners should in the first place refer the question to the Court of Justice, to allow the Court the possibility to offer clear uniform guidance on the compatibility of concentration mechanisms in the framework of severability of actions.
To the extent domestic courts have developed domestic approaches in the case law to cope with parallel actions being governed by different rules on jurisdiction, EU institutions could develop non-binding guidelines to *uniformly* suggest reconciliations and coordination of the diverse unities of the law so at to discourage forum shopping and avoid inconsistent judgments.

Guideline 3: Brussels Ia and "optional" second generation regulations

Optional regulations which may provide for a special regime on free movement of decisions if the interested party opts for such a regime do not necessarily entail direct rules on jurisdiction; however, practitioners should carefully control if the relevant instrument limits the available fora under the *lex generalis* to allow for the option in of the special regime.

Comment:
The so called second generation regulations, adopted when Brussels I (Regulation 44/2001) was applicable, can be opted in by the will of the parties. It seems thus that it is a combination of party autonomy and binding provisions that triggers the disconnection clause of art. 67 Brussels Ia, as *proprio motu* these special regimes would otherwise not be applicable. These special regimes contain few of the *lex specialis* rules in the field of free movement of decisions, which were quite innovative at the time. There are no direct rules on jurisdiction, which remains entirely governed by the *lex generalis*. However, for the party to opt in (eventually at the certification stage of the decision that has been issued), the relevant instrument might impose some conditions and limit its applicability only if the decision has been rendered by a specific court amongst those theoretically competent under the Brussels I regime. Under Regulation 805/2004 (recently amended), where a decision may be certified as an European enforcement order for uncontested claims provided a number of conditions are met, amongst such conditions the fact that the court of origin was that of the domicile of the debtor if the debtor was a consumer (see art. 6; thus raising possible practical questions on the possibility of certifying a decision rendered by a court prorogated by a choice of court agreement or by tacit prorogation under art. 26 Brussels Ia Regulation). Similar "limitations" as per the coordination

between the special instrument and the *lex generalis*, in the sense that it is only allowed to make recourse to the special rules on free movement of the which limits general rules on jurisdiction, see also art. 6, Regulation 1896/2006 creating a European order for payment procedure, as amended.

Guideline 4: Special rules, negative declaratory actions, preliminary and ancillary questions, and connected and related claims

Special rules on jurisdiction have a well-defined material scope of application; courts and practitioners, in particular to the extent where special rules establish exclusive jurisdiction, should carefully evaluate if and to what extent this jurisdiction extends to ancillary or preliminary questions, as well as to connected and related questions.

Comment:
The case law, in particular in the field of intellectual property, has shown that negative declaratory actions have raised issues whether these also fall within the scope of application of exclusive heads of jurisdiction (the question generally being answered in the affirmative; cf Case C‑433/16).
Connected and related actions have also been addressed: the *lex generalis* on jurisdiction in tort matters has been excluded to actions for a declaration of abuse of a dominant position and of unfair competition connected to actions for declaration of non-infringement, in so far as granting those applications presupposes that the action for a declaration of non-infringement is allowed. Jurisdiction must be based, for the entirety of the proceedings, on the jurisdiction regime established by regulation 6/2002 (see Case C‑433/16, para. 49).
Also, in another case the Court of first instance, when addressing the liability of the Union and of the European Central Bank for alleged patent violations did not address the cases as the violation of the patent, the pre-condition for determining the liability, was not set by the court having exclusive competence (whilst exclusive competence for liability was with the European court only – see Case T-295/05).
In insolvency matters, before the new European Insolvency Regulation Recast (Regulation 2015/848, art. 6) introduced a clear provision on *vis actractiva concursus*, the Court of Justice of the European Union already did exclude that jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them had to be determined according to the *lex generalis* (cf Case C-339/07).
However, in general terms, *lex specialis* remains the exception to the *lex generalis* and should thus not be subject to an extensive interpretation in any manner whatsoever.

Possible actions:
Instruments providing for additional rules on jurisdiction could clearly determine whether these rules also extend to negative declaratory actions, ancillary or preliminary questions, and connected actions. The solutions most likely being inspired by the exclusive or non-exclusive nature of the concurring head of jurisdiction. Guiding solutions could also clearly instruct that, to the extent special rules do not apply to such fields, these actions remain governed by the ordinary rules on the allocation of international jurisdiction.

Guideline 5: Explicit address of the disconnection clause

Courts and practitioners should clearly address the disconnection clause upon which a *lex specialis* regime takes precedence over the Brussels Ia Regulation.

Comment:
A case law study has shown that, from a methodological point of view, in some circumstances decisions at various levels do not deeply dwell on the proper disconnection clause, or do not dwell on the disconnection clause at all. Sometimes decisions list numerous grounds for international and territorial jurisdiction contained in general and special regimes, concluding for the competence of the seised court as this is apparent in the case at hand. In other circumstances, a well-established and consistent set of case law both at the domestic and supra-national level, as for example happens with regard to the CMR Convention, might induce courts to apply directly the *lex specialis* without paying specific attention to the relevant disconnection clause.
Again, in some cases the court may apply the *lex specialis* as this is directly invoked and not contested by the parties to proceedgins.
This might be understandable from a practical standpoint: if the court is satisfied it has jurisdiction and competence, the *mechanism* for coordination between the *lex generalis* and the *lex specialis* appears to be less relevant (even though the identification of the proper coordination venue eventually calls for relevant interpretative jurisprudence see *Guideline 1*) as the court, resolved just a preliminary matter, has to move the solve the merits of the case. This approach has several consequences. In the first place, the "EU question" of coordination remains somewhat blurred thus possibly dissembling preliminary questions to be raised to the Court of Justice of the European Union. In the second place, if the reference to the relevant provision on coordination is missing, legal research becomes more complicated for courts and legal practitioners themselves, who have to adopt investigation methodologies and techniques based on the *lex specialis* to indirectly identify case law on the *mechanism* of coordination.

Possible actions:
Courts and practitioners should clearly address the disconnection clause in pleading, act, decisions and summary of judgments. This will also increase classification quality of decisions for purposes of data entry in legal databases.

Guideline 6: Qualification

Courts should properly characterize legal relationships following autonomous definitions of EU law, where available, and free from qualifications of the parties.

Comment:
An (intentional or unintentional) incorrect qualification of the legal relationship calls for the application of the wrongful head of jurisdiction, most likely this being the *lex generalis* being applies in lieu of the *lex specialis* – to the detriment of the mechanism of coordination and disconnection.
The issue of proper characterization may prove particularly difficult in some circumstances, as in the case of passengers, where a number of different provisions concur, namely transport and consumer rules. Here case law has shown the importance of properly characterizing the party either as a "consumer" or as a "passenger" under a multi-layered normative corpus, as travel contracts are excluded from the scope of application of consumer contracts of the Brussels Ia Regulation, even though the general limitation to choice of court agreements in the Unfair terms in consumer contract directive may still be applicable. With the possibility to "revive" protective heads of jurisdiction for consumers also for passengers in the case of "travel packages".

Possible actions:
If any doubt arises on new characterization matters, a request for preliminary ruling to the Court of Justice of the European Union would be advisable.

Guideline 7: Influences in material and private international law

Courts and practitioners should play extreme attention to the *formalistic autonomy* between material law and private international law.

Comment:
It is generally accepted that EU law is a unitary system: terminology may thus be used and employed both at the level of material law and private international law. However, the Court of Justice of the European Union, even though consistency between definition is generally pursued, has advocated for the autonomy of substantive

law from private international. This *can possibly lead in some circumstances*, where specific provisions are differently framed, that the same notion acquires a different content and value in substantive law and in private international law – as has been the case in Pillar interpreting the notion of consumer (Case C-694/17).

The importance of the relationship between terminology and concepts becomes evident where a stratification of diverse unities of laws, such as in the field of consumer and transport protection at both substantive and private international law, influence the qualification of the case, thus possibly the erroneous non-application of a special regime (for example, in transport matters if the legal relationship is subsumed in consumer matters).

At the same time, courts and practitioners should also pay particular attention to those instruments that explicitly declare as not setting a rule on jurisdiction or on the free movement of decision – thus not triggering art. 67 Brussels Ia Regulation. These instruments might nonetheless be of paramount importance in the interpretation and application of Brussels regime as they might impose obligations that shape material elements upon which heads of jurisdiction are to be determined – triggering in this sense a "reverse" substantive coordination between material law and international civil procedure.

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