

Private International Law

Grado en Relaciones Internacionales

Profesora Ana Mercedes Lopez Rodríguez

Universidad Loyola Andalucía

Chapter 1.- INTRODUCTION TO PRIVATE INTERNATIONAL LAW

1.- The Object of Private International Law. International legal relations between individuals 2.- The content of private international law; 3.- Sources of private international law; 4.- The Europeanization of private international law

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

1.- The Object of Private International Law. International legal relations between individuals

1. Introduction.

The existence of PIL is explained by two factors: 1) the division of the world into States with different legal systems 2) the existence of legal relationships between individuals that exceed state borders: these relationships are increasing due to several factors (economic globalization, technological progress, migrations , tourism etc.)

Private international law is the branch of the legal system of each State which regulates legal relationships bewteeen individuals containing at least a foreign element. In common law countries is known as *conflicts of law*.

- Private international law used to be described as the legal branch that determines the geographical limits of application of the laws of different countries (publicist conception). And even the name of the subject is misleading: Private international law is not part of public international law, it is national law. Moreover, it is not only private law: it also deals with general or public interests, for instance, the sale of weapons between a Spanish company and a foreign businessman may affect the national defense and thus banned due to public policy reasons.

As PIL is national law, we can speak of Spanish PIL, Danish PIL, French PIL etc. However, the sources of PIL may be national (Leyes, Decretos etc) European (Regulations, Directives etc.) and international (international conventions). Since each State has its own PIL, it turns out that the same dispute can be solved differently by the courts of the different States. This gives rise to the phenomenon known as *forum shopping*: parties tend to file a claim within the courts of a specific country in order to achieve a concrete legal result that favors their interests. This result can be avoided by harmonizing PIL rules in different States.

2. Elements.

The object of PIL is private relationships containg a foreign element.

2.1. The private element

The parties to a legal relationship of private character occupy a situation of equality. They han an horizontal legal relationships. None of the intervening parties displays exorbitant or privileged powers. Consequently, the PIL regulates the following legal relationships: a) legal relationships involving individuals b) legal relationships in which a public authority intervenes acting without ius imperii

2.2. The international and foreign elements

The distinction between internal situations and international situations is more difficult than it seems. Therefore, some authors have tried to outline when a private legal situation is international. The most relevant elements are: a) thesis of the pure foreign element: a private situation shows international character when it presents, at least, a foreign element - whatever that be the b) international effect thesis: a situation is international when it has cross-border impact.

There is no legal provision in Spanish PIL indicating, in general, when a private situation is international except for a few provisions. The legislator leaves the matter in the hands of the courts, which mainly follows the thesis of the pure foreign element.

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2.- The content of PIL

1. Different approaches.

PIL provides an answer to three major issues: 1) Which courts or other public authorities are competent to solve a dispute deriving from an international private situation (JURISDICTION)? 2) Which is the law applicable to the dispute? (CHOICE OF LAW) 3) Which are the legal effects of foreign acts and decisions concerning international private situations (RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS)?

- According to the German approach, PIL only deals with Choice of law.
- The common law approach deals with Jurisdiction, choice of law and recognition & enforcement
- The French approach deals with Jurisdiction, choice of law and recognition & enforcement and, in addition, it includes the law of nationality and aliens

2. Summary

The content of PIL comprises therefore, the following three issues:

1) Jurisdiction: to determine whether the courts and other authorities of a state are competent to hear a case relating to an international private situation.

2) Choice of Law: to establish the substantial or substantive legal regime appliable to the merits of the case.

3) Recognition and enforcement of foreign judgments: to determine whether foreign decisions can displayed effects in another jurisdiction.

3.- Sources of Private International Law

Spanish PIL is a branch of Spanish law. This implies:

- The sources of Spanish PIL are the sources of Spanish law. ex. Art. 1 Civil Code, amended by the 1978 Constitution and EU Law
- Spanish PIL sources are national tanto fuentes internas – Leyes. Decretos-Leyes, etc. – as well as European and international – EU Regulations, Directives, International Conventions etc.

For study purposes, we must then distinguish between: a) PIL of national enactment, contained in standards elaborated exclusively by the Spanish legislator through the mechanisms provided for in its legal system - Laws, Legislative Decrees, Decrees-Laws, etc. b) PIL adopted by the EU c) PIL contained in international conventions, which are agreements between sovereign States. Thus, the fundamental characteristic of the Spanish PIL is the plurality of sources, bieng nourished by rules developed at three different levels.

1. National adopted rules.

National adopted PIL rules are provisoons enacted exclusively by the Spanish legislator: - Statutes, Legislative Decrees, Royal Decrees, etc. In particular,

- PIL Statutes of the Spanish Parliament (ordinary and Organic) and Government Decrees. Most of the provisions are embodied in Statutes of the Parliament (e.g. Civil Code or the the Judiciary Organization Act).
- Custom and usages have a very limited value. Although some authors have suggested that the rules of the so-called "New Lex Mercatoria" are customary law in Spanish PIL, Spanish courts do not follow this approach. General principles of law are of particular importance for Spanish PIL because, sometimes, courts must solve complicated cases by applying very vague concepts such as art. 12.3 CC "international public policy". Thus, general principles of Law help to interpret such vague concepst providing gap-filling.
- Case law is not a source of Spanish PIL. However, the case law of the Spanish Supreme Court is followed in the interpretation of PIL rules operating, in some cases, as an authentic source of law, whose infringement may open the door for an appeal in cassation (Article 477.3 Act on Civil procedure)

The Spanish Consitution

The Spanish Constitution is the supreme norm of the Spanish legal system (Article 9 CE, Article 5.1 Judiciary Organization Act, Constitutional Court Declaration TC 13 December 2004 4); In this way, the Constitution affects PIL in three ways:

a) It inspires the whole PIL system: The Constitution establishes certain values and principles applicable to the entire Spanish legal system, such as effective judicial protection (Article 24 EC), the principle of equality and non-discrimination (art. 14 CE) etc. Spanish PIL rules must reflect these constitutional values. New PIL provisions are enacted in accordance with these values (for example, forcing the elimination of discriminatory connecting points previously used, such as the "National Law of the husband" or rejecting enforcement in Spain of decisions that violate constitutional values, such as private property or the interest of minors

b) Interpretation of Spanish PIL rules: all PIL provisions must be interpreted according to constitutional values. The interpretation that enhances the constitutional values to a greater extent always prevails (Article 5 Judiciary Organization Act)

c) Competent authority to adopt PIL rules: According to Art. 149.1.8 º Consitution the State has the exclusive competence of the enactment of rules to resolve conflicts of laws (applicable law). The competence to issue norms in the field of international jurisdiction and the extraterritorial effectiveness of decisions also corresponds, exclusively, to the State. This is also clear from art. 149.1.1ª (regulation of the basic conditions that guarantee the equality of all Spaniards in the exercise of rights and in the fulfillment of constitutional duties), art. 149.1.5ª (Administration of justice) and art. 149.1.6ª (procedural legislation). Consequently, in Spain, the enactment of PIL provisions is the exclusive prerrogative of the State.

2. PIL Conventions

1. Introduction.

According to art. 96.1 Constitution, "international treaties validly concluded, once officially published in Spain, will be part of the internal order". Pursuant to art. 1.5 CC "the legal norms contained in international treaties will not be directly applicable in Spain until they have become part of the internal order through their publication in the Official State Gazette. Accordingly, PIL rules contained in international Treaties are part of Spanish PIL if they have been validly celebrated and if they have been officially published in Spain. Provisions in International Conventions cannot be repealed, modified or suspended by statutory provisions (art. 96 CE), but only in the manner provided for in the treaties themselves or in accordance with the general norms of

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international law. This is explained, according to some authors, because the relations between the Treaty and the Law are not hierarchical, but rather of subject matter.

PIL rules contained in international agreements strengthen the harmonization of the PIL rules of the States parties. This ends the relativity of solutions of PIL and puts an end to Forum Shopping, as well as it enhances legal security. However, international conventions also generate numerous problems related to succession of treaties, entry into force and denunciations, errors of translation, reservations, interpretation, internal ratifications in each State according to a procedure that varies from country to country, etc.

2. Main international organizations elaborating PIL Conventions

There are numerous international organizations, both public and private, aimed at hrmonizing PIL. The most relevant are the following: a) The Hague Conference of PIL b) United Nations: UNCITRAL has addressed various PIL issues, for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) or the Geneva Convention on International Commercial Arbitration (1961); c) The Council of Europe; d) The European Union; f) The International Commission on Civil Status (CIEC); g) The Inter-American specialized conference on PIL; i) UNIDROIT

2.1. The Hague Conference of PIL

It is the most important organization in the harmonization of PIL. Founded in 1893 with the participation only of European states, it took after the Second World War a more realistic course and incorporated non-European States. As of that date, the Conference has issued more than 35 international conventions on very varied subjects of PIL. (family, property law and procedural issues). Numerous international agreements drawn up by the Hague Conference are in force in Spain. These are the Hague Conventions of 12 June 1902 (guardianship of minors), 5 October 1961 (Apostille), 5 October 1961 (form of testamentary dispositions), 15 November 1965 (notification of documents abroad), 18 March 1970 (obtaining evidence abroad), 2 October 1973 (effects of resolutions on maintenance), 2 October 1973 (product liability), 4 May 1971 (road traffic accidents), 29 May 1993 (international adoption). Since 3 April 2007, the EU is formally a member of the Hague Conference. Http://www.hcch.net

2.2. The United Nations Commission on International Trade Law (UNCITRAL)

In the field of international commercial law the importance of the United Nations Commission on International Trade Law (UNCITRAL) has been manifest, giving rise to legal instruments of great importance such as the Hamburg Convention on the carriage of goods by sea (1978) or the Vienna Convention on the International Sale of Goods (1980)

3. European Private International Law

1. Impact of EU law on Spanish PIL

EU provisions that regulate international private situations are part of Spanish PIL. These provisions are contained in EU regulations, EU directives or in agreements concluded between the Member States, formerly known as community agreements. These provisions, being part of EU law follow a) The principle of primacy, meaning that in the event of a conflict between a domestic provision and EU law, the later prevails,; b) The principle of immediate application of EU law: EU PIL provisions are integrated into the law of the Member States without ratification; c) The Principle of direct applicability of EU law: any person has the right to invoke EU rules in court.

EU law pursues the construction of an internal market that is based on the traditional freedoms of movement: goods, people, services and capital. The internal market "is a space without internal borders, in which the free movement of goods, persons, services

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and capital will be guaranteed in accordance with the provisions of the EU Treaties (Article 14.2 TEC , now Article 26 TFEU). It has an impact on PIL since the freedoms of movement cannot be harmed by domestic PIL provisions (for example, as shown in the Judgments of the CJEU in *Centros*, *García Avello* or *Grunkin-Paul*). In other words, all Spanish PIL must be "eurocompatible", that is, fully respectful of the freedom of movement within the EU. This includes PIL rules in matters that are still competence of the Member States e.g. the name of natural persons, filiation or legal capacity**.**

2. Unilateral acts dealing with PIL

The framework in which the current EU Private International Law provisions are developed is contained in Article 81 TFEU:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. 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, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament [...].

Based on this legal precept, a corpus has been created to govern external traffic situations that arise within the Union, as well as those arising between EU countries and third States in those matters that are the exclusive competence of the EU. For instance, the Hague Convention of June 30 2005, on jurisdiction agreements has been ratified by the EU and not the Member States separately because it affects rules established in EU Regulations.

4. The Europeanization of PIL

For operators acting in the European market, it is important to be certain about which courts will be competent to resolve a dispute, which state law these courts will apply, and they must also have guarantees that the decisions European courts will be recognized and executed in the rest of the Member States. This idea has led to the "Europeanization of the DIPr", enshrined in art. 81 TFEU. Thus, to a greater extent, the PIL of the Member States has been adopted by EU institutions.

Examples: Brussels I Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); Brussels II bis

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; Bruselas III 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; Procedural Regulations on a) (European Enforcement Order), b) (European Payment Order); c) (Small Claim Procedure); d) (European Account Preservation Order); Regulations on judicial cooperation and the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; Rome I Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations; Rome II 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 III 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; 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; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Finally, two Regulations have been recently adopted on matrimonial property regimes and registered partnerships: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes and 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.

Today it can be said that most of the PIL rules applicable in Spain have a European origin.

Chapter 2.- INTERNATIONAL JURISDICTION

1.- Definition; 2.- Characteristics; 3.- Limits imposed by public international law. Immunity from jurisdiction and execution; 4.- The Forum as conferring criteria of international jurisdiction; 5.- The Spanish system of international jurisdiction

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1.- Definition

International jurisdiction can be defined as the legal ability of courts and public authorities of a State, considered as a whole, to hear disputes arising from international private situations, irrespective of whether adversarial or non-adversarial proceedings are involved.

We must distinguish between international jurisdiction and other concepts such as:

Jurisdiction in general: It is the power of the courts of a state to judge and enforce (art. 117.3 Spanish Constitution). Jurisdiction operates in relation to all types of legal relations with or without foreign elements, domestic or international.

Local judicial competence: It is the conferral of competence to entertain a particular claim to a given court, under the objective, territorial and functional criteria laid down in the procedural laws of each State.

2. Characteristics

a) Previous character of international jurisdiction, understood in two ways: 1) international jurisdiction is established prior to the determination of the law applicable to the international private situation; (2) the determination of the international jurisdiction of the courts of a State is also prior to the determination of the internal competence to hear a particular case. (Before knowing if a particular Court of first instance is competent to hear a dispute arising from an international private situation, it is necessary to determine if Spanish courts are competent to resolve the case)

b) It is controlled ex officio: courts must control its international jurisdiction ex officio. It does not depend on the arguments of the parties (art. 21(1) Judicial Organization Act). And, naturally, if a court lacks jurisdiction, it shall declice its competence ex officio

c) International jurisdiction is ”international” because it refers to disputes arising from international private situations.

d) All-embracing: international jurisdiction extend to all courts and public authorities of a given State, such as notaries, registrars, mayors, etc. and not only in relation to the courts of that State.

e) Freedom of every State to establish its own system of international jurisdiction: each State determines the conditions and cases in which its courts have international jurisdiction. This may entail: 1) Multiple fora: the courts of different States may declare themselves competent in relation to the same claim. This encourages the so called *forum shopping*; (2) Lack of international jurisdiction: the courts of the various States involved in a claim refuse jurisdiction.

f) To establish international jurisdiction, the courts of each State apply, exclusively, their rules of international jurisdiction and not foreign standards.

g) Unilateral character of national rules of international jurisdiction: these indicate, exclusively, whether the courts of that State have international jurisdiction to decide a given dispute. Accordingly, they do not determine in which cases foreign courts international jurisdiction.

3. Limits imposed by public international law. Immunity from jurisdiction and execution.

According to the notion of immunity from jurisdiction, a foreign State, any of its organs as well as other international bodies entitled to such immunity, may not be sued in the courts of another State by an individual. In such a case, the courts of a foreign State lack jurisdiction to hear the case. This immunity is not an exception to the international jurisdiction of the courts of a given State. It is an exception to the general jurisdiction of such courts, which lack of jurisdiction ratione materiae to hear the matter. Article 21.2 Spanish Judicial Organization Act determines that even in cases where Spanish courts have international jurisdiction to hear a dispute "Cases of immunity from jurisdiction and enforcement established by the rules of International Public Law are excepted.."

The beneficiaries of the immunity from jurisdiction are the following. A) Foreign States and their organs only when acting iure imperium; B. International organizations: eg the UN; C. Diplomatic Agents of foreign States and foreign heads of State (art. 31 of the Convention on Diplomatic Relations, made in Vienna on 16 April 1961). BUT: Only official acts. Private activities are not included; Consular offices and their members, officers and consular employees (art. 43 Consular Relations Convention made in Vienna on 24 April 1963); Certain individuals who carry out various functions of international cooperation: eg. Foreign armed forces under certain circumstances

Acta jure gestionis: Immunity from jurisdiction does not cover State activities carried out on a private basis, acting as a mere individual. Only acts carried out in the exercise of the sovereignty of the State (Acta jure imperii) are covered by immunity. In Spain courts generally apply an interpretative line which is quite restrictive. Existing case law underlines that immunity from jurisdiction and enforcement are jurisdictional privileges that should not operate in relation to simple acts of management where the State acts as an individual.

Immunity of execution means that certain assets of a foreign State are absolutely immune from execution. Assets of foreign States used for jure imperii activities cannot be executed, sold, auctioned or seized. If such assets are executed, such acts of execution shall be declared null and void.

4. The *Forum*

1. Definition and types of fora.

A forum is the place of jurisdiction where remedies afforded by the law are pursued..

Establishing the fora for international jurisdiction is the legislative prerrogative of the State. The adopted fora usually reflect a connection between the claim and the country whose courts are competent (principle of subsidiarity). This ensures effective judicial protection and prevents the denial of Justice. But fora can also respond to policies of protection of the weaker party in a legal relationship or benefit nationals instead of foreigners.

We can distinguish between: 1) personal forum: based on the personal circumstances of the parties; (2) territorial forum: based on a connection with a given place; (3) Forum of the autonomy of the parties: the parties to a legal relationship may choose the competent courts; (4) Forum conexitatis: extends jurisdiction to another matter by reasons of procedural economy; (5) Forum legis: the courts of a State are responsible

whenever its law is applicable to the merits of the case; (6) Forum reciprocitatis: the courts of a State are competent with regard to a foreign defendant if the same is granted by the other country to its citizens.

2. Policy and Scope

The choice by the legislator of a forum as the basis for international jurisdiction can respond to different policies. From this point of view it may be spoken of:

1) Protective fora: aimed at protecting weaker parties, the consumers, for example. These fora facilitate access to the courts for weaker parties, as they are usually allowed to bring a claim where they reside.

2) Neutral fora: jurisdiction is established without regard to any of the parties to the dispute

According to the scope , it is possible to distinguish between: General fora and special fora; usual fora and exorbitant fora and, finally, between concurrent fora and exclusive fora.

- General and special fora: Depending on whether international jurisdiction is conferred in general or according to specific circumstances (art. 22, 2nd and 3rd Spanish Law on the Judiciary). The relationship between general and special fora is of alternate character; i.e., the plaintiff can choose between one or the other.
- Exorbitant and usual fora: exorbitant fora confer a disproportionate or excessive volume of international jurisdiction to the courts of a State. Its objective is to benefit the position of that State or nationals of that State. States tend to deny extraterritorial effects to foreign decisions issued on the basis these exorbitant fora. Usual fora, on the other hand, do not allocate an excessive but a reasonable volume of claims under the courts of a State
- Concurrent and exclusive fora: Concurrent fora accept the possibility that courts in other countries are competent on the same matter based on the same or a different forum. Exclusive fora are established in certain matters for which the State does not the competence of courts in other countries. It has an impact on the extraterritorial effect of decisions since a State will not accept recognition and enforcement of foreign decision in a subject matter which is the exclusive competence of the State of recognition.

5. The Spanish system of international jurisdiction

To establish international jurisdiction Spanish courts shall firstly apply international instruments in force for Spain (art. 21 Spanish Law on the Judiciary, art. 96.1 Constitution). Only when no international convention is applicable, international jurisdiction determined pursuant to Spanish domestic rules (art. 22 Spanish Law on the Judiciary).

There are various international legal instruments on international jurisdiction which are in force in Spain:

- EU Regulations: The number of EU regulations in the field of PIL is increasing due to the competence of the EU under article 81 TFEU. Examples: Regulation 1215/2012 December 12, 2012 (jurisdiction, recognition and enforcement in civil and commercial matters); Regulation 2201/2003 (matrimonial matters and parental responsibility); Regulation 848/2015 (insolvency proceedings); Regulation 4/2009 (jurisdiction, applicable law and recognition and enforcement of decisions and cooperation in matters of

maintenance obligations) and Regulation 650/2012 concerning competence, applicable law, the recognition and enforcement of judgments, the acceptance and enforcement of public documents in the field of successions and the creation of a European certificate of succession.

- Multilateral conventions: they are numerous and deal with specific subjects. Examples: The Lugano Concention of 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; The 2005 Hague Convention on choice of Forum agreements; The 1956 Convention on the contract for international carriage of goods by road (CMR) or the 1961 Hague Convention of 5 October 1961 on the protection of minors.

- Bilateral conventions: only a few. Examples: Treaty between Spain and El Salvador of November 7, 2000 on jurisdiction and recognition of judgments in civil and commercial matters.

Finally, Spanish statutory rules on international jurisiction are included in Articles 21 et sq. Of the LOPJ 1985. International jurisdiction in civil matters is governed by the new articles 22-22 nonies LOPJ 1985, as redrafted by the reform of LOPJ in 2015. We can also find rules on international jurisdiction in special laws, the result in some cases of transposing EU directives, e.g. Insolvency Act (Law 22/2003, of 9 July or Act 14/2014, of 24 July, on Maritime Navigation.

Chapter 3.- INTERNATIONAL JURISDICTION IN THE EU (I)

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: Introduction; 2.- Scope of Application; 3.- Jurisdiction rules; 4.- Some issues of application; 5.- Otras juridiction rules in civil and commercial matters

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amlopez@uloyola.es
www.uloyola.es

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: Introduction

In pursuing the objective of maintaining and developing an area of freedom, security and justice, the EU legislator has undertaken significant action in unifying the rules on jurisdiction, civil procedure and enforcement of judgments. As expressed in Recital (1) of the Regulation Brussels I, '[i]n order to establish progressively such an area, the Community should adopt … the measures relating to judicial cooperation in civil matters which are necessary for the operation of the internal market.' The majority of legal instruments on private international law on the EU level concern the questions of international civil procedure. The EU legislator attaches particular importance to the principle of mutual recognition of judgments.

The Regulation 44/2001 (hereinafter: Brussels I), as revised in the Regulation 1215/2012 which applies from 10 January 2015 (hereinafter: Regulation Brussels Ibis or Regulation1215/2012) is certainly the most important legal instrument in the field of international civil procedure.

The Regulation Brussels I applies to all EU Member States. Denmark was not initially bound by the Regulation as has a special regime for judicial cooperation under the Treaty, which is also expressed in Recitals (21) and (22). It became applicable after the EU had concluded an agreement with Denmark by means of the Council Decision 2006/325/EC of 27 April 2006,6 which came into force on 1 January 2007. As to the Regulation Brussels Ibis it became applicable in Denmark on the basis of Agreements concluded between the European Union and Denmark in 2013 and 2014.

The predecessor of the Regulation, the 1968 Brussels Convention was the first legal instrument negotiated and drafted on the Community level. Jurisdiction on the interpretation of the Convention was conferred to the European Court of Justice by Protocol in 1971.

In general, the terms and concepts of the Regulation are to be interpreted autonomously. To this end, some concepts are defined in the Regulation, such as the domicile of a legal person in Article 63 of the Regulation Brussels Ibis (ex Art. 60). Thus, there is no need to resort to any national law of a Member State for the purposes of interpretation of this provision. A reference to private international law rules is exceptional under the Brussels I regime. The provision of Article 62 (ex Art. 59) providing for the law determining domicile of a physical person can be mentioned as an example. The 'autonomous interpretation' is to be maintained as a matter of principle. The provisions of the Regulation are to be interpreted in accordance with its terms, underlying principles and decisions

of the ECJ/CJEU. Thereby generally no reference to national laws is to be made. This view has been expressed in a number of CJEU judgments.9

The reasoning in the Judgment of 19 December 2013 (Corman-Collins) is illustrative. The CJEU held that 'the concepts used by the Regulation must, as a general rule, be interpreted independently, by reference principally to the general scheme and objectives of the regulation, in order to ensure that it is applied uniformly in all the Member States'

2.- Scope of Application

2.1 Substantive scope of application - Art. 1

The substantive scope of application is defined in Article 1 of the Regulation. It has largely been taken over in the Regulation 1215/2012 even though the wording is slightly changed.

Article 1 reads as follows:

'1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It 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).

2. This Regulation shall not apply to:

(a) 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;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration;

(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(f) wills and succession, including maintenance obligations arising by reason of death.'

The alterations from the wording under the Regulation Brussels I are indicated in bold. The provision of Article 1(2) is somewhat differently structured under the Regulation 1215/2012 and some text has been added whereby certain matters are expressly mentioned, but that does not imply any substantial changes.

2.2 Meaning of 'civil and commercial'- Article 1(1)

According to paragraph 1 of Article 1 it applies to 'civil and commercial matters', regardless of the court or tribunal. The provision of Article 1 paragraph 1 expressly excludes revenue, customs and administrative matters for the purpose of an example. The exclusion is not intended to limit or modify the concept of 'civil and commercial'. Rather it is added to clarify, by means of examples, the types of matters that clearly fall outside the scope of 'civil and commercial'. Obviously, the intention was to include issues of private law within the substantive scope of Regulation's application, with a general exclusion of matters pertaining to public law. The wording of Article 1 paragraph 1 has been slightly adapted in the Regulation 1215/2012. It merely restates the conclusion that follows from the ECJ in interpreting the expression 'civil and commercial' in disputes involving states or entities of public law. Thus, it expressly excludes 'acts of state' – acta iure imperii.

The terms, concepts and provisions of the Regulation are to be interpreted autonomously. The same holds true for the expression 'civil and commercial matters' referred to in Article 1(1). The concept of 'civil and commercial matters' is autonomous and independent of corresponding national legal concept. However, the clear distinction between matters of private law and those pertaining to public law is not always easily made. It may prove particularly difficult to define the meaning and the reach of 'civil and commercial matters' within the context of disputes between a private party and a public authority. The decisions of the ECJ/CJEU provide for some guidance in that respect.11 The same holds true for the matters expressly excluded from the Regulation's scope, as it may sometimes be difficult to determine whether a subject-matter in a particular case qualify for the 'excluded matter' (e.g., the issue of the validity of an arbitration agreement raised to object jurisdiction).12 In that context, difficulties may be encountered in 'drawing the line' regarding the substantive scope of application between different EU legal instruments (e.g., between the Brussels I regime and the Insolvency Regulation13 or Regulation Brussels IIbis).14

The reasons for excluding certain issues were either because they were considered to have been sufficiently regulated by other legal instruments on the global level or they were intended to be the subject of separate regulation on the Community level. Indeed majority of issues that are excluded in Article 1(2) are dealt with in other EU legal instruments (divorce and parental responsibility in Brussels IIbis and the Regulation on wills and successions; matrimonial property regimes - enhanced cooperation; property regimes for registered partnerships – enhanced cooperation.

As to the matters excluded in Article 2(1)(a), all issues except status and legal capacity of natural persons have been put at on the agenda of the EU legislator. Thus, certain questions pertaining to status such as jurisdiction and recognition and enforcement of judgments in matters of divorce and legal separation, as well as parental responsibility are regulated in the Regulation Brussels IIbis. The text of the Succession Regulation has been adopted and applies from 17 August 2015. It regulates issues of international jurisdiction, applicable law and recognition of decisions concerning wills and succession.

Regulation Brussels Ibis excludes wills and successions from its substantive field of application in new provision in Article 1(2)(f). The text of Article 1(2)(a) has been slightly changed and refers to 'statutes 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 effect to marriage'. In that sense, no substantial changes have been introduced, except that property regimes of unmarried couple or a comparable legal relationship is now expressly indicated.

2.3 Territorial scope of application of the rules on jurisdiction (scope ratione personae)

Just like its predecessor Regulation Brussels I, the Regulation Brussels Ibis has a limited scope of application: with a few notable exceptions, it applies, in principle, only when the defendant has his or her domicile in a EU Member State.15 Consequently, national rules on jurisdiction of EU Member States remain applicable when a dispute falls outside the Regulation's scope of application ratione personae. A defendant with a domicile in a Member State can be sued in the courts of another Member State only on the basis of the rules of jurisdiction provided in the Regulation. No rules on international jurisdiction under national procedural law may be relied upon to assume jurisdiction against defendants domiciled in EU Member States. This is particularly important with respect to the so-called exorbitant jurisdictional grounds, which are listed in Annex I of the Regulation. National rules on jurisdiction including those exorbitant grounds may be used against defendants domiciled outside the European Union.

The Regulation Brussels Ibis takes over the definitions of 'domicile' for legal persons as given in Article 60, as well as the provision of Article 59 referring to the conflict of law rules to determine 'domicile' of natural persons. The domicile of a legal person is to be interpreted autonomously.

The idea of the universal application of jurisdictional rules and their extension to disputes involving third party defendants suggested in the Proposal has not been accepted in the Regulation 1215/2012.16 However, the territorial (or formal/personal) scope of application is somewhat expanded under the Regulation 1215/2012.

In principle it only remains applicable if the defendant is domiciled in an EU Member State. However, in addition to the already existing exceptions of choice of court agreements and exclusive jurisdiction, the territorial scope is further extended so as to include certain 'weaker' party disputes, notably consumer and labour law disputes (Article 6; ex Art. 4).17 Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation Brussels Ibis 215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Art. 18 para. 1) and labour disputes (Art. 21 para. 2), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance contracts apply only if a defendant is domiciled in a EU Member State.

In addition to that, the amended provision on the prorogation of jurisdiction now contained in Article 25 of the Regulation Brussels Ibis (ex Art. 23 of Brussels I) no longer requires that one of the parties to a forum selection clause is domiciled in a EU Member State.

3.- Rules on International Jurisdiction

There are various groups of jurisdictional grounds under the Regulation. In most general terms they can be grouped as follows:

(a) General rule

(b) Special/alternative jurisdictional grounds

(c) Rules on jurisdiction for disputes involving a 'weaker party'

(d) Exclusive jurisdiction

(e) Choice of court (prorogation of jurisdiction)

(f) Tacit prorogation

The sequence in which the rules on jurisdiction are drafted in the Regulation does not reflect the 'hierarchy' of jurisdictional grounds. Yet the importance of the predictability of jurisdictional grounds, as well as the relevance of the general rule based on the defendant's domicile is clearly expressed in Recital (11) of the Regulation Brussels I, which is identical in wording to Recital (15) of the Regulation 1214/2012:

'The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor…'

The underlying idea is that a departure from the general rule on defendant's domicile is permitted only in circumstances when such a departure can be justified by compelling reasons

which are clearly defined. In most general such a departure is justified when the link with another jurisdiction is either considered stronger (rules on jurisdiction that prevail over the general rule) or at least equally close as the domicile of the defendant (alternative jurisdictional grounds).

'Connecting factors' relevant for determining jurisdiction under the Regulation

(1) Domicile of the defendant (forum rei) - general rule – Art. 4; ex Art. 2

(2) Domicile of one of the defendants in case of plurality of defendants, provided that the claims are closely connected (forum connexitatis) – Art. 8; ex Art. 6(1)

(3) Prorogation of jurisdiction (forum electus) (court chosen by the agreement of the parties) – Art. 25, ex Art. 23

The Regulation Brussels Ibis introduces some changes which are now contained in Article 25. In particular, it is no longer required that one of the parties is domiciled in a EU Member State for the provision to be applicable. Besides, the conflict of law rules for substantive validity of choice of court agreements has been introduced. Most importantly, the lis pendens rule has been adjusted with the purpose of enhancing the efficiency of prorogation clauses.

(4) Tacit prorogation – Art. 26; ex Art. 24

The provision on tacit prorogation has been adjusted so as to more appropriately incorporate the idea of protection the procedural position of weaker parties.

(5) Domicile of the claimant (forum actoris) –

In principle, it is considered as an exorbitant jurisdictional ground. Yet under the Regulation it is accepted exceptionally in order to protect the procedural position of a 'weaker party', i.e., domicile of a policy holder, an insurer or a beneficiary (Art. 11; ex Art. 9(1)(b) and domicile of the consumer (Art. 18(1), ex Art. 16(1)). Domicile or habitual residence of maintenance creditor (Art. 5(2) of the Brussels I is no longer relevant, as jurisdictional rules are now contained in the Maintenance Regulation.19

(6) Place where the work has been habitually carried out (forum laboris) – Art. 21(2)(a), ex Art. 19(2)(a)

(7) Place where the business which engaged the employee is or was situated – Art. 21(2)(b); ex Art. 19(2)(b)

(8) Place where the harmful event occurred or may occur (forum delicti) – Art. 7(2); ex Art. 5(3)

(9) Place of performance of the obligation in question (forum solutionis) – Art. 7(10; ex Art. 5(1)

(10) Place where immovable property is situated (forum rei sitae) – Art. 24(1); ex Art. 22(1)

(11) Place where a company, legal person or association has its seat (forum incorporationis) – Art. 24(2); ex Art. 22(2)

(12) Place where the deposit or registration has been applied for – Art. 24(4); ex Art. 22(4) or where the register is kept (Art. 24(3); ex Art. 22(3) (forum registrationis)

(13) Place where cultural object is situated (new provision contained in Article 7(4) of the Regulation 1215/2012) – new provision introduced in the revised Regulation

(14) Habitual residence/common habitual residence – after removing the rule concerning jurisdiction in cases of maintenance, this connecting remains relevant in the context of prorogation of jurisdiction in some weak party disputes, notable insurance and consumer contracts.

3.1 Exclusive Jurisdiction

Some provisions provide exclusive grounds of jurisdiction. The idea here is that a limited number of particular claims should be brought before the courts of a given Member State, to the exclusion of all other courts in Europe. For example, pursuant to Article 24(1) of the new regulation (corresponding to Article 22(1) of the Brussels I Regulation), claims regarding tenancy or rights in rem in immoveable property can be decided solely by the courts of the Member State where the property is situated.

The definition of exclusive jurisdiction is done in Article 24. It follows from this provision that, if the subject matter of the dispute is one of the specifically indicated therein, only the forums pointed there have jurisdiction to solve it.

The following are the characteristics of this exclusive jurisdiction – see Case 73/77 of 14 December 1977, 'Sanders':

a) It is mandatory – which means that the domicile of the parties is irrelevant – see Case C-343/04 of 18 May 2006, 'Land Oberosterreich', and Arts. 4(1) and 24 of the R. 44/2001 – such as it is the express or tacit prorogation of jurisdiction, without prejudice that the parties can choose, at the State indicated by Article 24, a concrete court at internal level; in such a context, it will be the procedural law of the State whose courts have exclusive jurisdiction to assess the validity of the private agreement on jurisdiction or the tacit choice of forum;

b) Article 24 indicates States since it is a strict sense international jurisdiction rule – see Case C-420/07 of 28 April 2009, 'Apostolides'; it is the procedural law of the State pointed out by Article 24 that selects the court with jurisdiction;

c) This criteria for the attribution of exclusive jurisdiction stand on the fact that the matters involved are closely linked to the State sovereignty – or, in the terminology of the Case C-261/90 of 26 March 1992, 'Dresdner II', the territory of a Member State; in these situations, the State interest prevails over the private;

d) The enumeration of art. 24 is exhaustive; the matters indicated are numerus clausus and need to be interpreted narrowly because they represent an exception to the general system contained in Regulation – see Cases C-372/07 of 2 October 2008, 'Hassett', 73/77 of 14 December, 1977, 'Sanders', C-8/98 of 27 January, 2000, 'Dansommer', and C- 343/04 of 18 May 2006, 'CEZ';

e) It covers the main questions and the incidental ones – it follows that a court that judges the main question cannot decide the incidental question if another court has exclusive jurisdiction to judge it; in this case, the court that deals with the main question shall declare its own lack of jurisdiction and stay the proceeding until the incidental question is settled; this was defined by the ECJ with the invoked motive of preventing the delivery of irreconcilable judgements – see Case C-4/03 of 13 July 2006, 'Lamellen';

f) It is denied the recognition if the exclusive jurisdiction rule is disrespected;

g) The declaration of lack of jurisdiction is pronounced by the own motion of the court not pointed out by Article 24;

h) There is, normally, coincidence between jurisdiction, law and place of execution – given the nature of the matters contained in Article 24 there is, usually, an overlap between the court of trial, the court of enforcement and the nationality of the applicable law.

Subject matters under exclusive fora are as follows:

1) Proceedings which have as their object rights in rem in immovable property or tenancies of immovable property (art. 24.1): the courts of the Member State in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;.

(2) Validity, nullity or dissolution of companies and legal persons, as well as in the field of validity of the decisions of their organs (art. 24.2): the courts of the Member State in which the Corporation or legal entity was domiciled; to determine the home, the Court shall apply its rules of private international law.

(3) Validity of entries in public registers (art. 24.3): the courts of the Member State in which registration was found (as long as the registration whose validity is in question is referred to a matter covered by the regulation)

(4) Registration or validity of patents, trade marks, designs or drawings and models, and other similar rights subject to registration or deposit (art. 24.4): regardless of whether the question is has raised by way of action or by way of exception, the courts of the State Member that is has been requested, made or had for deposit or registration pursuant to the provisions of any legal instrument of the EU or in any International Convention. Without prejudice to the European Patent Office (Munich Convention, 1973), the courts of each Member State shall be the exclusive jurisdiction, regardless of domicile, in respect of registration or validity of a patent issued for that State.

(5) Execution of judgments (art. 24.5): the courts of the Member State of the place of execution.

• Rights in rem in immovable property or tenancies of immovable property (art. 24.1): exclusive jurisdiction corresponds to the courts of the Member State where the immovable is situated, the so-called forum rei sitae. Art. 24.1 only includes, with the exception of tenancies, just on immovables, the so-called "actions in rem". These are actions to determine the extension, consistency of property or possession over immovables or the existence of other rights in rem over such property and the holders of such rights and the protection of rights (CJEU 5 April 2001, Gaillard). Therefore, actions for compensation of damages based on the violation of rights in rem or damage to property, are not covered by article 24. In addition, the CJEU makes a restrictive interpretation of art. 24, that excludes from its scope the following situations: a) exploitation of industry and leasing of companies (CJEU 14 December 1977, Sanders); b) so-called action Pauliana, based on a personal credit (CJEU 10 January 1990, Reichert I); (c) complex contracts for the provision of services among which is the enjoyment of a property (CJEU 26 February 1992, Hacker); (d) personal actions derived from a real estate trust (CJEU 17 May 1994, Webb); (e) claims for compensation for the use of real property following the declaration of invalidity of a transmission of property (CJEU 9 June 1994, Lieber); (f) actions following insurance relating to a lease (CJEU 27 January 2000, Dansommer); (g) actions following contract for sale of real estate (CJEU 5 April 2001, Gaillard).

In the case of cross-border properties, the CJEU distinguishes between adjoining or separate: in the case of separate estates, if the action affects a part of the property, the competent courts are those of the country where such part of the property is situated. If the action concerns the entire property, courts are competent on a concurrent basis regarding the part of the property situated in its territory. In the case of a contiguous property, when the property is almost entirely located in one of the States, jurisdiction corresponds to the courts of the State where largest part of the property is situated. Otherwise the courts of both States have jurisdiction in relation to the whole of the property and rules of lis pendens and related claims apply to avoid parallel proceedings.

• Tenancies of immovable property: in certain tenancies of immovables, besides the courts of the Member State where the immovable is situated, the courts of the defendant's domicile have also provided that: 1) the tenant must be a natural person. The landlord or the owner can be a legal person or corporation; (2) the owner/landlord and the tenant must be domiciled in the same Member State; (3) the lease must be intended for a particular use; (4) the contract may not have a duration exceeding 6 consecutive months; (5) it must be a contract for the tenancy of an immovable property.

The expression tenancies of immovable property is broad, encompassing both actions in rem and actions in personae, including actions on the validity or invalidity of the contract, term of the tenancy, repair of damages caused by the tenant, restoration of possession of the property to the landlord, costs incurred by the tenant etc.

Choice of exclusive forum: according to article 24.1 the parties can choose between the courts of the Member State where the property is situated and the courts of the Member State where the defendant is domiciled. It's exclusive and alternative jurisdiction at the same time.

3.2 Prorrogation of Jurisdiction

The Regulation further governs prorogation of jurisdiction. This may occur in two ways, viz. tacitly or through an express choice-of-court agreement. Tacit prorogation is the legal device whereby 'a court of a Member State before which a defendant enters an appearance' has jurisdiction even where jurisdiction would otherwise be lacking in the circumstances—in practice, where the defendant fails to raise the issue of jurisdiction in his first defense, the seised court 'becomes' competent by virtue of the appearance of the defendant (Article 26(1) of the new regulation, almost identical to Article 24 of the Brussels I Regulation). Express prorogation, on the contrary, reflects the European legislator's traditional policy in favor of party autonomy. Article 25 of the Brussels I a Regulation, largely corresponding to Article 23 of the previous text, sets forth the formal requirements under which a the parties may enter into a choice-of-court agreement, so as to confer jurisdiction to the designated court(s) and to exclude (at least as long as the parties have not agreed otherwise) the jurisdiction of all others.

Express agreements on jurisdiction

Article 25 of R. 1215/2012 rules the matter of the express agreement on jurisdiction. In order to this rule be applicable, it is necessary to find, cumulatively, the following requirements:

a) Parties agreement – a true celebration of an agreement conferring jurisdiction – see Case C-214/89 of 10 March 1992 'Duffryn';

b) Not necessary domiciled in a Member State

The agreement on choice of jurisdiction should assign jurisdiction to the courts of the Member States – since it is object of the Regulation the determination of jurisdiction of these courts and not of those of third countries that are strange to this legal text and to its approval.

The object of the agreement should be litigious matters since only this way we can understand the reference to 'disputes', 'parties' and intervention of courts.

The parties in the agreement:

a) Should refer to future conflicts arising in the context of a legal relationship; if it is defined a false place of performance of the obligations arising from a contract that might be considered as containing an agreement of choice of jurisdiction, it will only be valid if it complies with the provisions of Article 25 – Case C-106/95 of 20 February 1997, 'Mainschiffahrts-Genossenschaft';

b) Can confer jurisdiction to the courts of a State as a whole or to a specific court; in this case, the choice of forum will be valid if it will be adequate to the provisions of art. 25, even if not conform with the procedural law of the Country to which belongs the court chosen;

c) Can choose the court that they consider adequate without the need of existence of an objective connection between the forum and the conflict – Case C-159/97 of 16 March 1999, 'Castelletti';

Can celebrate an agreement where they do not choose the court but give the judge the elements needed to identify it – for instance indicating the court of the principal place of business of the transporter – see Case C-387/98 of 9 November 2000, 'Coreck';

e) May submit the dispute to courts of different States, provided they attribute to each one jurisdiction for the decision of a different question, even emerging from the same legal relationship – see Case 23/78 of 9 November 1978, 'Meeth '; the choice is even valid when the parties choose different courts within the same Member State; likewise, they may confer international jurisdiction to a court in relation to a concrete question of the legal relationship, maintaining as to the others the jurisdiction defined in the Regulation;

f) Can make an optional choice, agreeing that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise without preventing the access to the courts pointed out by the Regulation;

g) Cannot define that only one is entitled to apply before the court defined in the agreement while the other can make it before that court or before any other declared as having jurisdiction by the Regulation – Case 22/85 of 24 June 1986, 'Anterist' – since, if the solution was the opposite, it would favour the stronger party in a contract negotiations and would not benefit international trade;

h) May invoke the agreement, since it is presumed, unless otherwise agreed, the choice of jurisdiction has exclusive character, that is, shows the intention of excluding the jurisdiction of any other court.

To be valid, the agreement on choice of jurisdiction must respect the formal requirements specified in paragraph 1 of Article 25, under penalty of nullity, and cannot be required the accomplishment of other formal demands.

That agreement must, therefore, be concluded:

a) „In writing or evidenced in writing; or

b) In a form which accords with practices which the parties have

established between themselves; or

c) In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

Express jurisdiction agreements must satisfy certain conditions of substantial validity: it cannot concern matters that are subject to the exclusive jurisdiction of the courts of other Member State or be contrary to the provisions of the protective fora of articles 15, 19 or 23, referred to contracts of insurance, consumer or labour (article 25.4). This entails several consequences: a) a jurisdiction agreement related to matters subject to exclusive jurisdiction of the courts of another Member State, is null and void; (b) A jurisdiction agreement in relation to any dispute between the parties, irrespective of the nature of the legal relationship concerned, is void. All embracing jurisdiction agreements are not allowed (CJEU 10 March 1992, Duffryn). The agreemtn can relate to past, present and future disputes, but that always arise from a particular legal relationship. (c) the nullity of the contract does not affect the validity of the jurisdiction agreement. The validity of a jurisdiction agreement is independent from validity of the contract. Finally, the material validity of the jurisdiction agreement has to be determined in accordance with the law of the Member State whose courts are vested with jurisdiction (article 25.1).

The tacit choice of forum

It occurs a tacit choice of forum where the defendant enters an appearance before the court of a Member State chosen by the applicant without contesting the jurisdiction. Such court should correspond to a forum not indicated by the Regulation.

This produces a prorogation of jurisdiction ruled in Article 26 of the Regulation, subject to the following rules:

a) The appearance is not relevant if another court has exclusive jurisdiction under the provisions of Article 24;

b) For logical reasons, the dispute must have already been materialised at the time of acceptance of the jurisdiction;

c) The tacit acceptance of the forum prevails over prior private agreements on jurisdiction; due to this fact, such agreements become void – see Case 150/80 of 24 June 1981, 'Elefanten', and Case 48/84 of 7 March 1985, 'Spitzley';

d) The appearance is not relevant if the defendant challenges the international jurisdiction or, cumulatively, also plead as to the substance – see the cases indicated in the preceding paragraph and Cases 27/81 of 22 October 1981, 'Rohr', 25/81 of 31 March 1982, 'CHW', and 201/82 of 14 July 1983, 'Gerling';

e) Article 26 applies only to conferring jurisdiction on the courts of a Member State bound by the Regulation, not requiring the existence of an objective link with such courts;

f) This Article is only applicable where the disputes are comprehended in the material subject of the Regulation;

g) The parties domicile, even in Third Countries, is irrelevant for the application of Article 26 – Case C-412/98 of 13 July 2000, 'Josi'.

The concept of appearance for the effects of Article 26, shall be obtained by calling the national procedural law of the state of the proceeding. The same law also regulates the deadlines involved, particularly to challenge the jurisdiction.

3.3 General Rule. Domicile of the Defendant

There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised. However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

The rules of jurisdiction should be highly predictable. Importance of general predictability of jurisdictional rules is expressed in Recital (11):

'The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.'

Therefore, a departure from a general rule of defendant's domicile should be permitted only in exceptional, clearly defined circumstances. In broadest terms, such a departure is justified when connection with a particular jurisdiction is stronger (e.g., exclusive jurisdiction) or at least equally close as the domicile of the defendant (alternative ground of jurisdiction) or when specific policy considerations of protecting a procedural position of certain category(ies) parties override the general acceptance of jurisdictional rule on forum rei.

The general rule on jurisdiction is contained in Article 4 (ex Art. 2) providing for jurisdiction of a court of respondent's domicile. As stated previously, the definition of 'domicile' for legal persons is given in Article 60, whereas the provision of Article 59 refers to the conflict of law rules to determine 'domicile' of natural persons. The domicile of a legal person is to be interpreted autonomously.20 The purpose of the definition of domicile of a legal person is expressed in recital 11 BI: '…The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction'.

Rules on jurisdiction prevailing over the general rule

When a connecting factor is considered stronger the jurisdictional rule usually takes precedence over the defendant's domicile (e.g, rules on exclusive jurisdiction in Art. 24; ex Art. 22). The same holds true with respect to jurisdiction based on the agreement of parties (forum-selection clauses Art. 25 of the Regulation Brussels Ibis; ex Art. 23) and the rules formulated in order to protect the procedural position of a 'weaker' party in the dispute (Sects. 3, 4 and 5). The rule on the so-called tacit prorogation is not effective when there is exclusive jurisdiction of courts of a Member State (according to Art. 26 para 1; ex Art. 24) and under the revised Regulation is adjusted in disputes involving 'weak parties' (Art. 26 para 2 Regulation Brussels Ibis).

Alternative grounds of jurisdiction

Also, there is a possibility to deviate from the main rule in circumstances where connecting factors are considered at least equally close to the dispute and/or the parties as the domicile of the defendant. Such jurisdictional do not exclude the main rule and do not take prevalence

over it. Instead they are placed on the same footing and consequently present an alternative to the defendant's domicile (e.g., alternative jurisdictional grounds under Article 7 of the Regulation Brussels Ibis; ex Art. 5; see also, Arts. 8-10, ex Arts. 6-8).

In general, rules on jurisdiction are based on a close link between the court and the claim filed or action, as expressed in Recital (12): 'In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

The alternative jurisdictional grounds provided for in Section 2 of Chapter II present the only alternatives to this general rule. Presence of one of those connecting factors is crucial for a court to assume jurisdiction. Identification of such a connecting factor is intended to enable the court which is objectively best placed for deciding the claim filed to assume jurisdiction.23 Alternative grounds of jurisdiction in Arts. 7-9 (ex Arts. 5 and special jurisdictional grounds 6 and 7). In contrast to other specific jurisdictional grounds under the Regulation which prevail over the main rule (in particular, exclusive jurisdiction under Art. 22, prorogation of jurisdiction in Art. 23, as well as special rules for 'weaker party'- disputes in Sects. 3, 4 and 5) the alternative jurisdictional ground in Article 5 (Art. 7 of the Regulation Brussels Ibis) are on an 'equal footing' with the main rule in Article 2. They provide for an additional or alternative choice to the claimant. Thereby the option is to sue either in the court of the defendant's domicile or some other jurisdiction with which there is a close connection.

Only a connection which is sufficiently close can justify a departure from the main rule - actor sequitur forum rei. The same idea has been followed in drafting the rules on alternative jurisdictional grounds, as the criteria determinative for jurisdiction are based on internationally accepted standards.

The Regulation Brussels provides for alternative jurisdictional rules under Articles 7 (ex Art. 5), for the following disputes:

(1) Contractual disputes (Art. 7 para 1; ex Art. 5 para. 1) (2) Disputes relating to non-contractual obligations – tort, delict or quasi-delict (Art. 7 para 2; ex Art. 5 para. 3) (3) Civil claims for damages or restitution which are based on an act giving rise to criminal proceedings (Art. 7 para 3; ex Art. 5 para. 4). The courts where criminal proceedings have been commenced are competent to decide on a civil law claim based on the criminal act, if it has jurisdiction under its own law. (4) Disputes relating to claims for recovery of a cultural object – courts where the cultural object is situated at time the court is seised (Art. 7 para 4). (5) Disputes arising out of operations of a branch, agency or other establishment competent are the courts where such branch or agency is situated (Art. 7 para 5; ex Art. 5 para 5) (6) Disputes arising out in connection with a trust – competent are the court where the trust is domiciled (Art. 7 para 6; ex Art 5 para. 6) (7) Disputes concerning payment of remuneration claimed in respect of the salvage of a cargo or freight – competent is the curt where the cargo or freight has been arrested or could have been arrested provided that the defendant had an interest in the freight or cargo at the time of salvage (Art. 7 para 7; ex (Art. 5 para 7).

A new rule on jurisdiction regarding civil claims based on ownership for recovery of cultural objects has been introduced in the Regulation 1215/2012 in Article 7 para 4. The connecting factor for determining jurisdiction is rei sitae - competent are the courts at the place where the cultural object is situated at the moment when the claim is filed. For the purposes of application of this provision, relevant is the definition of a cultural object as provided in Article 1 of Directive 93/7/EEC. There are no further substantial changes in Article 5 of the Regulation Brussels I, which is now contained in Article 7 of the Regulation 1215/2012. Due to the deletion of the jurisdictional ground for maintenance, the numbering of some provisions has

changed, in particular those on the jurisdiction for claims based on non-contractual obligations and civil claims for damages based on acts subject to criminal proceedings. Jurisdictional grounds under Article 7 (ex Art. 5) present an exception to the general rules under Article 4 (exArt. 2). As such they should be interpreted and applied restrictively.24 There is a substantial case-law of the CJEU on the application and interpretation of provisions on jurisdiction relating to disputes arising in connection with contractual and noncontractual obligations. Abundant case law on Article 5 in general illustrates that it probably has given rise for preliminary rulings more often than any other provision of the Regulation.

3.3. Contractual disputes (Art. 7 par 1; ex Art. 5 para 1)

The relevant provision on jurisdiction for disputes arising in connection with contractual obligation has remained unchanged in the Regulation Brussels Ibis. It reads as follows:

'A person domiciled in a Member State may be sued in another Member State: (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided; (c) if point (b) does not apply then point (a) applies;'

Jurisdiction of courts at the place of performance – general remarks

Thus, a defendant domiciled in a Member Stat e may be sued in another Member State if that is the place of performance of the contractual obligation in question (forum solutionis). As stated in the literature, its complex structure strikes an equal balance between the creditor and the debtor and presents a compromise between an earlier solution under the 1968 Brussels Convention and a trend towards 'autonomous fact-based concept'26 for certain categories of contracts. Thus, paragraph 1(a) contains a general rule, whereas paragraph 1(b) presents a specific rule for contracts of sales of goods and contracts to provide services. In practice, the provision of second paragraph can be considered as a rule, as it relates to two most important types of contracts, i.e., transactions that are most frequently concluded. Therefore, if a contract giving rise to a dispute can be characterised as a contract of sales of goods or contract to provide services, paragraph 1(b) applies for the purposes of determining the internationally competent court. If it is another type of contract, relevant is paragraph 1(a). From the practical point of view, it is first to be checked whether a contract can be qualified as a contract for sale of good or providing services and if not, only then paragraph 1(a) would come into play. Both provisions apply if there is no stipulation in the contract on the place of performance. Paragraph 1(c) may be relied upon if the relevant criterion provided under 1(b) points to a place of performance in a non-EU Member State. For example, if the goods were delivered in a third country by applying the rule under paragraph 1(b) and the 'obligation in question' is a claim to pay purchase price, than a court in EU Member State would have jurisdiction on the basis of paragraph 1(a) if in there was the place the place of performance of the obligation in questions (i.e., payment of the purchase price). For the purposes of applying this provision, the following questions may appear relevant: - Can the legal relationship be characterised as a contract? - What is the 'obligation in question'? - What is the place of performance?

Presumption under Art. 7(1(b) (ex Art. 5(1)(b))

Just like Art. 5(1)(b), Article 7(1)(b) provides that the place of performance of the obligation in question for sales contracts is presumed to be the place where the goods, according to the contract, were delivered or should have been delivered. Similarly, for the contract to provide services the place of performance of the obligation in question is the place where the services, according to the contract, were provided or should have been provided. It seems appropriate to conclude that the wording 'unless otherwise agreed' imply that the presumption is relevant only if there is no agreement on the place of performance of the 'obligation in question' (i.e., litigious obligation). It is true that the purpose of concentrating all claims and controversies arising from the contract in one jurisdiction would be diverted if such interpretation was to be applied. Yet if it is to conclude that the presumption in 1(b) applies regardless of whether or not there is an agreement on the place of performance in the contract, the wording 'unless otherwise agreed' would be meaningless.

Most important consequences introduced by this provision when the Convention was converted into the Regulation can be summarised as follows:

(a) There is a presumption that the place of performance of only one obligation (performance of the obligation which is characteristic to the contract/characteristic performance) is decisive for determining jurisdiction for all obligations under the contract.

(b) For the purpose of determining the place of performance there should be no reference to national law. Thus, there is no use of private international law rules. Consequently, the Tessili-formula is excluded. Instead, an autonomous interpretation should be employed. The Tessilli-formula applies only in determining jurisdiction for 'other contracts' under 1(a).

Consequently, in cases under Article 7(1)(b) (ex Art. 5(1)(b)) the distinction between an obligation in kind (specific performance) and obligation in money is less relevant considering the presumption in case under 7(1)(b) - (considering the presumption Art. 7(1)(b) it is more exception than the rule).

3.4 Non-contractual obligations

Art. 7 para 2 Regulation Brussels Ibis (ex Art. 5 para 3)

The provision on jurisdiction for claims based on non-contractual has remained unchanged in the revised Regulation Brussels bis. It is contained in paragraph 2, as the provision concerning maintenance obligations has been omitted. The jurisdiction is conferred to the courts for the place where the harmful event occurred or may occur in matters relating to tort, delict or quasi-delict. The relevant case law refers to either Article 5 paragraph 3 of the Regulation Brussels I or Article 5 paragraph 3 of the 1968 Brussels Convention.

When the 1968 Brussels Convention was converted into the Regulation, the provision of Article 5 paragraph 3 was somewhat adjusted. In particular, to the wording 'or may occur' was added to the text which had referred to 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.' The relevance of certainty and predictability of alternative grounds of jurisdiction is reiterated in the Regulation 1215/2014 and further emphasised especially in the context of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Matters arising in 'tort,delict or quasi-delict'

The provision does not refer to non-contractual or extra-contractual obligations. Instead the wording 'tort, delict or quasi-delict' is used. The autonomous interpretation is decisive for the purposes of understanding these concepts. In order to determine the meaning of 'matters relating to tort, delict or quasi-delict', it is to be regarded as an autonomous concept to be

interpreted in mainly by reference to 'the scheme and objectives' of the Regulation.29 There is a clear instruction from the relevant case law of the ECJ that they are to be given an independent meaning and are to be construed independently from any national law (lex causae) that may be applicable according to the rules of private international law.

Action based on tort and contract – meaning of 'tort, delict orquasi-delict'

According to the ECJ case-law of the concept of matters relating to tort, delict or quasi-delict extends to 'all actions which seek to establish the liability of a defendant and are not and are not matters relating to a contract within the meaning of Article 5(1)' of the Regulation.30 When the claim submitted is based on both tort and contract, Article 5 para 3 confers jurisdiction only with respect to actions requesting to determine the respondent's liability and which are not related to a 'contract'. In the latter case such actions would be covered by Article 5 para 1.31 Thus, paragraphs 1 and 3 are mutually exclusive. Jurisdiction for the claims arising out contract must be determined independently from the claims based on tort. Therefore it is necessary in the first instance to examine whether an action is contractual in nature. In practice, it means that it first has to be determined that the claim filed is not a matter relating to a contract in order to establish jurisdiction on the basis of 5 para 3 (i.e, Article 7 para 2 of the 1215/2012 Regulation). Nevertheless, it is settled case-law that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001 covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)(a) thereof (see, as regards the interpretation of the Brussels Convention, Case 189/87 Kalfelis [1988] ECR 5565, paragraph 18; Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 16; Case C-51/97 Réunion européenne and Others [1998] ECR I-6511, paragraph 22; and Case C-334/00 Tacconi [2002] ECR I-7357, paragraph 21).

However, the application of criteria suggested by the ECJ – purely 'negative determination' - does not provide for a satisfactory answer for all situations. In particular, it is not entirely clear how to understand and interpret the wording 'tort, delict orquasi-delict'.The wording used may rise questions such as what is the difference between the tort and a delict and what is to be understood under 'quasi delict'. These concepts may have different meanings in national laws. Particularly interesting may be the question whether quasi-delict includes non-contractual obligations other than torts, such as vindicatory claims, unjust enrichment, negotiorum gestio and restitution.32

The question submitted to the ECJ by the German in Kalfelis court did refer to an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, as follows:

'The second question submitted by the Bundesgerichtshof is intended essentially toascertain, first, whether the phrase 'matters relating to tort, delict or quasi delict' used in Article 5 (3) of the Convention must be given an independent meaning or be defined in accordance with the applicable national law and, secondly, in the case of an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, whether the court having jurisdiction by virtue of Article 5 (3) may adjudicate on the action in so far as it is not based on tort or delict.'33

However, the ECJ refers merely to the distinction between the tort and contract and does not expressly address any other issue, in particular the issues pertaining generally to noncontractual obligations.

The existence of a contract between the parties does not necessarily have to imply that the action is contractual in nature. The reasoning provided in the CJEU Judgment in Marc

Brogsitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf is illustrative in this respect..

3.5 .Other special rules on jurisdiction

Arts. 8 and 9 Recast (ex 6 and 7 BI)

The provision of Article 8 relates to disputes involving multiple defendants, counter-claim, third-party proceedings, matters related to contract combined with matters related to rights in rem. They are created for the purpose of procedural economy, efficiency and convenience (Art. 8; ex Art. 6). Article 8 (ex Art. 6) deals with jurisdiction in multiple disputes/multiple parties situations in connected disputes (fora connexitatis), i.e., it provides for jurisdictional grounds when different disputes are closely connected. The common denominator of these rules is the possibility to extend the jurisdiction of the court having jurisdiction under the Regulation to other parties or other disputes/matters. The reasons of efficiency of proceedings, procedural economy and convenience underline the jurisdictional rules contained in Article 8.

Paragraph 1 deals with multiple defendants. The court competent to proceed against a defendant domiciled in a Member State under the Regulation may assume jurisdiction over defendants domiciled in other Member States if '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'. In other words, defendants domiciled in different member states may be sued in a member state where any of them is domiciled under the condition provided in paragraph 1 of the Regulation. The wording of Article 6 implies that the court must base its jurisdiction on the domicile of one of the defendants, but not on any other jurisdictional ground provided for in the Regulation, such as Article 5.

According to the judgment of CJEU in Freeport-case, it is irrelevant whether or not claims against all defendants are based on the same causes of action (legal basis).

Disputes relating to liability from the use or operation of a ship – when the court would have jurisdiction under the Regulation to decide the claims for liability, it will also be competent to decide over the claims for limitation of such liability (Art. 9; ex Art. 7).

3.6 Rules om jurisdiction in disputes involving 'weak' parties

Within the context of territorial scope of application, 'weaker' parties - consumers, employees and insurance policy holders - in the European Union can benefit from the jurisdictional rulesonly against defendants domiciled in the EU Members States under the current text of the Regulation. Indeed, the rules on international jurisdiction intended to protect a proceduralposition of a weaker party may as well be provided in national laws of the Member States.

Yet such rules are not necessarily identical, so that the 'level of protection' may vary among different EU Member States. Therefore, the changes introduced in the revised Regulation 1215/2012 so as to widen the territorial scope of application in certain 'weaker party disputes' are to be met with approval. Thus, consumers and employees domiciled in the EU an benefit from jurisdictional framework under the Regulation Brussels Ia regardless of the domicile of the defendant – 'stronger' party.

The provisions on jurisdiction in disputes involving 'weaker' parties are contained in Sections 3, 4 and 5 of the Regulation Brussels I. These provisions are to a large extent taken over in the Regulation Brussels Ia. They relate to disputes arising under insurance contracts,

consumer and labour disputes respectively. The rules on jurisdiction in these Sections are independent from other jurisdictional rules in the Regulation39 and aim at protecting the jurisdictional position of a weaker party.40 They prevail over both the main rule in Article 4 (ex Art. 2) and alternative jurisdictional grounds in Articles 7, 8 and 9 (ex Arts 5, 6 and 7).

Additionally, in accordance with Article 23(5), prorogation of jurisdiction is valid only to the extent that it complies with the special rules concerning weaker-party disputes. The rules in Sections 3, 4 and 5 do not modify or otherwise affect the provision of Article 7(5) (ex 5 para 5) relating to disputes arising out of a branch, agency or other establishment and the right to bring a counterclaim.41 What these provisions have in common can be summarised in the following:

(a) A weaker party (a policyholder, the insured or a beneficiary, consumer or employee) has a choice to bring proceedings against the other party to a contract either in the court of the Member State in which that other party is domiciled or in which it is more convenient to a weaker party (most likely in the country of its own domicile) or which is otherwise closely related to a dispute.

(b) Conversely, proceedings may be brought against a weaker party to the contract only in the courts of the Member State in which a 'weaker' party is domiciled.

(c) Forum selection clauses in these disputes have limited binding effect against a 'weaker' party. In other words, they may be successfully invoked against a weaker party only if the conditions provided in the relevant provisions of the Regulation are met.

(d) Violation of the rules on jurisdiction results presents a reason to refuse the recognition of enforcement in other Member States (Art. 45). Thus, an insurer domiciled in a Member State may be sued in the Member State of its domicile or in the Member State where the plaintiff is domiciled if an action is brought by a policyholder, the insured or a beneficiary. A co-insurer may be sued in a Member State where proceedings were brought against the leading insurer. With respect to liability insurance or insurance of immovable property, the insurer may also be sued in the courts for the place where the harmful event occurred. The same holds true 'if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency'. Also, the insurer may be joined in the proceedings initiated by an injured party against an insured if the law of the court where such proceedings are pending so permits.

On the other hand, the insured, policy holder or beneficiary as a weaker party may be sued only in the courts of the Member State of its domicile. Thus, a weaker party may choose among the possibilities given in Articles 11 and 12 (ex Arts. 9 and 10) when filing an action against the insurer, whilst it can be sued exclusively in the country of its domicile. The only exception is in the case of direct actions of an injured party against the insurer when the law governing such direct actions provides that the policy holder or the insurer may be joined as a party.

Similarly, when a contract complies with the definition of a 'consumer contract' under Article 17 (ex Art. 15 of the Regulation), a consumer may choose between forum rei and forum actoris. Conversely, a consumer may be sued only in a courts for the place where he/she is domiciled (Art. 18(2); ex 16(2)). As in the case of insurance contracts, the right to bring a counter-claim in the court where the original claim is pending remains preserved.

Also, an employee may be sued only in the Member State of his/her domicile. The action against an employer may be brought in courts of the country of its domicile, in the country where the employee habitually carries out or carried out his work or in the courts

where the business which engaged the employee is oar was situated, if the employee does not carry out his work in any one country. Accordingly, an employee may choose between forum rei and forum laboris – the courts where he habitually carries out his the work or in the courts for the last place where he carried his work. If the employee does not habitually carry his work in any one country, he may choose between the courts of employer's domicile and the courts where the business that engaged the employee is or was situated.

In applying the Regulation and its predecessor the 1968 Brussels Convention, the relevant case law of the ECJ illustrates that the criterion 'habitually carries out his work' can also be applied when the work is carried out in the performance of a contract of employment in more than one Member State. According to the relevant case law of the Court of Justice EU (CJEU), it is the place where an employee has established the effective centre of his working activities. In order to identify that place, certain relevant circumstances need to be taken into account, such as where the employee spends most of his working time, 'where he has an office where he organises his activities for his employer and to which he returns after each business trip abroad.' In the absence of an office, it will be the place in which employee carries out the majority of his work.51 The Court in its various decisions interpreting the jurisdictional grounds emphasised the need to guarantee adequate protection to the employee as the weaker of the contracting parties also when the employee carries out his work in more than one contracting state. In other words, such an employee should not be deprived of procedural protection under the Regulation. Only if the effective centre of its working activities cannot be established the employee will have to file the claim against his employer either in the courts of employer's domicile or the courts where the business that engaged the employee is or was situated. The need to ensure 'more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship' is reflected not only in private international law instruments that regulate procedural issues, but also those that unify conflict of law rules.

The analysis of the rules on jurisdiction illustrates that the Regulation Brussels I departs to certain extent from the main rule contained in Article 4 – domicile of the defendant - in lawsuits against a 'stronger party'. In disputes arising under consumer and insurance contract disputes, a weaker party is given the possibility to choose between forum rei and forum actoris (consumers) and some other fora (the insured). Although following similar lines, a slightly different approach has been adopted in drawing the grounds for jurisdiction in disputes arising from individual employment contracts. A weaker party - an employee – is given the possibility to choose between fora closely related to the individual contract of employment. In particular, he/she can file the claim in the courts where he/she habitually carries out his work. However, differently from insurance- and consumer contracts, the choice does not expressly include forum actoris, even though in practice the place where an employee habitually carries out his work and his domicile will most frequently be in the same country. Outside the context of 'weaker party disputes', domicile of the plaintiff, as well as a nationality of a claimant, is generally considered to be an exorbitant jurisdictional ground - i.e., the criterion that according to internationally accepted standards does not justify assuming jurisdiction against a defendant domiciled abroad.

Interpretation of Article 17 by the CJEU

The fact that one of the parties to the contract is a consumer does not necessarily imply that the consumer is a 'weaker' party entitled to the procedural protection under the jurisdictional rules in 17 of the Regulation Brussels I. In particular, it would be inappropriate if a business party was to be compelled to appear before a foreign court when it never intended to pursue any professional activity abroad. For example, a tourist domiciled in France who purchases a

souvenir in Greece from a local shop would not be a 'consumer' entitled to the procedural protection under the Regulation enabling him to sue the owner of the shop in France considering that the seller has never pursued its commercial activities abroad. In other words, such a person would not be a 'consumer' within the meaning of Article 17 of the Regulation. This provision defines agreements that are considered as 'consumer contracts' as follows:

'(a) it is a contract for the sale of goods on instalment credit terms; or

(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 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.'

Only if one of the requirements indicated in Article 17 is fulfilled can the consumer make the use of the jurisdictional grounds and procedural protection.

If the contract is not a 'consumer contract' as defined in Article 17, the consumer will not be able to rely on jurisdictional grounds in Section 4. Instead he/she will have to sue either in the Member State of the trader's/professional's domicile in accordance with Article 4 or to rely on one of the alternative jurisdictional grounds, most likely those in Articles 7(1) and 7(3).

The latter provisions define the rules on jurisdiction for contractual and extra contractual obligations respectively. Also, the consumer will not be entitled to procedural protection under Article 17 which restricts the binding nature of forum-selection-clauses in consumer contracts.

Especially the interpretation and application of the requirement under (c) of Article 17 may prove problematic. Namely it is not always easy to determine whether or not a professional directs its commercial activity to the country of the consumer's domicile so that a contract can be considered as 'consumer contract'.

When services and products are offered on internet it may prove particularly difficult to determine whether or not business activities are directed to the Member State of consumer's domicile, as the information may be accessed from anywhere in the world. National courts of the Member States on several occasions have been submitting questions for the interpretation to the CJEU and there is substantial case law developed on the issue. Interpretation of Article 17 of the Regulation illustrates that the idea of protecting a procedural position of weaker parties incorporated in the Regulation is firmly supported by the CJEU case law.

Thus, the possibility to access the website in itself is not sufficient to conclude that a trader whose activity is presented on its website can be considered to be 'directing' its activity to the Member State of the consumer's domicile. Rather it is necessary to establish that it is apparent form the website and the professional's overall activity that the trade envisaged doing business with consumers domiciled in one or more Member State, including the Member State of that consumer's domicile, 'in the sense that it was minded to conclude a contract with them'. The Court states a rather extensive list of circumstances that may be relevant and capable of constituting evidence from which it can be concluded that the commercial party's activity is directed to the Member State of consumer's domicile, as follows:

'…the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than

the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.'

Obviously, such a wide range of relevant matters that may be considered when establishing the fact that the commercial activity is directed to a Member State of consumer's domicile favours a consumer's position when interpreting Article 17(1)(c). The same holds true as far as the nature of some of the relevant matters is concerned, especially the circumstances suchas telephone numbers with an international code and a use of top level domain name other than that of the Member State in which the trader is established.

In order to comply with the requirement in Article 17(1)(c) it is not necessary that the contract between the professional and the consumer is concluded at a distance. Besides, it is not required that there is a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile and the conclusion of the contract. Thus, when it is it is established on the basis of the information on the website and the professional's overall activity that the commercial activity is directed to the Member State of the consumer's domicile, it is irrelevant whether the consumer has learned about the product by searching the website or from another source. Yet 'existence of such a causal linkconstitutes evidence of the connection between the contract and such activity'. The rules on jurisdiction in Section 4 apply only in case when a contract is concluded between a professional and a consumer, but not in transactions between two persons not engaged incommercial or professional activities.

Regulation No. 1215/2012 (Brussels Ibis - Recast) – consequences for weaker party disputes

The revised Regulation extends the territorial (or formal) scope of application in disputes involving weaker parties. Besides, a number of new provisions are inserted either to ensure a greater degree of protection for weaker parties or to clarify the existing regulatory scheme aimed at protecting such parties.

The territorial scope is expanded in the Recast Regulation so as to include certain 'weaker' party disputes, notably consumer and labour law disputes. The provision of Article 6 paragraph 1 of the Recast Regulation (the current Art. 4 of the Brussels I Regulation) reads as follows:

'1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 18(1), 21(2) and Articles 24 and 25, be determined by the law of that Member State.'

The reference to Articles 24 and 25 relate to exclusive jurisdiction and prorogation of jurisdiction respectively (current Arts. 22 and 23). Provisions of Article 18 and 21 relate to disputes involving consumers and employees.

Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation 1215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Art. 18 para. 1) and labour disputes (Art. 21 para. 2), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance

contracts only apply if a defendant is domiciled in an EU Member State. The relevant provisions on jurisdiction in Article 18 relating to consumer contracts (Art. 16 of the Regulation Brussels I) and Article 21 relating to contracts of employment (Art. 19 of the Regulation Brussels I) have been adjusted so as to reflect the changes introduced to the territorial scope of application in Article 6 of the Recast. Accordingly, the new regulatory scheme enhances further the protection of consumers and employees. In particular, such ´weaker parties´ may rely on the rules on international jurisdiction in disputes against professionals and employees domiciled outside the European Union.

Besides the scope of application and relevant rules on jurisdiction in disputes involving consumers and employees, there is further amendment to the provision on the tacit prorogation of jurisdiction. It has been amended so as to better accommodate the interests of 'weaker' parties. Under the current regime of Brussels I, if a defendant enters an appearance, a court in an EU Member State in principle does not examine ex officio whether or not it has jurisdiction under the Regulation. The exception is an obligation to examine whether a court in another state has exclusive jurisdiction according to Article 22. This follows from the current text of Article 24 of Brussels I which relates to tacit prorogation, as well as from Article 25.

The jurisdictional rules in disputes involving weaker parties are not mentioned in Article 24 of the Regulation 44/2001. Yet a violation of the jurisdictional grounds in disputes arising out of insurance contracts and consumer disputes, as well as the rules on exclusive jurisdiction presents a valid ground to refuse the enforcement of the judgment under Article 35(1) of the Regulation Brussels I. Considering that the current provision on tacit prorogation in Article 24 of the Regulation 44/2001 does not refer to disputes involving weaker parties, the CJEU held that the court seised could validly assume jurisdiction in such disputes if a weaker party enters the appearance without contesting jurisdiction. It reasoned, inter alia, that 'although in the fields concerned by Sections 3 to 5 of Chapter II of that regulation the aim of the rules on jurisdiction is to offer the weaker party stronger protection …, the jurisdiction determined by those sections cannot be imposed on that party'. One could expect that a weaker party should be put in the position to be fully aware of the effects of submitting his/her defence as to the substance and that the court seised should therefore determine ex officio what is the intention of a entering an appearance. However, the Court held that '[s]uch an obligation could not be imposed other than by the introduction into Regulation No 44/2001 of an express rule to that effect'.

Thereby the protection intended to be ensured in Article 35(1) is somewhat undermined, as the 'violation' of the jurisdictional rules referred to therein would not qualify as a ground for refusal of enforcement of the judgment even if a weaker party was unaware of the protection of its procedural position provided under the Regulation. The newly introduced provision in paragraph 2 of Article 26 of the Recast Regulation (currently Art. 24 Regulation Brussels I relating to tacit prorogation) remedies such a result and improves the positions of weaker parties. It reads as follows:

'Art. 26(2) of the Recast Regulation reads: 'In matters referred to in Sections 3, 4 and 5 (…) where the policyholder, the insured, the injured party of a beneficiary of the insurance contract, the consumer or the employee is the defendant, the court, before assuming jurisdiction under paragraph 1, shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.'

Thus, the court seised is under an obligation to inform a 'weak' party defendant of the consequences of entering an appearance (i.e., a policy holder/an insured/injured party/a beneficiary of the insurance contract, a consumer or an employee). Such additional protection for a weaker party is to be met with approval.

The provision of Article 26 of the Regulation Brussels I has remained unchanged in the Recast (new Art. 28). In accordance with paragraph 1 of this provision, a weaker party will be 'protected' as any other party domiciled in a one Member State sued in a court of another Member State but does not enter an appearance. In such a case, the court seised is required to declare ex officio the lack of competence if it cannot establish its jurisdiction on the provisions of the Regulation. When a defendant does enter an appearance the court seised is required to examine jurisdiction on its own motion only in case that the courts of another Member State have exclusive jurisdiction under the Regulation. As already explained, according to the new regulatory scheme of the Regulation Brussels Ibis will have to warn a weaker party about the need to contest jurisdiction and the consequences of its failure to do so.

3.7.Provisional measures

The applicant can ask provisional, including protective, measures:

a) Before the court of the main case – acting as the court of domicile of the defendant – Article 4 –, before the court of the place of the performance of the obligation – Article 7(1) or, even, before the court indicated by the internal rules of Private International Law; it can be requested any provisional, including protective, measures admitted by the internal law of the Member State where the main action is pending;

b) Before the court of the Member State where should be performed or enforced the measure – Article 35; in order to apply this Article and to allow the introduction of a provisional measure before the special forum that is the court of the Member State of the enforcement, it is necessary that:

1. the assets on which it is intended to enforce the measure are situated in the territory of a Member State;

2. The measure aims to protect rights relating to matters covered by the R. 44/2001 being irrelevant, for this purpose, the subject of the main action and the nature and matter of the provisional measure – Cases C-391/95 of 17 November 1998, 'Van Uden' and 'CHW'

The measures in question must be brought before the courts of a Member State, being irrelevant the domicile of the defendant.

4. Some issues of application

4.1 Ex-officio control of jurisdiction

A court should declare, of its own motion, that it has no jurisdiction:

a) Where it is seized 'of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24' – see Article 27;

b) In face of disputes for which the court lacks jurisdiction under the rules of the R. 1215/2012 where defendant domiciled in one Member State 'does not enter an appearance' – Article 28(1). In this situation, the 'court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end' – see paragraph 2 of the same Article.

There is no ex officio control of the jurisdiction emerging from private agreements. Where such agreements exist, the court should only analyse the question of its jurisdiction if the party concerned question it.

This is true whether are chosen Member State courts or Third Countries courts – that control is prohibited by Articles 24, 25 and 26(1) of the Brussels I Regulation, as referred by the Case 48/84 of 7 March 1985, 'Spitzley'.

4.2 Lis pendens and related actions

Article 27(1) of the 2001 Regulation provides: "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established". In practice, the interpretation of this provision given by the Court of Justice in the Gasser case leads to a possible avoidance of the application of a choice of court agreement. The Court of Justice ruled that this Article "must be interpreted as meaning 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" and that "it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long".

Therefore, a claimant acting in bad faith can easily block the operation of a choice of court agreement by starting first a proceeding before a court situated in a member State which is not the one of the court designated in the choice of court agreement creating a so called "torpedo action" by which the chosen court will have to stay proceedings, sometimes for years.

The Regulation is intended to fight against such "torpedo actions" by introducing an exception to the general rule of Article 27 of the 2001 Regulation (now Article 29). The exception provided for in a new paragraph 2 added to Article 29 of the Brussels I Regulation (now Article 31). Article 31(2) states that "where a court of a Member State on which a [choice of Court] agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement". Thus, the priority is now clearly given to the court designated in the choice of court agreement to decide on its jurisdiction. Article 31(3) clarifies that "[w]here the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court".

The lis pendens rules can only be applied in a correct way if a seised court knows the date when another court has been seised. Some problems had been reported to the Commission as to the availability of such information. The Regulation has added a new Article 29(2) clarifying that "upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised". In parallel, some clarifications relating to the time where a court is deemed to be seised have been added to Article 30 of the 2001 Regulation (Article 32 of the Regulation).

Finally, in Article 33 and 34, the Regulation introduces new rules regarding lis pendens and related actions pending before a court of a third State. Such rules only apply where jurisdiction is based on Article 4 (General principle of jurisdiction of the court of the Member States of the defendant) or on Section 2 (special jurisdiction). Articles 33(1) and 34(1) state that, when proceedings or an action are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State

may stay the proceedings. Two requirements are laid down in the provision. Firstly, it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in the Member State concerned; and, secondly, the court of the Member State is to be satisfied that a stay is necessary for the proper administration of justice. It should be stressed that this stay of the proceedings is only a possibility given to the court of the Member State. The goal of this provision is to give some flexibility to the court of a Member State to stay proceedings when it appears that the court of a third State is better placed to rule on the case. Articles 33(3) and 34(3) provide that the court of the Member State dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

In order to avoid infinite staying of the court of the Member State concerned due to the absence of action of the court of the third State, Articles 33(2) and 34(2) give the possibility to the court of the Member State concerned to resume the proceeding at any time if one of the following conditions is met: the proceedings in the court of the third State are themselves stayed or discontinued or it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or the continuation of the proceedings is required for the proper administration of justice

5.-Other rules on jurisdiction in civil and commercial matters

The number of EU Private International Law rules adopted Pursuant to article 81 TFEU is growing. In addition to Regulation 1215 / 2012, other European texts containing rules on jurisdiction are -Regulation 2201/2003 (matrimonial matters and parental responsibility); Regulation 848/2015 (insolvency proceedings); Regulation 4/2009 (jurisdiction, applicable law and recognition and enforcement of decisions and cooperation in matters of maintenance obligations) and Regulation 650/2012 concerning competence, applicable law, the recognition and enforcement of judgments, the acceptance and enforcement of public documents in the field of successions and the creation of a European certificate of succession.and, more recently, Regulations (EU) 1103 and 1104/2016 of the Council of 24 June of 2016, by which establishes closer cooperation in the competence, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes/registered partnerships.

Chapter 4.- INTERNATIONAL JURISDICTION IN THE EU (II)

1.- El Reglamento (CE) n° 2201/2003 del Consejo, de 27 de noviembre de 2003, relativo a la competencia, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental; 2.- Normas aplicables; 3.- Delimitación ámbitos de aplicación; 4.- Foros en materia de crisis matrimonial; 5.- Foros en materia de responsabilidad parental; 6.- Foros en materia de alimentos; 7.- Otros foros

DERECHO INTERNACIONAL PRIVADO

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UNIVERSIDAD LOYOLA ANDALUCÍA
Ana Mercedes López Rodríguez, *Ph.D.*
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es
Profesora titular de Derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

1-5.- El Reglamento (CE) n° 2201/2003 del Consejo, de 27 de noviembre de 2003, relativo a la competencia, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental

See article on Moodle.

6.- Maintenance

On 18th June 2011, Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("the Maintenance Regulation") entered into force. It applis to all EU Member States with a few modifications for some countries.

The Maintenance Regulation is designed to replace the provisions in Council Regulation No (EC) 44/2001 (Brussels I) relating to maintenance (Article 68(1), recital 44)2. The aim of the Maintenance Regulation is to enable a maintenance creditor to obtain easily, in one Member State, a decision which will automatically be enforceable in another Member State without further formalities (i.e. registration) (Recital 9). Recital 1 reminds us that the underlying objective is the proper functioning of the internal market.

The Regulation applies to "maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1). Recital 11 provides that the term "maintenance" should be interpreted autonomously and does not provide any further definition of the term (see further section B below). It will clearly apply to maintenance as between spouses, civil partners, and parents and children. The term 'affinity', though, may be applied more widely in different Member States to include decisions in relation to other types of relationships, which the English courts would have to recognise automatically and enforce, even if that type of relationship did not exist under English law.

Recital 21 makes clear that these new rules are designed to apply only to maintenance obligations, and do not determine the law applicable to the establishment of the family relationships upon which the maintenance obligations are based. Family relationships will still be determined by national law. Recital 25 further stipulates that recognition in Member State B of a decision relating to maintenance made in Member State A does not imply the recognition by State B of the family relationship out of which the maintenance obligation arose3, the only object of the recognition is the recovery of maintenance under the decision.

A 'decision' can be made by a court, whether called a decree, order or judgment and includes costs decisions (Article 2(1)(1)). Chapter IV on recognition and enforcement also applies to court settlements and authentic instruments (e.g. notarised documents) (see Article 2(1)(2),(3) and Article 48). The term 'court' includes administrative

authorities (Article 2(2), recital 12) and such bodies can be treated as 'maintenance creditors' for the purposes of recognition and enforcement. Therefore it is arguable that this would include decisions of the Child Maintenance and Enforcement Commission (Article 64, recital 14). It seems logical to assume that the decision can be either interim or final: so long as the decision is in force, no other maintenance award could be made which would give rise to a conflicting judgment. Notably, an application may be made to the courts of a Member State for such provisional, including protective, measures as may be available, even if, under the Maintenance Regulation, the court of another Member State has jurisdiction as to the substance of the matter (Article 14). Importantly, however, this cannot assist a party in an application for MPS, as this has been held not to constitute a 'provisional' or 'protective' measure (see Wermuth v Wermuth (No. 2) [2003] EWCA Civ 50, [31]-[33]).

B What counts as 'maintenance'?

The problem of adhering to a European definition of 'maintenance' is not a new one. Guidance can be taken from the decision of the Court of Justice of the European Union ("CJEU", formerly "ECJ") Van den Boogaard v Laumen (1997) ECR I-1147, (albeit that this related to the Brussels Convention 1968) which was summarised by the Court of Appeal in Moore v Moore [2007] EWCA Civ 361 (a case relating to Brussels I; see [68]-[80]). The Court of Appeal stated that in giving 'maintenance' an autonomous interpretation, the definition given to the same by national law is not decisive. As set out by the Court of Appeal, Van den Boogaard held that a lump sum or transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse. If, however, it serves only the purpose of division of the assets, it will not be treated as maintenance. Further it was proposed that whether a claim relates to maintenance will depend on its purpose, in particular whether it was designed to enable one spouse to provide for him/herself, or if the needs and resources of each of the spouses was taken into consideration in the determination of the amount, or where the capital sum set was designed to ensure a predetermined level of income.

There have long been, and will continue to be, difficulties in reconciling the English and European approaches to monetary awards following divorce. Questions of interpretation will arise, as demonstrated in a recent German case which involved the interpretation of an English ancillary relief order for enforcement in Germany under Brussels I. Even though the court examined carefully the reasoning behind the English award, which included a lump sum payment, periodical payments, transfer of life insurance claims and a costs order, the Federal Supreme Court in Germany did not regard the lump sum order as 'maintenance', despite the fact that the order was meant for the maintenance (including costs for housing) of the wife and children. The German court's approach was to regard such a transfer of assets as more than mere maintenance because the spouse receiving it gains the value of the asset as well. Accordingly that part of the order was held to be unenforceable. With such an interpretation in mind, one might ask what the outcome would have been if the asset to be transferred were to be held on trust to provide maintenance, which would revert to the other spouse at a certain point.

A further reminder of the differences between English and continental family law is the treatment of housing as part of 'needs'. An English court would consider carefully the housing needs of the parties. In Europe however, it is not given such prominence. If a judgment is to be enforced in another Member State, it will be important for the judgment to explain very carefully the aspects of the award which relate to maintenance and those which deal with division of matrimonial property. Particularly, it will be desirable to avoid references to 'sharing' or 'compensation' which may cause difficulty with interpretation.

A question which arises out of the above is whether pension sharing orders would be considered as 'maintenance'? If so, once a maintenance award has been made in another Member State, this will therefore preclude a party from issuing an application for a pension sharing order in England.

C Jurisdiction

Jurisdiction for making decisions relating to maintenance can be established under one of five different grounds as set out in Articles 3 to 7. The use of 'domicile' as under Brussels I is removed. The default position is found in Article 3, which states that jurisdiction shall lie with the court where (a) the defendant is habitually resident; or (b) where the creditor is habitually resident; or in the court with jurisdiction to entertain proceedings as to (c) the status of a person (i.e. marital status) or (d) parental responsibility, where the maintenance is ancillary to those proceedings (unless jurisdiction is based solely on nationality).

In order to increase legal certainty, predictability and the autonomy of the parties (according to recital 19), the parties may agree that a particular court has jurisdiction (deriving from Article 23 of Brussels I). Article 4 provides that, except in disputes relating to maintenance for a child under 18, jurisdiction may be agreed between the parties for: (a) the court of a Member State in which one of the parties is habitually resident; or (b) where one of the parties has his/her nationality; or (c) in disputes between spouses, the court with jurisdiction to deal with the divorce, or the court where the spouses had their last common habitual residence for at least one year. Such agreement is to be in writing and shall be exclusive unless the parties have agreed otherwise. The exception relating to maintenance for children is a notable departure from the situation under Brussels I, under which such an agreement could be made (thus superseding, for example, M v V [2010] EWHC 1453. Recital 19 explains that this is to protect the weaker party. It should further be noted that there is no requirement set out in Article 4 that the parties should obtain independent legal advice before making such an agreement.

A ground of jurisdiction based on submission is set out in Article 5: a court before which the defendant enters an appearance shall have jurisdiction, save for where the defendant appears only to contest jurisdiction (as under Article 24 of Brussels I). Article 6 provides a subsidiary jurisdiction, providing nationality as a basis for jurisdiction where no court of a Member State has jurisdiction under Articles 3, 4 or 5. This is therefore no longer left to national law to determine, as was the case under Article 4 of Brussels I. Article 7 of the Maintenance Regulation, entitled 'forum necessitatis', provides jurisdiction for the courts of a Member State on an exceptional basis so that it may hear the case if proceedings cannot reasonably be brought or conducted, or would be impossible, in a third State with which the dispute is closely connected. Recital 16 suggests that this might be, for example, when there is civil war in that third State. The dispute must still, though, have a sufficient connection with the forum necessitatis.

Interestingly, an amendment was proposed to the Maintenance Regulation for a mechanism to transfer jurisdiction to a court better placed to hear a dispute (as under Article 15 of Brussels II Revised), but this was removed.

D Limits on Jurisdiction, Variation and Review

Articles 12 and 13 echo those of Articles 27 and 28 under Brussels I, providing that for proceedings with the same cause of action (lis pendens), any Member State court other than the first seised shall stay its proceedings of its own motion until the jurisdiction of the Member State first seised is established. If it is so established, the other court(s) shall decline jurisdiction (Article 12). For related actions, the court other than the first seised may stay proceedings and may, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the related action and can consolidate those actions (Article 13). The Maintenance Regulation defines 'related actions' in the same way as under Article 28 of Brussels I, namely that the proceedings 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".

The Maintenance Regulation attempts to limit the possibility of forum shopping by preventing a debtor from seeking in Member State B a new decision, or the modification of an existing

decision made in Member State A5, whilst the creditor remains habitually resident in Member State A (Article 8, recital 17). This is subject to situations where there is an agreement as to jurisdiction under Article 4, or where the creditor submits to that new jurisdiction under Article 5. Article 8 represents a notable change from the position under Brussels I in which variation of registered orders was possible if based on a change of circumstances (as in the case of M v V [2010] EWHC 1453 (Fam) per Wall P): under the Maintenance Regulation there will not be jurisdiction to vary directly in State B if the creditor remains habitually resident in State A, supporting the notion of protecting the weaker party. Variation applications would have to be made in State A and then enforced in State B.

7.- Other fora

As it has already been mentioned, there are European Regulations governing jurisdiction in civil matters: in addition to Brussels II recast and Regulation 4/2009 of 18 December 2008: 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; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Finally, two Regulations have been recently adopted on matrimonial property regimes and registered partnerships: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes and 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

Regulations 2016/1103 and 2016/1104 seek enhanced cooperation between Member States in the area of jurisdiction, applicable law and the recognition and enforcement of decisions regarding the patrimonial relations between spouses and couples with registered partnerships.

The EU Matrimonial Property Regulation is 2016/1103 with a full title of Council Regulation 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. It should be read alongside Council Regulation 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 property consequences of registered partnerships. The two are almost identical save that the first applies to marriage and the second to registered partnerships but covering the controversial topic for some member states of same-sex marriage. The Regulation came into force on 29 January 2019. Applicable en Belgium, Bulgaria, Czech Republic, Greece, Germany, Spain, France, Croatia, Italy, Luxembourg, Malta, The Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

Both daily management and liquidation of the partners' property, as a result of separation or death of one of the partners, are governed by the Regulations. Excluded from the scope of application of the Regulations are those matters already covered by other European instruments, such as alimony obligations and the law of succession.

The Regulations give a broad meaning to the term "court": not only courts in the strict sense, but also broader categories, such as public notaries who exercise judicial functions, are covered. A court of a Member State that has been consulted in the context of a dispute about an inheritance or the dissolution of a marriage or registered partnership will also have jurisdiction to deal with the patrimonial consequences thereof. For example, a public notary who is in charge of the liquidation and partition of the estate of a spouse on the basis of the Succession Regulation will also be responsible for the liquidation and partition of the dissolved marital property regime.

If there is no dispute about an inheritance or divorce (e.g. when spouses wish to amend their matrimonial property regime), jurisdiction to rule lies with the courts of the Member State in whose territory the partners are habitual residents, unless the partners have appointed another court through a jurisdiction agreement.

JURISDICTION. – The purpose of the Regulation is to enable various related procedures pending before the courts of that Member State to be heard jointly. Article 4 provides that Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case; Similarly, according to Article 5, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

Article 6 concerns jurisdiction when matters of the matrimonial property regime are not related to succession or divorce, legal separation or marriage annulment procedures. It establishes a list of hierarchical connecting points: the habitual residence of the spouses, their last habitual residence if one of them still resides there or the habitual residence of the defendant. These are widely used criteria that often coincide with the place of the patrimony of the spouses. The last connecting point is the common nationality of the spouses.

Party autonomy: article 7 allows the spouses to choose the competent courts to hear matters concerning their property regime: In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

Tema 5.- EL RÉGIMEN AUTÓNOMO DE COMPETENCIA JUDICIAL INTERNACIONAL

1.- Rasgos caracterizadores; 2.- Los foros de competencia judicial internacional en el orden civil; 3.- Relaciones y estructura global de los foros de competencia judicial internacional; 4.- Los problemas de aplicación de las normas de competencia judicial internacional

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

1.- Rasgos caracterizadores.

El sistema de normas de producción estatal, actualmente vigente, que regula la competencia judicial internacional en España, viene establecido en la Ley Orgánica 6/1985, de 1 julio, del Poder Judicial. Desde la perspectiva del DIPr, la LOPJ delimita, por primera vez en nuestro ordenamiento jurídico, los foros o criterios de competencia judicial internacional de los Tribunales españoles en los órdenes civil (art. 22), penal (art. 23), contencioso-administrativo (art. 24) y social (art. 25). Todos ellos constituyen el Titulo Primero del Libro Primero, "De la extensión y límites la jurisdicción" que comienza con el art. 21 disponiendo que,

1. Los Tribunales civiles españoles conocerán de las pretensiones que se susciten en territorio español con arreglo a lo establecido en los tratados y convenios internacionales en los que España sea parte, en las normas de la Unión Europea y en las leyes españolas.

2. No obstante, no conocerán de las pretensiones formuladas respecto de sujetos o bienes que gocen de inmunidad de jurisdicción y de ejecución de conformidad con la legislación española y las normas de Derecho Internacional Público.

Así pues, para fijar la competencia judicial internacional de los tribunales españoles deben aplicarse, en primer lugar, los instrumentos legales internacionales en vigor para España (art. 21 LOPJ, art. 96.1 CE). Sólo cuando ningún instrumento internacional sea aplicable a la cuestión, la competencia judicial de los tribunales españoles se determina con arreglo a las normas españolas de producción interna (art. 22 a 22 *nonies* LOPJ).

En la determinación de los criterios de competencia judicial internacional en materia civil y mercantil de nuestros Tribunales, el legislador español se inspiró ampliamente en el Convenio de Bruselas de 1968 relativo a la competencia judicial internacional, el reconocimiento y ejecución de resoluciones judiciales en materia civil y mercantil. Tanto es así que España no figura en la lista de Estados miembros con competencias consideradas exorbitantes que enumera l art. 3 del Convenio, el Anexo I de su sucesor, el Reglamento (CE) n° 44/2001 o del Reglamento 1215/2012.

La acogida clara y manifiesta de los foros europeos —por otra parte necesaria puesto que el ingreso de España en la CE le obligaba a adherirse al Convenio de Bruselas- supuso un cambio radical de concepción y de filosofía en la materia, acabando con el imperialismo jurisdiccional de la época anterior.

Las disposiciones de la LOPJ en la materia responden a los principios de unilateralidad, exclusividad y generalidad:

1) Unilateralidad porque se hallan formuladas de manera que señalan sólo los supuestos en los que los Tribunales españoles son competentes; fuera de ellos, nuestros Tribunales carecen de competencia, sin que, en tal caso, la disposición indique los Tribunales del Estado extranjero que serán competentes.

2) Exclusividad porque la Ley predetermina los casos en los que podrán conocer los Tribunales españoles, de conformidad con los criterios por ella establecidos. De tal forma que, fuera de ellos, deberán declararse incompetentes, ya sea de oficio, con audiencia de las partes y del Ministerio Fiscal (art. 38 LEC) o a instancia de parte, por medio de la declinatoria (art. 39 LEC). Sin embargo, tras la reforma de la LOPJ operada por la Ley Orgánica 7/2015, de 21 de julio sobre cooperación judicial internacional, se incorpora el foro de necesidad. En el artículo 22 octies se establece que los tribunales españoles no podrán abstenerse o declinar su competencia cuando el supuesto litigioso presente vinculación con España y los Tribunales de los distintos Estados conectados con el supuesto hayan declinado su competencia.

3) Generalidad porque atribuyen la competencia globalmente a los Tribunales españoles, sin que indiquen, salvo alguna excepción, el juez o tribunal territorialmente competente, función que corresponde a la LEC.

Por último, el catálogo de foros de competencia, como en Bruselas I bis, viene jerarquizado: Se incorporan así competencias exclusivas, generales y, por último, las competencias especiales y particulares, que tienen carácter subsidiario puesto que entran en juego “en defecto de los criterios anteriores”.

2.- Los foros de competencia judicial internacional en el orden civil

1. Los foros exclusivos.

El artículo 22 LOPJ recoge unos foros con carácter exclusivo, que coinciden prácticamente con los previstos en el art. 24 Reglamento 1215/2012: 1) derechos reales y arrendamientos de inmuebles que se hallen en España; 2) Constitución, validez, nulidad o disolución de sociedades o personas jurídicas domiciliadas en España, así como respecto a los acuerdos y decisiones de sus órganos; 3) Validez o nulidad de las inscripciones practicadas en un Registro español; 4) Inscripciones o validez de patentes y otros derechos sometidos a depósito o registro cuando se hubiere solicitado o efectuado en España el depósito o el registro; 5) Reconocimiento y ejecución en España de resoluciones judiciales y decisiones arbitrales dictadas en el extranjero.

La competencia exclusiva, significa que, cuando concurra uno de los criterios antes enumerados, los Tribunales españoles serán los únicos competentes para conocer del asunto, excluyendo a todos los demás. Si un Tribunal extranjero dictara una resolución sobre alguna de estas materias, tal resolución no sería reconocida ni ejecutada en España.

Los criterios de competencia exclusiva son exhaustivos y constituyen una enumeración cerrada, de interpretación estricta. Coinciden casi literalmente con los enumerados en el artículo 24 Reglamento 1215/2012.

Es importante tener presente que, habida cuenta de que el art. 24 Bruselas I bis se aplica en todo caso, independientemente del domicilio o cualquier otra circunstancia del demandado y que prima sobre el Derecho interno, el art. 22 de la LOPJ carece prácticamente de virtualidad, de manera que las competencias exclusivas de los Tribunales españoles se regulan únicamente por el art. 24 del Reglamento comunitario.

2. Los foros generales.

El art. 22 bis LOPJ dispone que los Juzgados y Tribunales españoles serán competentes,

Con carácter general, "cuando las partes, con independencia de su domicilio, se hayan sometido expresa o tácitamente a ellos".

A) Sumisión tácita o expresa a los Tribunales españoles

En virtud de la autonomía de la voluntad, las partes en un negocio jurídico pueden acordar someter los litigios que pudieran surgir entre ellas a un determinado tribunal o a los Tribunales de España (art. 22 bis LOPJ). El acuerdo de sumisión puede ser:

1) Expreso, esto es, a través de una cláusula o acuerdo atributivo de jurisdicción incluida en un contrato o en un acuerdo independiente, o verbalmente con confirmación escrita, así como en alguna forma que se ajuste a los hábitos que las partes tengan establecidos entre ellas, o en el comercio internacional sea conforme a los usos que las partes conozcan o deban conocer y que, en dicho comercio, sean ampliamente conocidos y regularmente observados por las partes en los contratos del mismo tipo en el sector comercial considerado. Se entenderá que media acuerdo escrito cuando resulte de una transmisión efectuada por medios electrónicos que proporcione un registro duradero.

2) Tácito, derivado de la conducta procesal de las partes, a saber, el demandante, por el hecho de presentar la demanda, el demandado por el hecho de comparecer sin impugnar la competencia, entrando en el fondo, sin que quepa entender que su incomparecencia equivale a sumisión tácita (art. 36.3 LEC).

Las posibilidades de aplicar esta norma para fundamentar la competencia judicial internacional de nuestros tribunales también son muy limitadas. El ámbito natural de los acuerdos de sumisión está ampliamente cubierto por normas internacionales que son de aplicación preferente, fundamentalmente los artículos 25 y 26 Reglamento 1215/2015, pero también por el Convenio de la Haya de 2005 sobre acuerdos de elección de foro.

B) Domicilio del demandado en España

El domicilio del demandado es un criterio atributivo de competencia judicial internacional de carácter general y, pudiera decirse que también universal porque existe en la mayoría de los países del mundo. Es así, entre otras razones, porque atribuye la competencia al juez natural de la persona demandada, permite a esta una adecuada organización de su defensa y facilita el desarrollo del proceso y la ejecución de la sentencia que se dicte.

El art. 22 ter LOPJ contempla que los Juzgados y Tribunales españoles sean competentes, con carácter general cuando el demandado tenga su domicilio en España. Las posibilidades de aplicar esta norma para fundamentar la competencia judicial de nuestros órganos jurisdiccionales son igualmente limitadas.

El art. 22 ter incorpora una definición de domicilio: se entenderá, a los efectos de este artículo, que una persona física está domiciliada en España cuando tenga en ella su residencia habitual. Se entenderá que una persona jurídica está domiciliada en España cuando radique en ella su sede social, su centro de administración o administración central o su centro de actividad principal.

El art. 22 ter también introduce el foro de la pluralidad de demandados en base a que uno de ellos tenga su domicilio en España, inspirándose en el foro especial del art. 8.1 Reglamento 1215/2012, lo cual resulta útil en relación con demandados en terceros estados.

3. Los foros especiales por razón de la materia.

Los art. 22 quáter y 22 quinquies LOPJ recogen una amplia lista de foros especiales, referidos a cuestiones de persona, familia y sucesiones y a cuestiones de derecho patrimonial. En algunos casos se ofrecen varios foros especiales referidos a una misma materia.

Para el examen de los distintos foros remitimos a la materia reguladora, limitándonos a señalar aquí las materias sobre las que se recogen foros especiales conforme a la estructura de la LOPJ reformada. Art. 22 quáter: a) materia de declaración de ausencia o fallecimiento; b) materia relacionada con la capacidad de las personas y las medidas de protección de las personas mayores de edad o de sus bienes; c) materia de relaciones personales y patrimoniales entre cónyuges, nulidad matrimonial, separación y divorcio y sus modificaciones; d) materia de filiación y de relaciones paterno-filiales, protección de menores y de responsabilidad parental; e) materia de adopción; f) materia de alimentos; g) materia de sucesiones. Art. 22 quinquies: a) materia de obligaciones contractuales; b) materia de obligaciones extracontractuales; c) acciones relativas a la explotación de una sucursal, agencia o establecimiento mercantil; d) materia de contratos celebrados por consumidores; e) materia de seguros; f) acciones relativas a derechos reales sobre bienes muebles. El art. 22 septies se refiere a la materia concursal y demás procedimientos de insolvencia, remitiendo a su normativa reguladora.

Los rasgos esenciales que caracterizan a estos foros de nuestra Ley son:

1) Se trata de foros particulares o especiales por razón de la materia, es decir, que atribuyen la competencia en cada una de las materias concretas a las que se refieren.

2) Como estos foros especiales responden al principio de proximidad, esto es, indican la competencia del juez que consideran más próximo al litigio, y en las relaciones jurídicas en las que las partes no están en igual posición, protegen a la parte débil, permiten al demandante atraer a la competencia del juez español a un demandado domiciliado en otro Estado.

3) Todos estos foros de competencia, con excepción de las materias civiles no incluidas en el ámbito de Bruselas I bis fueron incorporados, de una forma u otra, en la LOPJ, provenientes del texto europeo. Por tanto, la aplicación de estos foros especiales a efectos de fundamentar la competencia judicial internacional de nuestros tribunales va a depender de que la materia a la que se refieran esté o no cubierta por algún Reglamento UE o Convenio internacional y de cuáles sean los criterios de aplicación de estos instrumentos. Recuérdese que los foros especiales del Reglamento 1215/2012 se aplican cuando el demandado esté domiciliado en un Estado miembro, por lo que cabe acudir a la LOPJ cuando el demandante esté domiciliado en un tercer país.

- Competencia en materia de medidas cautelares y provisionales

Con arreglo a lo dispuesto en el art. 22 sexies LOPJ, los Juzgados y Tribunales españoles son competentes para adoptar “medidas provisionales o de aseguramiento respecto de personas o bienes que se hallen en territorio español y deban cumplirse en España”. En este precepto se precisa que también serán competentes para adoptar estas medidas si lo son para conocer del asunto principal. Esta disposición, al igual que las anteriores, también se aplicará en defecto de norma internacional.

3.- Relaciones y estructura global de los foros de competencia judicial internacional

La competencia judicial internacional corresponderá a los tribunales españoles si concurre cualquiera de estos criterios o foros: 1.°) Competencias exclusivas (art. 22

LOPJ); 2.°) Sumisión expresa o tácita de las partes (art. 22 bis LOPJ); 3.º) Domicilio del demandado en España (art. 22 ter LOPJ); 4.°) Competencias especiales por razón de la materia (art. 22 quáter y quinquies LOPJ).

4.- Los problemas de aplicación de las normas de competencia judicial internacional

A) Control de oficio de la competencia judicial internacional

El art. 22 octies LOPJ dispone que no serán competentes los tribunales españoles en aquellos casos en que los foros de competencia previstos en las leyes españolas no contemplen dicha competencia. Señala, a continuación, que los tribunales españoles apreciarán, de oficio o a instancia de parte, su competencia de conformidad con las normas vigentes. Esta referencia nos lleva a la LEC.

En tal sentido, la LEC precisa que los Tribunales españoles carecen de competencia para juzgar asuntos:

1) Cuando no les este atribuida por uno de los foros previstos en la LOPJ (art. 36.1 LEC).

2) Cuando se haya formulado demanda o solicitado ejecución respecto de sujetos o bienes que gocen de inmunidad de jurisdicción o de ejecución conforme a las normas del Derecho Internacional Público (art. 36.2.1 LEC).

3) Cuando, en virtud de un tratado o convenio internacional en el que España sea parte, el asunto se encuentre atribuido con carácter exclusivo a la jurisdicción de otro Estado (art. 36.2.2 LEC).

4) Por incomparecencia del demandado emplazado en debida forma, si el único criterio que pudiera fundar la competencia internacional de los Tribunales españoles fuera la sumisión tácita de las partes (art. 36.2.3 LEC).

El concreto Juzgado o Tribunal español debe abstenerse de conocer del litigio, de oficio, con audiencia de las partes y del Ministerio Fiscal, tan pronto como sea advertida la falta de competencia internacional (art. 38 LEC).

B) Control a instancia de parte de la competencia judicial internacional

Las controversias que históricamente existieron en relación con el control a instancia de parte de la competencia judicial internacional del juez español quedaron resueltas con la promulgación de la LEC de 2000. Actualmente, el control a instancia de parte de la competencia judicial internacional del modelo español de DIPr se encuentra recogido en el artículo 39 de la LEC 1/2000.

El precepto precisa que el demandado podrá denunciar mediante declinatoria la falta de competencia internacional o la falta de jurisdicción por pertenecer el asunto a otro orden jurisdiccional o por haberse sometido a arbitraje la controversia.

C) Litispendencia y conexidad

El art. 22 nonies LOPJ dispone que "*las excepciones de litispendencia y de conexidad internacionales se alegarán y tramitarán con arreglo a las normas generales que regulen las leyes procesales.*"

Se ocupa de esta cuestión la Ley de Cooperación Judicial Internacional en Materia Civil (arts. 37 ss). En el art. 39 se define cuándo estamos ante una situación de litispendencia internacional: "Cuando exista un proceso pendiente con idéntico objeto y causa de pedir, entre las mismas partes, ante los órganos jurisdiccionales de un Estado extranjero en el momento en que se interpone una demanda ante un órgano jurisdiccional español". Y en el art. 40 se concreta cuándo estamos ante una situación de conexidad internacional: "cuando las demandas estén vinculadas entre sí por una relación tan estrecha que sería oportuno tramitarlas y juzgarlas al mismo tiempo a fin de evitar resoluciones inconciliables".

La solución que se ofrece es que el órgano jurisdiccional español podrá suspender el procedimiento a instancia de parte y previo informe del Ministerio Fiscal, siempre que se cumplan los requisitos establecidos en los artículos 39.1 y 40.2 para las situaciones de litispendencia y conexidad respectivamente. Se prevé además en los arts. 39.2 y 40.3 que los órganos jurisdiccionales españoles, si se dan las circunstancias previstas en estos apartados, podrán acordar la continuación del proceso en cualquier momento, a instancia de parte y previo informe del Ministerio Fiscal. Es decir, que aún en el caso de que el órgano jurisdiccional español se hubiera pronunciado inicialmente en favor de suspender el procedimiento, pude dejar sin efecto tal suspensión y continuar con el desarrollo del proceso.

El art. 39.3 dispone en relación con la litispendencia internacional que el órgano jurisdiccional español pondrá fin al proceso y archivará las actuaciones una vez que el proceso ante un órgano jurisdiccional extranjero haya concluido con una resolución susceptible de reconocimiento y, en su caso, de ejecución en España. No es por tanto hasta esta fase final, y una vez que se tiene constancia de que la sentencia extranjera es susceptible de desplegar efectos en España, que el órgano jurisdiccional español podrá fin al proceso.

Debe tenerse presente que el Reglamento 1215/2012 también se ocupa de las situaciones de litispendencia y conexidad con terceros estados, arts. 33 y 34. Estos preceptos se aplican únicamente a las situaciones de litispendencia y conexidad con terceros estados en las materias cubiertas por el Reglamento y cuando la competencia corresponda a los órganos jurisdiccionales de un estado miembro en virtud de los arts. 4,7, 8 ó 9, del Reglamento.

D) La *prorrogatio fori* a favor de tribunales extranjeros

La cuestión se refiere a si nuestros órganos jurisdiccionales deben aceptar los efectos de un acuerdo atributivo de competencia en favor de los órganos jurisdiccionales de un tercer país, y no conocer por tanto del asunto a pesar de gozar de competencia judicial internacional.

Pues bien, el art. 22 *bis* LOPJ dispone que no surtirán efectos los acuerdos que excluyan la competencia de los órganos jurisdiccionales españoles en materias objeto de su competencia exclusiva. Se añade en el art. 22 *ter* que la competencia establecida con arreglo al foro del domicilio del demandado o los foros especiales (arts. 22 *quáter* y *quinquies*) sí podrá ser excluida en virtud de un acuerdo de sumisión de foro en favor de tribunales extranjeros. No obstante, esta exclusión tiene una limitación y es que solo será operativa en relación con aquellas materias en las que estén permitidos los acuerdos de sumisión a los tribunales españoles.

Tema 6.- PROCEDURE AND LEGAL COOPERATION IN CIVIL MATTERS

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

1. The principle of lex fori

Whenever a Spanish court assumes jurisdiction over a PIL issue, the lex fori governs all matters relating to procedure. It is a principle of universal application with a long-standing tradition in Spain. In fact, the Supreme Court recognized this principle in decisions of 31 January 1921 and 19 December 1930. In the latter decision, the Supreme Court clearly states that: Application of the formal statute of lex terrae or lex loci is clear in all that regards procedural matters and it is the rule by which our procedural civil law is governed ..

In the Spanish legislation, the lex fori regit processum rule was expressly established in the Preliminary Title to the CC in Article 8.2. Currently, this rule was replaced by Article 3 LEC (Act 1/2000, 7 January 2000), which sets out that:

Besides the exceptions contained in Treaties and International Conventions, civil procedures in Spanish territory are governed exclusively by Spanish procedure law..

This rule's generality and inflexibility is obviously inadequate to the reality of international civil litigation today, and for these reasons it has been thoroughly criticized.239 Particularly, it must be taken into consideration that this rule refers to civil procedure in Spain, and thus it does not cover that, in the context of interna tional litigation, it is likely that some procedural acts may have to be conducted nec essarily in another forum with the help of international co-operation. Thus the wording employed by the former Article 8.2 of the CC was much better, because it referred to proceedings conducted in Spanish territory.

Moreover, Article 3 does not provide for any exception to the scope of the lex fori rule, even though it is obvious that some important issues can hardly be gov erned by such principle. The new statute should have at least determined which issues are not characterized as procedural in order to determine the applicable law. Issues related with legal capacity, legal standing of the parties and representation, as well as those related to certain aspects of evidence, require special solutions.

2. Judicial cooperation in civil matters in the EU

Article 81(2)(a) and (c) TFEU entrust Parliament and the Council with the task of adopting measures aimed at ensuring mutual recognition and enforcement of judgments and the compatibility of national rules with regard to conflict of laws and of jurisdiction. Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 (currently under review) is intended to simplify and expedite the transmission between Member States of judicial and extrajudicial documents for service purposes and thus to increase the efficiency and speed of judicial procedures. In order to simplify and accelerate cooperation between courts in the various Member States in the taking of evidence in civil or commercial matters, the Council adopted Regulation (EC) No 1206/2001. It does not apply to Denmark.

Lesson 7.- RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

1.- Concepts; 2-. Legal effects of foreign judgments in Spain; 3. Plurality of legal sources; 4. Regulation 1215/2012; 5.- Regulation 2201/2003; 6.- Statutory provisions; 7.- Collective actions; 8.- The exequatur

1.- Concepts

Once a relevant judicial decision is issued, the next problem that arises in private international law concerns the extraterritorial validity of the judgment in another State. Indeed, due to the principle of State sovereignty, a court decision only produces effects in the territory of the State where it is issued (art. 117.3 Spanish Constitution).

This solution is contrary to the continuity of legal relationships and legal certainty, since it would require that individuals, who have obtained a favourable judgment in one State, restart the process in the State where they want to assert their rights, thus increasing the risk of duplication and contradictory solutions. Arguments such as the principle of international cooperation, legal certainty, judicial economy and the continuity of the legal relationships underline the necessity to give effect to foreign judicial decisions.

The mechanisms usually employed in private international law to ensure the extraterritorial effects of foreign judgments are *recognition* and *exequatur*.

This lesson focuses on the extraterritorial effects of foreign judicial decisions in the private law realm. It does not deal with specific solutions provided for public documents, court settlements and arbitral awards, as well as those established for decisions issued by supranational and ecclesiastical authorities.

Recognition refers to the acceptance by the law of the Forum that the judgment put an end to the subject-matter of the dispute and that it can deploy specific effects in its territory. Granting recognition does not mean unconditioned acceptance of the judgment in the requested State. The requested State has to perform a control check to ensure that the foreign judgment complies with certain conditions.

The concept of recognition must be distinguished from that of *exequatur* or *declaration of enforceability*. If a foreign judgment is to be implemented in the requested State, it will need to be converted into an executive title because the foreign resolution does not confer the right to proceed with enforcement. Accordingly, *exequatur* is a concept specific to private international law that refers to the decision by a court authorising the enforcement in that country of a judgment given abroad. Once an exequatur is issued, the execution of the judgment may be carried out properly, i.e. enforce the sanction contained therein, even with coercive measures if the defendant does not voluntarily comply.

Only sentencing resolutions may obtain an exequatur, not declarations or decisions that are not capable of execution (arts. 521.1 and 523 Spanish Law on Civil Procedure). The latest trend in the EU is the abolition of the exequatur procedure between Member States for all judgments in civil and commercial matters and even regarding parental responsibility.

2.- Legal effects of foreign judgments in Spain

Traditionally, the study of the effects of foreign resolutions in Spain reflects the double dimension of any judicial decision: it can be conceived as a jurisdictional act which must be recognized to unfold effects in Spain or as a public document, which needs not be recognized to deploy extra-territorial effects.

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
Av. De las Universidades s/n
41704 Dos Hermanas (Sevilla)
Tel. +34 955 641 600 (Ext.2 450)
amlopez@uloyola.es

— The effects related to recognition are as follows:

a) *Res judicata*. This means that the matter has been adjudicated by a competent court and therefore may not be pursued further by the same parties. The res judicata allows a winning litigant in a lawsuit developed abroad to defend himself if a loser litigator initiates preceedings in Spain between the same parties and with same cause of action. The winning party may then oppose to the new proceedings on the basis of res judicata.

b) Constitutive effect. If a foreign decision creates, extinguishes or modifies a right or legal relation, recognition will deploy the same effects in the requested State.

c) Registry entries. A foreign decision that constitutes or declares a fact or a right to be recorded at the Spanish civil Registry, must be recognized first (art. 96 Civil Registry Act). As regards the registration of the property, an analogous rule is established in article 4 Spanish Mortgage Act and article 38 Spanish Mortgage Regulation.

— Effects *not* related to recognition. A foreign judgment is a public document and thus it may deploy effects in Spain even without recognition:

a) Evidentiary effect. A foreign judgment is a public document and as such, it may serve as proof in a Spanish procedure if it meets the requirements of article 323 Spanish Act on Civil Procedure. The evidentiary force of a foreign judgment will be assessed by the judge according to the lex fori (the judge's own procedural law).

b) Evidentiary effect of the capacity for certain acts to be recorded in a Spanish Registry. For instance, where a foreigner wants to marry in Spain, he or she has to demonstrate the dissolution of a previous marriage by providing the foreign divorce judgment, but recognition of this judgment is not required.

3.- Plurality of legal sources

The legal sources for recognition and exequatur in Spain are international: Conventions and regulations and domestic: Statutory provisions (Act 29/2015, of 30 July, on international legal cooperation in civil matters). Under the principle of legal hierarchy, statutory provisions only apply in default of international sources (arts. 96 Spanish Constitution, art. 288 TFEU and art. 2 Act 29/2015.

As far as international sources are concerned, the main role is currently being taken by European regulations. In cicil and commercial matters the most important source is **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. Other regulations in this field also abolish the need for an exequatur : **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; **Regulation (EC) No 1896/2006** of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; **Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure** [the last two amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015; **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 family matters it is worth mentioning **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 (known as Brussels II Regulation). Other Regulations containing rules on extra-territorial effectiveness of foreign judgments in this field are the **Regulation (EC) No 4/2009** of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

cooperation in matters relating to maintenance obligations; **Regulations 1103 and 1104/2016** 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/property regimes of registered partnerships and **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.

Spain has also subscribed a number of international conventions regarding recognition and enforcement, both bilateral and multilateral. The most important multilateral convention is the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which binds EU Member States and Iceland, Norway and Switzerland. The Lugano Convention applies where either the State of origin or the State addressed is Iceland, Norway and Switzerland (art. 64).

To date, Spain has also signed more than twenty agreements on recognition and exequatur of foreign judgments. All, except those signed with Romania and El Salvador, are simple agreements, that is, they only regulate recognition and exequatur, leaving the issue of international jurisdiciton to the domestic legislation of each State.

4. Regulation 1215/2012

The detailed regulation of international jurisdiction under Regulation 1215/2012 is complemented by the provisions contained in Chapter III (arts. 36 to 57), relating to the recognition and enforcement of judgments. The philosophy that inspires the Regulation is mutual trust between Member States by establishing the automatic recognition and exequatur (without any procedure) of judgments issued in other Member States, in the interests of the principle of the free movement of judgments in the EU. However, not every decision by a court of a Member State benefits from the automatic mechanisms of recognition and enforcement provided for in the Regulation. It must be a judicial decision issued by a court of a Member State in a matter covered by the Regulation.

a) It must be a **judgment**. Art. 2.a) of the Regulation defines this concept autonomously as: "*judgment' means 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.*

For the purposes of Chapter III, 'judgment' 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. It 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".

b) It must be a judgment issued in a civil or commercial matter within the scope of the Regulation whatever the nature of the court or tribunal.

c) It must be a judgment issued by a court of a Member State (including Denmark), and excludes jugments issued by third countries. The crucial element is the State of origin of the judgment irrespective of whether or not the parties are domiciled in a Member State and whatever their nationalities are.

As stated in art. 2 of the Regulation, Member State of origin means "the Member State in which, as the case may be, the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered".

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Ana Mercedes López Rodríguez, *PhD.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 11
41014 Sevilla
Tel: +34 955 641 600 (Ext: 450)
amlopez@uloyola.es
www.uloyola.es

AUTOMATIC RECOGNITION AND ENFORCEMENT

As a general rule, judgments issued by a court in a Member State are to be automatically recognized in the requested Member State. According to 36.1 Regulation: “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required”. Automatic recognition means that any decision by a court in a Member State may be invoked directly before the authorities of any other Member State, without the need for any ad hoc approval procedure to be developed. The judgment is to be fully recognised and the effects derived from it extend to the Member State requested (Judgment CJEU C-145/86, Hoffman). Recognition may be refused, at the request of any interested party, only for the reasons listed in article 45. The request for refusal of recognition shall be made in accordance with the procedure laid down for refusal of execution.

Regulation 1215/2012 has abolished the exequatur procedure, that is, the need for declarations of enforceability in the requested State. This, according to art. 39 “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.” This means that the winning party mat directly apply for exequtión in the requested State.

Upon request of the interested party, the court of the State of origin will issue a certificate using the form set out in Annex I, which shall be presented by the applicant to the competent enforcement authority (in Spain, Juzgado de Primera Instancia), a copy of the judgment which satisfies the conditions necessary to establish its authenticity. The certificate shall be served on the person against whom the enforcement is sought who may apply for refusal of enforcement under any of the grounds set forth in art. 45.

GROUNDS FOR REFUSAL

The grounds for refusal are listed in art. 45 and are common to both requests for recognition and enforcement. They must be interpreted restrively and applied exceptionally. In no case may the judgment be subject to a review on the merits (art. 52).

The grounds for refusal are:

a) By **contradiction to public policy** – 'if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought'.

Public policy refers both to substantive public policy (C-38/98, Renault), and procedural public policy, for instance, rights of defence not covered under b) (C—7/98, *Krombach* and C—394/07, *Gambazzi*).

b) **Violation of the rights of defence**

If the rights of defence were violated – where the judgement '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'.

Article 45.1 (b)) refers to judgments issued in absentia of the defendant (if the defendant appeared before the court of origin, this ground cannot be applied). The concept of " default of appearance" has been interpreted autonomously by the Court of Justice, understanding that the defendant is in such a situation where he was not aware of the proceedings against him and had no chance of defending himself (C-172/91, Volker Sonntag, and C-78/95, Hendrikmman).

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *PhD*.

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 11
41014 Sevilla
Tel. +34 955 641 600 (Ext. 460)
amlopez@uloyola.es
www.uloyola.es

However, this is not to say that all judgments issued in absentia will be denied recognition or enforcement. In addition to such default of appearance the defendant must not have been 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. Hence, if the defendant was absent on its on motion, that is, he was aware of the proceedings against him, he did not suffer a violation of his defence rights and the judgment shall be recognised and enforced in the Member State requested.

c) **Inconsistency of judgments**.

This ground is usually exceptional due to the provisions on lis pendens and related actions set forth in articles 29-34 Regulation.

In any case, recognition and enforcement may be refused if there is inconsistency with other internal judgement or decision given in another Member State or Third Country – 'if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed' – Article 45.1(c) or 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' – art. 45.1(d).

i) Art. 45.1 c) requires that both judgments "entail legal consequences that are mutually exclusive" (C—145/ 86, Hoffman). For example, a judgment prohibits the use of a trade mark and the other authorizes its use (C-80/00, *Leather*).

ii) Art. 45.1 d) requires stricter conditions and refers to decisions issued in States other than the requested State. The triple identity of parties, cause of action and object is required and the rule of the temporal priority is expressly enshrined, the relevant date being that of issuing of the judgment.

d) **Infringment by the judge of the State of origin** of the rules on international jurisdiction consecrated in the Regulation in matters of **Exclusive jurisdiction** (art. 24) **Insurance, employment and consumer contracts** (arts. 10-23).

5. Regulation 2201/2003

The Regulation, known colloquially as Brussels II bis, applies in all the Member States of the European Union with the sole exception of Denmark. Within the subject matter of the Regulation, decisions are automatically recognized without a specific procedure. According to art. 21.2 no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State. In this way records may be updated in Registries without the need of a special procedure or the like. Filed the application for registration, with the documents indicated in articles 37 to 39, the Registrar of the Civil Registry will assess whether or not to record it (since it must verify that none of the grounds for refusal of recognition are concurred). Art. 21 also refers to recognition with an application that the judgment be or not be recognised (which is to be entertained following the exequatur procedure) recognition of a judgment is raised as an incidental question. The grounds for refusal are listed separately, in art. 22 (Grounds of non-recognition for judgments relating todivorce, legal separation or marriage annulment) and art. 23 (Grounds of non-recognition for judgments relating to

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

parental responsibility).

According to **art 22,** a judgment relating to a **divorce, legal separation or marriage annulment** shall not be recognised: a) if such recognition is manifestly contrary to the **public policy** of the Member State in which recognition is sought; b) where it was given in **default of appearance**, if the respondent 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 the respondent to arrange for his or her **defence** unless it is determined that the respondent has accepted the judgment unequivocally; c) **Inconciliability** e with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; d) Inconciliability with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

According to **art 23,** a judgment relating to **parental responsibility** shall not be recognised: a)) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child; b) if it was given, except in case of urgency, **without the child having been given an opportunity to be heard**, in violation of **fundamental principles of procedure** of the Member State in which recognition is sought; c) where it was given in **default of appearance** if the person in default 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 that person to arrange for his or her **defence** unless it is determined that such person has accepted the judgment unequivocally; d) on the request of any person claiming that the judgment infringes his or **her parental responsibility**, if it was given **without** such person having been given an opportunity to be **heard**; e) **Inconciliability** with a **later judgment** relating to parental responsibility given in the Member State in which recognition is sought; j) **Inconciliability** with a **later judgment** relating to parental responsibility given in **another Member State or in the non-Member State** of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought; g) if the procedure laid down in **Article 56** was not complied with**.**

The CJEU, in C-455/ 15 PPU, has ruled that art. 23 must be interpreted restrictively, since it constitutes an obstacle to the realization of the objectives of the Regulation.

In any case, the requested court cannot deny recognition on grounds that the Court of origin was not competent (control of its jurisdiction), or because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts (articles 24 and 25). The judgment cannot be subject to a review on the merits.

Articles 28-36 deal with the **exequatur procedure**, that is to say, with the application for a declaration of enforceability, a necessary step for a later execution. The exequatur will be required only concerning judgments on the exercise of parental responsibility in respect of a child given in a Member State and which is enforceable enforceable there. Judgments on divorce, judicial separation or marriage annulment cannot be executed, they only need recognition.

Exequatur is always applied upon request of the interested party. The application must be addressed to the Juzgado de Primera Instancia in Spain. According to art. 31, the exequatur may be refused only for the reasons as specified for recognition in arts. 22 and 23.

ABOLITION OF EXEQUATUR FOR CERTAIN JUDGMENTS

In articles 40 a 45 the Regulation has abolished the need for an exequatur concerning rights of access and of certain judgments which require the return of the child, in accordance with art. 11.8. These decisions must be certified, in the State of origin, using the forms in Annexes I and IV. Once certified, they must be recognised and enjoy executive force in another Member State, without requiring any proceedings or declarations recognizing them as executive documents and without contesting their recognition. However, this is a optional solution, since the holder of parental responsibility can always seek recognition and enforcement of a judgment in accordance with the exequatur procedure (art. 40.2).

6. Statutory provisions

The statutory Spanish rules on recognition and enforcement of foreign judgments are included in the new Act on International Judicial Cooperation in Civil Matters (Law 29/2015, 30 July). The rules in arts. 41-61 of Law 29/2015 are therefore applicable to this issue, except when conventional (multilateral or bilateral conventions) or Eu rules (such as Regulation 1215/2012, Regulation 2201/2003, Regulation 4/2009, Regulations 1103 and 1104/2016 and Regulation 650/2012 apply.

RECOGNITION

As a general rule, Law 29/2015 applies the exequatur procedure to recognition. According to art. 42, " 1. the procedure to declare main title recognition of a foreign judgment and, where appropriate, to authorize their execution is referred to as exequatur procedure.

2. the same procedure can be used to declare that a judgment is not susceptible to recognition in Spain by incurring any of the grounds for refusal laid down in article 46..

The exequatur procedure is configured, then, as a single procedure in which two pronouncements (recognition and exequatur) can be obtained. If the ruling is declaratory or constitutive, recognition is obtained and if it is condemning, it will also imply a declaration of enforceability. Foreign judgments which are enforceable in the State of origin are enforceable in Spain once the exequatur has been obtained (art. 50). Law 29/2015 distinguishes between the concepts of "recognition","exequatur "and "execution". Law 29/2015 also provides for automatic recognition, without a specific procedure but this is only applicable when the recognition of a foreign judgment is incidental to a main procedure. The effectiveness of incidental recognition shall be limited to the ruling in the main proceedings and will not prevent requesting the exequatur of the judgment. (art. 44.2).

GROUNDS FOR REFUSAL

Article 46 establishes the grounds for refusing the recognition of a foreign judgments. A review on the merits (art. 48) is prohibited. Law 29/2015 also allows a partial recognition (art. 49).

Las causas de denegación son las siguientes: a) The foreign judgment is **contrary to public policy**. [art. 46.1 a)]. Public policy is an indeterminate legal concept that consists of the set of principles and fundamental values that inspire, from time to time, a legal system. According to the Spanish Constitutional Court Spanish public policy equals to the "constitutional order" (Judgments 43/86, 15

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

April and 54/89, 23 February). Although not expressly mentioned, the judgment must be manifestly contrary to public pulicy, since the public policy exception must always intervene exceptionally and its interpretation must be restrictive. As stated in the Preamble of Law 29/2015, if the subject matter of the judgment is a measure of child protection, the public policy standard must be interpreted taking into account the best interests of the child; b) **Infringement of the rights of defence of any of the parties**. This ground reflects the procedural dimension of public policy and refuses recognition "when the judgment has been rendered with a manifest infringement of the rights of defence of any of the parties". If the judgments was rendered in absentia, there is a manifest infringement of the rights of defence when "the defendant was not served with the document which instituted the proceedings in the regular way or with an equivalent document in sufficient time to enable him to arrange for his defence" [art. 46.1 b)]. Spanish statutory law is therefore more strict than Regulation 1215/2012, which does not request the serving of the document in the regular way but in such a way as to enable the defendant to arrange for his defence. Furthermore, this ground does not apply if the defendant could have appealed the decision but refused to; c) **Control of jurisdiction**. Recognition may be refused when "when the foreign judgment decided on a matter with respect to which Spanish courts have exclusive jurisdiction, or with respect to other matters, if the jurisdiction of the judge of origin is not based on a reasonable connection. The existence of a reasonable connection with the litigation shall be presumed when the foreign court has based its international jurisdiction on criteria similar to those provided for in Spanish legislation." [art. 46.1 c)]. This ground verifies whether there was a link of proximity between the foreign court which rendered the judgment and the dispute. In any case, recognition will be refused if the foreign judgment was rendered in violation of Spanish exclusive jurisdiction rules; d) **Irreconciability of judgments**. This ground is based on the principle of legal certainty and applies to two different situations: on the one hand, "when the foreign judgments is irreconcilable with a judgment given in Spain." [art. 46.1.d] and on the other hand, "when the foreign judgment is irreconcilable with a judgment previously rendered in another State, when the latter meets the conditions necessary for its recognition in Spain" [art. 46.1.e)]. This ground for refusal does not require a triple identity (object, parties and cause). There is irreconciliable judgments when both cannot be implemented at the same time. In the event of irreconciliability with a Spanish judgment, the latter need not have been issued prior to the foreign one whose recognition is sought. The Spanish judgment will always prevail; e) **Pending litigation in Spain**. Recognition will be also refused when "there is pending litigation in Spain between the same parties and with the same object, started prior to the litigation abroad" [art. 46.1f)].

7. Collective actions

Art. 47 Law 29/2015 includes a special provision on recognition of foreign, collective actions. It is, without a doubt, one of the most important innovations of this Act. Collective actions allow a group of people to claim damages for infringment of their rights by a corporation. According to art. 47.1 foreign judgments in proceedings arising from collective actions will be subject to recognition and enforcement in Spain. In particular, for its effectiveness in Spain it is required that the collective action has been reported or published in Spain by equivalent means and that the parties affected have had the same opportunities for participation or severance in the collective process than those domiciled in the State of origin. In any case, pursuant to art. 47.2, the foreign judgment will not be recognized when the jurisdiction of the Court of origin has not had been based on a forum equivalent to those provided for in Spanish legislation.

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Profesora titular de derecho internacional privado

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

8. The exequatur procedure

Articles 52 a 55 Law 29/2015 deal with the judicial procedure of exequatur. Art. 52 establishes the jurisdiction of either the domicile of the person against whom the recogniton or enforcement is sought or the domicile of the person to whom the effects of the judgment are referred. In absence of that, the judge of the first instance of the place of enforcement has jurisdiction. However, commercial judges have jurisdiction on the recognition and enforcement of judgments and other foreign decisions on commercial matters, unde the same criteria (art. 52.2).

The exequatur procedure in Law 29/2015 requires that foreign judgments be final and that they were rendered in a contentious procedure (art. 41). This excludes decisions in matters where there is no dispute. The exequatur is a written procedure which begins by the introduction of a claim accompanied with the original foreign decision or a certified copy duly legalized or apostilled. The claim must be served on the defendant, who must have the possibility of being part in the procedure and make oppostion to the exequatur within 30 days of being served with the claim. The Ministerio Fiscal or Public Prosecutor shall also be part in this exequatur proceedings (art. 54). Appeal to the Provincial Court against the decision given by the Court of First Instance is possible for both parties and the appeal decision can be subject to further appeal (recurso de casación) before the Spanish Supreme Court (art. 55).

LESSON 8. CONFLICT RULES AND BASIC TERMS OF PRIVATE INTERNATIONAL LAW

Profa. Ana Mercedes López

CONFLICT RULES: CONCEPT, STRUCTURE, TYPES, CHARACTERISTICS AND FUNCTIONS

1. Concept: The rule of law the object of which is the designation of the law applicable to a specific legal relationship (or group of such relationships) – here: within the framework of the private (civil and commercial) law. It does not regulate directly the content of such a legal relationship. The conflict rule locates a legal relationship in a particular country, whose law will apply to the merits of the dispute to solve the claim. Conflict rules are used in most jurisdictions.

2. Structure: A conflict rule contains the following elements: 1.°) Factual situation (*Tatbestand*); 2.°) Connecting factor (*Anknupfungspunkt*); 3.°) Legal consequence (*Rechtsfolge*). This structure allows the conflict rule refer to the law of a State, without substantially solving the issue raised.

3. Types: conflict rules may be **unilateral** or **bilateral**.

4. Characteristics: typically conflict rules have been characterized by three features: automatic application, abstraction and neutrality. However, modern conflict rules are becoming more specialized, are result oriented and flexible.

5. Function: **Conflict rules are mandatory**.

II. SUBSTANTIVE PRIVATE INTERNATIONAL LAW RULES

Substantive private international law rules provide a direct, immediate and substantive legal answer to international private situations. They do not refer to the law of any country.

Most of these rules solely govern specific aspects of international private situations. Examples: Regulation (EC) 40/94 of the Council of 20 December 1993 on the Community Trade Mark, The Vienna Convention of 11 April 1980 on international sale of goods (CISG), etc. The adoption of these rules is very limited because it is not easy to develop a legal text for internal cases and another for international cases.

These rules may be: (a) Independent: they apply notwithstanding conflict rules and and the national applicable law to the case; (b) Dependent: they apply only if the conflict rules of the judge lead to the application of the law of a particular country in which such substantive rules are in force; (c) With a territorial indicator: they only apply in certain cases connected with the country whose courts have jurisdiction on the case.

III. EINGRIFFSNORMEN. OVERRIDING MANDATORY PROVISIONS

1. **Definition**: **overriding mandatory provisions** are provisions which serve a public purpose or the general interest of the State which adopts them.

2. Art. 8.1 Spanish Civil Code, refers to the existence of rules that take precedence over any conflict rule and the application of foreign law: “Criminal, police and security statutes shall be binding on all persons within Spanish territory”.

3. The CJEU has defined these rules as “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.” (Judgment of the CJEU 23 November 1999, *Arblade*).

4. In Spanish Private International Law there is no general clause allowing Spanish courts to apply overriding mandatory rules of third States. However, in connection with international contracts, article 9.3 Rome I Regulation provides that, "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.”

IV. SELF-LIMITED PROVISIONS

1. **Definition**: **unilateral** provisions by which the legislator determines the scope of application of its own legislation.

Example: art. **9.6 Spanish Civil Code**: "[…] Spanish law shall apply to the taking of protective and educational measures relating to abandoned minors or incapable persons within Spanish territory".

2. Provisions that contain at the same time the substantive regulation and the "territorial indicator" are known as self-limited substantive provisions.

Example: art. 733 Spanish Civil Code: "The joint will, forbidden by article 669, made by Spaniards in a foreign country shall not be valid, even if authorised by the law of the State where it should have been executed".

V. BASIC TERMS

1. **Interpretation**: The first question to solve by the judge is the interpretation and definition of the terms used by the conflict rules and the factual description

2. **Characterization**: The process in the course of which the judge has to interpret the terms used by the legislature in the scope of the conflicts rules (e.g. "the dissolution of marriage", "the legal capability of the natural person", "the contractual obligation" etc.) to answer the question: which of several conflicts rules has to apply to a given case? The basic problem follows from the fact that various legal systems define the same terms (e.g. "marriage") in a different way, they create different kinds of relationships unknown in the forum State (e.g. "the registered partnership" in Poland) or attach the same function to the institutions systematized in a different way. Example: *nasciturus (conceived but unborn child)*: is this a question of legal capacity (art. 9.1 CC) or of succession law (art. 9.8 CC)? Usually four approaches are applied: a) **lex fori**; b) **lex causae**; c) **autonomous characterization**; d) **detailed description of the scope of application of the conflict rule**.

3. **Preliminary question**: A legal relationship or legal figure which is a precondition for the solution of another relationship (called also a "principal question" or "main question"). . Ej: A Spanish court has to settle the order of succession after the national of the State B whose Civil Code provides that one of the heirs is the "spouse" of the deceased. The applicant claims that she was married with the deceased but the judge has doubts as to the validity of this wedlock. The Spanish system of PIL has no specific rule on this subject. Most schol ars agree that the Spanish courts are bound to apply conflicts rules specifically applicable to each preliminary issue, and not the conflicts rules of the lex causae or the lex materialis causae. This solution conforms to the imperative character of conflict of laws rules in the Spanish PIL system (Article 12.6 CC). However, reported cases of Spanish courts are scarce and not conclusive

V. BASIC TERMS

4. Evasion of the law: The situation where the party interested in achieving a certain material result of the application of the law governing a relationship creates artificially a factual state so as to make the court apply the legal relationship in a way comfortable to him/her. The judge may exceptionally disregard facts undertaken by the party to bring about the application of a certain law. The relevant rule for evasion of the choice-of-law rule or fraud to the applicable law is included in Article 12.4 Spanish Civil Code: 'It shall be considered as fraud to the law the employment of a choice-of-law rule in order to evade an imperative Spanish law."

5. **Renvoi**: The word "Renvoi" comes from the French "send back" or "return unopened". The "Doctrine of Renvoi" is the process by which the court adopts the private international law rules of a foreign jurisdiction referred to by the forum's own private international law rules. There are two types of renvoi: 1.°) First degree or return to Spanish law; 2º) Second degree renvoi or referral to a third state's law.

In Spanish law renvoi is admitted only if the result of its application is a remission back to Spanish law (first degree renvoi); therefore, it is to be excluded if it leads to the application of the law of a third State (second degree renvoi). This rule is clearly stated at Article 12.2 CC: "Remission to a foreign law shall be understood as to its substantial law, without consideration to the renvoi that its choice-of-law rules can make to any other law that is not the Spanish law."

V. BASIC TERMS

6. ***Ordre public***: The conflicts rule which prohibits the application of the foreign law contrary to the fundamental legal ideas of the forum (e.g. the equality of men and women, the special protection of children, etc.). It is defined by the judge on the ad hoc basis, always in relation to the axiological assumptions of the given legal and constitutional system. Applied cautiously, only to the consequences of the application of foreign law and not to its very content.

En el sistema de Derecho Internacional privado español, es esta dimensión negativa del orden público la que se recoge en el artículo 12.3 del Código Civil: "En ningún caso tendrá aplicación la ley extranjera cuando resulte contraria al orden público".

VI. APPLICATION OF FOREIGN LAW

1. Conflict of laws rules may lead to the application of a foreign legal order as lex causae. Indeed, it is widely known that a unique characteristic of the multilateral conflicts rule is that, in principle, it treats all legal systems equally: principle of equality between lex fori and the foreign lex causae. Nevertheless, the way in which foreign law can be applied in Spain has always been, and continues to be, troublesome

2. The main problem here is a kind of indecision on the part of the Spanish legislator about whether or not the applicable foreign law determined by the Spanish conflicts rules must be applied by the court of its own motion. As it is provided in Article 12.6 CC: "The courts and authorities will apply of their own motion the conflicts rules of the Spanish law."

3. This statement clearly establishes the imperative character of the Spanish conflict of laws rules. However, when a foreign law, instead of the lex fori, must be applied, this clearness suddenly vanishes, because Spanish procedural rules require the parties' allegation and proof of the content of such foreign law. Thus, although it may seem contradictory, the conflicts of law rules are imperative but Spanish courts cannot apply the foreign applicable law of their own motion. In fact, the Spanish Civil Procedure Act (LEC) of 2000 expressly requires proof of the foreign law by the parties, in Article 281.2:

“The foreign law shall be proved with respect to its contents and operation and the court may use as many means of verification as it deems necessary for its application.”

VI. APPLICATION OF FOREIGN LAW

4. Article 282 LEC sets forth that:

All evidence shall be presented by the parties. Nevertheless, the court may of its own motion permit that certain evidence be presented or that certain documents be obtained, as may also other opinions or means of proof, when the law permits.

5. Artículo 281.2 says nothing regarding the case that it is impossible to know the contents of the applicable foreign law. Some favour the application of Spanish law but in some cases may be most appropriate to apply a foreign law - for example, in the case the conflict rule contains alternative connections. In that case, perhaps the foreign law designated by the second connection will be preferable to Spanish law. Finally, another thesis holds that in the absence of proof of foreign law, the court should dismiss the case

6. May the judge or court infringe the applicable foreign law? It is debated whether the case could be appealed in cassation to the Supreme Court. Article 477 of the Civil Procedure Act neither supports nor rejects the appeal for infringement of foreign laws. Case law has traditionally refused such an appeal, since the application of foreign law does not affect uniformity in the application of Spanish law

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Tema 9. – LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I)

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

The Rome I Regulation is an integral legal instrument dealing with the law applicable in contractual matters.

9.1 Scope of Application

Pursuant to its Article 1, the Rome I Regulation applies to: 1) contractual obligations 2) in civil and commercial matters 3) when they involve a conflict of laws. As in the preceding Rome Convention, the notion "contractual obligation" is understood autonomously and independently from any national concept in order to assure uniform application of the Regulation provisions. It has to be interpreted consistently with the same notion found in the Brussels I Regulation and it should not overlap with the scope of the Rome II Regulation because contractual obligations and noncontractual obligations are strict alternatives. The reference to civil and commercial matters indicates that the Regulation does not apply to public law matters, in particular, to revenue, customs or administrative matters. Some civil obligations are still outside the Regulation"s scope such as those related to family matters and matrimonial property regime, wills and successions, involving the status and legal capacity of natural or legal persons, arising under certain insurance contracts, certain negotiable instruments and trusts as well as pre-contractual obligations, arbitration and choice of court agreements and the issue whether agent may bind principle. Final condition for the Regulation"s applicability is a cross-border element of the case which is the reason for the issue of applicable law to arise in the first place.

Territorial scope of the Rome I Regulation includes all Member States save for Denmark which remains under the Rome Convention regime. For States with several territorial units having separate rules regulating contractual obligations, each territorial unit is considered as a country when determining the law applicable under this Regulation (Article 22). According to the temporal scope of application, the Rome I Regulation entered into force on 24 July 2008, but its application is postponed so as to cover only the contracts concluded as from 17 December 2009 (Article 28). It is important to note that the Rome Convention entered into force between Romania, Bulgaria and the other Member States on the 15 January 2008. Thus, the contracts concluded in between 15 January 2008 and 16 December 2009 are under its temporal scope of application.

The provisions on relationship with other legal instruments give priority to international conventions in the field to which one or more Member States are parties at the time when the Rome I Regulation is adopted, except when such conventions are concluded exclusively between the Member States. In the latter case, the priority is given to the Rome I Regulation (Article 25). Among the Hague conventions which take precedence are: the 1955 Convention on the Law Applicable to International Sales of Goods (Denmark, Finland, France,

Italy and Sweden) and the 1978 Convention on the Law Applicable to Agency (France, the Netherlands and Portugal).

The Rome I Regulation applies universally or erga omnes meaning that it is irrelevant whether the law of a Member State or a nonMember State is designated as applicable (Article 2). It also excludes renvoi, so that the reference to a certain law is a reference directly to the substantive rules of that law (Article 20). This exclusion improves foreseeability in legal relations and harmony of decisions intended by the EU legislator.

9.2 General Conflicts Provisions

Preserving the basic principle of the Rome Convention that contractual parties may choose the law governing their transaction (lex voluntatis), the Rome I Regulation introduces structural changes in the default rules. According to Article 3, the autonomy of the parties is quite wide: the choice of applicable law may be express or tacit, the latter if demonstrated with reasonable certainty by the circumstances of the case, such as the choice of court clause, reference to the specific national legal instrument, use of the form contract typical of certain national legal system, use of terms typical for certain national legal system, etc. Furthermore, the lex voluntatis may capture the whole or only a part of the contract and it may occur or be altered at any time. However, subsequent choice of another applicable law may not adversely affect formal validity of the contract or third party‟ rights. Additionally, the parties‟ choice of law to govern their contract, which at the time the choice was made was solely connected to a single country (intra-state situations), does not operate as a choice of law (Ger. kollisionsrechtliche Verweisung), but merely as a choice of contract terms (Ger. materiellrechtliche Verweisung). This means that legal provisions in the country of sole connection, which are not derogable by agreement (ius cogens), always apply. Transferred to the EU level, this principle dictates that in case where all other elements relevant to the situation at the time of the choice are located in one or more Member States without any connection to a non-Member State (intra-Union situations), the choice of a non-Member State law does not prevent the application of mandatory provisions (ius cogens) of the EU law.

In Article 4, the Regulation also determines which law applies if there is no agreement between the parties. While inspired by the general objective of the Regulation – legal certainty, the default provisions vary depending on characteristics of the parties or on the object of transaction. A contract for the sale of goods and the contract for provision of services are governed by the law of the country where the seller or the service provider has his or her habitual residence (lex firmae habitationis).

However, law of the country where the auction takes place applies to sale by auction. A franchise contract and a distribution contract are governed by the law of the country of the franchisee‟s or distributor‟s habitual residence, respectively.

A contract concerning a right in rem in or a tenancy of immovable property is subject to the law of the country where the property is situated (lex rei sitae), except in case tenancy envisages temporary private use for no more than six consecutive months and a tenant is a natural person. In a latter case the

applicable law is that of the country where both the landlord and the tenant have their habitual residences.

Specific contracts relating to certain financial instruments traded in multilateral systems are subject to the special conflict rule which points to the law of the country under whose non-discretionary provisions such system operates.

For contracts other than the mentioned ones or those covered by more than one of the mentioned relationships, the applicable law is determined by reference to the country where the party required to effect the characteristic performance has his or her habitual residence (Article 4(2)). This entails answers to two questions in a specific case before the court: which party affects the characteristic performance and where the habitual residence of that party is. Ascertaining the characteristic performance is based on the assessment of the socio-economic function of the contract in a certain legal system in order to identify the contractual obligation distinguishing that contract from other contracts. As for the habitual residence, there are helpful definitions in the Rome I Regulation. Thus, for a natural person acting in the course of his or her business activity, the connecting factor “habitual residence” is understood as his or her principal place of business, while for a legal person that would be the place of its central administration. However, where a contract is concluded in the course of the operations of a branch, agency or any other establishment, or if the contract performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence (Article 19). Conversely, the notion of the “habitual residence” for natural person acting outside his or her business activity is not explicitly defined in the Regulation; it is to be autonomously interpreted by the courts.

An escape mechanism is available if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the country to which any of the above allocations refers to, be it under the provisions for the specifically named contracts or the general provision for all other contracts. The escape clause allows the court to depart from the applicable law determined on the basis of the presumptions set out in the above-mentioned provisions and to eventually apply the law of more closely connected country, but the wording of the provision suggests that it is to be used in exceptional cases only.

Finally, where the law applicable cannot be determined applying the former provisions (such as in the case of a barter contract or a cross-licence contract where obligations are the same, or a joint venture contract where the obligations might be diverse and complimentary so that it is impossible to determine the characteristic performance), the law of the country with which the contract is the most closely connected applies. Assessment under this provision is done, first by establishing all the relevant territorial connections for an actual legal relationship (such as parties" habitual residences, place of the conclusion of the contract, places of the performance of the contractual obligations, etc.), and then by weighing those connections to decide towards which country they prevail.

9.3 Conflicts Provisions for Specific Contracts

Contracts for carriage are subject to special conflict rules in Article 5. Unless chosen by the parties, the law applicable to a contract for the carriage of goods is the law of the country of carrier"s habitual residence, but only if that is also the country where the place of receipt or of delivery or the consignor"s habitual residence is located. If not so, applicable is the law of the country where the place of delivery as agreed by the parties is situated. Where it is clear from all the circumstances of the case that the contract for the carriage of goods is manifestly more closely connected with a country other than that which the presumptions point to, the law of that other country shall apply. Like no other escape clause, this also does not affect the lex voluntatis.

In this context it is important to refer to the judgment of the EU Court of Justice in the case C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV. Although the case refers to Article 4(4) of the Rome Convention, it is relevant here because the Rome I Regulation is the replacing instrument which should assure continuity with the Rome convention to the extent that the concepts and/or provisions are not altered. In the case at hand, the notion of "the contract for the carriage of goods" is used in both instruments. The case concerned a charter party concluded between ICF, on the one side, and Balkenende and MIC, on the other. The contract provided, inter alia, that ICF was to make train wagons available to MIC and would ensure their transport via the rail network. Upon failure to receive payment, ICF sued MIC before the Dutch court. The dispute revolved around the issue of whether the claim was time-barred, which in turn depended on whether the contract was categorised as the contract for the carriage of goods or not and thus governed by Belgian law or Dutch law. The Court of Justice rules that the Article 4(4) of the Rome Convention includes contracts the main purpose of which is the carriage of goods, even if they are classified as charter-parties under national law. In order to ascertain that purpose, it is necessary to take into consideration the objective of the contractual relationship and, consequently, all the obligations of the party who effects the characteristic performance. The Court concludes that Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods. Furthermore, in regard to splitting the contract the Court of Justice was rather inflexible in that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent.

Pursuant to Article 5 of the Rome I Regulation, a contract for the carriage of passengers is primarily governed by the law which parties selected among the options listed in the Regulation. The closed list requiring connexity to exist between the chosen law and the contract in question is intended to assure protection to the passengers as the weaker parties. In the absence of such choice, the law of the country of the passenger"s habitual residence governs the transaction, provided that either the place of departure or of destination is also situated there. If not so, the law of the country of the carrier"s habitual residence applies. Here as well, the Regulation opens a route to escape the application of the law designated by the objective connections if it is clear from

all the circumstances of the case that the contract is manifestly more closely connected with another country.

9.4 Contracts with weak parties

Another special category are **consumer contracts** defined autonomously in Article 6 of the Regulation as the contracts concluded by a natural person for a purpose which can be regarded as being outside his or her trade or profession with another person acting in the exercise of his or her trade or profession. However, not all consumer contracts are within the protective umbrella, only those which are not explicitly excluded (Article 6(4)) and which are entered into under these specific circumstances: 1) the professional pursues commercial or professional activities in the country of consumer‟s habitual residence, or directs such activities to that country, and 2) the contract falls within the scope of such activities. These circumstances are to be understood coherently with the respective rules in the Brussels I Regulation. In described situations the parties may choose the applicable law but such choice may not deprive the consumer of the protection afforded to him or her by mandatory rules of the law designated under the subsidiary conflicts provision. The subsidiary provision states that consumer contracts entered into under specific circumstances are governed by the law the most familiar to the consumer, that of the country of his or her habitual residence.

Besides consumers, **employees** are regarded as weaker parties and their position in an individual employment contract is safeguarded by special conflicts provisions in Article 8. Although parties may choose applicable law under primary provision, such a choice of law may not deprive the employee of the protection afforded to him or her by the mandatory provisions of the law that governs in the absence of choice. Subsidiary applicable is the law of the country in which or, failing that, from which the employee habitually carries out his or her work. If it is impossible to determine the applicable law pursuant to this rule, the contract is governed by the law of the country where the place of business through which the employee was engaged is situated. The law applicable by virtue of the objective connecting may be declined if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Related to the individual employment contracts are two judgments of the EU Court of Justice concerned with the interpretation of Article 6 of the Rome Convention which corresponds to Article 6 of the Rome I Regulation. In the first of the two cases, the case C-29/10 Heiko Koelzsch v État du Grand-Duché de Luxembourg, Mr. Koelzsch, domiciled in Osnabrück (Germany), and the international transport undertaking Ove Ostergaard Luxembourg SA, formerly Gasa Spedition Luxembourg, established in Luxembourg, had entered into a contract of employment. Under that contract Mr Koelzsch, was engaged as an international driver for Gasa, transporting the plants from Odense (Denmark) to destinations situated mostly in Germany, but also in other European countries, by means of lorries stationed in Germany, namely in Kassel, Neukirchen/Vluyn and Osnabrück. The contract referred to the Luxembourg labour law, and conferred an exclusive jurisdiction on the courts of that State. Gasa did not have a seat or offices in Germany and its lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security. Mr Koelzsch was

elected as an alternate member of the company"s work council and soon after his employment contract was terminated due to company restructuring. He challenged the dismissal and claimed damages relying on mandatory provisions of the German law on protection against dismissal, claiming that this is the law that would be applicable in the absence of choice. The Luxembourg courts rejected his claims. He then brought an action for a declaration of liability against the État du Grand-Duché de Luxembourg (State of the Grand Duchy of Luxembourg) arguing that the judicial authorities of that State breached the Rome Convention provisions. In these proceedings the Luxembourg court made reference to the EU Court of Justice on whether in the situations such as in the case at hand the criterion of "the country in which the employee habitually carries out his work" or the criterion of "the place of business through which he was engaged". The Court of Justice held that the former connecting criterion can also be applied in cases where work is carried out in several Member States, as ruled in the earlier EU Court of Justice cases on the Brussels I Regulation. The preference for the former criterion is explained by more adequate protection for the employee who from the socioeconomic point of view is regarded as the weaker party in an employment contract. It follows that the first connecting criterion must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. Hence, in the light of the nature of work in the international transport sector, the courts seized has to determine in which State is situated the place from which the employee carries out his transport tasks and receives instructions concerning his tasks and organises his work, the place where his work tools are situated, the places where the transport is principally carried out and where the goods are unloaded as well as the place to which the employee returns after completion of his tasks.

The second case on individual employment contracts is case C384/10 Jan Voogsgeerd v Navimer SA. The relevant facts of the case state that at the headquarters of Naviglobe NV, an undertaking established at Antwerp (Belgium), Mr Voogsgeerd entered into a contract of employment of indefinite duration with Navimer SA, an undertaking established in Mertert (Luxembourg). The parties chose Luxembourg law to be the law applicable to that contract. Mr Voogsgeerd served as chief engineer on the ships MS Regina and Prince Henri, which belonged to Navimer, and whose navigation area extended to the North Sea, until he received the notice of dismissal. He sued Naviglobe and Navimer before the Belgian court, seeking a payment in lieu of notice in accordance with the Belgian labour law. In support he claimed that the mandatory rules of Belgian employment law were applicable, irrespective of the choice made by the parties regarding the applicable law. In that respect, Mr Voogsgeerd claimed that he was contractually bound to the Belgian undertaking Naviglobe, and not to the Luxembourg undertaking Navimer, and that he had principally carried out his work in Belgium where he received instructions from Naviglobe and to which he returned after each voyage. Under Luxembourg maritime law damages for the wrongful dismissal of that contract are time barred three months subsequent to dismissal. The Belgian court referred the questions on the interpretations of the connecting criterion of "the place of business through which he was engaged" assuming that in the case at

hand employee did not habitually carry out his work in any one country. In the spirit of usefulness, the EU Court of Justice returned one step back and gave an interpretation of the criterion of "the country in which the employee habitually carries out his work". Relying on the arguments presented in the former case, the Court of Justice stated that the national court seized of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his obligations towards his employer. The Court of Justice further explained that the factors characterising the employment relationship at hand, namely the place of actual employment, the place where the employee received instructions or to where he must report before discharging his tasks, are relevant for the determination of the law applicable to that employment relationship in that, when those places are located in the same country, the court seized may take the view that this place must be considered to be the place where (or from which) he habitually carries out his work.

Rather complex is the special scheme for **insurance contracts** in Article 7 (reinsurance contracts fall under general conflict of law rules). These special rules regulate insurance contracts for large risks situated in or outside the EU and all contracts covering the risks situated within the EU. To simplify, the former are subject to chosen law, or if none is chosen, to the law of the insurer‟s habitual residence. The latter are governed by the law chosen from the closed list assuring the connexity between the chosen law and the legal relationship at issue, or in default, by the law of the Member State in which the risk is situated at the time of conclusion of the contract. Where such contract covers risks situated in more than one Member State, for the purposes of determining the applicable law, the contract is considered separated to as many contracts as there are Member States involved.

9.5 Scope of Applicable Law and Validity of Contract

According to the non-exhaustive list in Article 12 of the Rome I Regulation, the scope of the law applicable to a contract encompasses issues such as its interpretation, performance, and the consequences of breach (to the extent the procedural law of the forum allows) including the assessment of damages in so far as it is governed by rules of law, the ways in which obligations are extinguished, prescription and limitation of actions, and the consequences of nullity of the contract. Pursuant to Article 18, the lex contractus also applies if, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof. On the other hand, the mode of proof of a contract or a legal act may be any mode recognized by the law of the forum, or by any of the laws applicable to formal validity if such mode of proof can be administered by the forum. In regard to the manner of performance and the steps to be taken in the event of defective performance which is subject to the lex contractus, regard shall nevertheless be had to the law of the country in which performance takes place.

The rule established under Article 10 states that the lex contractus applies to the issue of material validity. However, one has recall that questions involving the status or legal capacity are excluded from the scope of the Rome I

Regulation. This exclusion is limited by the following provision: When proving lack of consent, a person may invoke the law of the country of his or her habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the lex contractus. Additionally, when a contract is concluded between persons in the same country, a natural person may still rely on his or her incapacity under the law of another country, if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence (Article 13).

As much as the rules on formal validity in Article 11 differ depending on the circumstances or object of the transaction they basically aim at keeping the contract valid. Traditionally, formal validity of a contract concluded between persons present in the same country is governed by the lex contractus or the law of the country where concluded, whichever renders the contract valid. A distance contract may be formally valid either pursuant to the lex contractus, or to the law of any of the countries where either of the parties is present or had his or her habitual residence at the time of its conclusion. Form of a consumer contract is always subject to the law of the consumer‟s habitual residence. A unilateral act is formally valid if valid under the lex contractus, the lex loci actus, or the law of the country of that person‟s habitual residence at the time when taken. A contract the subject matter of which is a right in rem in immovable property or a tenancy thereof has to comply with the requirements of form prescribed by the lex rei sitae if by that law 1) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract, and 2) those requirements cannot be derogated from by agreement.

9.6 Mandatory provisions. Public policy

In exceptional circumstances, public interests may serve as basis for relying on the overriding mandatory provisions and public policy clause. Unlike its counterpart Rome II, the Rome I Regulation contains in Article 9 the first statutory definition of the overriding mandatory provisions: Provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Consequently, the overriding mandatory provisions are not all provisions which cannot be derogated from by the contractual stipulation (ius congens), but only such mandatory provisions which satisfy additional requirements set out in the definition. While application of such provisions of the forum law may not be restricted, those of a certain country may be given effect only if place of performance is in that country and in so far as those overriding mandatory provisions render the performance of the contract unlawful. The court‟s discretion to give effect to such rules is guided by the nature and purpose of those provisions and the consequences of their application or non-application. Additionally, the application of a provision of the law applicable pursuant to the Rome I Regulation may be refused under Article 21 if such application is manifestly incompatible with the forum public policy.

LESSON 10.- LAW APPLICABLE TO EXTRACONTRACTUAL OBLIGATIONS

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations (Regulation Rome II)

10.1 Scope of Application

As defined in Article 1 of the Rome II Regulation, it applies to: 1) non-contractual obligations 2) in civil and commercial matters 3) involving conflict of laws. Difference in relation to the Rome I Regulation scope concerns the first element. The interpretation of the concept of "non-contractual obligations" has to be carried out autonomously from any national legal system. Article 2 of the Rome II Regulation states that it includes both the obligations arising out of a tort or delict, and those resulting from unjust enrichment, negotiorum gestio (agency without authority) or culpa in contrahendo (pre-contractual liability). The Regulation also covers noncontractual obligations that are likely to arise. The concept should be complementary to the substantive scope of the Rome I Regulation so that an obligation cannot at the same time be contractual and non-contractual in nature. Furthermore, it has to be coherent with autonomous interpretations of respective terms in the Brussels I Regulation. In the settled judicial practise of the EU Court of Justice, a negative definition of non-contractual obligation is adopted so that it covers all (civil and commercial) obligations not covered by the notion of "contractual obligations". To be precise, the phrase "tort, delict or quasi-delict" in the Brussels I Regulation is to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (case C-26/91 Handte v Traitements Mécano-Chimiques des Surfaces). Further reference is thus made to the materials dealing with the Brussels I Regulation.

The notions of "civil and commercial matters" signify that the Rome II Regulation does not apply to public law matters, including revenue, tax and administrative matters or acta iure imperii (Article 1). Besides, the Regulation"s scope does not cover non-contractual obligations arising out of certain private matters including family relationships, matrimonial property regimes, negotiable instruments, company status, trusts, nuclear damage as well as privacy and personality rights. The last condition for applicability of the Regulation ratione materiae relates to the requirement that there must be a cross-border implication of the case. Otherwise, no conflict between two or more laws would arise.

Territorial scope of the Regulation encompasses all Member States apart from Denmark which did not opt-in. Pursuant to Article 25, where a state whose law is designated by the Regulation conflict rules comprises of several territorial units with own rules on noncontractual obligations, each territorial unit is regarded as a country for the purposes of identifying the law applicable under this Regulation. For instance, if damage has occurred in Glasgow, application of the general rules referring to the place of damage means direct designation of the Scottish law as the legal system of a territorial unit within the United Kingdom, the country with multiple legal systems.

Due to relatively unclear provisions of Articles 31 and 32, the Regulation"s temporal scope of application has been a matter of interpretation by the EU Court of Justice. In the case C-412/10 Deo Antoine Homawoo v GMF Assurances SA, the confusion was cleared so that the Rome II Regulation applies only to events giving rise to damage occurring after 11 January 2009, while that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope ratione temporis of the Regulation.

The scope of the Rome II Regulation is also limited as a result of its relationship with other legal instruments. According to the principle lex specialis derrogat legi generali embodied in Article 27, the special conflict rules in the EU instruments have the priority. The same applies, pursuant to Article 28, in regard to the international conventions to which Member States are parties at the time the Regulation is adopted. Among the Hague conventions these are: the 1971 Hague Convention on the Law Applicable to Traffic Accidents for 12 Member States (Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia and Spain) and the 1973 Hague Convention on the Law Applicable to Products Liability for 7 Member States (France, Italy, Luxembourg, the Netherlands, Portugal, Slovenia and Spain). These lists, however, in no way affect the operations of the Romanian courts since Romania is not a party to these conventions. What certainly affects the Romanian courts is a further provision which states that the international conventions binding merely between the Member States will no longer be effective.

Similarly to other EU instruments in the field, the Rome II Regulation is based on the erga omnes principle meaning that any law designated by the Regulation applies regardless of whether it is the law of a Member State or not (Article 3). For the same reasons as the Rome I Regulation, it also excludes renvoi (Article 24).

10. 2 General Conflicts Provisions

By its conflicts provisions the Rome II Regulation intends to accommodate two often opposing interests: the requirement of legal certainty and the need to do justice in individual cases. To contribute to legal certainty and to respect the contemporary trends of widening the reach of the parties" autonomy in the conflict of laws, Article 14 of the Regulation primarily allows limited option of choosing the applicable law. As under the Rome I Regulation, the choice may be expressed or tacit. The limitation specific to non-contractual obligations concerns the time of choice and is intended to guarantee protection to the weaker parties. A choice of law agreement may be entered into only after the event giving rise to the damage occurred, save when all the parties are pursuing a commercial activity when also an earlier agreement will be valid. Another limitation assures that it may not prejudice the rights of third parties. Furthermore, the mandatory rules (ius cogens) operate as a limitation to the choice of the law of a certain country in cases where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen (intra-state situations). This principle transferred to the EU level is expressed in a provision that ensures the application of the EU mandatory rules in cases where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States (intra-Union situations) yet the law chosen is of a non-Member State. In addition to these restrictions to the party autonomy, there are overriding mandatory provisions which affect also the law determined on the basis of objective connecting factors (see ad. 3.6 below). Some other limitations are dependant of the type of the non-contractual relationship; the exclusion of party autonomy covers unfair competition, restrain of free competition and intellectual property rights.

In cases where the parties did not choose the governing law for a non-contractual obligation arising out of a tort or delict, Article 4 designates the law of the country in which direct damage occurred (lex loci damni directi/lex loci laesionis). This connecting factor is an expression of the belief in the compensatory function of noncontractual liability. The situation in which direct damage arises in more than one country is subject to as many laws as there are places where the direct damage occurred; these laws distributively apply to the respective portions of the non-contractual relationship (mosaic approach). However, this connecting factor does not apply where the person claimed to be liable and the person sustaining damage both have their habitual

residence in the same country at the time when the damage occurs. In such a case the law of common habitual residence governs the relationship (lex firme habitationis communis).

Mentioned fixed provisions are softened by means of the general escape clause which enables displacement of the lex loci damni directi or lex firme habitationis communis with the law which is manifestly more closely connected with the tort or delict in question. As an example of the circumstances in which the escape clause may operate, the Regulation refers to the pre-existing relationship between the parties. For instance, if there is a non-contractual claim on the basis of non-existing contract, the law that would govern this contract may be deemed manifestly more closely related to the claim.

10.3 Special Provisions

General conflicts provisions are not applicable to the torts or delicts which, due to the interests involved, require special connections. One of them is product liability where the cascade system provided for under Article 5 contains connecting factors to be applied in the following cascade order: country in which the person sustaining the damage had his or her habitual residence when the damage occurred, the country in which the product was acquired, and the country in which the damage occurred, all relevant only under further condition that the product in question was marketed in that same country. Priority, however, belongs to the law chosen by the parties, and in cases they fail to do so, to the law of common habitual residence of the victim and the producer. Laws applicable on the bases of objective connecting factors (which do not include the party autonomy) will not apply if the producer could not have reasonably foreseen the marketing of the product or the product of the same type in a respective country. This “foreseeability clause” balances the risk between the producer and the victim, while the flexibility is assured by the possibility of relying on the special escape clause, identical to the general one.

Another category of special provisions in Article 6 involve noncontractual liability arising out of unfair competition and acts restricting free competition, where party autonomy is excluded. In the situation of unfair competition applicable is the law of the country where the competitive relations or the collective interests of consumers are, or are likely to be, affected. This, however, does not cover the situations in which an act of unfair competition affects exclusively the interests of a specific competitor, which fall under the general rules.

A non-contractual obligation arising out of a restriction of competition is governed by the law of the country where the market is, or is likely to be, affected. This means that in case where markets of several countries are affected, their laws apply to the respective portions of the obligation (mosaic approach). Given that this may cause complications in practice, the Regulation provides that a single law, that of the forum, may apply if the market of the forum state is directly and substantially affected by the restriction of competition. This decision is left to the sole option of the victimplaintiff.

A non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage is primarily governed by the law chosen by the parties (Article 7). Default rule provides that applicable is the law determined on the basis of the general rule on the applicability of the lex loci damni directi, unless a victim chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred (lex loci actus). The possibility of unilateral choice is established to the benefit of the person suffering damage, but also serves the purpose of promoting general principles of environmental law endorsed in the EU. This is counterbalanced by the alleged wrongdoer‟s possibility to assert non-actionability on the basis of rules of safety and conduct in the country in which the alleged wrongdoer acted.

When intellectual property rights (such as, copyright, related rights, the sui generis right for the protection of databases and industrial property rights) are infringed, Article 8 of the Regulation differentiates between national and unitary EU (formerly Community) rights. The infringement of the former is governed by the law of each country for which the protection is sought (lex loci protectionis). This rule reinforces the principle of territoriality, which limits the effects of an intellectual property right to the country of its protection and makes it independent from other parallel rights potentially existing in other countries. As a consequence, the number of applicable laws equals the number of countries for which the protection is sought (mosaic approach). In the case of the unitary EU intellectual property rights (such as the Union trademark, the Union design, the Union plant variety right), the territory in which they produce effects is not a single country but the EU as a whole. The principle of territoriality requires that the relevant EU legal instrument is applied. Nonetheless, any question not governed by such an instrument is subject to the law of the country in which the act of infringement was committed. Partie"s choice of law is not permitted in cases of intellectual property rights infringements.

The last of the special provisions in Article 9 concerns a noncontractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, whether pending or already carried out. In such cases primarily the general rule pointing to the law of common habitual residence applies. Subsidiary connection points to the law of the country where the action is to be, or has been taken that governs the obligation (lex loci actus).

Where damage is caused by an act other than tort or delict, and does not involve intellectual property rights, the Regulation provides special conflict rules distinguishing among pre-contractual liability (culpa in contrahendo), unjust enrichment, including payment of amounts wrongly received, (condictio sine causa) and benevolent intervention in another's affairs without due authority (negotiorum gestio). The culpa in contrahendo is an autonomous concept meaning a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, and includes the violation of the duty of disclosure and the breakdown of contractual negotiations. The conflicts provisions in Article 12 follow a cascade scheme where a succeeding rule applies in default of the former. Thus, for the culpa in contrahendo the first step is to apply the law that governs the contract or would apply to it had it been concluded. Failing that, the law of the country of the parties" common habitual residence governs the relationship. Finally, if there is no common habitual residence of the parties, the law of the county of direct damage applies. Both the law of the common habitual residence of the parties and the law of the direct damage may be displaced by the special escape clause where the relationship is manifestly more closely related to a country different from the designated law.

When any such obligation of the other two types (condictio sine causa or negotiorum gestio) concerns and is closely related to the relationship already existing between the parties, e.g. contractual or tortuous, it is governed by the same law that applies to that relationship (Articles 10 and 11, respectively). If this is not the case, applicable is the law of the country of common habitual residence of both parties at the time the event giving rise to damage occurs. If this does not lead to the applicable law, reference is made to the law of the place where unjust enrichment took place or where the act of intervening in another"s affairs is performed, respectively. Any of the former allocations may be bypassed relying on the special escape clause using the criterion of manifestly more close connection with another country.

10.4 Scope of the Applicable Law

According to Article 15, the law applicable to non-contractual obligations under the Rome II Regulation governs number of issues including, but not limited to, the basis and extent of liability, delictual capacity, liability for the acts of another person, the grounds for exemption from liability, any limitation of liability and any division of liability, the existence, the nature and the assessment of damage or the remedy claimed, the issue whether a right to claim damages or a remedy may be transferred, including by inheritance, persons entitled to compensation for damage sustained personally, the manner in which an obligation may be extinguished, and rules of prescription and limitation. To the extent that it falls within the powers conferred on the court seized by its procedural law, the lex causae also applies to the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation. Other matters of procedure fall under the lex fori. The issue of formal validity of a unilateral action related to a noncontractual obligation is treated separately in Article 21 and such validity exists if it is recognised under either the lex loci actus or the lex causae.

10. 5 Subrogation, Direct Action and Multiple Debtors

Subrogation is subject to the same conflicts provision that applies to the legal subrogation in the Rome I Regulation (Article 19). Such situations regularly occur where the insurance company paid damages to the victim on the basis of the insurance contract with the wrongdoer. The person suffering damage may bring the claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides (Article 18). If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor"s right to demand compensation from the other debtors shall be governed by the law applicable to that debtor"s non-contractual obligation towards the creditor (Article 20).

10.6 Public policy. Mandatory rules

A possibility to depart from the law determined on the basis of the aforementioned conflicts provisions is justified on the basis of public interest, and it may operate via different conflicts mechanisms. Thus, the application of a provision of the law of any country specified by the Rome II Regulation may be refused under Article 26, only if such application is manifestly incompatible with the public policy (ordre public) of the forum. This provision may be relied on to discard the law whose effect would be awarding non-compensatory exemplary or punitive damages of an excessive nature. In addition, the law applicable by virtue of the conflicts provisions may have to give way to the overriding mandatory provisions of the lex fori to the extent that the latter demand their application irrespective of the law otherwise governing the non-contractual relationship (Article 16). Finally, there are rules of safety and conduct. Such rules in force at the place and time of the event giving rise to the liability may be taken into account as facts and in so far as appropriate in assessing the conduct of the person claimed to be liable (Article 17).

LESSON 11.- LAW OF PROPERTY

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

11.1 General rule. Lex rei sitae

The general conflicts rule on property rights and interests is found in Article 10.1 CC, which states that:

Possession, property, and other rights over immovable goods, as well as pub licity, shall be governed by the law of the place where they are situated. The same law will be applicable to movable goods.

Therefore, the rule lex rei sitae is applied without distinguishing between movable or immovable goods. This rule is considered the general rule for the pro tection of rights over corporeal or material goods. The protection of rights and inter ests over intangible goods has a specific regime, and it is also the case with regard to cultural property pertaining to the Spanish cultural or patrimonial heritage.

The scope of the lex rei sitae rule includes the following issues: the system of constitution of rights in rem, conditions of modification, transmission, loss and extinction of rights in rem; content of a right in rem (rights and obligations of the holder of such right); effects of rights in rem in relation to third parties, publicity of the acts of constitution, transmission, and extinction of rights in rem constituted over movable and immovable goods. 5 Nevertheless, the lex rei sitae rule does not govern the issue of capacity to acquire rights in rem, which is under the nationality rule in Article 9.1 CC. It does not govern either formal validity issues of the legal acts necessary for the acquisition or transmission of property rights, which are gen erally submitted to the rule of Article 11 CC, or to Article 11 Regulation 593/2008, Rome I, in the case of contracts for the acquisition of property. Neither does the lex rei sitae rule govern issues of substantial validity of the title by virtue of which a real right is acquired or transmitted, such as a sale purchase contract, which is sub ject to Rome I Regulation with regard to the determination of the applicable law to the validity of the contract.

Article 10.2 CC establishes a particular rule for ships, aircrafts, and means of transport by railroad, giving preference to the law of the flag:

Ships, aircrafts and means of transport by railroad, as well as all the rights con stituted upon them, will be submitted to the law of the place of the flag, matriculation or registration of the respective country.

Immediately after, the lex rei sitae rule is applicable to means of transport by road:

Automobiles and other means of transport by road will be submitted to the law of the place where they are situated.

The distinction between the different means of transportation obeys to the num ber of transactions, far greater in relation to the means of transport by road, which may explain the interest of the State of the place of location to govern the issue.

11.2 Movable and Immovable Property

The Spanish legislator has not considered specific problems of precision of the lex rei sitae rule, such as property situated in two States or those situated in extraterritorial spaces. Neither has the legislator contemplated the fact that movable goods can be changed of location, thus ignoring the problem of 'mobile conflict' (conflicto móvil). The lex rei sitae rule lacks any temporal concretization in Spanish PIL. Article 10.1 CC submits movable property to the law of the country of loca tion, avoiding any mention to the problem of mobile conflict, although there are spe cial rules for goods in transit.

A distinction is made if property is integrated in an estate. In succession matters, the hereditary rights over goods pertaining to the decedent's estate are gov erned by the rule of Article 9.8 CC and not by the rule contained in Article 10.1 CC, as some judgments of the Spanish Supreme Court have pointed out. 116

If property does not form part of an estate, but is instead contemplated in an isolated way, as an independent patrimonial unit, in this case the applicable rule is Article 10.1 CC.17

11.3 Transfer of Property

Lex rei sitae governs modes of acquisition of rights in rem, the moment of transfer of ownership in a sale contract, or registration requirements of authentic documents in cases of mortgage contracts. In Spain, the transfer of ownership requires a title, generally a contract and an act of transmission (traditio), causally connected with the former.

The rule determining the applicable law to rights in rem does not govern the title of acquisition, which in most cases will be a contract. The regime of contractual obligations is determined by Rome I Regulation or, exceptionally, by Article 10.5 CC.8 Transfer of property effects of contracts is not governed by Rome I Regulation. Transfer, modification, or constitution of property rights are governed by the lex rei sitae (Articles 10.1 and 10.2 CC). The law of the place where property is located at the time of entering into the contract determines if the latter produces a direct transfer of property or only personal obligations, as is the case in Spanish law.

11.4 SPECIAL RULES

I. Goods in Transit

Article 10.1, paragraph 3 CC determines a fictional place of situation. According to this rule, goods in transit will be considered located in the place of expedition, unless the parties have agreed, tacit or expressly, that they should be considered located in the place of destination.

We are dealing here with a useful presumption for cases in which the goods are to be sold when still in the process of transportation. The rule is that the goods will be considered as located in the place of expedition, but if the parties have agreed so the property can be considered as located in the place of destination, which can also bring certainty as to the law applicable to the constitution and transfer of property rights upon goods in transit.

125. This special rule exclusively deals with the validity and content of rights in rem between contracting parties and cannot be opposed to bona fide third parties. The effects of property rights in relation to third parties will be determined, again, by the general lex rei sitae rule.

126. It can be submitted that the same rule is applicable to goods bound for exportation. Certainly in this case it seems more convenient for the parties to agree on the application of the law of the place of destination in order to anticipate the application of the laws of the market where property is to be located after expedition. 19

II. Other Special Rules

The lex rei sitae is applied to possession, property, and other rights or inter ests in rem over movable and immovable goods, such as usufruct, as well as secu rity interests (retention of title, pledge, mortgage, chattel mortgage).

In Spanish law, it is usually said that there is a numerus clausus system of property rights, and therefore it would be difficult to admit the validity of some property interests like the English floating charge.120 Even though the parties can create atypical rights between them, in their relations with third parties, only typi fied rights in rem are recognized. This raises the problem of the validity of property rights unknown to the applicable lex causae.

There is a lack of a specific PIL rules for security interests. Obviously, the problem refers to movable goods that may change their place of location. If the legal systems involved require different conditions as to the constitution and the effects of security interests, there is a problem of mobile conflict. The most commonly pro posed solution is to apply the same rule applicable to goods in transit. In this way, the security interest will be governed by the law of the place of the goods location at the time of constitution of the security interest. If the movable good changes its location to a different country, the content and effects of the security interest against third parties and in insolvency situations are governed by the law of the place of the new location of the good, but its validity and effects inter partes is to be ascertained by the law of the place of the original location. This means that if the law of the place of the new location is more restrictive than the previous one, because it requires, not only an agreement between the parties, but also, as is the case in Span ish law, a public registration of the security interest in order to exercise the right and oppose it to third parties, it would be necessary to proceed to the completion of the requirements of the law of the place of the new location.

As a clear example of a security interest, the retention of title enables the seller to retain title of ownership of the sold goods until the deferred payments of the sale price have completely been made. In this manner, in case of non performance of the payment obligation, the seller may claim the goods back exer cising his ownership rights against the buyer or even against a third party. Retention of title must be governed by the property rights conflicts rule (Article 10.1 CC), and not by the law of the contract. The constitution of this security interest is to be gov erned by the law of the place of the location of the goods at the time of entering into the sale purchase contract that includes a clause of retention of title. This law will be applicable to the formal and substantial validity requirements and effects of the security interest, such as the existence of a right of seizure over the goods or their liquidation value. If the movable goods change of country of location, the con tent and effects of the security interest against third parties or in situations of insol vency will be governed by the law of the new place of location of the goods.

LESSON 12.- PERSONAL STATUS AND CHILD PROTECTION

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

12.1 NATURAL PERSONS

Legal Capacity

Legal capacity is one of the institutions included in the so-called matters of personal status, which include those legal institutions that establish the legal con dition of an individual. The Spanish legal system offers a wide concept of personal status, as it includes issues related to capacity of individuals, birth, extinction of per sonality, and legal rights inherent to personality. This also includes family rights, obligations and succession by death. It should be noted that the protection of per sonality rights (right to life, personal and family honour, physical integrity, personal intimacy) is also recognized beyond the conflicts method, since those are fundamental rights with international and constitutional protection.

According to Article 9.1 CC:

The personal law which corresponds to natural persons is determined by their nationality. This law governs capacity and civil status, family rights and obli gations and succession by death.

Capacity is governed by the personal law of natural persons, which in Spanish law is determined by nationality. This solution refers to capacity in a generic way, which makes it difficult to determine whether within its scope we can include not only the general capacity of a person but also special capacity requirements for the performance of certain legal acts. The majority opinion is that the law of nationality governs all capacities. The law of nationality determines legal capacity (entitle ment to rights and obligations), as well as capacity to act (to execute legal acts). Therefore, the Spanish legal system does not follow the common law rule which states that special capacity requirements for the execution of certain acts are governed by the lex causae. In Spanish PIL, the national law of a natural person is always the law applicable to issues of capacity to execute legal acts and not the lex rectori acto.

For instance, the consequences of marriage upon the name of the spouses or their contractual capacity or, in more general terms, upon their legal capacity to act, are issues outside the scope of the law applicable to the matrimonial regime. Such issues will be solved according to the personal law determined by Article 9.1 CC and therefore to the law of the nationality of the spouse whose name or legal capac ity to act may be subject to change as a result of marriage. Nevertheless, if the wife's contractual capacity is denied or diminished as a consequence of this rule, resort to the public policy exception may imply the exclusion of any foreign law that intro duces unjustified sex discriminations from the Spanish constitutional perspective.

There are other exceptions to the application of the personal law determined by nationality. One of them is the exception of national interest that allows applying the lex loci actus instead of the law of nationality of the parties to the contract (Article 10.8 CC), a rule that has been replaced for most cases by the similar Article 13 of the Rome I Regulation on the law applicable to contractual obliga tions. Article 10.8 CC lays down that:

According to the Spanish legal system an onerous contract celebrated in Spain by a foreigner, who is considered incapable pursuant to his national law, shall be valid if the cause of incapacity is not recognised by the Spanish legislation. This rule will not be applied to contracts relating to property situated in a foreign country

Another exception has to do with the fact that the Spanish PIL system does not allow the application of foreign laws that are against Spanish public policy (Article 12.3 CC). For instance, laws establishing civil death or laws going against the principle of non-discrimination, as it is the case of the laws that establish the incapacity of a married woman.

The third exception has to do with the doctrine of renvoi. In cases where the lex causae uses the domicile as a connecting factor, there could be renvoi if such domicile is situated in Spain (Article 12.2 CC allows a single or first-degree renvoi).

Another important exception to the law of nationality is to be taken into con The same connection, i.e., the law of the person's nationality, governs special situations of incapacity of natural persons. Limitations on capacity are a matter reserved for statutory law. Declarations of absence or death are also under the national law rule. Incapacitation of adults has also been governed by the person's national law, which is sociologically of some importance in Spain because elderly people from other European countries take residential homes as retirees and their eventual incapacitation would be governed not by Spanish law but by their personal law. Unfortunately, Spain has not ratified the Hague Convention on the protection of adults. However, the result of the recent amendment to Article 9.6 CC (Act on the system of protection of infancy and adolescence 2015) has been the inclusion of a new paragraph dealing the protection of adult people which refers the issue to the application of the law of habitual residence.

Second paragraph in Article 9.1 CC governs the effects of a change of nationality when this mobile conflict might have as a result the loss of the legal capacity acquired under another personal law: "The change of personal law will not affect the full legal age acquired in conformity with a previous personal law.'

Legal persons

The general choice-of-law rule applicable to legal persons is Article 9.11 CC that sets out the following: "The personal law in relation to legal persons is the one determined by its nationality, and it will govern questions related to capacity, incorporation, representation, operation, transmission, dissolution, and extinction."

This rule uses a wide concept of legal persons which includes all 'organi zational forms' that develop a function which is similar to those developed by 'legal persons' admitted in civil and commercial law: associations, foundations, private limited companies, public limited companies and so on. Therefore, the rule is applicable irrespective of the legal form taken by the legal person and without consideration given to whether such legal form exists under Spanish law."

The employment of nationality as the connecting factor for legal persons encounters some difficulties. Article 9.11 CC does not precise the criteria to deter mine the nationality of a legal person, neither Spanish nor foreign. Therefore, there is a need to resort to other complementary rules for each legal person category. With regard to capital companies, such as public limited companies (sociedades anónimas) and limited liability companies (sociedades de responsabilidad limitada), Article 8 LSC (Act on Capital Companies 2010) follows the real or effective seat theory, laying down the rule that capital companies that have their domicile in Span ish territory will be considered Spanish and will be governed by the Spanish law. Additionally, capital companies which have their principal establishment or exploi tation in Spanish territory must have their domicile in Spain (Article 9.2 LSC).

12. 2 Nationality

Nationality as a connecting factor may require the solution of problems posed by the existence of stateless persons and persons with multiple nationalities.

In cases of more than one nationality, Article 9.9 CC gives a solution distinguishing between double nationality situations foreseen by Spanish laws and those situations of double nationally that are not regulated by the Spanish laws. Article 9.9 states that:

To the effects of this chapter, double nationality situations foreseen by Spanish laws will be governed by international treaties, if nothing is established, the nationality that corresponds with the last habitual residence shall be preferred, and in its defect, the last one acquired. The Spanish nationality shall prevail over other nationalities that are not foreseen in our laws or in international treaties.

The rule is only applicable to positive conflicts of nationality, but not for determining a person's nationality (this confusion can be seen in the case that gave rise to the Decision of the European Court of Justice, 7 July 1992, Micheletti v. the Government Delegation of Cantabria, Spain).

Double nationality situations foreseen by Spanish laws are a consequence of the existence of double nationality treaties with Iberian-American countries or with other countries that have had a particular historical connection with Spain since they do not lose the Spanish nationality of origin (Article 11.3 Spanish Con stitution). Another hypothesis of double nationality foreseen by Spanish laws regards the case of a Spanish national that keeps Spanish nationality by express dec laration made within a three-year period after having acquired a foreign nationality. The solution to the first case, i.e., double nationality situations foreseen in a treaty, depends on the content of the international treaty. In double nationality treaties signed by Spain with Iberian-American Countries, only one nationality is active, while the other one stays latent until the former nationality is reactivated. The active nationality determines the personal law for conflict of laws issues. This active nationality will be, according to the terms of the different treaties, that of the per son's habitual residence (as it is the case in treaties with Chile, Peru, Guatemala, Nicaragua, Bolivia and Honduras) or the most recent nationality (as it is foreseen in treaties with Argentina, Paraguay, Colombia, Ecuador, Costa Rica and Dominican Republic). Apart from treaties on double nationality, Article 9.9 CC sets out the rule for double nationalities situations foreseen by Spanish laws that the prevailing nationality shall be that of the last habitual residence or, in absence of a habitual residence, the last acquired nationality.

Double nationality situations not foreseen in Spanish laws are also frequent because of the effect of different legislations on the attribution and acquisition of nationality. Here the distinction to be made is whether one of the nationalities is Spanish or whether all of them are foreign nationalities. In the first case, Spanish nationality always prevails.74 If the person possesses several foreign nationalities, the law of the habitual residence will be applied (Article 9.9, paragraph 2 in fine).

Article 9.10 CC governs situations such as statelessness or indeterminacy of nationality, substituting nationality with habitual residence as connecting factor in Spanish system domicile is equal to habitual residence according to Article 40 CC).

12.3 Scope of the law applicable to personal status

Despite the wording of article 9.1 CC, the national law designated as "personal law" does not regulate numerous legal issues relating to the person, for instance, marriage, filiation, the protection of minors and incapable or maintenance between relatives, which are subject to specific rules of conflict.

Accordingly, the issues covered by article 9.1 CC are few: a) capacity of natural persons; (b) Declaration of absence and death; (c) major and minor age; (d) gender; (e) emancipation.

12.4. Protection of children

The issue of the protection of minors includes a variety of institutions such as parental custody, guardianship and other protective measures with the common purpose of child protection. All these institutions of minor's protection used to be subject to the national law of the minor according the conflicts solution laid down in Article 9.6, paragraph 1 CC:

[T]he guardianship and other institutions of protection of incapable individuals shall be governed by his/her national law.

However, the entry into force of the Hague Convention, 19 October 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, having a universal scope of application replaced for most practical purposes Article 9.6 Spanish Civil Code, establishing as the basic conflict-of-laws solution the appli cation of the lex fori.196 Art. 9.6 CC has been redrafted by Law 26/2015 to include a mere reference to the application of the 1996 Hague Convention.

With respect to the prevention of child abduction by one parent the issue is subject to the 1980 Hague Convention on the Civil Aspects of International Child Abduction and to Regulation (EC) 2201/2003, on International Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, and also to the Spanish Minor Protection Act 1/1996, 15 January 1996.197 The 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Cus tody of Children should also be taken into consideration.198

1. Affiliation (paternity)

Article 9.4 CC has been entirely redrafted by Law 26/2015 on the system of protection of infancy and adolescence substituting the national law as connecting factor by the law of the place of habitual residence of the child. Article 9.4 CC now sets out that:

”The determination and character of natural affiliation shall be governed by the law of the habitual residence of the child at the time of the affiliation determi nation. In the absence of a habitual residence of the child, or if this law would not allow the declaration of affiliation, the national law of the child shall be applied.”

With the expression character of the natural affiliation' the distinction between matrimonial (legitimacy) and non-matrimonial affiliation (legitimization) is avoided, because the legal effects of both sorts of affiliation are the same, and dis tinctions between legitimate and illegitimate affiliation are unjustified in Spanish law (Article 39.2 CE).

The Spanish legislator's choice in favour of the law of the child's habitual residence protects the interests of the child and also avoids the discrimination that would imply the application of any of the parents' law. This rule has been intro duced in order to make the affiliation process easier since in most cases the situa tion will imply a minor residing in Spain and applying Spanish law to paternity actions filed before Spanish Courts will avoid the application of foreign laws in most cases. Of course, there will also be some cases of minors with habitual resi dence in a foreign country, being the domicile of the defendant in Spain the juris dictional basis for the exercise of Spanish jurisdiction, The child's habitual residence, or in its defect, the national law of the child,

governs the different kinds of affiliation and related presumptions, as well as evidentiary means, although cer tain requirements of procedural nature in the Spanish code of civil procedure (LEC) should also be followed. Spanish law admits the validity of biological means of evidence establishing paternity, and admission of this means of proof is characterized as pertaining to Spanish public policy, even against foreign applicable laws that do not admit this kind of evidence.

2. Adoptive affiliation

Adoptive affiliation is under the rule in Article 9.5 CC, which refers mat ters related to the granting of adoptions by Spanish authorities and recognition of foreign adoptions by Spanish Courts, to the International Adoption Act, 28 Decem ber 2007,200 which contains specific rules of applicable law (Articles 18–24) and recognition of foreign adoptions (Articles 25–31), although the 1993 Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption must also be taken into consideration.201 Article 18.1 International Adoption Act 2007 states that requirements of an adoption to be granted by a Spanish judge will be governed by Spanish law. However, according to Article 19, the national law of the adopted child should be observed in matters of capacity and necessary consents if the child is habitually resident outside Spain or if he does not acquire the Spanish nationality as a consequence of the adoption. The applica tion of the national law of the adopted child is only justified where the Spanish authority considers that it enhances the possibilities of recognition of the adoption in the country of the nationality of the adopted child (Article 19.2 International Adoption Act 2007). Non-acquisition of the Spanish nationality as a result of adop tion affects all individuals over the age of 18, because in such cases Spanish nation ality is not automatically granted; instead, there is a right of option according to Article 19.2 CC.

Of particular interests are the situations of conversion from a Moroccan kafala to a Spanish adoption which may be granted by Spanish authorities without much con trol of the requirements for its recognition in Morocco. Thus, an adoption can be granted in Spain by Spanish authorities according to Spanish law over a minor of Moroccan nationality whose habitual residence is in Spain because previously a Moroccan kafala has been granted by Moroccan authorities in favour of two Span ish nationals 202 This situation has led Morocco to complain publicly and to reiter ate the need for more controls on the constitution of kafalas and its recognition in Spain, while Spain declared its willingness to give a clear solution to this issue in its adoption laws 203 The International Adoption Act 2007 governs the recognition of kafalas in Spain in Article 34 (amended by Law 26/2015) which refers to the legal effects in Spain of foreign decisions on the protection of minors that do not create a filiation relationship (status filii), such as the Moroccan Kafala, and the new Article 34.2 imposes on the Spanish authorities in charge of the Civil Registry an obligation to control the validity of the foreign decision.

In order to expedite adoptions by Spanish citizens in a foreign country, the consular adoption is permitted whenever the receiving State of the Consul allows it and the adoptive child has his/her domicile in the consular demarcation. The consul will apply Spanish law (Article 17 International Adoption Act 2007).

Spanish legislation tries to guarantee the international validity and effectiveness of adoptions granted by Spanish courts. That is the reason behind the rule establishing that the judge may require, as long as it is so petitioned by the adopting parent or the State Attorney, the application of the laws of the nationality or habitual residence of the adoptive parent or the adopted child in relation to the necessary consent or authorizations for the adoption (Article 20 International Adoption Act 2007).

If the adoption is granted by a foreign authority, questions of recognition may arise. Article 26.1 International Adoption Act 2007 (amended in 2015) provides the

requirements for validity in Spain of an adoption constituted by foreign authori ties when no international conventions are applicable. First, it should have been constituted by a competent foreign authority. Second, the adoption should not be against public policy. There is a need to emphasize the fact that Spain does not rec ognize adoptions made abroad by a Spanish adoptive parent if the effects of that adoption constituted in a foreign country do not substantially correspond with those of the Spanish legislation, in what is known as the 'effects equivalency test' (Article 26.2 International Adoption Act).204 This rule prevents the recognition of foreign legal institutions as adoptions where the effects are not equivalent because the for eign institution does not create an affiliation bond between adoptive parent and adoptive child or because it does not require the dissolution of prior natural affili ations, or only give effect to a revocable affiliation 205 This last obstacle can be solved if there is a waiver of the right to revoke the adoption before the minor is brought to Spain and waiver is made in an authentic act or before the Judge respon sible for the Civil Registry (Article 26.2).206 In the case of foreign adoptions which have lesser effects than those foreseen in Spanish Law (‘simple adoptions', as opposed to full adoptions), these may have effects in Spain, but will not be regis tered in the Civil Registry as adoptions and shall not be enough to obtain Spanish nationality, although simple foreign adoptions can be transformed into full adop tions by Spanish authorities (Article 30).

12.5 Maintenance

The legal and social relevance of the right to obtain food has been elevated to the category of human right recognized and protected beyond borders: at a generic level, with the Universal Declaration of Human Rights of 10 of December 1948 (article 25.1) and the International Convention on Economic, Social and Cultural Rights of 19 December 1966. Within the framework of cooperation between State authorities, it may be mentioned the United Nations Convention of 20 June 1956 on recovery abroad of maintenance, as well as the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (in force in Spain since August 1, 2014).

1. Regulation 4/2009

Regulation (EC) No 4/2009 of the Council of 18 December 2008 concerning competition, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations entered into force on January 30, 2009.

The so-called Brussels III Regulation, shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity. (art. 1.1).

The Regulation does not provide a notion of "maintenance obligations", so it must be interpreted autonomously (Recital 11 of the Regulation). In this regard, the case law of the CJEU regarding the interpretation of the Brussels I Regulation may be applicable.

Regulation 4/2009 deals with the three traditional issues of private international law: international jurisdiction, applicable law and recognition of judgments. Furthermore, it includes provisions on legal aid and cooperation between central authorities. The 4/2009 Regulation applies in all Member States, although with certain qualifications in relation to Denmark, where it does not apply regarding administrative cooperation between authorities and the applicable law.

Regarding the law applicable to the maintenance obligations:

Article 15 R 4/2009 incorporates by reference the solutions contained in the Hague Protocol of 2007 on the law applicable to the maintenance obligations. Hence, the applicable law is determined according to the Protocol, for all Member States except

for the United Kingdom and Denmark, States which are not bound by the 2007 Hague Protocol.

The Protocol includes two sets of general rules, to determine which law applies to maintenance obligations.

1) Firstly, article 3.1 of the Protocol requires that maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise."; that is, where there are special rules.

(2) Then, the Protocol supports a limited party autonomy of the parties to choose the law applicable to maintenance obligations. In this regard:

(a) Article 7.1 of the Protocol states that, 'Notwithstanding Articles 3 to 6, the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation'. Therefore, the parties may choose the lex fori (law of the country where the claim has been brought).

(b) Furthermore, according to art. 8.1 Protocol, the parties may choose among certain laws as the applicable law: i) the law of a State of nationality of either party at the time of the designation; ii) habitual residence of either party at the time of designation; iii) law designated by the parties as applicable, or the law in fact applied, to their property regime or iv) the law applied, to the divorce or legal separation . But there are certain limits: the parties may not choose the applicable law regarding a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest. (article 8.3 of the Protocol).

The Protocol also contains certain basic terms of Private International Law: thus, it excludes renvoi (art. 12); includes an ordre public clause (art. 13) and contains certain particular solutions for the resolution of internal conflicts (arts. 15-17).

When the Regulation does not apply, Article 9.7 Spanish Civil Code applies, which also refers to the provisions of the Hague Protocol of 2007.

12.6 Law applicable to parental responsibility

In relation to the question on the law applicable to parental responsibility, the Regulation 2201/2003 (Brussels II bis) does not apply (the Regulation only deals with jurisdiction, recognition and enforcement, but not with choice of law issues). Instead, the applicable law is to be determined under the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. This Convention has universal or erga omnes effect. That means that its rules may lead to the application of the law of a State which is to party to the Hague Convention. This implies a de facto derogation of art. 9.6 Spanish Civil Code (provision which establishes the law applicable to parental responsibility).

According to art. 15.1 1996 Hague Convention, for the protection of the person or property of the child, the authorities of the Contracting States with jurisdiction, shall apply their own law. The application of the lex fori thus avoids having to establish the contents of a foreign law. However, according to art. 15.2 1996 Hague Convention, in so far as the protection of the person or the property of the child requires, the court may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Finally, regarding the law applicable to the attribution and exercise of parental responsibility, arts. 16-17 1996 Hague Protocol refer to the law of the State of the child's habitual residence. In this way, the competent courts which typically would be the courts of the habitual residence of the child (art. 8 Brussels II bis Regulation) would be also applying their own national law.

LESSON 13.- MARRIAGE

DERECHO INTERNACIONAL PRIVADO

Ana Mercedes López Rodríguez, *Ph.D.*

UNIVERSIDAD LOYOLA ANDALUCÍA
C/ Energía Solar, 1
41014 Sevilla
Tel. +34 955 641 600 (Ext. 450)
amlopez@uloyola.es
www.uloyola.es

13.1 Validity, capacity and form

Marriage is a constitutional right connected with the right of equality between men and women, which is also a principle of public policy (Article 32 Spanish Constitution). The right to marriage is open to heterosexual and same-sex relationships. Same-sex marriage was made possible in Spain following reform of Article 44 Civil Code by Act 13/2005, in force from 3 July 2005, and this possibility is also applicable to foreign citizens getting married in Spain, even though the law of their nationality does not recognize same-sex marriages.

A polygamous marriage is incompatible with Spanish public policy, although some favourable effects for the women concerned can be recognized.

The celebration of marriage requires the consultation of multiple laws, since the applicable law is not confined to a single choice-of-law rule. There is a distinction between issues related to capacity and consent and issues related to formal validity.

Consent is an essential requirement for the validity of marriage and it is submitted to the spouses' personal law (Article 9.1 CC, as an issue related to civil status). For the same reason, requirements related **to capacity are submitted to the personal law of each spouse**, although the marital bond impediment is **subject to the public policy** exception in cases of polygamous or polyandrous marriages.

Regarding **same sex-marriages**, Spanish authorities have ruled that a marriage celebrated between a Spanish national and foreigner or between foreigners residents in Spain who are of the same gender will be valid, by application of Spanish substantive law, although the national legislation of the parties does not allow or does not recognize the validity of such marriages. This is so if the marriage has been celebrated in Spain or in another country.

In relation to the **form of marriage**, the Spanish system conceives a solemn act that requires for its validity the manifestation of consent in a certain form and with the intervention of certain authorities in the presence of witnesses. These requirements do not preclude the admission of informal marriages if they are admit ted in the place where the celebration took place and the spouses have their resi dence in that territory.

The celebration of marriage is allowed in a plurality of forms, civil or religious. The validity of religious forms requires the existence of an agreement between the State and the confessional group (Evangelical, Hebraic, Islamic or Canon law marriages), but all forms have the same civil effects, the only distinction is the competent intervening authority. The control of capacity to marry is done in a different moment depending on the religious authority who is to intervene in the marriage, while for Evangelical and Hebraic it is done prior to the marriage, in the same way as it is done for the civil marriage (Article 56 CC), Canon and Islamic marriages benefit from a control done ex post (Article 63 CC). These religious forms, different from the Canon law celebration, are not possible where marriage between Spanish citizens is celebrated in a foreign country, because it is understood that the agreements with the different religious entities (Islamic, Hebraic and Evan gelical) have a strict territorial scope of application."

According to Article 49 CC, Spanish citizens can legally marry in or out side Spain. In the latter case, marriage can be celebrated according to the Spanish law (consular marriage foreseen in Article 51.3 CC) or in conformity with the law of the place of celebration (Article 49 CC). A marriage celebrated in Spain, if at least one of the spouses is Spanish, only admits the form of marriage regulated under Spanish domestic laws. If marriage is celebrated in Spain between foreigners, Article 50 CC

allows the celebration of marriage in conformity with Spanish laws, as the law of the place of celebration, or in accordance with the national law of any of the spouses. In this way, foreigners can celebrate marriages in Spain according to the civil form foreseen by Spanish law, but also in the different religious forms admissible in Spain, or in the form established by the personal law of any of the spouses, including consular marriage or religious forms admitted by those national laws. This makes possible the celebration of marriages between foreigners in Spain in all the religious forms permitted by their national laws, but not if one of the spouses is a Spanish citizen, since for Spaniards the only religious forms admissible are those 'legally foreseen by Spanish laws'.

Marriages celebrated in a foreign country between Spanish citizens or if any of the spouses is Spanish, will be valid if they are in conformity with the civil form foreseen by the law of the place of celebration, or with the religious forms admitted by the same law. The civil and religious forms admitted in Spanish law are also possible through a consular marriage (Article 51.3 CC). Consular marriage of a Spanish citizen in a foreign country in the presence of a foreign consular authority is admitted, provided that the Vienna Convention on Consular Relations is observed; moreover, international practice and customs, require that none of the spouses can be national of the State in which the consul exercises his/her functions and that at least one of the spouses must be Spanish citizen.

13.3 Legal effects of marriage

The applicable law designated by Article 9.2 CC will govern the so-called effects of marriage, which is a much wider concept than the matrimonial property regime, since those effects of marriage of a personal nature should also be considered under that legal category. This unitary solution to the personal and property effects of marriage avoids conflicts of characterization, but the expression 'effects of marriage can be criticized for the reason that its origin can be traced back to Canon Law and includes those personal duties deriving from marriage (Articles 66–71 CC) whose enforceability would be against the principle of individual free dom of the spouses and are therefore not enforceable in the Spanish legal system.

A) Personal effects: Art. 9.2 Spanish CC provides that the law applicable will be the ”common personal law of the spouses at the time of celebration of their marriage”, personal law being determined by nationality. Only in case spouses are of a different nationality at the time of celebration of their marriage may the subsidiary connecting factors be applied, but always in a hierarchical way: i) the spouses may choose the applicable law limited to the law of the nationality or habitual residence of any of the spouses before the celebration of the marriage and formulated in an authentic document; ii) If the two preceding factors are not applicable, the law will be the law of the first common habitual residence of the spouses after marriage; iii) if the spouses have not had a coomon habitual residence immediately after the celebration of the marriage, the law of the place of celebration of the marriage will apply.

B) Matrimonial property

On 24 June 2016, the EU council adopted two regulations concerning common rules on jurisdiction, applicable law and the recognition and enforcement of decisions in the area of the property regimes of international couples. One regulation covers marriages and the other covers registered partnerships (Regulation 1103/2016 and 1104/2016, respectively).

The regulations are a continuation of the EU harmonization process in the field of international private law, complementing the already existing instruments regulating jurisdiction and applicable law concerning divorce (Brussels II bis regulation and Rome III regulation) and succession (the Succession regulation). The objective is to clarify the

rules applicable to property regimes for international married couples and registered partnerships in order to avoid parallel and possibly conflicting procedures in different EU Member States. The regulations entered into force on 29 January 2019.

Scope of the **Regulation 1103/2016 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes**

The Regulation will be directly applicable only in those EU countries which are party to the Regulation (Belgium, Cyprus, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, Czech Republic, the Netherlands, Austria, Bulgaria Sweden and Finland). The countries that did not adopt the Regulation – Ireland, the United Kingdom and Denmark – are to use choice of law rules as defined by their national law.

According to article 20 of the Regulation, the **rules on applicable law are universal in scope**. Thus, the law of any state, including states that are not members of the EU, may be found to be applicable. The law provided by the Regulation is applicable on all assets, irrespective of in which country the assets are situated (art. 21).

The Regulation does not define 'marriage', which is defined by the national laws of the Member States. Lacking a unified definition, it is reasonable to presume that each Member State may decide whether the Regulation is applicable to same-sex marriages. Member States that do not recognize samesex marriages in their national law, but do recognize registered partnerships, may choose to apply the Regulation regarding registered partnerships instead.

APPLICABLE LAW

The spouses may choose which state's law they want to be applicable to their matrimonial property regime, insofar as they select the law of a state in which at least one of the spouses is habitually resident or a national (art. 22). The law chosen may be later changed, but without detriment to third parties (article 22 (2) and (3)). The Regulation also includes rules on the formal and material validity of the choice of law (articles 23 and 24).

In the absence of choice, the Regulation stipulates that the law applicable to the matrimonial property regime shall be the law of the State of the spouses' first common habitual residence at the conclusion of the marriage (art. 26.1 a). Failing that, the applicable law shall be the law of the state of the spouses' common nationality (art. 26.1. b). Common nationality ought to be an easily verifiable criterion. In cases where the spouses do not share a common nationality, the applicable law shall be the law of the state with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances (art. 26.1 c) This criterion is contrastingly vague when compared to the previous criterion of common nationality.

As it is usual in the European Regulations, the regulation contains rules on internationally mandatory rules (article 30), order public (article 31), the exclusion of renvoi (article 32), and a referral to States with more than one legal system (articles 33 and 34). But it excludes its application to purely internal conflicts (article 35).

13.4 Dissolution of the marriage

Annulment

Article 107.1 CC (Act 11/2003, 29 September 2003) establishes that the nullity of marriage and its effects shall be determined according to the law applicable to its

celebration. Therefore, the law applicable to nullity depends on the legal requirement of validity that has not been observed. If nullity is a consequence of lack of consent or capacity, the national law of the spouse whose consent or capacity is under scrutiny will be the governing law applicable to nullity. If it is a question of form, laws applicable to the formal validity of marriage are applicable to nullity challenged on formal grounds. No matter what law governs nullity, in Spain the intervention of the Public Prosecutor (Ministerio fiscal) is required (Article 749 Civil Procedure Act (LEC), 1/2000, 7 January 2000).

The law that governs nullity is also applicable to the effects of nullity, including the existence of a putative marriage (the Spanish Civil Code understands that the declaration of nullity of a marriage does not invalidate the effects already produced with respect to offspring and to bona fide spouses', Article 79 CC).

Divorce

In Spain, as in many other countries, there is a basic distinction between separation and divorce (only the latter implies dissolution of marriage). While separation, as a cessation of cohabitation, can be a separation of fact or judicially declared, divorce can only be the consequence of a judicial decision to that effect. Article 107.2 CC established the choice-of-law rule applicable to legal separation and divorce; however, this conflict-of-laws regime for divorce was radically changed because of the entering into force of Regulation 1259/2010, Rome III, 20 December 2010, implementing enhanced co-operation in the area of the law appli cable to divorce and legal separation, on 21 June 2012, in Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and Lithuania. It should be reminded that its universal scope of application implies that Article 107.2 CC no longer could be applied by Spanish courts and to this effect Article 107.2 CC has been redrafted by Law 15/2015 (in force from 23 July 2015) only to affirm that separation and divorce will be governed by the choice-of-law rules of the EU.

The **Regulation 1259/2010** implementing enhanced cooperation in the area of the **law applicable to divorce and legal separation (called Rome III Regulation)** provides citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, protects weaker partners during divorce disputes and prevents 'forum shopping'. This also helps avoiding complicated, lengthy and painful proceedings.

This Regulation does not, on the other hand, apply to the following matters: the legal capacity of natural persons; the existence, validity and recognition of a marriage; the annulment of a marriage; the name of the spouses; the property consequences of the marriage; parental responsibility; maintenance obligation and trusts and successions (art. 1.2). It also does not affect the application of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (art. 2).

The Rome III Regulation has universal application. This means that the law designated by the Regulation shall apply whether or not it is the law of a participating Member State (art. 4).

APPLICABLE LAW (art. 5 and following):

1. **Party autonomy** (art. 5). The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or

(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or

(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or

(d) the law of the forum.

An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized (art. 5.2) or if the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding (art. 5.3).

Consent and material validity of the choice (art. 6).

The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it under the Regulation if the agreement or term were valid.

Nevertheless, a spouse, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seized if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law applicable.

Formal validity (art. 7): written (including by electronic means which provides a durable record of the agreement)

2. **Law applicable in the absence of choice** (art. 8)

In the absence of choice, the applicable law to divorce and legal separation shall be the law of the State:

(a) where the spouses are habitually resident at the time the court is seized; or, failing that

(b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that

(c) of which both spouses are nationals at the time the court is seized; or, failing that

(d) where the court is seized.

3. **Conversion of legal separation into divorce** (art. 9)

The law applicable to divorce shall be the law applied to the legal separation, unless the parties have agreed another law in accordance with Article 5. If the law applied to the legal separation does not provide for the conversion of legal separation into divorce, Article 8 shall apply, unless the parties have agreed otherwise in accordance with Article 5.

4. **Renvoi** is excluded (art. 11) and an **ordre public** clause is introduced (art. 10)

5. It also includes rules regarding States with two or more legal systems (art. 14-16)

Universidad LOYOLA

LESSON 14. SUCCESSION LAW

Profa. Ana Mercedes López

I. CONCEPTS OF SUCCESSION AND PRIVATE INTERNATIONAL LAW: UNITY VERSUS FRAGMENTATION

- There are two opposing approaches to the law of succession: the ***romanist*** and the ***germanic***. According to the romanist approach (also called personal approach), the principle of unity and universality shall apply to the succession based on the idea that the heir continues the personality of the deceased. Private international law systems that follow this approach (Spain and Italy), have traditionally included a personal connecting point (such as the nationality of the deceased, art. 9.8 CC o the last domicile of the deceased). In this way, the legislator ensures that the succession of the deceased is regulated by a single State substantive law, regardless of which is the nature of the hereditary property (movable or immovable) and the place where the property is located. Regarding jurisdiction, the principle of universality and unity respond to the need to avoid having to bring claims in different places. In this way, there is only one competent court (country of nationality or domicile of the deceased) to entertain the whole succession.

I. CONCEPTS OF SUCCESSION AND PRIVATE INTERNATIONAL LAW: UNITY VERSUS FRAGMENTATION

- According to the Germanic (or territorialist) approach, succession is based on the principle of territoriality and fragmentation. In the field of applicable law, this principle applies not personal, albeit territorial connecting factors (at least regarding the real estate of the deceased). This leads to a splitting in the regulation of the succession, that is, the application of different State substantive laws to the succession. Private International Law systems based on a Germanic conception of succession, for instance, French or Belgian Private International Law, tend to establish a different connecting factors for movables and immovables in such a way that the succession of movables will is subject to the law of the country of the last domicile of the deceased, while immovables are subject to the law of the place where they are situated (lex rei sitae).
- Concerning jurisdiction, the principle of territoriality may cause the "judicial fragmentation" of the succession, i.e., that several State courts have jurisdiction to entertain the succession of a deceased (depending on the nature of the property that forms part of the succession and the place where that property is situated).

II. REGULATION 650/2012

- The EU has unified private international law rules on succession: REGULATION (EU) NO 650/2012 ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND ACCEPTANCE AND ENFORCEMENT OF AUTHENTIC INSTRUMENTS IN MATTERS OF SUCCESSION AND ON THE CREATION OF A EUROPEAN CERTIFICATE OF SUCCESSION
- Objectives: One of the consequences of the growing mobility of persons within the European Union is the increase of successions with an international component. In many cases, these successions are difficult and complex due to the divergent ways in which succession is regulated in the legislations of the various Member States. Regulation 650/2012 aims to unify the European law of succession in terms of jurisdiction, applicable law and recognition and enforcement of in matters of succession in the European Union.
- Entry into force: the Succession Regulation entered into force on 16 August of 2012, twenty days after its publication in the OJEU, as established in art. 84. However, it did not apply until August 17, 2015. Hence, as a general rule, the provisions of the regulation apply to the succession of persons who die who die on or after 17 August 2015 (art. 83).

II. REGULATION 650/2012

- Territorial scope of application: The Regulation applies to all successions that have international character, regardless of whether the deceased is or not national of a Member State, provided that they occur within the territory of the European Union. The regulation is not applicable in Denmark, Ireland and United Kingdom, although if affects nationals of these States residing regularly in other EU Member States.

- Material scope of application (art. 1): The Regulation applies to succession to the estates of deceased persons. Some matters are expressly excluded: revenue, customs or administrative matters, status of natural persons, family relationships, legal capacity of natural persons, questions relating to matrimonial property regimes, gifts, questions governed by the law of companies and other bodies, the nature of rights in rem and recording in a register of rights in immovable or movable property.
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III. JURISDICTION

- Generally, the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.
- However, the courts of the nationality of the deceased may be competent under certain circumstances, when that law was expressly designated by the deceased as the applicable law to the succession.
- When the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall have jurisdiction under the conditions required in art. 10.

- The Regulation includes rules on examination as to jurisdiction (art. 15), lis pendens (art. 17) and related actions (art. 18).

IV. APPLICABLE LAW

- As a **general rule**, the law applicable to the succession as a whole shall be the **law of the State** in which the deceased had **his habitual residence at the time of death**.(Art. 21).
- This principle represents a radical change with Spanish legislation as art. 9.8 Spanish Civil Code provides that the law applicable to the succession is the law of the nationality of the deceased at the time of death.
- It is important to highlight that the applicable law according to the Regulation, applies even if it is not the law of a Member State. Thus, if a Spaniard dies having his habitual residence in Brazil, the law applicable to his succession will be Brazilian law.
- Although the United Kingdom, Ireland and Denmark are excluded from the application of the Regulation, if a national of those countries die being habitually resident in Spain, the law applicable to the succession is Spanish law, and the competent courts, Spanish courts.
- 2. The Regulation allows a testator to choose the law of the State whose nationality he possesses at the time of making the choice or at the time of death (Art. 22). Therefore, the choice of law must be expressly made in his will.

IV. APPLICABLE LAW

- **** Therefore, when a **foreigner resides permanently in Spain**, he/she should consider whether he/she wishes his/her succession to be governed by Spanish law or by the law of his/her nationality. If Spanish law applies, all requirements of Spanish succession law must be met, including the reserved portions in favor of rightful heirs. If the foreigner wishes, instead, to have his/her succession governed by the law of his/her nationality, **a testament (will) must be issued** give expressly designating the law of his/her nationality as the law applicable to his succession.
- 3. Regulation 650/2012 includes in art. 21.2 **an exception to the general rule**: Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of his habitual residence at the time of death, the law applicable to the succession shall be the law of that other State. BUT: the application of this rule must be exceptional and only in those cases where the existence of a law more closely linked to the deceased than of their last habitual residence is clear under the circumstances of the case.

V. V. RECOGNITION AND ENFORCEMENT OF DECISIONS FROM ANOTHER MEMBER STATE

- As a general rule, the Regulation provides that A decision given in a Member State shall be recognised in the other Member States without any special procedure being required (Art. 39).
- The **grounds for refusal** are (Art. 40): if such recognition is manifestly contrary to **public policy** (ordre public) in the Member State in which recognition is sought; where it 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 decision when it was possible for him to do so; if it is **irreconcilable** with a decision given in proceedings between the same parties in the Member State in which recognition is **sought or** if it is irreconcilable with an earlier decision given in **another Member State or in a third State in proceedings involving the same cause of action and between the same parties**, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.
- An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned and shall be declared enforceable in another Member State on the application of any interested party. The same applies to court settlements.

VI. EUROPEAN CERTIFICATE OF SUCCESSION

- The Regulation creates the European Certificate of Succession (Art. 62 y ss) which shall be issued for use in another Member State.
- The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.
- The Certificate shall be issued in the Member State whose courts have jurisdiction under the Regulation (art. 64).
- The Certificate shall produce its effects in all Member States, without any special procedure being required (art. 69).

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