

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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Possibility and terms for applying Brussels I Regulation (recast) to extra-European disputes

STUDY for the JURI Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**Possibility and terms for applying
Brussels I Regulation (recast) to extra-
EU disputes**

STUDY

Abstract

Upon request by the JURI Committee, this study provides an analysis of improvements to European rules on jurisdiction and enforcement of judgments. It concerns, in particular, disputes connected to third (non-EU) States by virtue of the domicile of the defendant or as a result of a connecting factor that the European Union considers as a ground for exclusive jurisdiction where it points towards the courts of a Member State. In summary, the research is aimed at determining the external boundaries of the European Union's jurisdiction. Moreover, the study explores the possibilities open to the European Union for achieving the best possible coordination in the exercise of jurisdiction with its economic partners. More specifically, a two-step progression is suggested: first, the unilateral introduction of specific rules of coordination - via the adoption of legislation setting out specific jurisdiction rules for non-EU disputes – and, secondly, the promotion of international conventions with third States, so as to coordinate EU and non-EU private international law systems and in order to attain a higher degree of legal certainty for EU and non-EU litigators.

Document requested by the European Parliament's Committee on Legal Affairs

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EXECUTIVE SUMMARY

This study was commissioned by the European Parliament with a view to providing “an analysis of the possibility and terms for applying the Brussels I Regulation provisions to non-EU defendants [...] to make recommendations in this respect [and in order to] look more particularly into defining the grounds for (exclusive) jurisdiction in case of non-EU defendants, and [into addressing] the question of attributing a “reflexive effect” to (certain) jurisdictional rules, according to which EU Member States’ courts have to respect such third States’ rules in cases where, if the reverse or the reflex situation occurred, the EU Member States’ courts would assume their jurisdiction as exclusive”.

The aim of this study, therefore, is to provide **a theoretical framework for understanding the current regulation of jurisdiction in the European Union**, with a view to it adopting unilateral jurisdictional rules for the **purpose of co-ordinating the European private international law system with that of third States**.

In this respect, the study points to:

- **mapping the rules on jurisdiction** in force in selected Member States (as regards to cases over non-EU domiciled defendants) as well as in selected non-Member States;
- **mapping national rules on exclusive jurisdiction** and describing their functioning and effects;
- **making recommendations** for the adoption of European rules in order to increase access to justice, uniformity and enhance legal certainty to European and non-European litigators as regards to jurisdiction rules and to the rules on recognition and enforcement of foreign judgments.

Jurisdictional power in the EU

Judicial jurisdiction is the power to hear a case upon which a judicial decision is sought. Judicial jurisdiction belongs to every legal order holding the power to impose it. Within the boundaries of the European area of freedom, security and justice, **the European Union has set rules distributing jurisdiction according to the traditional principles of procedural law guaranteeing administrative efficiency** (*actor sequitur forum rei*; *Näherberechtigung*, *principe de proximité*, etc.). In particular, the European Union exercises its power to allocate civil cases in the courts of EU Member States. On the other hand, the European Union does not of course have the power to allocate civil cases in non-Member States’ courts.

The European Union exercises its **power to allocate civil cases in the courts of EU Member States as part of a shared competence with Member States** (Article 81 Treaty on the Functioning of the European Union: TFEU). As a result, today, the sources of Member States’ jurisdiction to adjudicate and decide on civil cases are to be found, in part, in International Conventions, in part, in EU Regulations and, in part, in national laws.

Very often the same set of criteria is employed in these different contexts in order to address different purposes. For example, in the case of a defendant domiciled in the EU, his domicile in Prague serves as a basis for Czech jurisdiction and, at the same time, identifies the competence of Prague’s district Court.

EU and non-EU disputes

In the Brussels I system, jurisdiction rules allocate EU cases among the courts of EU Member States. The purpose of its distributive criteria is also that of **identifying in a**

straightforward manner the territorial court having the right to adjudicate an EU dispute.

According to Brussels I currently in force, the concept of EU cases essentially embraces: (1) cases over EU defendants; and (2) cases connected to EU countries due to EU exclusive jurisdiction rules.

Non-EU cases in civil and commercial matters are subject to national jurisdiction rules. These rules have been extensively described and analysed in the Report of Professor Nuyts and in prominent academic writings and, for the purposes of the present study, are synthesized through the following categories.

“Private International Law” approach and “Procedural Law” approach

A comparative overview of national jurisdiction rules reveals two main alternative approaches for addressing civil adjudication in international disputes (par. 2). The first approach can be described as a **“private international law” approach**. It is based on a **basic and fundamental difference between issues of judicial jurisdiction and issues of territorial allocation** of disputes in the various domestic courts within a Member State: the first approach focuses on judicial jurisdiction (though the rules might sometimes be applied equally for territorial allocation of disputes). The second approach can be described as a **“procedural law” approach** and consists of **using the procedural rules on territorial allocation within a State as a basis for judicial jurisdiction in international disputes**. Broadly speaking, under this second route, there is **no difference** between the issue of jurisdiction and that of territorial allocation among district courts within a Member State. In these systems, only a few additional rules - if any - are established in order to adapt the rules on territorial allocation for the international context of judicial jurisdiction.

Under the first approach the international jurisdiction issue needs to be addressed specifically and independently from the question of which internal district court is competent; while under the second approach, international jurisdiction is a consequence of the internal competence of the district court.

Categories of exclusive jurisdiction rules

Three different categories of national exclusive jurisdiction rules have been analysed in the present study.

The first category concerns **“exclusive national jurisdiction”** and embraces those cases where a State is in the position of being able to enforce its own judicial decision and refuses to give effect to any other State’s evaluation of the same case. In other words, a State **refuses to give effect to a foreign judgment involving parties to an international dispute, since it claims to have exclusive jurisdiction on that dispute**. This approach does not address the possibility for judges to deal with the reverse situation – i.e. the case where the main connecting factor is abroad, and the State is therefore not in a position to give effect to its own evaluation. This issue is addressed by the second category.

The second category of rules concerns **“exclusive foreign jurisdiction”**. It is the opposite scenario: a State obliges its judges **to decline jurisdiction** in an international dispute, because **the connection of such a dispute with another State is so strong** that its decision risks being uselessly pronounced. In this situation, as already described, the other State is in the position of giving effect to its own judicial decision through enforcement mechanisms. Recognising the strength of the other State’s jurisdictional power and in order to economise energies, **the first State “withdraws” its judicial jurisdiction** and obliges its judges to decline jurisdiction.

The third category of rules is that of a “**verified exclusive foreign jurisdiction**”; it consists of those rules allowing the judge to subordinate the exercise of its jurisdiction to that of another State. This means that the State in question will require its judges to exercise jurisdiction **only after having first verified** that the other State concerned **does not claim exclusive jurisdiction** in the dispute.

The third category is different from the first two, because these adopt *a priori* solutions. In other words, in the first two categories, **the State concerned decides a priori**, normally through a specific rule, when to exercise, as well as when to refuse to exercise, judicial jurisdiction, regardless of the existence of a competent forum abroad. Mirroring this, the third hypothesis involves jurisdiction only being declined **after judicial verification** of the private international law system of the other State touched by the dispute: where that other State concerned claims to have exclusive jurisdiction (and will consequently deny access to any foreign decision on the dispute), the first State will decline its jurisdiction in order to avoid a decision that would be *inutiliter data* (useless).

These three categories are **all unilateral attempts to coordinate** a State’s own exercise of judicial jurisdiction with that of other States.

Key findings

If we compare national rules with the rules of the EU, it appears that Council **Regulation n. 44/2001** of 22 December 2000 “on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” bears comparison more readily to the aforementioned “**private international law**” approach than to the “procedural law” approach. It differentiates the issues of territorial allocation of EU cases among the courts of EU Member States, from the issue of jurisdiction in non-EU cases. The same approach may be seen, with few exceptions, in Regulation n. 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)”. On the contrary, **Regulation n. 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” does not make any distinction between territorial allocation over parties of European disputes and over parties of extra-EU disputes. It therefore seems closer to the aforementioned “**procedural law approach**”.

As regards to exclusive jurisdiction, the study points out that the three categories of exclusive jurisdiction rules unilaterally and autonomously foreseen by national legal orders **cannot be assimilated with the European ones**. In the Brussels system, the rules attributing exclusive jurisdiction are addressed to all the judges of the Member States and they provide for a distribution of jurisdiction according to the typical model of **exclusive territorial competence**. This imports the legitimation of a single judge to exercise the jurisdictional power and the corresponding absolute lack of power of all other judges. Moreover, the exercise of jurisdiction by that judge is **compulsory**. In contrast, national exclusive jurisdiction rules are only addressed to national judges and are directly linked to the possibility of giving effect to a foreign judgment. Hence, **the concept of exclusive jurisdiction must be understood from the point of view of a single State** which claims jurisdiction in respect of a controversy and simultaneously denies, due to the absence of international competence, any possibility whatsoever of recognising any foreign judgment that purports to settle it.

Key options

The European Union has two key options for future legislation on jurisdiction rules for disputes over non-EU defendants: the first being that of bringing Regulation 1215/2012 into line with Regulation 650/2012 by **erasing the reference to the domicile** of the defendant. In this case, the existing rules for distributing jurisdiction among Member States

would also serve as **grounds for European judicial jurisdiction in non-EU disputes**; the second being that of **creating grounds for jurisdiction on an *ad hoc* basis for defendants who are not domiciled in a Member State**, under what can be called the “private international law” approach. This second approach has the advantage of keeping and showing the conceptual difference between the issue of **distributing cases among the European judges and the issue of deciding, unilaterally, which connecting factors are considered relevant for the EU in order to found the jurisdiction of European judges**. This means that the EU establishes – in the same way as a national legislator – under which circumstances an international case should be decided by a European judge and, possibly, under which circumstances a European judge should decline jurisdiction (where its forum is not appropriate, economical or convenient due to concerns of legislative policy).

Key recommendations

In our view, the European system, currently provided with a specific set of rules aimed at distributing cases among European judges (the existing Brussels I rules), should also be provided with **a specific set of uniform jurisdictional rules on which Member States’ courts may ground their jurisdiction or decline it**. This set of rules should be accompanied by rules on the issue of choice-of-forum, *lis pendens* and on the issue of recognition and enforcement of third States’ judgments, since these criteria will have to be used as criteria of international indirect jurisdiction in order to recognise and enforce judgments pronounced by third States’ judges.

There are two possible ways to increase access to justice and predictability as regards to the enforcement of judgments in international disputes involving parties or property located in third States.

The first is that of adopting uniform and unilateral rules on jurisdiction concerning parties in international disputes which involve persons domiciled, or property located, outside of Europe. The second is that of pursuing bilateral – or, whenever possible, multilateral – **conventions on the reciprocal recognition and enforcement of judgments**.

Unilateral coordination is, by definition, imperfect. It could nevertheless represent a starting point and a good basis for negotiations with a view to concluding international agreements. An international covenant with one or more third States guarantees access to justice and predictability over recognition and enforcement of judicial judgments of EU Member States abroad and vice versa.

Moreover, the aforementioned two options are not exclusive of each other. On the contrary, they are perfectly compatible: they can and should be pursued in parallel.

In summary, we make the following recommendations to the European Parliament:

- The existing dividing lines between EU and non-EU cases should be maintained;
- The rules distributing EU cases among European judges (sections 2 to 7 of Chapter II of Regulation 1215/2012) should also be maintained;
- The EU should adopt legislation setting out the criteria giving jurisdiction to the judges of European Member States in non-EU disputes, having due regard for the issue of choice-of-forum and *lis pendens*, as well as for the issue of recognition and enforcement of third States’ judgments, given that these criteria will have to be used as *criteria of international indirect jurisdiction* in order to recognise and enforce judgments pronounced by third States’ judges;
- Finally, we recommend that the European Parliament promote bilateral or multilateral conventions on the recognition and enforcement of judgments with its principal strategic commercial partners.

INTRODUCTION¹

Within the legislative process of recasting the Brussels I Regulation, which continues even after the adoption of Regulation 1215/2012², the European Parliament has expressed its wish to have the issue of the application of the Regulation's jurisdictional rules to third-country defendants and the issue of (partial) reflexive effect of this regulation further explored.³ It therefore commissioned the present study.

These introductory remarks will first explain the background as well as the mandate to prepare the study (1) and then elaborate more specifically on a few methodological aspects (2).

Background and mandate

The Brussels I Regulation deals with the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Within its material scope of application (civil and commercial matters, see Article 1 of Regulation 1215/2012 and Regulation 44/2001), the Regulation is generally applicable in international cases, if the defendant is domiciled in a Member State (Articles 4 and 6 of Regulation 1215/2012 and Articles 2 and 4 of Regulation EC 44/2001)⁴. As a principle, therefore, it does not contain general rules relating to defendants domiciled in non-EU States. Exceptions are provided by Article 6 of the Regulation 1215/2012, which subjects the jurisdiction of the Member States to the provisions of Articles 18(1) (consumers), 21(2) (employment), 24 (exclusive jurisdiction) and 25 (prorogation of jurisdiction)⁵. The previous version of the Brussels I Regulation only provided for exceptions in the case of exclusive jurisdictions and prorogation (previous Articles 22 and 23 as well as Article 4 of Regulation 44/2001). In this limited number of cases, European courts have jurisdiction even if the defendant is not domiciled in an EU Member State.

The European Commission had proposed an application of the rules of jurisdiction to non-EU defendants⁶. It is in this context that the European Parliament has commissioned the present study, with the aim of providing "an analysis of the possibility and terms for applying the Brussels I Regulation provisions to non-EU defendants, and to make recommendations in this respect." The study "should look more particularly into defining the grounds for (exclusive) jurisdiction in case of non-EU defendants, and the question of attributing a 'reflexive effect' to (certain) jurisdictional rules, according to which EU Member States' courts have to respect such third States' rules in cases where, if the reverse or the reflex situation occurred, the EU Member States' courts would assume their jurisdiction as exclusive."

More particularly, the mandate extended by the European Parliament requires a study in two parts. In its first part, the study should "provide a brief analysis of the current legal situation under the Brussels I Regulation" while the second part should "survey the various policy options and make relevant proposals."⁷ The different sub-questions and the way in which they were addressed will be described in the section on methodology (2.).

¹ Lukas Heckendorn Urscheler, Vice-Director at the Swiss Institute of Comparative Law.

² Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

³ Specific Terms of Reference, JURI Request for one *ad hoc* briefing paper on the Brussels I Regulation, p. 1.

⁴ See KROPHOLLER, vor Art. 2 EuGVO, N 5 seq.

⁵ See: A. NUYTS, « La refonte du règlement Bruxelles I », *Revue critique de droit international privé* 102 (2013), p. 1 seq, p. 5 seq.

⁶ See e.g. KROPHOLLER, Einleitung, N 32.

⁷ Given the limited timeframe, several issues and options that do not figure in the text of the study could not be included in the present report.

Methodology

The study combines the analysis of “Member States’ approaches to jurisdictional rules” with the functioning of Brussels I Regulation, as well as their impact on third States. Thus, the three different sets of rules (Member States, EU, third States) have to be taken into account. In order to facilitate the understanding of the national issues, the general report is based on a number of national reports. Given the limited scope of the study, seven legal orders were selected while still aiming to present a representative picture (2.1.). The structure of the general report reflects the different questions formulated by the European Parliament (2.2.).

Sampling of Legal Systems to be Analyzed

The first consideration when selecting States for the purpose of the present study was to take into account a variety of legal traditions. In making a pre-selection of the **Member States**, special consideration was therefore given to the traditional core traditions, i.e. the Roman legal tradition (French law), the Germanic legal tradition (German law) and the common law legal tradition (English law). In addition, in order to reflect the importance and the particularities of the new, formerly communist Member States, Polish law was preselected. Finally, to reflect the Scandinavian legal tradition, as well as the particular position of Denmark in respect of the area of freedom, security and justice⁸, Danish law was equally added to the sample.

This provisional sample was then assessed in a preliminary analysis, mainly taking into account existing literature⁹. In that context, the sample originally proposed was maintained, for the following reasons: All three different systems of jurisdiction (venue, specific jurisdiction, mixed systems), the different types of sources (civil procedure / specific act on private international law) and the different types of structure of the rules (purely national, similar to those of the Brussels I Regulation, original approach) are represented in the sample. Moreover, the sample seems to translate differing degrees of EU-influence on jurisdictional rules (clear influence in Italy, diffuse influence in Denmark, France and Poland, no influence in Germany) and the variable influence of other factors (right of access to courts in Germany, non-discrimination in Italy). Finally, the sample does include a country where recent reforms have been carried out (Poland), as well as countries with differing traditions when it comes to international agreements (judicial cooperation agreements in Poland, special enforcement conventions in Germany and Italy). Therefore, the literature review confirmed the preliminary selection of legal systems.¹⁰

In the course of research, the preselected sampling continued to be maintained. The selected legal systems did offer sufficient material to deal with the questions. In addition, the selected legal systems proved particularly interesting: Danish law with a specific system in the Scandinavian context, and Italian law with specific rules adopted in the context of Article 4 of the Brussels I Regulation. In addition, the German and Danish reports contain particular references, respectively, to Austrian law and to Swedish and Norwegian law, which proved particularly interesting.

As the analysis touched upon the position of third States, a few **non-EU Member States** were equally taken into account in the analysis by way of summary national reports. A member of the Lugano Convention and a non-member were chosen in that context:

⁸ See Protocol 22 to the Lisbon Treaty, taking into account the provisions of the Danish Constitution that represent an obstacle to the full participation to the Treaty of Denmark.

⁹ Especially A. NUYTS, Study on Residual Jurisdiction (Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), 3 September 2007, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (05.06.2013).

¹⁰ See Nuyts, Study, cit., p. 18 seq.

Switzerland, a country that has close ties with the European Union, and Japan, an important economic partner. In addition, Japan offered particular insights into international procedural issues given the fact that new legislation was recently adopted in that area. Other important third States could not be included due to the limited scope of the mandate. More specifically, the US and the Chinese legal system were consciously not taken into account, in spite of the importance of economic links with the European Union for reasons of efficiency: in both countries, sources are difficult to access and systems are particularly complex. In addition, given the importance of those countries, it is not unthinkable that jurisdictional relations with them might be subjected to a different paradigm (i.e. a bilateral approach).

Structure of the study

As indicated above (1.), the study is divided into two parts: the first one consisting in an analysis of the current legal situation, the second one in a survey of the various policy options. For each of the parts, the European Parliament has listed a number of questions that should be addressed.

In the first part, the first set of questions relate to the existence of rules in Brussels I Regulation regarding jurisdiction of third States' courts in disputes involving EU parties or property in the EU and the identification of the rules applied in case of absence of such EU rules. The Parliament required therefore an "analysis of Member States' approaches to jurisdictional rules for such disputes, including any reflexive rules, where applicable".

The second set of questions deals with the way in which jurisdiction rules (mainly the ones contained in Brussels I Regulation) affect parties or property in third States and requires to set out the relevant provisions regarding jurisdiction bases, choice-of-court agreements and other rules or the way in which such issues have been resolved.

In view of the questions above, the first part will be structured in three chapters. A first chapter will deal with the fundamental concepts of jurisdiction (and its relation with sovereignty), exorbitant jurisdiction, exclusive jurisdiction and "reflexive effect" and look at their application in the context of the Brussels I Regulation in particular. The aim of this chapter consists in achieving conceptual clarity and in determining the (non-)existence of rules in Brussels I Regulation regarding jurisdiction of third States courts in disputes involving EU parties or property in the EU.

The second chapter will then analyse the Member States' approaches to jurisdictional rules. This includes an analysis of the different approaches with a special regard as to the differences in the sources and the distinction between domestic and international jurisdictional rules. It then ends with an overview of the different grounds for international jurisdiction, also according to the national legal systems, thereby providing an overview on the Member States' approaches to jurisdictional rules for disputes in which the defendant is not domiciled in the EU. At the same time, this overview shows how parties or property in third States might be affected by the jurisdiction rules.

The third chapter addresses the issue of exclusive jurisdiction and reflexive effect more in detail. In fact, the reflexive effect – i.e. the decline of jurisdiction that might exist according to general connecting factors – is mainly, if not exclusively, at stake in cases of exclusive jurisdiction. The comparative overview on exclusive jurisdiction shows that there are three possible ways of dealing with or understanding the issue of exclusive jurisdiction from a national perspective: the first concerns cases where a dispute is strongly connected to the *forum* and consists in the *forum* claiming exclusive jurisdiction over such dispute – regardless of the circumstance that the case has been (or could be) brought before a foreign judge; the second is the reverse situation, i.e. disputes where the connection to a foreign country is so strong, that the national legislator prescribes to its judges to decline jurisdiction over such dispute, regardless of the circumstance that the foreign country

strongly connected to the dispute is exercising jurisdiction over it (or would do it if requested); the third way concerns the same situation as the second—a case strongly connected to a foreign country – but differs from the second way as the national legislator prescribes to its judges to decline jurisdiction if and only if the third state has actually assumed jurisdiction or would assume it if requested to do so. The third chapter finally also assesses other means of coordination such as *lis alibi pendens* and non-recognition of foreign decisions.

The second part of the study surveys the various policy options and makes relevant proposals.

FIRST PART: ANALYSIS OF THE CURRENT SITUATION

1. JURISDICTION OF THE EUROPEAN UNION AND THIRD STATES; THEORETICAL POINTS OF REFERENCE¹¹

KEY FINDINGS

- Jurisdiction can be exercised only within a sphere of sovereignty.
- The European Union has rule making powers only with regard to the judges of EU Member States.
- The content of rules – for present purposes – may be of two kinds: 1. those which require to exercise or not to exercise jurisdiction; and, 2. those which recognise or do not recognise a foreign judgment.
- The criteria for recognising a foreign judgment differs according to the (a) intra-EU or (b) extra-EU origin of the particular judgment.
- The criteria for exercising jurisdiction may also differ according to whether the case covers (a) the European area or (b) the rest of the world.
- Recognition of a foreign judgment depends upon the criteria for exercising jurisdiction.

1.1. Jurisdiction and Sovereignty

In modern States, jurisdiction and sovereignty have become inseparable juridical categories. Accordingly, jurisdiction is manifested as an exercise of power and is necessarily based upon a legal system invested with sovereignty. This interdependency explains why jurisdiction is defined and understood as a material and compulsory realisation of the legal order in a given case.

1.1.1. Unilateral nature of the limits of jurisdiction

Each sovereign legal order – independently of any superior power – is free to regulate the exercise of jurisdiction without taking into account the existence of any other sovereign order. As a result, each State proceeds autonomously and unilaterally in this regard, determining the cases in which its own judges are authorised to exercise jurisdictional power. This may lead to the extension or the restriction of the scope of the field within which such power may be exercised, but in no case can the determination of that field affect the power of any other legal order to autonomously limit the exercise of its own jurisdiction. Each order, when defining the field of its own jurisdictional power, finds itself, as against other orders, in a relationship of reciprocal autonomy and freedom.

1.1.2. Requirement of reasonable limitation of jurisdictional power

In theory, nothing prevents a State from affirming its own jurisdictional power over any controversy, even in the absence of any link to the social environment of which it forms a part¹². It is, however, only from a purely theoretical point of view that the State's jurisdiction can be considered exempt from all limits; in fact, every State shows that it is well aware of the need to limit the exercise of its jurisdictional power to a clearly defined series of controversies, in some way connected to the field in which its sovereignty is

¹¹ Luigi Mari, Professor at the University of Urbino Carlo Bo.

¹² Morelli, *Diritto processuale civile internazionale*, Padova, 2nd Edition, 1954, p. 87 *et seq.*

manifested *de facto*. One can in fact easily conclude that, although it is true that no order can impose limits upon another, it is nevertheless also true that no legal order can totally ignore the existence of other sovereign powers and of the territorial delimitation of jurisdictional power.¹³

The measure in which a State should take into account the jurisdictional power of other States is, however, an intricate question in so far as it must be decided according to objective and universally valid or accepted criteria. Apart from the possible effects of the right to a fair trial laid down in the ECHR¹⁴, general rules of public international law provide no assistance. The sole acceptable conclusion that can be drawn from the continuous efforts to formulate fundamental guiding principles of delimitation of jurisdiction is that some theoretical principles apt to delimiting state jurisdiction in a reasonable and non-arbitrary manner can be identified. Applying such principles, jurisdiction should not only be founded upon considerations of "*convenience, fairness and justice*", but should also open the way towards coordination, more-or-less effective and complete, between the various state jurisdictions¹⁵.

Nonetheless, it is unmistakably evident that each legislature interprets the reasonableness of the limits of jurisdiction in its own way and that no national doctrine of jurisdiction can avoid unilaterally and autonomously defining the criteria that indicate when a controversy is sufficiently and reasonably connected to the national forum. As such, they thus relegate the need to implement an effective coordination with foreign jurisdictions.

1.2. Refusal of exorbitant criteria of jurisdiction

Considering the multiplicity of reasons that each legislature can freely set as the foundation of jurisdiction, it is inevitable that the national systems sometimes permit possibly "exorbitant" or "excessive" jurisdictional criteria, as a result of which jurisdiction subsists, although a link between the litigation and the forum, which is reasonable and sufficient to justify the exercise of jurisdiction, is entirely lacking. The well-known prototype of all the exorbitant criteria is that of the nationality (or the residence) of the plaintiff serving as the basis for jurisdiction.

It would be appropriate to make it clear that the concept of exorbitant jurisdiction summarises considerations of legislative policy and cannot be used as a parameter of positive law to evaluate *ex ante* the legitimacy of any particular criterion of jurisdiction. Even apart from the vagueness of the concept, the autonomy enjoyed by States renders baseless any pretention of being able to define *a priori* those criteria of jurisdiction that are legitimate (i.e., non-exorbitant). International practice instead takes a quite different approach: instead of opposing recourse to exorbitant criteria of jurisdiction, it refuses to allow them to serve as suitable criteria of international competence in the context of recognition of foreign judgments. This is also known as indirect international competence). When a criterion is designated as exorbitant, this accordingly expresses, depending on the case, either a theoretical judgment that the criterion lacks justification, or an evaluation *ex post* which above all takes account of the consequences potentially flowing from the use of that criterion in the course of deciding upon the recognition of a judgment which is based upon it. This possible reaction to excessive autonomy, to which another legal order may be induced when exercising its own jurisdictional power, is an effective

¹³ Quadri, Studi critici di diritto internazionale, I, 1, Milan 1958, 319: il "*potere dello Stato, come capacità dello Stato stesso di comandare, e, quindi, di mandare ad esecuzione i suoi comandi, trova limiti insormontabili negli eguali poteri degli altri Stati; e l'ordinamento dello Stato non può non riflettere la limitazione del potere dello Stato. Una norma la quale pretendesse superare i limiti della capacità di comando dello Stato, difetterebbe del requisito della efficacia, della positività, e non sarebbe pertanto espressione che di una mera velleità*".

¹⁴ In respect of that problem, which lies beyond the boundaries of the present considerations, see MARI, *Liber Fausto Pocar*, II, Milano 2009, p. 673 *et seq.*

¹⁵ Usunier, *La régulation de la compétence juridictionnelle en droit international privé*, Paris 2008, 319 *et seq.*

incentive for States to place limits on their own recourse to exorbitant criteria of jurisdiction¹⁶. It is important, however, to avoid confusing the rejection of an exorbitant criterion as a suitable criterion of indirect international competence, with an affirmation of the exclusive competence of the State in which recognition of the judgment is requested (refer *infra*).

1.2.1. Unilateral coordination with foreign jurisdiction

The necessity for a legal order to coordinate itself with others in the practical implementation of rules of law – thus taking account of the jurisdictional power that appertains to other legal orders – is an objective fact, which does not need to be demonstrated. Apart from having recourse to international instruments, there are various ways in which a legal order may unilaterally and autonomously attribute relevance to the jurisdictional powers of other legal systems. Limiting ourselves to the essential approach, the most obvious one (and the most important from a practical point of view) consist of attributing the force of a jurisdictional act to a foreign judgment; in this way, the product of foreign jurisdictional activity is permitted to operate in another legal order where it would otherwise be entirely deprived of the intrinsic force of a jurisdictional act. Another method of recognising the foreign jurisdictional power consists of granting effect to the commencement of foreign proceedings for the purpose of suspending and even preventing the prosecution of national proceedings that appear to duplicate foreign proceedings. Finally, foreign jurisdictional power may be considered jurisdictionally relevant in another legal order in that it excludes the exercise of jurisdiction: either because exclusive character is attributed to a foreign jurisdiction (in a sense that will be explained *infra*), or because the parties to the proceedings had agreed to submit the dispute to a foreign judge, who has confirmed his own jurisdiction over the matter.

1.2.2. Consequences

It is appropriate to note that none of these three forms of relevance of foreign jurisdictional power impairs the autonomy of the legal systems that recognise them. The foreign jurisdictional power remains foreign and independent of the legal order in which it has become relevant, just as the jurisdictional power of the latter remains fully independent of the former. In other words, each jurisdictional power remains subject to its own legal order and no connection is created between the jurisdictional organs of the two States, which always unilaterally and autonomously determine the principles of their own jurisdiction.

1.3. Exclusive jurisdiction in the true sense

After these preliminary issues, we must now specify the meaning to be attributed to the concept of *exclusive jurisdiction*.

Used in a narrow sense, and linked to the logical consequences to be drawn from the notion of exclusivity, this concept implies a distribution of jurisdictional power amongst judicial organs. The judge designated as “exclusive” is accordingly the only one legitimated to resolve the controversies foreseen by the norm which results in the distribution of jurisdiction among the territorial courts, to the exclusion of any other judge. It should be noted that the essence of exclusivity is characterised by this single specific consequence, i.e., the exclusion of any possibility that the defendant could be called before a judge other than the one legitimated to decide the issues.

One understands, therefore, how the double effect of the exclusivity – legitimation of a particular judge to exercise jurisdictional power, on the one hand, and the absolute lack of

¹⁶ On these concepts, *amplius*, see MARI, *Il diritto processuale civile della Convenzione di Bruxelles*, Padova 1999, 11-15; 198-203.

power of any other judge, on the other – can only be achieved by means of a norm which imposes a distribution of jurisdictional power among judicial organs subject to one and the same juridical order. So understood, the concept of exclusivity is regularly employed in the distribution of territorial competence among several judicial organs belonging to the same legal order and correlates to the concept of concurrent territorial competence¹⁷. This concept corresponds to the exclusivity currently operational in the Brussels system (see *infra*, 1.4.)¹⁸.

1.3.1. Exclusivity of jurisdiction in relation to the recognition of foreign judgments

The concept of exclusivity, understood in the abovementioned narrow sense, cannot be used to qualify a corresponding relationship between judicial organs belonging to different States. In this case, since we are confronted with jurisdictional powers regulated by legal orders which place themselves in positions of reciprocal autonomy and independence, there is no possibility for any norm whatsoever of one of the two legal orders to effect a distribution of jurisdiction with consequences for the powers of the judges of the other legal order.

Nevertheless, the concept of exclusive jurisdiction, as often employed in international civil procedural law, is not taken in its narrow sense described above.

We now consider the position adopted by a particular legal order when confronted with a foreign judgment, the recognition of which is excluded, by virtue of the fact that the legal order has deemed this to violate its own exclusive jurisdiction over the dispute decided by the foreign judge.

In this case, the foreign proceedings are deprived of the prerequisite of the recognition of the judgment which is referred to as *international competence* and which consists of the connection that the litigation should have with the foreign forum (the State of Origin) so that the resulting judgment might take effect in the State in which recognition is desired (the Requested State)¹⁹.

The concept of exclusive jurisdiction now under consideration is, therefore, derived from an evaluation undertaken in the Requested State in order to give effect to a foreign judgment. It is to be noted, however, that this concept does not express the simple absence of an appropriate criterion of international competence with respect to the dispute and the foreign forum. That is to say a connection that corresponds to one of those that would establish jurisdiction in the Requested State. The concept of exclusive jurisdiction goes beyond this simple hypothesis because it contains, and at the same time creates, a link between two distinct evaluations: (a) the existence, within the dispute decided by the

¹⁷ More precisely, the exclusivity is manifested in the exclusion of the competence of both the general forum and fora, which are special or alternative to the general forum. This gives rise to a right of the defendant, which the legal order may allow him to waive in case the forum designated by law as exclusive is not also be qualified as compulsory. It is nonetheless possible for an exclusive forum to be optional or compulsory depending upon the particular case, just as it is possible that a compulsory forum may not be characterised as exclusive.

¹⁸ The Brussels regime represents in this respect an exception; as a matter of fact, regardless of the fact that the EU is not a State, the Brussels regime distributes jurisdiction within the EU as if the EU were a single autonomous territory.

¹⁹ It is worthwhile to note that international jurisdiction exists independently of the criteria of jurisdiction that the foreign judge has recognised as the foundation of his own power to decide the case, since it is established by means of the same criteria, or principles, which the Requested State uses in order to attribute jurisdictional power to its own judges. This procedure accordingly gives rise to a complete correspondence between the limits of the jurisdiction of the Requested State and the sphere of the international competence of the foreign judge. It is, therefore, clear that this correspondence exists only from the point of view of the legal order of the Requested State and only for the purposes of this pursuit. It is in fact quite possible for the foreign forum to be vested with jurisdiction according to the norms of its own legal order, but be considered as deprived of international competence according to the criteria applied in the Requested State for the purpose of recognition of foreign judgments.

foreign judge, of a criterion which is recognised as attributing jurisdiction to the judicial organs of the Requested State, and (b) the exclusion of the possibility that a recognised criterion of international competence exists with respect to the foreign judgment which had settled that dispute, *no matter from which foreign State the judgment originates*.

In other words, in order to be able to speak of exclusive competence, it is necessary to consider one single legal order. Subsequently, it is also necessary that this legal order provide for its own jurisdiction over the dispute. Thereafter, it is necessary that this legal order exclude the possibility of recognising any decision from a foreign State.

This illustrates that the concept of exclusive jurisdiction is absolutely incompatible with any hypothesis of distribution of juridical power, because it expresses the point of view of a single legal order.

To deepen our understanding of the implications of this concept, let us begin by noting that it may apply in two different situations. As previously discussed, the first situation is present if the legal order which we are concerned to understand affirms its own jurisdiction over the dispute and at the same time excludes the possibility to recognise foreign judgments. We are then faced with *exclusive national jurisdiction* of the Requested State. The second situation occurs when the State which we are concerned to understand excludes its own jurisdiction regarding the dispute on the basis of general jurisdictional criteria, and permits recognition only of judgments originating from a particular foreign legal order. In this hypothesis, we are faced with *exclusive foreign jurisdiction*, but it is irrelevant whether the State of Origin of the decision considers itself vested with or deprived of exclusive jurisdiction over the case. The only important factor is whether the Requested State considers that only this particular foreign State is vested with exclusive jurisdiction.

1.3.2. Foundations of exclusivity

Another important aspect to be considered concerns the grounds upon which the exclusivity of the jurisdiction is based. From this point of view, the exclusivity does not originate in the impossibility of recognising any foreign judgment (i.e., cases of exclusive national jurisdiction), or in the possibility of only recognising those judgments that originate from certain States (i.e., cases of exclusive foreign jurisdiction), but instead consists of a true and rightful restriction of jurisdiction, as determined by the Requested State. As a result of this restriction, the parties to the dispute have no other option but to resolve it by resorting to the judge indicated by the norms that have created this restriction. The circumstances in which such a restriction applies, and from which the obligation to submit the dispute to the designated judge originates, are independent of both the rules of (direct) jurisdictional competence and of the rules of (indirect) international competence, since they have a different function. Ultimately, these rules aim to prevent the recognition of a foreign judgment. Therefore, these rules constitute the logical antecedent of the concept of exclusive jurisdiction and are derived from autonomous principles that must be conceptually distinguished from the rules on jurisdiction.

1.4. Exclusive competences within the Brussels system

The 'Brussels' system (Article 16, Brussels Convention 1968; Article 22, Brussels I Regulation (Regulation 44/2001), and Article 24, Brussels I-bis Regulation (Regulation 1215/2012) creates various exclusive rules of allocation of territorial jurisdiction in the presence of particular connections with the territory of a Member State. Those rules of jurisdiction correspond precisely to the concept of exclusive jurisdiction in the true sense, as described above.²⁰ In this system, the norms attributing exclusive allocation of territorial

²⁰ *Supra*, under point C.

jurisdiction are addressed to all the judges of the Member States taken as a single unit and decree a distribution of jurisdiction according to the typical model of exclusive territorial jurisdiction. This imports the legitimation of a single judge to exercise the jurisdictional power and the corresponding absolute lack of power of all other judges. The exclusive nature of this jurisdiction is affirmed by the same rules that institute it and has does not need to be justified. That competence is characterised, furthermore, as being compulsory.

This result is made possible by two peculiar circumstances. Firstly, at the general level of the system, jurisdiction is attributed as a function of the relationship that has been put into place between numerous judges subject to the same set of procedural norms. Secondly, the rules of attribution/distribution of jurisdiction uniformly define the sphere of the exercise of jurisdictional power with respect to the whole body of judges of the Member States. Accordingly, the Brussels regime not only effects a distribution of jurisdiction among the judges of the Member States, but also lays down, within and with respect to *the whole territorial extent of the Union*, the preconditions for the actual exercise of jurisdictional power.

As a consequence of those characteristics of the system, the exclusive jurisdiction thus established cannot be assimilated to the hypotheses of exclusive jurisdiction unilaterally and autonomously foreseen by national legal orders. As has been indicated above,²¹ the concept of exclusive jurisdiction must be understood from the point of view of a single State which claims jurisdiction in respect of a particular dispute and simultaneously denies, due to the absence of international jurisdiction, any possibility to recognise any foreign judgment whatsoever that purports to settle it. In contrast, in the Brussels regime the exclusivity is directly correlated to the distribution of jurisdiction amongst all the judges of the Member States, with the effect of preventing the recognition *in all the Member States* of any decision originating from a judge deprived of exclusive competence, not only in the State to the judges of which that competence is attributed. On the other hand, the Brussels system does not stipulate that European judges must decline jurisdiction when the connecting factor – the one used to grant exclusivity to European judges – points to a non-European *forum*.

1.5. Reflexive effect

The exclusive competence of the Brussels regime prevents recourse to the national jurisdiction criteria, which remain applicable according to Article 4, in respect of a defendant who is not domiciled in any Member State.

The system makes no provision, on the contrary, for the hypothesis under which the exclusive head of jurisdiction points outside the territory of the Union, while the controversy is *also* connected to the territorial area of the Union, by virtue of either the domicile of the defendant or the will of the parties. It is, therefore, uncertain if the criteria of distribution of jurisdiction amongst the judges of the Member States should be applied in this case. According to the theory of “reflexive effect”²², the Brussels regime does not require the exclusion of the jurisdiction of the judges of the Member States, but rather entrusts the resolution of that question to the judge of the potential forum, who could find that the missing jurisdiction is provided by national law under such a hypothesis, thus

²¹ *Infra*, sub III.

²² The theory of « reflexive effect » originates from the following comment of Georges A. L. Droz, *Compétence judiciaire, Compétence judiciaire et effets des jugements dans le Marché commun. Etude de la Convention de Bruxelles du 27 Septembre 1968*, Paris, 1972, p. 109: ‘We believe therefore that if the linking factors appearing in Article 16 are located outside the Community, the contracting courts, which would be competent pursuant to an ordinary ground of jurisdiction, could nonetheless declare themselves without jurisdiction if their common law authorises this’. For reference and an in-depth analysis of the Droz doctrine, see MARI, 145-150 and the comments by PRETELLI, Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Study PE 453.205, 22-28, sp. 23.

excluding the consequences of the application of the criteria of competence specified in the Brussels regime.

Understood in this way, the theory of “reflexive effect” introduces into the Brussels regime a norm that permits the disapplication of the Brussels regime in order to make space for the application of national law. In substance, the theory boils down to a negative rule of jurisdiction laid down by the regime, the operation of which is conditional upon the expectation of the lack of any jurisdiction provided by national law. A lack of jurisdiction on the basis of national law thus prevails over the jurisdiction derived from the Brussels regime.

The prevalence that the theory attributes to national law is not compatible with the *exclusive* nature or with the *unitary and complete* structure of the Brussels regime. The Brussels regime regulates imperatively not only the jurisdiction of the judges of the Member States when confronted with specific connections to their respective territories, but also foresees in the regulation of that jurisdiction in respect of controversies which involve connections to third States (Article 4). This complete character of the system, derived from the incorporation within it of the national rules of jurisdiction, does not permit any negation of *one* connection to the territorial space of the Union in order to give effect to *another* connection with a third State.²³ The theory of “reflexive effect” leads to an arbitrary exclusion of the criteria of competence of the Brussels system, since the national law is made applicable, under this theory, in an autonomous manner and not because it is required by this system, as on the contrary happens in the cases foreseen by Article 4.

1.6. Conclusions of Chapter 1

The legal order of the European Union has effected, by means of the Brussels regime, a distribution of jurisdictional power amongst the judges present in its territory. This *internal* distribution of jurisdictional power has hitherto not been complemented with a unitary regulation, belonging to the Union itself, which delimits the extent of that power in respect of disputes from outside the scope of the internal distribution.

The EU legal order has provided a method for directly resolving the various questions appertaining to (international direct) jurisdiction, treating them simply as questions of allocation of territorial jurisdiction (competence), but adapting the relevant rules exclusively to the measure and the manner in which they affect the relations between the judges of the Member States. The Brussels regime does not, however, only regulate situations exclusively connected to the legal orders of the Member States, but operates, in part, also with respect to situations connected to third States. Furthermore, for these situations, the uniform rules of the Brussels regime – by way of reminder: conceived and structured exclusively in respect of the relations between the Member States – cover only some of the disputes which could require the activation of the judicial power of the Member States, while national law operates upon the remaining ones. On the whole, the various questions of jurisdiction (direct international jurisdiction) involving connections to the legal orders of third States are partly subjected to the Brussels system – such questions are, therefore, assimilated to questions of internal competence and treated in a manner identical to those which only relate to the relations between the Member States – and partly to national law, where they are regulated, naturally according to the unilateral point of view of each Member State, as pure questions of international competence.

This structural dichotomy of the Brussels regime – which leads it to operate, in respect of the Member States, as a true and rightful mechanism for the distribution of territorial competence, and in respect of third States, as a jurisdictional regime that is based in part

²³ Compare: Court of Justice of the European Union, Opinion 1/03 of 7.2.2006, specifically at points 143, 148 and 153; the earlier proposition in MARI, 148-149; 197-203.

on the extension of the rules of territorial competence to the delimitation of the extent of jurisdiction and is integrated, for the remainder, into the national rules of each Member State – is not adapted to the need to regulate, in a uniform and reasonable manner, the extent of the jurisdiction of the Union in relation to third States. In the way in which it is currently structured, the Brussels regime permits the use of exorbitant criteria in relation to third States – national criteria which it prohibits on the internal plane – which correspond to a unilateral evaluation of the interests that the Member States deem to be worthy of protection. Yet, that is not all. Even when it operates exclusively as a system of territorial distribution of jurisdictional power within the Union, that same system inevitably intervenes in the regulation of direct international jurisdiction in respect of cases connected to third States using exorbitant rules. In fact, it happens that this system of criteria conceived for the purposes of the internal distribution of jurisdictional power is automatically applied *tel quel* in situations which are predominantly connected to third States, as per the hypotheses presented in respect of the theory of reflexive effect, in such a way that some rules of competence, which are not *per se* exorbitant, actually function in an exorbitant manner in concrete cases.

These results do not provide any reasonable coordination between the sphere of the jurisdictional power of the Union and that of third States. In other words, such coordination cannot be achieved by accepting the theory of reflexive effect, thus implying a resurgence of national private international law. More accurately, coordination between the sphere of the jurisdictional power of the EU and that of the US, China and any other third State can only be obtained by means of a uniform system of jurisdiction which takes into account both the need for coordination and the necessity of guaranteeing protection of the collective interests of the EU.

The EU legal order is invested with autonomy and with the competences necessary for the unilateral determination of the cases in which judges subject to its legal order are authorised to exercise jurisdictional power. Like the national legal systems, that of the Union should limit the exercise of jurisdictional power to those disputes that are reasonably connected to the Union. In doing so criteria should be selected that are most apt to satisfy the interests of the Union. It does not seem possible to carry out that task, however, without being well aware that coordination must be effected in global terms, coherently foreseeing and regulating all the circumstances in which foreign jurisdictional powers may become relevant, whilst also taking into account the *principle of reciprocity* which in fact governs international relations.

Therefore, since the rules of (international direct) jurisdictional competence constitute the fundamental and unavoidable point of reference for determining the criteria of indirect international jurisdiction – itself required for the recognition of foreign judgments – it is in the first instance necessary that the criteria of (international direct) jurisdiction, applicable in situations involving third States, be determined and structured also with a view to their indirect relevance as criteria of the international competence of foreign judges. It is thus intuitively obvious that a global and uniform regulation of jurisdictional competence, the operation of which encompasses situations involving third States, cannot be rationally structured, even purely unilaterally, without simultaneously foreseeing the creation of a complete, global and uniform regime for the recognition of judgments originating from third States.

Only within the scope of this specific regime for giving force to foreign judgments will it be possible to formulate hypotheses of the exclusive jurisdiction of a third State and of the exclusive jurisdiction of the Union in the sense which has been explained *supra*,²⁴ which sense is the only conceivable one in respect of relations between the Union and third States characterised by reciprocal autonomy.

²⁴ *Infra*, sub III.

2. INTERNATIONAL JURISDICTION AND DOMESTIC TERRITORIAL ALLOCATION IN INTERNATIONAL LITIGATION²⁵

KEY FINDINGS

- The same (or identical) criteria are often used for different purposes: establishing international jurisdiction, determining domestic allocation of disputes and circumscribing the field of application of a set of rules.
- From a comparative perspective, it is possible to extract two main alternative approaches for addressing the allocation of civil cases in international disputes.
- Namely: a “private international law” approach based on a basic and fundamental difference between issues of judicial jurisdiction and issues of territorial allocation of disputes in the various district courts within a Member State; and a “double functionality” approach consisting in using the domestic rules on territorial allocation as a basis for judicial jurisdiction in international disputes.
- Regulation 44/2001 (as well as, in substance, Regulation 1215/2012) is based on a “private international law” approach.
- Conversely, Regulation 650/2012 does not make any distinction as to domestic territorial allocation over parties of intra-EU disputes and over parties of extra-EU disputes.

2.1. The function of jurisdictional rules

The essential prerequisite for analysing the possibility and desirability of fully harmonising European jurisdictional rules is a sound awareness of the concept of jurisdictional rules via an analysis of the function of these rules within the legislation of Member States, third States and the European Union.

In this respect, the starting point is to establish and accurately **qualify the jurisdictional criteria according to their function**. In other words, the first question that must be answered, prior to considering a criterion such as the *forum rei* criterion, the *forum rei sitae* criterion or the *forum commissi delicti* criterion etc., is the following. Is this criterion: (a) a ground for determining whether international jurisdiction exists; (b) a ground for the applicability of national law, European law or international law; and/or (c) a criterion for allocating disputes between national courts?

It is important to realise that the same (or identical) criteria are often used for different purposes. For example, in Regulation 1215/2012 (and in the corresponding rules of the former Brussels Convention and the Brussels I Regulation), the *forum rei* contained in Article 4 is *at the same time*, **a ground for jurisdiction**, a ground for the **applicability of Sections I and II of Chapter II of the Regulation** and a criterion for **distributing jurisdiction *ratione loci***. The same applies to the *forum rei sitae* in Article 24: the Member State in which the property is situated provides at the same time a ground for jurisdiction and territorial adjudication²⁶.

²⁵ Ilaria Pretelli, Legal advisor at the Swiss Institute of Comparative Law.

²⁶ As stated by M. Fallon and T. Kruger, “The Spatial Scope of the EU’s rules on jurisdiction and enforcement of judgments: from bilateral *modus* to unilateral universality?”, *Yearbook of Private International Law*, vol. 14, (2012/2013), p. 219: “[In international conventions] often it is the jurisdiction rule itself that defines the spatial application [of the convention]. In such cases, when] there is no jurisdiction [...] the Convention simply offers no basis for its application. One would then have to fall back on domestic rules”.

This is neither the case for the *forum commissi delicti* in Article 7(2), nor for the *forum destinatae solutionis* in Article 7(1). The latter are *merely* criteria for territorial allocation within the European area of freedom, security and justice *ratione loci*, i.e., criteria allowing the claimant to ascertain which judge or judges may hear the case. Unlike *forum rei* and *forum rei sitae*, these criteria do not render the Regulation applicable in the State they point towards, nor do they provide *per se* a ground for international judicial jurisdiction, for they provide a ground of jurisdiction - and simultaneously, territorial allocation (venue within the Member State)²⁷ - if, and only if, the defendant is domiciled in another Member State.

For example, the French judge will apply Regulation 1215/2012 to a dispute concerning a sales contract that had to be performed in Marseille only if the defendant is domiciled in another Member State, such as Germany. If the defendant proves that according to German law its domicile is not in Germany and according to US law its domicile is in the USA, the French judge will have to determine its jurisdiction according to its national (i.e., French) rules of private international law. All the other factors connecting the dispute to France - such as the French nationality of the defendant, the French domicile of the claimant, the French city where the contract was negotiated and signed, as well as performed - are of course all irrelevant and cannot lead to the application of Regulation 1215/2012.

On the contrary, if the contract concerns the long-term tenancy of a property located in Aix-en-Provence, the defendant's domicile becomes completely irrelevant and Article 24(1) of Regulation 1215/2012 provides a ground for jurisdiction for the French judge. Moreover, the dispute is adjudicated in the Aix-en-Provence Court.

The **heterogeneity of functions of the different sets of criteria** can be better understood in light of the specific nature of EU rules. The EU is an entity different from an international organisation and from a Federal State; its peculiar nature has an impact on the structure of its legal norms, as well as on the addressees of its rules.

As regards jurisdictional rules, these may be divided in **two major models**²⁸. The first model of rules is that which can be said to encompass supranational, international and distributive rules, similar to those found in international treaties. It is via these rules that the EU **allocates territorial jurisdiction** to the courts of Member States. An example of this principle is Article 7(2) Regulation 1215/2012 which states that in matters involving torts, provided that the defendant is domiciled in a European Member State, jurisdiction belongs either to the District Court of the domicile of the defendant or to the District Court where the harmful event occurred or may occur.

These types of rules are complemented by a different set of rules - **unilateralist rules** - that fix the boundaries of EU Member States' jurisdiction. An example of this second rules model is Article 24(1) Regulation 1215/2012. This provides that in proceedings that have, as their object, rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction. This means that all the immovable property situated within the European area of freedom, security and justice is subject to the jurisdiction of EU courts as regards rights *in rem* or tenancies.

The first set of rules aims to allocate judicial jurisdiction among Member States (the model would be that of international convention distributive rules on jurisdiction). The second set

²⁷ Except in the case of the trust, see Article 7, No. 6.

²⁸ A comparable dichotomy is traced by M. Fallon and T. Kruger, "The Spatial Scope of the EU's rules", *op cit.*, p. 217 *et seq.* distinguishing a bilateral *modus* - broadly corresponding to what we call the international conventions distributive model - from unilateral universality - corresponding to what we call the unilateral fixation of the boundaries of national jurisdictional power enacted by each State.

of rules has the purpose of dictating to Member States in which circumstances they must accept jurisdiction in a unilateral manner, i.e., regardless of what other States order to their judges in the same circumstances (the model would then be that of national unilateralist rules of jurisdiction).

2.2. National sources of international jurisdiction

The source of national rules on jurisdiction is to be found either in the national procedural law statutes (e.g., France's *code civil*, *code de procédure civile* and *code du travail*, Germany's ZPO, UK's Civil Procedure Rules 1999, Denmark's *Retsplejeloven*, United States' Constitution and Code²⁹, Japan's Code of Civil Procedure (*hereinafter* "CCP" and Civil Provisional Remedies Act) or in special private international law statutes (e.g., Polish Act of 4 February 2011 Private International Law *Dziennik Ustaw 2011, No. 80, item 432*, Italian Act of 31 May 1995 n. 218 on Private International Law, Swiss Act of 18 December 1987 on Private International Law *Loi fédérale du 18 décembre 1987 sur le droit international privé*, SR 291).

The content of these rules is different according to the type of their source. Within national private international law statutes, these rules are intended to determine when all national judges have jurisdiction to adjudicate a case. A series of factors connecting disputes to the legal order of the home State is provided for, thereby granting the power of *iuris dicere* to home State judges.

For example, Article 50 of the Italian Private International Law Act grants jurisdiction to the Italian judge in matters regarding succession – until 01.08.2015, when Regulation 650/2012 will become applicable – if (a) the deceased was an Italian citizen at the time of death, (b) the estate devolved in Italy, (c) the assets of greater economic value that are part of the succession are located in Italy, (d) the defendant has his/her habitual residence in Italy or lives in Italy or has accepted Italian jurisdiction, unless the request concerns immovable property located abroad, or (e) if the request concerns assets located in Italy.

When no such special pieces of legislation exist, the problem tends naturally to be solved in two different ways.

First, the problem of international jurisdiction is solved by resorting to the rules applied in order to allocate internal disputes to the various national district courts. This, therefore, assigns these rules a second function. Indeed, the German doctrine talks of these rules having "**double functionality**" (*Doppel Funktionalität*) since they serve **two objectives**: that of allocating disputes efficiently in the various home State courts (i.e., by allocating cases to the relevant venues), as well as of providing these courts with jurisdiction whenever the relevant connecting factor of an international dispute points towards them.

For example, § 27 ZPO (in conjunction with § 13 and 15 ZPO) allocates international jurisdiction and resolves internal allocation disputes in certain matters of successions, firstly to the Court of the place in which the *de cuius* was domiciled at the time of his death and, secondly, if the *de cuius* was a German citizen not domiciled in Germany at the time of his death, to the Court of the place of its last residence in Germany. In the absence of both of these connecting factors, § 27-2 ZPO allocates the dispute to the Amtsgericht, AG of Schöneberg in Berlin.

Given that an entirely domestic dispute will always need to be allocated to a domestic Court, the operation of the double functionality will always grant jurisdiction to a German judge, **even in the absence of a significant connecting factor**. In other words, it is obvious that within any national system a dispute always needs to be allocated to a

²⁹ Cf. arts. . Art. III, § 1 USCS Const and 1332 USC.

territorial court. Thus, every national statute on civil procedure contains rules allowing a claimant to identify the competent judge. If these criteria are also used as jurisdictional rules – and not only in their original function of allocating a domestic dispute to a territorial court – the consequence of the extension of the scope of these rules will be that of always granting jurisdiction to a national judge, by virtue of any territorial criterion.

Secondly, within the systems lacking a specific private international law statute, certain exceptions to the internal territorial allocation rules have been developed in order to restrict the exercise of jurisdiction.

For example, Article 5 No. 1 of the Japanese CCP allocates internal disputes on civil obligations to the court of the place for the performance of such a civil obligation, whereas, according to Article 3-3 No. 1 CCP, this is not the case in international disputes in matters of tortious obligations. In other words, in the case of tortious obligations, the connecting factor of the place of performance is merely a **criterion for territorial allocation** (i.e., the venue), and **does not carry the function of providing the judge** in whose district a tortious obligation must be performed **with jurisdictional power**³⁰.

2.3. Distribution of Jurisdictional power among National Courts in national and international cases

An analysis of the national sources of international civil adjudication reveals two different models for distributing jurisdictional power among home State courts in national and international cases³¹.

The first being an approach in which international jurisdiction is dealt with in accordance with specific rules, most often in a Statute implementing private international law, and the second consisting in a mere extension of the rules on domestic jurisdiction to international cases, usually complemented by some special rules. Within each of those approaches, it is again possible to differentiate two sub-types.

With respect to the first approach, in countries where private international law statutes provide for jurisdictional rules, it will frequently be necessary to carry out **a two-step approach before allocating a dispute to a judge**. Firstly, it must be considered whether the national judges have jurisdiction according to the rules of private international law. Secondly, one must ascertain which of these judges, according to the internal procedural rules, may hear the case.

For example, in the United Kingdom, “there is a fundamental conceptual difference between the rules of English private international law concerning international jurisdiction and the rules distributing cases among national judges: [...] the Courts of England and Wales have jurisdiction over any case in which a writ initiating process has been validly served and do not have jurisdiction over any other cases. This means that the question of jurisdiction is discussed in England and Wales in terms of “service of initiating process”. In other words, the scope of international jurisdiction depends on the categories of cases in which a writ is permitted to be served”³². These categories embody the relevant connecting factors, but have no function in allocating the dispute to a particular district judge. Only once the existence of international jurisdiction is verified can the case be attributed at an early

³⁰ See Nishitani, n. 2 a).

³¹ See, for a more detailed analysis and an extensive description of all possible distinctive criteria: Arnaud Nuyts, Study on residual jurisdiction (Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), JLS/C4/2005/07-30-CE)0040309/00-37, General Report, (final version dated 3 September 2007), at p. 5 ff., whose study “identifies and compares the general structure and connecting factors used in the (then) 27 Member States with respect to the international jurisdiction of their Courts”.

³² See M. Sychold, Jurisdiction with UK, par. II.

“allocation hearing” to the *small claims track*, the *fact track* or the *multi-track* and referred to a court as a function of that allocation, by virtue of the Civil Procedure Rules 1999³³. In France, the same two-step analysis is applicable in accordance with Articles 14 and 15 French *Code civil*, as an expression of the so called “*privilège de juridiction*”³⁴.

The two-step approach is facilitated where the rules providing international jurisdiction correspond to the rules for territorial allocation within the state (i.e., the venues). Take the example of an accident occurring entirely within the borders of Italy, where all of the parties involved are domiciled in non-European countries. Article 3 Italian PIL Statute grants jurisdiction to the local judge of the place where the accident took place, and the Italian Code of Civil Procedure grants him territorial competence³⁵. **The conceptual difference between the jurisdictional power and the territorial competence remains, albeit blurred by the identity of the criteria.** In fact, a defendant could, under a separate analysis, object to jurisdiction and/or to territorial competence - for example by challenging assertions made as to where the accident took place. In order to contest the Italian jurisdiction, the defendant needs to rely on a special procedure in front of the *Sezioni Unite* of the *Corte di cassazione* (that may be introduced as an incident of the first instance and thus avoiding the appellate court) called “*Regolamento di giurisdizione*” (art. 375, co. 1, n. 4 and art. 380ter Italian *codice di procedura civile*). On the other hand, a challenge based on the absence of territorial jurisdiction will not lead to a **dismissal of the claim**, but has merely procedural consequences and leads to a ***translatio iudicii***. In other words, the procedure *continues* in front of the judge that has territorial competence.

Within the first approach, a second category of rules is characterised by the fact that the heads of jurisdiction are the same as those allocating disputes among judges within a State. For example, Article 1166 French Code of Civil Procedure provides that “an application for adoption must be made [...] if the applicant lives abroad, [to the court] within the judicial district of the person to be adopted; if the applicant and the person to be adopted live abroad, [to] the court chosen by the applicant”³⁶. In these cases, **the rule providing for jurisdiction also points to a venue.**

The second main approach is found in countries such as Austria (§ 27a Jurisdiktionsnorm), Germany (§§ 12 to 40 ZPO, § 105 FamFG) and Sweden. In these countries, the approach towards international jurisdiction, and the criteria relied on by courts, are rooted in existing rules of domestic allocation rather than in the rules on international jurisdiction, as is the cases in countries such as Italy and France. In this second group of systems, these rules, by definition, point to a single national court because **their primary aim is not to grant jurisdiction, but instead to allocate disputes to the different district judges.** In the absence of a special and separate private international law statute, these rules have been given an ancillary effect; that is to say that of granting jurisdiction to the sole judge towards to whom they point³⁷. The German BGHZ has adopted this approach, described as “*Doppelfunktionalität*” of the rules on *Gerichtsstände*³⁸. The Austrian *Jurisdiktionsnorm* and the German *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG) explicitly affirm the double function of the rules on domestic territorial allocation. An important consequence of this approach is that there is **no need for the two-step analysis** referred to above. If the dispute has to be allocated to

³³ *Ibidem*.

³⁴ Article 14 and 15 of the Civil Code grant jurisdiction to French court on the sole ground that the plaintiff (Article 14) or respectively, the defendant (Article. 15), is a French national. See Cour de cassation, Chambre civile 1, 29 February 2012, 11-40.101. See also Audit, p. 317.

³⁵ Article 20 Italian Code of Civil Procedure provides for the venue of the District Court of the place where the civil obligation is born or has to be performed.

³⁶ See Ch. Dodd, *The French Code of Civil Procedure in English*, 2004, Oceana Publications, p. 254 *et seq.*

³⁷ Y. Nishitani, *International Jurisdiction of Japanese Court in comparative perspective*, p. 3 commenting Articles 4-22 of the Japanese CCP.

³⁸ Entscheidung des Großen Zivilsenates des BGH (14.06.1965), BGHZ 44, 46 and the literature quoted by A. Fötschl, Germany’s National Report.

a particular Court's district, it follows that the District Court has jurisdiction over the case, unless the peculiar circumstances of the case forbid this conclusion³⁹.

With respect to certain subject matters, these countries do indeed have some **special provisions on international jurisdiction** (e.g., §§ 98 to 106 FamFG for Germany), but the majority of rules derive from the "double function" of the criteria for distributing the cases to the district courts.

A sub-category of the second approach is found in countries such as Denmark, Norway and Japan. In these countries, national civil procedure provisions address by way of exceptions international geographical allocation issues. In these cases, the national provision on territorial allocation is specifically **adapted to international cases**. For example, section 246 Danish *Retsplejeloven* (Administration of Justice Act, or RPL) restricts the scope of domestic rules of territorial jurisdictional allocation when the defendant is (a) a person not domiciled in Denmark, (b) a person whose last known place of residence was outside Denmark, or (c) a person whose last known domicile was outside Denmark. Therefore, Danish procedural law creates *ad hoc* criteria for disputes concerning non-Danish defendants. A similar example is provided by the rule established by Article 5 No. 1 of the Japanese CCP in conjunction with Article 3-3 No. 1, as discussed above.

What broadly distinguishes the two approaches examined is firstly, the starting point for any analysis, and secondly, their function. The rules in the first approach have the objective of circumscribing a **State's "jurisdictional power"** and indicating to judges **when to exercise such power**. According to the second approach, the majority of rules have the objective of efficiently distributing disputes to the district courts, and - in order to let them operate in the international context - either one must attribute to them **a double effect** or the legislature needs to add new **rules** to adapt the existing ones to **international cases**.

2.4. Territorial allocation from a comparative perspective

From a comparative point of view, grounds for determining jurisdiction can be grouped into four major categories.

Firstly, grounds related to the person, e.g., by way of their physical presence for a meaningful amount of time, combined with their will of maintaining such presence (domicile, residence) or by way of their genetic and cultural roots (citizenship) - that justifies their subjection to jurisdiction.

Secondly, the physical attachment of the *res litigiosa* or (in certain States more extensively) of any *res* belonging to the defendant (whether or not useful *ad actoris satisfaciendum*) to the territory subject to sovereignty.

Thirdly, the physical advent of the event linked to the origin of the dispute (e.g., tort, performance of the obligation in contract and/or consumer law or maintenance law) justifies the exercise of jurisdiction; reasons of procedural economy and efficiency are traditionally invoked to explain these grounds for jurisdiction.

Fourthly and finally, the will of the parties by means of the submission of their dispute to a particular legal order, as an expression of party autonomy.

Certain legal orders have a fifth additional head of jurisdiction which grants the claimant the possibility to bring a case in his own *forum* without there being a predetermined link to

³⁹ The parallelism of regimes is only adequate if there is no difference in the interests governing the situation of the parties: please refer to the arguments quoted by A. Fötschl, Germany's National Report, *passim*.

that jurisdiction. There have to be objective and important reasons, submitted to the evaluation of the judge. The issue concerns the *forum necessitatis*.

2.4.1. Jurisdiction over the person

2.4.1.1. Physical presence of the defendant

Physical presence alone suffices as a basis for jurisdiction in the United Kingdom⁴⁰ and, to a certain extent, in Denmark (*oppholdsværnting*, tag-jurisdiction, § 246 sect. 2 RPL)⁴¹.

This criterion derives from the *ubi te reperio ibi te iudico* principle, that may be explained as follows: “he who has been served with the King’s writ and finds himself within the King’s realm is subject to the jurisdiction of the King’s courts”⁴². While in the UK, mere physical presence is sufficient, Danish law requires a place of abode in Denmark at the time of service of documents⁴³.

2.4.1.2. Domicile/residence or habitual residence of the defendant

In most countries, e.g., France (art. 42 ss. CPC), Germany (§§ 12 to 19 ZPO), Italy (art. 3 PIL), Japan (art. 3-2 (1) 1st alternative CCP), Poland (articles 27-30 CCP), and Switzerland (art. 2 LDIP), the domicile of the defendant provides the general ground for jurisdiction. Definitions and interpretations of the concept of domicile might vary greatly from one legal system to the other. For this reason this criterion is usually accompanied by alternative general criteria, such as the residence⁴⁴ or the habitual residence⁴⁵ of the defendant.

In other countries, the relevant factor is residence, e.g., Denmark (§ 235 RPL, § 448d sect. 1 RPL, 456c RPL, § 2), but its definition is broad enough to include the most diffused definition of domicile, i.e., “the centre of a person’s life.”

When the defendant is a legal person, company, association or foundation it may be very difficult to ascertain where it “lives”. The place where the principal office is situated (e.g., Italy, Japan, Poland)⁴⁶, or where the centre of activity is situated (e.g., France) are taken into account.

2.4.1.3. Domicile/residence of a representative of the defendant

Art. 3 para. 1 Italian PIL grants jurisdiction when the general representative of the defendant is domiciled or resident in Italy, and has been duly authorised to sue and be sued.

2.4.1.4. Citizenship of the defendant

a) Citizenship is the general venue for German diplomats (§ 15 ZPO), and a special venue for succession in Germany (§ 27 sect. 2 ZPO). In Italy it is widely used in civil status, family and succession matters (Articles 9, 22, 32, 37, 40, 42, 50 l. 218/95).

⁴⁰ See M. Sychold, UK National Report, for a comprehensive description of the rule and its meaning for natural and legal persons.

⁴¹ See A. Fötschl, DK National Report, *passim*.

⁴² See M. Sychold, UK National Report, *passim*.

⁴³ See A. Fötschl, DK National Report, *passim*.

⁴⁴ Article 3-2 (2nd) alternative. See French Report, § 3,1.

⁴⁵ Article 109 (1) and (2) Swiss PIL.

⁴⁶ The Italian law does not contain express provisions, but it is traditionally thought that the domicile of natural persons corresponds to the main seat of legal persons (see. Ballarino (ed.), *Diritto internazionale privato*, Napoli, 2008, *sub* Article 3, p. 40).

b) When the defendant is a legal person, the criterion is that of the seat of incorporation (e.g., Switzerland)⁴⁷. As with natural persons, it is very easy to ascertain "citizenship", since companies are "creatures of the law" and are necessarily incorporated under a specific law.

2.4.1.5. *Citizenship of the claimant*

This is the famous "privilege" of jurisdiction of Article 14 French Civil Code (*supra* 2.3)⁴⁸. Moreover, in many countries, such as Italy, Poland, and Switzerland, the criterion is widely used in family law and non-contentious legal disciplines in general.

2.4.2. Jurisdiction in rem

2.4.2.1. *Forum rei sitae*

In case of rights *in rem* and, in certain cases, rental contracts over immovable property and lease⁴⁹, France and Sweden (Sect. 1 point 2 of 10-3 Act on Civil Procedure) grant jurisdiction to the judge of the place where the good is located, regardless of its movable or immovable nature. The majority of States, however, make a difference according to the nature – movable or immovable – of the *res*. In the United Kingdom, claims *in rem* are brought only against a ship, or an aircraft, or something within such a vessel (fuel, cargo) by means of physical attachment of the writ to some part of the superstructure of the vessel. Under UK law, the attachment of the writ grants jurisdiction to the UK. In Japan, the *situs* of property brings with it international jurisdiction when the subject matter of the claim (movable, immovable or intangible property) is located in Japan (Art. 3-3 No. 3 CCP) or the claim is related to immovable located in Japan (No. 11).

2.4.2.2. *Asset venues*

In Germany, monetary claims against a person who has no residence (*Wohnsitz*) in Germany may be brought in front of the District Court where the assets belonging to that person are located. If the property is not immovable, but a credit, the *forum patrimonii* is either the Court of the place of residence of the debtor of the defendant or, when the credit is secured by a pledge, the place where such pledge is (see § 23 ZPO)⁵⁰. In Norway, § 4-3 sect. 2 Tvisteloven grants jurisdiction to the judge of the place where the debtor's assets are located, provided the case has sufficient connection to Norway. In Sweden, the location of the asset is residual; it serves to grant jurisdiction when the defendant in monetary claims has no residence (or seat in cases where it is a company) in Sweden. Sect. 1 point 1 of 10-3 Act on Civil Procedure determines jurisdiction according to the location of the defendant's property. The notion of assets includes receivables only when, (i) these are incorporated in a letter of debt called *skuldbrev* or (ii) these are secured by a pledge. In these cases, the Swedish judge may accept jurisdiction on the basis of the *situs* where the document is recorded or, respectively, the *situs* of the pledge. The relationship between the value of the claim and the value of the asset is totally irrelevant. Japan and Switzerland also grant *situs* jurisdiction on the basis of the defendant's seizable (or seized, for Switzerland) property (though this has been criticised in Swiss legal writing). To restrict its scope, the relevant subject matter of the claim is limited to the payment of money and the

⁴⁷ Article 43 para. 3 French CCP; Articles 109(1), 149(2)(b), 151(1), and 152(b) Swiss PIL.

⁴⁸ See D. Solenik, National Report for France, No. 3.3.1.

⁴⁹ See D. Solenik, National Report for France, No. 3.1.1, J. Skala, National Report for Poland, No. III, 2.

⁵⁰ § 23 Besonderer Gerichtsstand des Vermögens und des Gegenstands. Für Klagen wegen vermögensrechtlicher Ansprüche gegen eine Person, die im Inland keinen Wohnsitz hat, ist das Gericht zuständig, in dessen Bezirk sich Vermögen derselben oder der mit der Klage in Anspruch genommene Gegenstand befindet. Bei Forderungen gilt als der Ort, wo das Vermögen sich befindet, der Wohnsitz des Schuldners und, wenn für die Forderungen eine Sache zur Sicherheit haftet, auch der Ort, wo die Sache sich befindet.

situs jurisdiction is precluded when the value of the property is extremely low (Art. 3-3 No. 3 CCP).

2.4.2.3. *Forum arresti*

Jurisdiction for taking provisional measures belongs to the court capable of executing the measure in France and Switzerland⁵¹.

2.4.3. Subject-matter jurisdiction

2.4.3.1. *Place of performance of the contract/place of the tort*

In matters of civil liability for torts or contracts, the places where the obligation arose or, respectively, where the obligation has been performed or needed to be performed or where the service are accepted as a ground for jurisdiction in Italy, France, Poland, Germany, Japan and Switzerland⁵².

In maritime transport contracts, France refers to the port of loading and boarding, or unloading and landing⁵³.

2.4.3.2. *Domicile/residence or habitual residence of the weaker party*

The reasons for protecting the defendant as expressed by the principle *actor sequitur forum rei* are weaker when the defendant is substantially stronger than his counterparty. In particular, these cases involve consumers, creditors in case of maintenance obligations, or employees. In these cases, French law⁵⁴, Polish law⁵⁵, Japanese law and Swiss law⁵⁶ all provide for *forum actoris* jurisdiction.

2.4.4. Submission to jurisdiction

2.4.4.1. *Choice-of-court agreement*

In the United Kingdom, the choice of English or Welsh courts always grants jurisdiction to the chosen judges, unless there appears to be a good reason for refusing leave⁵⁷. In France, a choice-of-court agreement can only confer exclusive jurisdiction on the French judges and will not be capable of impairing French jurisdiction to consider the validity of the clause where it seeks to confer exclusive jurisdiction in favor of a foreign judge.

2.4.4.2. *Submission to jurisdiction*

In most countries – e.g., UK⁵⁸, Italy (art. 4, al. 1 PIL), Japan (art. 3 CCP), Switzerland (art. 6 PIL) etc. – jurisdiction will be granted to a court which would not have it otherwise if the defendant appears before that court without objecting to jurisdiction. Submission to jurisdiction is sometimes limited to property issues (e.g., Italy and Switzerland).

⁵¹ See D. Solenik, National Report for France, No. 3.5.

⁵² Please refer to the national reports for detailed information.

⁵³ See D. Solenik, National Report for France, No. 3.1.1.

⁵⁴ See D. Solenik, National Report for France, No. 3.4.

⁵⁵ See J. Skala, National Report for Poland, No. III.2.

⁵⁶ See L. Heckendorn Urscheler, National Report for Switzerland, No.

⁵⁷ See M. Sychold, UK National Report, *passim*.

⁵⁸ See M. Sychold, UK National Report, *passim*.

2.4.5. Judicial acceptance of jurisdiction

The *forum necessitatis* can be found under French law, Swiss law and German law. However, German doctrine is very doubtful as to its practical importance⁵⁹. In Switzerland and France, case law illustrates that the *forum necessitatis* is actually used occasionally

2.5. Conclusions of Chapter 2

If we compare the national rules to the European rules, it appears that **Regulation No. 44/2001 of 22 December 2000** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and, in substance, **Regulation No. 1215/2012 of 12 December 2012** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)⁶⁰, as well as **Regulation 2201/2003 of 27 November 2003** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, are based on a method which addresses the issues of territorial allocation among the Courts of European Member States, while leaving the issue of international jurisdiction in “non-European” disputes to national rules.

Instead, **Regulation 650/2012** does not make any distinction between jurisdiction over a defendant domiciled in a Member State and jurisdiction over a defendant domiciled outside the area of freedom, justice and security.

Therefore, it seems possible **to characterise the rules provided for by the first Regulations within the “private international law” approach**; the relevant rules being founded on a distinction between jurisdiction and (intra-EU) allocation of disputes. **The Succession Regulation appears, on the other hand, to correspond more to the double functionality principle**, since it provides a series of connecting factors with a view to allow the exercise of jurisdiction within European Member States courts.

⁵⁹ See A. Fötschl, Germany's National Report, *passim*.

⁶⁰ With the exceptions of jurisdiction over consumers, employees and – maybe – with the exception of choice-of-court agreements.

3. EXCLUSIVE JURISDICTION FROM A COMPARATIVE PERSPECTIVE⁶¹

KEY FINDINGS

- Comparative analysis shows that exclusive jurisdiction rules foreseen by national legal order include criteria for claiming exclusive national jurisdiction and rules dealing with exclusive foreign jurisdiction.
- The first category concerns those cases where a State is in the position of being able to enforce its own judicial decision and refuses to give effect to any other State's evaluation of the same case.
- The second concerns the opposite scenario: a State obliges its judges to decline jurisdiction in an international dispute, because the connection of such a dispute with another State is so strong that its decision risks being uselessly pronounced.
- A third category of rules – also dealing with exclusive foreign jurisdiction – prescribes to decline jurisdiction only after judicial verification that jurisdiction is in fact exercised (or will presumably be exercised) by the foreign State connected to the dispute.
- These three categories are all unilateral attempts to coordinate a State's own exercise of judicial jurisdiction with that of other States.

3.1. Proximity, effectiveness and exclusivity

The categories of criteria for determining jurisdiction, as examined above (see §2.4), are traditionally thought to be expressions of the "principle of proximity"⁶². Their organisation within the Brussels regime points to two different understandings of that principle. The first is that, when the legal order of a particular State is able to "**guarantee the effectiveness**" of its allocation of a given case – precisely because it is the only possible legal order where the enforcement of the judgment can take place – that State will have exclusive jurisdiction in relation to the case, *regardless* of any other possible points of contact of the case with other States⁶³. The criterion is hierarchically superior to all others on account of the principle of effectiveness and **the State may be said to have effective control over the substance of the dispute**.

Secondly, **in the absence of a link capable of guaranteeing the effectiveness of the evaluations of a particular forum**, the legal orders of States linked with the case are – as a matter of fact – in an equal position to hear and decide the case. Therefore, the points of contact are all comparable and sufficient. This explains why the claimant may choose between the principal/general *forum* of the defendant and the special *fora* identified through their proximity to the subject-matter of the dispute.

Coordination can be very straightforward in cases where a vertical hierarchy of venues can be identified, i.e., when a State has been able to determine jurisdiction, and to impose and render effective its evaluations. No overlap is possible. In all other cases, the overlap between two courts equally empowered with jurisdiction over the case (neither of which is able to solely guarantee the effectiveness of its own evaluation of the relevant criteria), can only be prevented by the common adoption of principles such as the one founding the rules

⁶¹ Ilaria Pretelli. Legal advisor at the Swiss Institute of Comparative Law

⁶² T. Ballarino, G.P. Romano, *Le principe de proximité chez Paul Lagarde*, Mélanges Lagarde, p.

⁶³ See F. Kahn, *Gesetzeskollisionen*, 1928 (1891) p. 31 *et seq*, Dicey, Morris & Collins, *The Conflict of laws*, 2012, No. 22-025: "The rationale for the application of the *lex situs* to many questions of property law is [...] that the country of the *situs* has control over the property".

on *lis pendens* – i.e. *prior in tempore potior in iure* – or that elaborated by the *forum conveniens* doctrine.

The Brussels regime of coordination is indeed founded on exclusive jurisdiction and *lis pendens*. In the following paragraphs we examine unilateral coordination of jurisdiction by the States, object of this study.

3.2. Exclusive Jurisdiction of the forum:

3.2.1. Claims in rem related to immovables located within the territory of the forum

In the United Kingdom, the national courts have **exclusive jurisdiction** as regards to equitable orders concerning conduct involving **immovable property** in England and Wales⁶⁴. In Switzerland, Article 97 PIL (read in conjunction with Article 108 PIL) prevents recognition of foreign judgments dealing with real property rights (*droit reëls / dingliche Rechte*) concerning real property located in Switzerland. It can be argued, therefore, that claims *in rem* related to immovables located within the territory of the *forum* need to be exclusively brought to the judge of the *forum* (with the notable exception of succession cases). German doctrine and case law agrees that claims *in rem* (i.e., property law disputes) concerning immovable assets (*dinglicher Gerichtsstand*, § 24 ZPO), and claims on lease and leasehold concerning also immovable assets (*Klagen bei Miet- und Pachtsachen*, § 29a ZPO) are exclusively subject to German jurisdiction⁶⁵. Similarly, in France, claims *in rem*, rental contracts of immovable assets and succession-related actions fall under the exclusive jurisdiction of French courts. In Italy and Poland, only rights *in rem* or possession of real estate fall under the exclusive jurisdiction of the *forum*. On the other hand, Japanese jurisdiction rules do not grant exclusive jurisdiction to the *situs* of immovable property, even if the claim concerns rights *in rem* (Article 3-3 No. 11 CCP).

3.2.2. Pacta sunt servanda: Jurisdiction prorogated by the will of the parties involved

In Switzerland, jurisdiction clauses validly agreed upon by the parties are exclusive according to Article 5(3) PIL whenever one of the following two circumstances occur: either one of the parties involved has his domicile or his habitual residence or a place of business in the canton where the chosen court sits, or the case has to be decided by Swiss law according to the PIL statute. In France, a **choice-of-court** agreement is regarded as conferring exclusive jurisdiction when established in favour of a French court.

3.2.3. Implementation of Public policy legislation

It is interesting to note that exclusive jurisdiction rules may also be used in order to protect **public policy**. An extremely interesting example, although not covered by the present research, is provided by Article 3151 Quebec Civil Code, according to which, “a Québec authority has exclusive jurisdiction to hear in first instance all actions founded on liability for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec”⁶⁶. Similar provisions, although less clear as regards to their exclusiveness, are § 32a and § 32b German ZPO⁶⁷ relating to damages caused by industrial factories and damages caused by false or misleading information on the capital markets respectively. Ultimately, the Ministry of Justice decided on the non-exclusive character of these grounds of jurisdiction at the international level.

⁶⁴ See M. Sychold, UK National Report.

⁶⁵ BGH 28.09.1994, NJW 1995, 58. *Amplius* A. Fötschl, Germany's National Report, *passim*.

⁶⁶ The civil code of Quebec in force is online at <http://www.canlii.org/en/>. On this rule see P. de Vareilles-Sommières, « Lois de police et politiques législatives », *Revue critique*, 2011, p. 207 ss et les références, notes 178 et seq.

⁶⁷ A. Fötschl, Germany's National Report for Germany, No. 4.1.1.

Also falling into this category is the Polish *forum* for marital matters (Article 1100 Polish Code of Civil Procedure), as well as the Polish *forum* for relationships between parents and children. This also includes matters of adoption (Article 1101 Polish Code of Civil Procedure) in cases where Polish citizens or persons residing in Poland are involved. In Switzerland, scholarly writers and courts agree that, in matters of validity or registration of intellectual property rights, the jurisdiction at the place where the authority keeping the register has its office is exclusive⁶⁸. This is also in line with Article 3-5(3) CCP of Japan.

Protective measures in respect of weaker parties may well be included in this category. According to the current interpretation of § 29c ZPO, the venue for doorstep contracts with consumers residing in Germany is exclusive. If the consumer has no residence or place of abode in Germany, the exclusivity of jurisdiction according to the ZPO does not prevent the German courts from exercising jurisdiction by referring to the general rules of procedure. German doctrine speaks of '**half-sided exclusivity**' (*halbseitig ausschliessliche Gerichtstände*) because the exclusivity is prescribed only in favor of the consumer and leaves the consumer free to also sue the professional at the domicile of the professional.

3.3. Denial of jurisdiction of the forum in cases where the only relevant connecting factor is abroad

The majority of States do not prevent jurisdiction from being exercised by their judges in circumstances where the case in question is related to their legal order by one or more of the connecting factors listed above (§2.4). Among these, Germany – with its *forum patrimonii* and *forum necessitatis* – almost **always grants itself jurisdiction**, even in the absence of meaningful connecting factors with the case⁶⁹. Equally, very few legal systems decline jurisdiction over a case when it is connected to the *forum* by virtue of one or more of the connecting factors enumerated above (See 2.4.).

Moreover, even in these few legal systems where a general rule prescribing to decline jurisdiction under certain circumstances exists, various **exceptions allow the exercise of jurisdiction** notwithstanding the existence of such a general rule.

The only clear examples of legal systems prescribing that jurisdiction be declined concern cases related to rights *in rem* or leasehold as regards to immovable assets and those involving choice-of-court agreements.

However, in the case of **choice-of-court agreements**, no State declines jurisdiction *a priori* by simply relying on the validity of a clause favouring another designated judge. The use of exceptions, which provide for **a judicial review of the validity of a clause** purporting to choose a court is commonly admitted, despite the so-called presumption of validity of such clauses. Control, albeit summary in nature, is always carried out by the national court before it is prepared to decline jurisdiction in favour of the designated judge.

3.3.1. Claims in rem related to immovables located in foreign land

Italy⁷⁰, France⁷¹ and Poland⁷² claim exclusive jurisdiction on real estate actions relating to immovable assets located in their territory and, by the same token, decline jurisdiction on claims related to immovable assets located abroad.

⁶⁸ See L. Heckendorn Urscheler, National Report for Switzerland, *passim*. In these cases Swiss courts also have jurisdiction if the defendant is domiciled in Switzerland. If he is not domiciled and there is no representative, courts at the place where registers are kept also have jurisdiction. It is a subsidiary ground of jurisdiction. However, it is also termed as exclusive, since a foreign decision will not be recognized if the authority keeping the register has its office in Switzerland.

⁶⁹ *Ibid.*

⁷⁰ Article 5, I. 218/95.

In the United Kingdom, the national courts do not have jurisdiction in cases concerning immovable property situated in foreign States. The rule is interpreted as a principle of public international law in light of the equivalence between territorial sovereignty and ownership of land. This principle is, however, being substantially eroded; claims regarding immovable property abroad are only dismissed in the increasingly rare cases in which a plaintiff is not able to raise any equitable claims in connection with this immovable property⁷³.

Germany does not prevent the exercise of jurisdiction by German courts on proprietary claims (including contracts for lease or leasehold) when the object of the claim is real estate located in a Non-Member State⁷⁴. On this basis, a dispute, for example, between the German-domiciled owner of an apartment located in Egypt and the German-domiciled agency that rents the apartment does not necessarily have to be brought in front of the Egyptian court. This would suggest that the *Doppelfunktionalität* principle is in fact only **used to attribute jurisdiction to German Courts**, and that the provisions of § 12 ZPO (which state that “exclusive jurisdiction” means excluding every other *forum*, including the *forum* prorogated by the will of the parties) only refers to **local, and not international, jurisdiction**. It has, therefore, also been argued that these provisions do not bar the exercise of German jurisdiction and so have no **veto-effect** (*Sperrwirkung*). This is despite the fact that a third State’s Court should, according to the ZPO, have exclusive jurisdiction in certain circumstances. In short, there is no reflexive effect.

3.3.2. *Pacta sunt servanda*: Jurisdiction derogated by the will of the parties involved

In Switzerland, jurisdiction clauses validly agreed to by the parties in principle prevent the exercise of jurisdiction by Swiss Courts according to Article 5 (and Article 149b PIL as regards trusts), but this principle is deprived of effect if it results in the abusive deprivation of a Swiss protective *forum* for the defendant. Despite the definition of “exclusive”, the Swiss judge has jurisdiction, even though he was not designated by the relevant clause, for the purposes of determining the validity of the clause.

Different exceptions also exist in France where, apparently, only a *lis pendens* exception in favour of the foreign chosen court allows French courts to decline jurisdiction⁷⁵. Japanese courts defer to an exclusive choice of foreign courts, insofar as the agreement is valid and the designated courts are legally or factually not prevented from exercising jurisdiction (Article 3-7 CCP).

3.3.3. Sovereign or similar immunities, public services etc.

All national courts lack jurisdiction in the following cases: (a) where the defendant is a diplomatic and consular agent, or a family member of either of these, (b) where the defendant is an international organisation, properly identified, (c) where the defendant is a foreign State, or (d) an emanation of a foreign State (subject to numerous exceptions and differences from State to State). These exceptions are excluded from the scope of the present research, since they derive from public international law and do not affect procedural issues. The same applies in the case of disputes related to acts of civil status, granting patents etc.

⁷¹ See D. Solenik, National Report for France, No. 4.1.2.

⁷² See art. 1102[2] of the Polish code of Civil Procedure. See J. Skala, National Report for Poland, No. 4.1.2.

⁷³ See M. Sychold, UK National Report, *passim*.

⁷⁴ A. Fötschl, Germany’s National Report, *passim*.

⁷⁵ See D. Solenik, National Report for France, No. 4.1.3.

3.4. Lack of jurisdiction of the forum if - and only if – another State assumes to have, in the case in question, an exclusive ground of jurisdiction

The majority of States consider the attitude of other States towards a given case to be irrelevant with regard to their assessment of appropriate jurisdiction. Few examples exist of a unilateral will by a State to coordinate with other States. A good example is, nonetheless, available in Article 86 Swiss PIL, according to which:

“1. Swiss judicial or administrative authorities at the last domicile of the deceased have jurisdiction to take the measures necessary to deal with the inheritance estate and to entertain disputes relating thereto.

2. The above provision does not affect the exclusive jurisdiction claimed by the state where real property is located”.

According to these provisions, the *forum* lacks jurisdiction on the succession of a Swiss resident as regards immovable assets located outside Switzerland, *if and only if*, the State where the immovable assets are located claims the exclusive jurisdiction of its own courts.

These rules are the most appropriate *unilateralist* rules for guaranteeing the harmonious jurisdictional treatment of an international case. It is only by looking at the attitude of the foreign State that it becomes possible to determine if the exercise of national jurisdiction is useful and necessary. Exercising national jurisdiction may, for example, be unnecessarily costly, since the party who wants to take advantage of it will not be able to rely on the decision across the border, and will have to start entirely new proceedings.

In the United Kingdom, the attitude of another State towards the case can, at the discretion of the relevant court, always be taken into account in evaluating the convenience of an English *forum* within the context of the application of the *forum non conveniens* principle⁷⁶.

3.5. *Lis alibi (extra territorium) pendens*

According to Article 1098 Polish Code of Civil Procedure, proceedings pending abroad have no influence on the proceedings before Polish courts if the jurisdiction is given to them by Polish law. In France, it seems that the French courts have a discretionary power to dismiss an action when a *lis pendens* exception is filed⁷⁷. In the United Kingdom, the principle of *lis pendens* is subsumed within the concept of *forum (non) conveniens* and is, therefore, subject to the discretionary determination of the judge. The date on which foreign proceedings were commenced is, therefore, considered purely accidental and thus irrelevant; the decision on “convenience” depends more on the behavior of the party in the foreign proceedings, for example if the foreign action aims at quickly obtaining a judgment (so called “*torpedo actions*”) etc.⁷⁸. In France, Germany, Italy and Switzerland, a positive prognosis of recognition is required in order to accept the defendant’s exception on *lis pendens*. In Japan, although no specific rules have been adopted for international parallel litigation, the judge can refrain from exercising jurisdiction under special circumstances (Article 3-9 CCP) to give *de facto* priority to foreign proceedings. This is comparable to the doctrine of *forum non conveniens*.

⁷⁶ See M. Sychold, UK National Report, No. 4.1.3.

⁷⁷ See D. Solenik, National Report for France, No. 4.2.

⁷⁸ See M. Sychold, UK National Report, No. 4.2.

3.6. Grounds for non-recognition related to international indirect jurisdiction

International indirect heads of jurisdiction, although reciprocal, are not identical to international heads of jurisdiction. In other words, international indirect heads of jurisdiction are prescribed by **specific rules** or principles. These specific rules or principles have a different function than the rules on international heads of jurisdiction. They neither deal with the existence nor with the distribution of jurisdictional power. Instead their function is restricted to the conditions under which a foreign judgment may be recognised.

In the United Kingdom, Poland, Germany, Italy, Japan and Switzerland, the lack of international indirect jurisdiction is considered **a ground for non-recognition**. This refers not only to the violation of a national exclusive ground of jurisdiction, but also to a non-exclusive ground of jurisdiction of a third State.

German doctrine talks of a ***Spiegelbildlichkeitsprinzip***, meaning that Germany will only recognise decisions emanating from a foreign State if Germany, in the **reverse situation**, would have had jurisdiction to deal with the case. French and Italian doctrines refer to international indirect heads of jurisdiction.

In summary, it is a means of **imposing "reciprocity"** on other States: "if you do not act the same way as I would, had I been in the situation in which you are now, I will not recognise your action".

SECOND PART: SURVEY OF OPTIONS AND RECOMMENDATIONS⁷⁹

4. JURISDICTION OF THE EUROPEAN UNION AND RELATIONS WITH THIRD STATES

KEY FINDINGS

- The European Union has laid down rules aiming at identifying the most appropriate *forum* in case of intra-community disputes. There is, however, a lack of rules on how to deal with defendants domiciled in third states and with immovable assets situated in third states.
- It seems appropriate for the European Union to further harmonize or even unify the European Union's (Member States) jurisdiction rules in order to encompass non-EU cases. The new rules may be positive rules: i.e. affirming under which circumstances the European Member States should exercise jurisdiction in extra-EU cases; but they may also be formulated in a negative form: i.e. prescribing under which circumstances the European Member States should not exercise jurisdiction because the refusal of jurisdiction guarantees a better coordination with third States – i.e. it prevents *lis pendens* and guarantees predictability in recognition and enforcement of judgments.
- As a first step, the European Union should decide under which circumstances Member States should exercise jurisdiction in order to safeguard the interests of the European Union when the dispute is connected with third States; conversely, the European Union should decide in which cases it is better for Member States to decline jurisdiction, in an attempt to guarantee effective coordination of jurisdiction with that of third States.
- Since unilateral attempts of coordinating the exercise of jurisdiction cannot guarantee certainty and predictability, we suggest, as a second step, to promote bilateral (and if possible multilateral) agreements of the EU with its most strategic partners in line with the Lugano Convention.

Already the Hess-Pfeiffer-Schlosser report on the application of the Brussels I Regulation in Member States⁸⁰ called for amendments of its rules in order to avoid discrimination among European claimants and thereby enhance the area of freedom, security and justice foreseen by Article 61 EC Treaty (now Article 67 TFEU). The Nuyts Report also proffered a similar conclusion. This report, after examining different options, prefers a simple and easily implementable approach that consists of the mere extension of the existing jurisdictional rules to claims against defendants domiciled in third States⁸¹. In addition, the Nuyts Report

⁷⁹ Drafted by Ilaria Pretelli on the basis of the results of the meeting held on May 29th at the Swiss Institute of Comparative Law with Andrea Bonomi, Lukas Heckendorn Urscheler, Luigi Mari and Gian Paolo Romano.

⁸⁰ Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, The Brussels I Regulation 44/2001, Application and Enforcement in the EU, Study JLS/C4/2005/03, Munich 2008, p. 45 *et seq.* See also: GEDIP, "Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen 2008, Padua 2009, Copenhagen 2010) Proposed amendment of Chapter II of Regulation 44/2001 in order to apply it to external situations".

⁸¹ Please refer to Arnaud Nuyts, Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), JLS/C4/2005/07-30-CE)0040309/00-37, General Report, (final version dated 3 September 2007), p. 117 *et seq.*

proposed that the extension of the scope of the existing rules be accompanied with the introduction of additional grounds of jurisdiction, so as to compensate the unavailability – also in extra-EU cases – of the national rules of jurisdiction in force. Furthermore, the Report called for the introduction of rules allowing European judges to decline jurisdiction under certain circumstances⁸².

This analysis received widespread approval in academic circles and by the European institutions, as illustrated by the Impact Assessment analysis of the European Commission preparing the Brussels I recast⁸³ and, more importantly, by Regulation 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. More generally, it has recently been pointed out that, at least in the field of private international law, the European Union is today in a position comparable to that of a nation State⁸⁴.

The different developments and analyses point towards further steps that could and, in our opinion, should be taken to further harmonize or even unify the rules regulating international jurisdiction.

It must be pointed out that **the ultimate goal of the rules regulating international jurisdiction** is to ensure that decisions regarding disputes involving parties or property situated in third States are pronounced by the *forum*, not only if there is a reasonable and **legitimate interest** to do so, but also to make sure that these **decisions are exportable** whenever they need to be enforced in a third State connected with the dispute.

In light of this underlying rationale, the most relevant options for developing the international rules on jurisdiction within the EU seem to be the following: (a) the setting of unilateral EU rules of jurisdiction for non-EU cases; (b) the negotiation of bilateral or multilateral rules of jurisdiction or indirect rules of jurisdiction with third States (especially treaties on the mutual recognition and enforcement of judgments).

In the following paragraphs we will examine the above options with a reference to the existing national approaches. We will also discuss the opportunity to reproduce national rules within the EU, bearing in mind that where third States are involved, the issue of jurisdictional rules is addressed in order to harmonise access to justice, and to ensure recognition and enforcement of European judgments abroad and, at the same time, to ensure recognition and enforcement of third States' judgments in Europe.

Examples of unilateral (4.1.) and bilateral (4.3.) coordination by States allow to assess the possibility and options to change the current approach (4.2. and 4.4.).

4.1. Unilateral coordination by States

As mentioned earlier, the European Union, up until the recast was approved, had left it to each Member State to coordinate their jurisdictional power with that of third countries; the European Union, in the Brussels I Regulation, has only assumed the task of coordinating jurisdictional power with regard to intra-EU disputes.

⁸² *Ibid*, and at 141 *et seq*.

⁸³ Commission staff working paper Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, SEC (2010) 1548 final, p. 23 *et seq*.

⁸⁴ See M. Fallon and Th. Kruger, *op. cit.*, p. 218: "The EU possesses a legislator, a territory and judges who have to apply the law".

4.1.1. Purely unilateral coordination

With the exception of the Inter-Nordic Conventions and the Conventions negotiated within the European Union framework⁸⁵, Denmark has almost no bilateral agreements as regards to recognition and enforcement of foreign decisions⁸⁶. This means that Denmark attempts to coordinate its jurisdictional power with that of other countries in a purely unilateral manner⁸⁷.

4.1.2. Unilateral coordination with foreign countries by means of reciprocity

The United Kingdom generally tends to deal with cross-border legal cooperation, by means of reciprocity schemes⁸⁸. Such schemes assume that States will adopt a liberal approach in the recognition and enforcement of foreign decisions towards States that are themselves liberal towards UK decisions. Complementary to that, the UK thus restricts recognition and enforcement of foreign decisions in the same way as the State author of such a decision would restrict recognition and enforcement of a UK decision. However, reciprocity arrangements do not simply derive from a unilateral decision of the UK, but underwent negotiations with different States⁸⁹; the UK is also part of the Hague Convention on the Recognition of Divorces and Legal Separations (Hague Conference Convention No. 18). Its reluctance towards solutions derived from international cooperation (see annex IV) is, therefore, not absolute (see *infra*, par. 4.2).

4.2. Recommendations for unilateral coordination from a European perspective

In our opinion, a shift from the status quo will simplify matters, increase the predictability of decision-making and improve homogeneity with other EU instruments.

As regards the first outcome, reducing the number and diversity of the rules on international civil procedure in force in each Member State would simplify the task for lawyers, judges, public authorities, and in the end, European citizens. Limiting the categories of sources where jurisdictional rules may be found in each Member State will also lead to simplification. Having a harmonized set of rules also enhances predictability and security.

Furthermore, the adoption of European rules and the European Court of Justice's power to interpret them might eventually lead to a uniform interpretation of these rules, through the definition of autonomous concepts. Even though uncertainties and divergences in the interpretation of new autonomous concepts may emerge at first, uniformity will, in the end, help to create a common legal terminology, encompassing the existing diversity of national legal concepts, and may eventually increase the pace of justice. The common legal framework will subsequently increase predictability even in cases where third country defendants are involved.

As regards to the homogeneity and consistency within European law, it is important to refer to Regulation 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. This Regulation leads to the abolition of the existing

⁸⁵ See A. Fötschl, DK National Report, *passim*.

⁸⁶ See A. Fötschl, DK National Report, *passim*.

⁸⁷ *Amplius* A. Fötschl, DK National Report, *passim*.

⁸⁸ See M. Sychold, UK National Report, *passim*.

⁸⁹ *Ibid.*

national rules on jurisdiction in succession matters, making no distinction between intra-EU and extra-EU disputes⁹⁰.

Moreover, the adoption of uniform jurisdictional rules would facilitate recognition and enforcement of judgments pronounced in third States. In fact, the recognition in one Member State (according to national rules) of a judgment pronounced in a third State, in principle, bars the recognition of a European judgment on the same matter in that Member State. In order to prevent this situation, uniform rules on recognition and enforcement of judgments are not actually required, provided that the European Union adopts uniform principles on indirect rules for jurisdiction. The European Union could simply have a black list of prohibited *fora* with the effect that a judgment pronounced in a third State will not be recognised in Europe if the court outside the EU based its jurisdiction on a ground that the European Union considers exorbitant.

While such a shift from the status quo appears preferable, it is still necessary to analyse the way in which future actions could be taken.

4.2.1. The reasons to differentiate between EU and non-EU cases

Until now, the criterion of domicile draws the **main dividing line** between what is regarded as intra-EU and what is regarded as extra-EU. Nevertheless, other criteria such as **exclusive jurisdiction**, also establish a distinction between **intra and extra EU-disputes**.

In intra-EU cases, the claimant suing the defendant in a Member State may also sue him in another Member State, pursuant to Art. 7, Regulation 1215/2012. In our opinion, these criteria that provide the claimant with an alternative forum (and in certain cases a *forum actoris*) **should not serve as unconditional grounds for jurisdiction irrespective of the domicile of the defendant**.

A recent example is provided by the proposed amendments to the Brussels I Regulation recast in the field of employment law. The case has been made in favour of creating an exclusive **forum for industrial actions**⁹¹. In the explanatory statement of the motion for a European Parliament Resolution on this topic, it is clearly stated: "the objective [of the newly proposed rules] is to protect individual Member States' rules on employment from being undermined by the jurisdiction of other Member States"⁹². In order to reach this objective, according to the *Rapporteur* Evelyn Regner, "jurisdiction and applicable law should be that of the same Member State, as far as possible"⁹³. The rule has, therefore, been drafted bearing in mind the need to identify "which Member States' jurisdictions have the right to adjudicate disputes". It does, however, not intend to provide any ground for jurisdiction in case of extra-EU disputes.

In this case the dispute is deemed "extra-EU" whenever the industrial action is not to be or has not been taken in a European Member State⁹⁴.

A second example is provided by Article 7(1)(b) Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)". It is only possible to

⁹⁰ See A. Bonomi, P. Wautelet, *Le droit européen des successions*, Commentaire du Règlement n° 650/2012 du 4 juillet 2012, Bruxelles, Bruylant, 2014.

⁹¹ See Draft Report on "Improving private international law: jurisdiction rules applicable to employment", 2013/2023 (INI), 8.5.2013, PR/931852EN.doc, PE508.078v.01-00 and Amendments 1-12, AM/939102EN.doc, 17.6.2013.

⁹² See Draft Report, *op cit*, p. 6/9.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

understand the rationale of the ECJ decisions *De Bloos*⁹⁵, *Color Drack*⁹⁶ and *Car Trim*⁹⁷ - restricting the *forum destinatae solutionis*, i.e., the forum of the place of performance – in the framework of the European Union area of freedom, security and justice. However, **these restrictions do not seem to be suitable** whenever the *forum destinatae solutionis* needs to serve as an unconditional ground for jurisdiction **in “extra-EU” cases**.

It is indeed difficult to explain why EU-based companies exporting goods to non-EU States should be deprived of a European *forum* when seeking execution of monetary obligations to be performed in European Member States.

A different issue concerns the so-called “reflexive effect” of exclusive grounds of jurisdiction as a means of unifying the rules applicable to extra-EU disputes and those applicable to intra-EU cases. Such a principle will not always appear to be appropriate. An example is provided by German case law: in case of a monetary claim based on a rental contract over a house located in a third State – e.g., New Zealand – it seems inappropriate and overly burdensome on the parties to force them – if both reside in the same EU Member State – e.g., Germany – and entered into a contract having in mind German rules governing rental contracts – to sue and, respectively, defend themselves in New Zealand. Not only does this lead to an **increase in expenses**, but it also results in **uncertainty** as regards to the applicable law.

In certain circumstances, the European Union may well prohibit the exercise of jurisdiction due to the strong links between the dispute and a third State. However, such a rule would have to be **a specific rule for extra-EU cases**, and would have to be drafted in terms which grant European judges the ability **to accept or decline jurisdiction** – in the presence of such strong ties – rather than in terms of **designating the competent (third State’s) judge**.

In summary, we do not see valid and convincing reasons to override the existing separate private international law treatment of intra-EU cases and that of extra-EU cases. There are, in our opinion, important reasons – a different constellation of interests and differing considerations as to access to justice – to maintain the distinction (see below §4.1.2.2.). As the European Court of Justice explained in the Lugano opinion⁹⁸, the Brussels regime is indeed founded on such a **dichotomy**.

4.2.2. Creating ad hoc criteria for non-EU cases

Rather than providing a different function for the existing rules, it is preferable to establish a coherent and comprehensive system of jurisdiction in cases where non-EU defendants are involved that should have due regard for **access to justice** and **lack of mutual trust considerations**, as well as for the ultimate need of dealing with recognition and enforcement of judgments from non-EU States.

The abolition of *exequatur* suggests that the European Union considers itself as a **unified jurisdictional power** – as explicitly stated by the ECJ in the Lugano opinion⁹⁹ – and confirms that the Brussels regime has the function of **distributing jurisdiction** among Member States. Consequently, the European Union should also adopt **uniform rules** in order to trace **the boundaries of such unified jurisdictional power**.

The purpose of distributive criteria is that of identifying, in a straightforward manner, the territorial court having the right to adjudicate an intra-EU dispute, while uniform rules on

⁹⁵ECJ, 6 October 1976, *A. De Bloos, SPRL v Société en commandite par actions Bouyer*, ECR 1976, p. 01497.

⁹⁶ECJ, 3 May 2007, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, ECR 2007 p. I-03699.

⁹⁷CJEU, 25 February 2010, *Car Trim GmbH v. KeySafety Systems Srl.*, ECR 2010, p. I-01255.

⁹⁸ECJ, 7 February 2006, Opinion No. 1/2003.

⁹⁹*Ibid.*

jurisdiction over extra-EU disputes would have the alternative purpose of guaranteeing access to justice and, possibly, the enhancement of European substantive rules in the European area of freedom, security and justice.

In summary, the European system should be provided with a specific set of rules aimed at distributing cases among European judges (i.e., the existing Brussels I rules) and with another specific set of rules aimed at affirming (or even possibly denying) the existence of the jurisdictional power of Member States.

More specifically, the existing dividing lines between **EU and non-EU cases** should be maintained. The articles distributing intra-EU cases among European judges (i.e., Sections 2 to 7 of Chapter II of Regulation 1215/2012) should also be maintained. A provision enumerating a list of all criteria giving jurisdiction to European judges in case of non-EU disputes should be drafted¹⁰⁰.

The setting of specific rules declaring when the European Union claims jurisdiction over a case and when it does not would also have the advantage of encouraging negotiation of international agreements with third States on the reciprocal recognition and enforcement of judgments.

4.3. Bilateral coordination with foreign countries by means of international cooperation through treaties

France, Germany, Italy, Poland and Switzerland show a firm belief in solving issues of recognition and enforcement of foreign decisions towards third States by way of international (either bilateral or multilateral) treaties¹⁰¹. Scandinavian States have an enhanced cooperation and longstanding experience in double conventions on jurisdiction and reciprocal recognition of judgments that covers almost every domain of civil law. Furthermore, Denmark is part of the Hague Convention on enforcement of maintenance obligations towards children; the Hague Convention on recognition in divorce law; the Hague Convention on enforcement of maintenance obligations; the Hague Convention on child abduction; and the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (of 19 October 1996).

4.4. Recommendations for promoting bilateral coordination

Under this recommended policy option, the EU would seek to negotiate international agreements that would establish common rules on jurisdiction and the recognition and enforcement of judgments at the international level. Such agreements would notably ensure that third countries take jurisdiction on the basis of internationally accepted criteria if they wish to ensure that their judgments will be recognised within the EU and vice versa.

As stated above, these conventions may contain a list of indirect criteria for jurisdiction or merely include a black list of prohibited *fora* in order to bar the international “movement” of a decision pronounced on the basis of a ground that the European Union considers exorbitant.

¹⁰⁰ It would be possible to adopt all the national criteria granting jurisdiction to Member State, with the exception of those that are not really used or that do not guarantee the enforcement of the decision abroad.

¹⁰¹ See extensively Daria Solenik, National Report for France, *passim*; Lukas Heckendorn Urscheler, National Report for Switzerland, *passim*.

4.5. Conclusions and recommendations

It is important to bear in mind that the European Union has no power to allocate jurisdiction in third States, in the same way as it has - and so far exercises - the power to distribute jurisdiction within the EU. Nonetheless, the European Union may well set the limits of its (Member States') jurisdiction where non-EU cases are concerned.

In this regard, the EU could establish – in a similar fashion to the national legislature – in which circumstances **an international case should be decided by an EU judge** and, possibly, under which circumstances a EU judge should **decline jurisdiction** because its forum is not appropriate, economical or convenient under concerns of legislative policy.

An alternative option is to erase the reference to the domicile of the defendant and using identical jurisdiction criteria for EU and non-EU cases. This way, the existing rules for distributing jurisdiction among Member States would also serve as grounds for European judicial jurisdiction in non-EU disputes. However, for the reasons explained above (see §§4.2, 4.2.1 and 4.2.2) we prefer the option of creating grounds for jurisdiction on an *ad hoc* basis for defendants who are not domiciled in a Member State, under what can be called the “private international law” approach. This approach maintains and reveals the conceptual difference between the **issue of distributing cases** among the European judges and **the issue of deciding, unilaterally, which connecting factors** are considered **relevant** for the EU in order to found the jurisdiction of European judges.

In our view, the European system, currently operating a specific set of rules aimed at distributing cases among European judges (i.e., the existing Brussels I rules), should also be provided with a specific set of uniform jurisdictional rules on which Member States' courts may accept jurisdiction or decline it. We consider that specific unilateral – instead of the existing bilateral - rules on the issue of choice-of-forum and *lis pendens*, as well as on the issue of recognition and enforcement of third States' judgments should also be adopted for non-EU cases. These jurisdictional criteria might be used as criteria of international indirect jurisdiction (see above §1.2) in order to recognise and enforce judgments pronounced by third States' judges.

Uniform rules for non-EU cases would **increase access to justice and predictability** as regards to the enforcement of judgments in international disputes involving parties or property located in third States. Moreover, unilateral coordination via the adoption of a set of criteria allowing the EU to draw the boundaries of Member States' jurisdictional power would also be in line with developments in other areas, and it would enhance free and fair movement of judgments.

However, **unilateral coordination** is, by definition, imperfect. It works best if non-EU States collaborate in making it work. It could, nevertheless, represent an essential starting point and a good basis for negotiations with a view to concluding international agreements. An international covenant with one or more third States guarantees access to justice and predictability over recognition and enforcement of judicial judgments of EU Member States abroad and vice versa. We consider, in other words, that legal certainty on recognition and enforcement of judicial decisions from non-EU States may only be acquired through binding international instruments.

As stated above, these options are not exclusive of each other. On the contrary, they are perfectly compatible and, in our opinion, they should be pursued in parallel.

By way of summary, we would suggest the following recommendations:

- a. We recommend that the European Union maintain **separate provisions** for cases within the European area (EU cases) and those cases outside the European area (non EU cases).

- b. According to the current Brussels regime, the European jurisdictional rules are applied to EU cases, and national rules are applied to non-EU cases. In the future, we recommend that the European Parliament, as legislator, should draft a specific set of rules in order to unify and substitute the current plethora of national jurisdictional rules currently applicable to non-EU cases.
- c. At present, many criteria allow for distinctions to be drawn between EU and non-EU cases, according to the jurisdictional rules to be applied. For example, EU cases embrace all actions against a defendant domiciled within the EU. However, this criterion does not apply in case of actions related to rights on immovable assets located in Member States (as well as to the other hypothesis of article 24 Reg. 1215/2012). Even if the domicile of the defendant is in a third State, this case is always considered as an EU-case by virtue of the location of the immovable and the European exclusive jurisdiction rules will apply. These dividing lines should be maintained or rethought in terms of legislative policy (since they **indirectly determine how far the substantive rules reach**). In other words, we recommend that the European Parliament maintain the existing dividing lines.
- d. Furthermore, we recommend that the European Parliament adopt legislation laying down the criteria providing for jurisdiction of EU Member States where non-EU cases are concerned, taking into account the issue of choice-of-forum and ***lis pendens***, as well as the issue of **recognition and enforcement** of third States' judgments, given that these criteria will have to be used as criteria of **international indirect jurisdiction** in order to recognise and enforce judgments pronounced by third States' judges;
- e. Finally, we recommend that the European Parliament should promote **bilateral or multilateral conventions on recognition and enforcement of judgments with its principal strategic commercial partners**.

ADDENDUM

PROPOSED AMENDMENTS TO REGULATION 1215/2012 IN ORDER TO REGULATE JURISDICTION OVER NON-EU DISPUTES

Article 2:

The reference to Member States should be removed from letters a) and b);

A letter g) should be added as shown hereafter, with a view to determining what is a "Non-Member State of origin" and thereby excluding any reference to authentic instruments, since the rules on jurisdiction do not concern non-jurisdictional authorities:

"For the purposes of this Regulation:

- (a) '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) 'court settlement' means a settlement which has been approved by a court of a ~~Member~~ State or concluded before a court of a ~~Member~~ State in the course of proceedings;
- (c) 'authentic instrument' means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
- (i) relates to the signature and the content of the instrument; and
 - (ii) has been established by a public authority or other authority empowered for that purpose;
- (d) '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;
- (e) 'Member State addressed' means the Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought;
- (f) 'court of origin' means the court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

(g) 'Non-Member State of origin' means the Non-Member State in which, as the case may be, the judgment has been given or the court settlement has been approved or concluded.

Article 6:

As explained in the Report, cases within the European area (EU cases) and cases outside the European area (non-EU cases) shall be specifically addressed. The reasons to differentiate lie in the acknowledgment that the EU has the power of allocating disputes among EU judges, whereas the EU does not have the power of allocating disputes to non-EU judges. The entire article should be amended 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 Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.~~
- ~~2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.~~
1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2), Article 24 and Article 26(1), as well as to all existing bilateral or multilateral conventions, be determined by the following rules:
- a) In matters relating to a contractual or unilateral obligation, the courts of the Member State at the place where the obligation has or should have been performed shall have jurisdiction;
 - b) In matters relating to rights in rem to movable property, the courts of the Member State at the place where the movable property is located shall have jurisdiction;
 - c) In matters relating to torts, the courts of the Member State at the place where the harmful event occurred or may occur shall have jurisdiction;
 - d) In matters relating to the violation of intellectual property rights, the courts of the Member State in which the rights have been or may be infringed, or where the damage has been suffered, shall have jurisdiction;
 - e) In matters relating to unjust enrichment, repayment of amounts wrongly received, *negotiorum gestio* and *culpa in contrahendo*, the courts of the Member State at the place where the event giving rise to the related obligation occurred, or at the place of performance of the obligation giving rise to the claim, shall have jurisdiction;
 - f) In respect of actions brought against the settlor, the trustee or the beneficiary of a trust created by the operation of a statute, or by a written instrument, or by parole and evidenced in writing, the courts of the Member State in which the trust is domiciled shall have jurisdiction;
 - g) In matters relating to provisional or protective measures, the courts of the Member State in which the measure is sought shall have jurisdiction;

- h) In respect of actions related to an action pending before the courts of a Member State, the court seized of the pending action shall have jurisdiction.
- 2. Subject to Article 18(1), Article 21(2), Article 24 and Article 26(1), the courts of a Member State shall decline jurisdiction whenever the parties, regardless of their domiciles, have agreed that a court or the courts of a Non-Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, unless the agreement is null and void:
 - a) as to its formal validity, under the provisions of art. 25, or;
 - b) as to its substantive validity, under the law of that Non-Member State.
- 3. The courts of a Member State shall decline jurisdiction in matters relating to rights in rem to immovable property located abroad."

Article 33

A reference to Article 6 (as amended above) should be added:

- "1. Where jurisdiction is based on Article 4, **6**, 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:
 - (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
 - (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
- 2. The court of the Member State may continue the proceedings at any time if:
 - (a) the proceedings in the court of the third State are themselves stayed or discontinued;
 - (b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
 - (c) the continuation of the proceedings is required for the proper administration of justice.
- 3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
- 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."

Article 34

*Article 34 should be **deleted** because it is formulated in too generic terms: the power of the judge to stay proceedings is so wide that it allows to cast doubt on the respect of the right to a fair trial and law certainty.*

Since Article 34 operates as a negative rule of jurisdiction, because it allows the EU judge to dismiss the proceedings pending before him, it may potentially impair the right of the plaintiff and of the defendant to be heard by the "tribunal established by law" (art. 6 ECHR).

Within the EU, there is no necessity to prevent abuses potentially deriving from the stay or dismiss of an action related to a proceeding previously filed in another Member State, since the rules of jurisdiction are uniform rules.

Conversely, such a risk, in connection with the stay or dismiss of an action related to a proceeding previously filed in a Third State, exists because the rules on which the non-EU judge has grounded his jurisdiction escape to the control of the European Union.

*Moreover, the risk of contradictory judgements is prevented by the wide notion of *lis pendens*, which is sufficiently comprehensive to include hypothesis traditionally qualified, within national legal orders, as hypothesis of "related actions".*

Article 35

The final reference to Member States should be removed from the last sentence of the Article, so the Article would read as follows:

"Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another ~~Member~~ State have jurisdiction as to the substance of the matter."

CHAPTER III - RECOGNITION AND ENFORCEMENT

*Uniform criteria of recognition and enforcement of judgments seem the most natural consequence of the unification of rules of jurisdiction achieved through Article 6 above. Thus, a section 2 bis should be **added** (between the current Articles 44 and 45; between the current section 2 and 3) with the following title:*

New Section 3

Recognition and enforcement of Non-Member States' judgments

New Article 45

1. A judgment given in a Non-Member State shall be recognised in Member States in accordance with the following provisions.

2. Any interested party who raises the recognition of a judgment given may, in accordance with the national procedures providing for exequatur, apply for a decision that the judgment be recognised and enforced in a Member State.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction to determine that question.

New Article 46

A decision of a court of a Non-Member State shall be recognised and enforced in a Member State:

- a) If that court of the Non-Member State would have had jurisdiction according to the criteria set out in Section 1, Chapter II of the present Regulation;
- b) If the judgment is final and no appeal or revision proceedings are pending, and;
- c) If Article 45 does not provide grounds for refusal of recognition and enforcement.

ANNEX I: NATIONAL REPORT FOR DENMARK WITH REFERENCES TO NORWAY AND SWEDEN

(Andreas Fötschl)

1. Sources

The Danish law on civil procedure is governed by the so called *Retsplejeloven* (Administration of Justice Act, abbreviated in Denmark as RPL).¹⁰²

The rules on local jurisdiction are to be found in chapter 22, respectively in §§ 235 to 248 RPL.

A special rule (§ 246 RPL) exists in cases where the defendant is classified under procedural law as a foreigner, which means that she/he does not have her/his *hjemting* (residence) in Denmark. The concept of "*hjemting*" (home court) is central in Danish law on jurisdiction. The *hjemting* is a person's general venue. Next to the *hjemting* (general venue) there exists *undtagelsesværn timer* which defines the court where the defendant can be sued on a more exceptional basis (special venues). We will use the term special venues for the Danish *undtagelsesværn timer*. The Brussels I Regulation is a binding international instrument for Denmark¹⁰³ and has been enacted through Danish legislation.¹⁰⁴ In the sphere of their application, these two instruments (EU and national) prevail before other Danish legislation, **priority** which is explicitly provided for in § 247 sect. 1 RPL.

Denmark has (by letter of 20 December 2012) notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012¹⁰⁵ (recast of Brussels I). This means that the provisions of Regulation (EU) No 1215/2012 will be applied to relations between the Union and Denmark.

Denmark is a Scandinavian State. These states have a particular form of cooperation in the form of the Nordic Council. For **Inter-Nordic cases**, particular rules on jurisdiction are to be found in the Nordic marriage convention, the Nordic convention on bankruptcy and the Nordic convention on Estates upon death.

2. Danish distribution of jurisdiction

The Danish rules on local jurisdiction can be classified as follows¹⁰⁶:

Someone who has his *hjemting* in Denmark is regarded as a native according to procedural law. Someone who does not have his *hjemting* in Denmark is regarded as a foreigner under procedural law. According to § 235 RPL, a claim shall be brought at the defendant's general venue (*hjemting*) if the law does not provide otherwise. The *hjemting* is where the defendant has his residence or address (§ 235 sect. 2 and 3 RPL). If the defendant does not have residence or address, the *hjemting* is the last known residence or address in Denmark (§ 235 sect. 4 RPL).

There is no legal definition of residence or abode. According to Danish legal writers and Danish jurisprudence, residence is the place where a person and her/his family have their

¹⁰² LBK Nr. 1008 of 24 October 2012. We use in the following the Danish abbreviation. The Act is for civil as well as for penal cases. Therefore, the abbreviation CCP (Code of Civil Procedure) cannot be used.

¹⁰³ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 299, 16/11/2005 P. 0062 – 0067.

¹⁰⁴ Act of 20 dec 2006, nr. 1563 (so called BIFL).

¹⁰⁵ Art. 3, par. 3, of the 2005 Agreement.

¹⁰⁶ This classification is found in Gomard/Møller/Talevski/Thønnings, *Kommetar til Retsplejelov*, Bind I, 8. Ed. 2008, chapter 22, Introduction, p. 479 et seq.

lasting home, where their assets and property normally are located and where the person normally stays unless a particular situation arises (like, e.g., holidays, business trips, sickness, stay in prison).

The decision to have one's residence at a particular place has to be expressed by certain externally visible dispositions. E.g., a French woman, owning an apartment in Denmark and living there at irregular time intervals (between five and six months per year), was not regarded having her residence in Denmark for a case on divorce filed by her in Denmark against her French husband.¹⁰⁷ Her internal decision was only relevant from the time by which she filed an application for a permanent residence permit at the authorities in Denmark. That she had such internal wish for residence before and that she started to prepare the final moving already long before, was regarded as irrelevant.¹⁰⁸

A person who is in Denmark as an asylum seeker has normally no residence in Denmark until the residence permit is given, even if this can take many years.¹⁰⁹

Decisive are the factual circumstances. A weekend or summer-house is no residence if there is another, regular home. The stay in another's house as a visitor can form a residence, if the stay has a permanent character. The stay in a hospital or prison, also for many years, is no residence, if the home is upheld by other members of the patient's or prisoner's family. If the stay in hospital or in a home for aged is of a permanent character, it would be a residence, even though the person kept a fully equipped home and no moving was announced to the authorities. The address in the telephone book or the registered address in the register of the population at the authorities only gives an indication of the real circumstances.¹¹⁰

Persons who do not have a residence in Denmark nonetheless have a *hjemting* there, if they have, by a former residence or abode, a connection to Denmark which is at least as strong as their connection to another country. The rules on abode and former residence or abode shall (only) prevent that persons to be sued anywhere. If a person has no residence in any country, a place of abode in Denmark suffices for the *hjemting*. A person that has no residence anywhere, and who had some residence before in Denmark, can be sued in Denmark. For a person who does not have a residence or abode abroad, the former abode in Denmark is sufficient as the *hjemting*. That is to say, a residence in Denmark only loses its relevance if a new residence in another country has been created. Legal practice in Denmark demands some quite strong connection to another country for the creation of a new residence abroad.¹¹¹ An abode in Denmark loses its relevance already if there is a new abode in another country.¹¹²

According to Danish law the *hjemting* is also the general defendant's venue respectively for divorce, filiation and bill of exchange (see respectively: § 448d sect. 1 RPL, 456c RPL, § 2 Vekselloven).

A so called fictitious *hjemting* exists for Danish citizens abroad who have never had a residence or abode in Denmark and are not subjected to foreign jurisdiction at their place of residence (e.g. Danish ambassadors or Danish employees of international organizations). They have their fictitious *hjemting* in Copenhagen (§ 236 RPL).

¹⁰⁷ According to § 448c sect. 1 nr. 2 RPL, the plaintiff would have had to show that she/he has had lived in Denmark the last two years before bringing the claim or has had previously a residence in Denmark.

¹⁰⁸ Østre Landsret, 20. june 1995, UfR 1995.808.

¹⁰⁹ Vestre Landsret, 27 june 1995, UfR 1995.789.

¹¹⁰ Gomard/Kistrup, Civilprocessen, 6. Ed., 2007, p. 106, 107.

¹¹¹ It seems strange that the creation of a residence in another country is evaluated according to Danish law. Within the Brussels-Lugano regime such evaluation would have to be done according to the place of the new residence. However, there seem to be no judgments or legal writings in Denmark where this would have been regarded as a problem.

¹¹² For all see Gomard/Kistrup, Civilprocessen, 6. Ed., 2007, p. 109.

Corporations have their *hjemting* at the place where their main-office is located (§ 238 RPL). If no such place can be found, the *hjemting* is at the board's or director's place of residence.

Regions and municipalities have their *hjemting* at the place of their main-office (§ 239 RPL). A state department has its *hjemting* where the office sued is situated (§ 240 RPL).

All these notions of *hjemting* do not refer to citizenship. The citizenship is of no importance for the question if someone is regarded as "native" in the meaning of procedural law.¹¹³

All other venues are exceptional and supplementary. We will refer to these as **special venues** (*undtagelsesværenting*).

Real estate (§ 241 RPL), the enforcement of pledges (§ 487 sect. 1 RPL), and lease relationships (§ 111 Act on Leases) cases may be brought in front of the *forum rei sitae*.

Cases against natural persons or corporations doing business can be brought where the activity is executed (§ 237, 238 sect. 2 RPL).

Disputes for the performance of contractual obligations can be brought at the place of performance (§ 242 RPL).

Claims from non-contractual liability can be brought at the place where the wrong was committed (§ 243 RPL).

Actions arising from a consumer contract that was not concluded at the merchant's fixed place of business can be brought by the consumer at her/his own *hjemting* (§ 244 RPL). The *hjemting* can also be an active venue when the *forum actoris* is justified by the need to protect a weak party.

One subgroup in this second group of venues is the **special venue for foreigners** (without residence in a Member State to the Brussels I Regulation or the Lugano Convention, § 246 RPL). A special rule (§ 246 RPL) exists for the case that the defendant does not have her/his *hjemting* (residence) in Denmark.

Special venues do exist for the transfer of property in case of death (§ 2 Act on the transfer of estate in case of death).

A claim for which an arrest has taken place shall be brought at the place where such arrest occurred (§ 634 sect. 2 and 3 RPL).

A third group of rules treats situations where there is one claim against **several defendants** (subjective cumulation, § 250 sect. 1 RPL) or different claims against one defendant (objective cumulation, § 249 RPL). Counter claims are governed by § 249 sect. 2, 2. RPL.

A fourth category consists of the rule on **prorogation** (§ 245 RPL).

As a matter of principle, the relation between general and special venues is of a facultative nature. This means that the plaintiff may choose between a general and a special venue. However, important exceptions do apply, amongst others, in the case of the special rule for foreigners (§ 246 sect. 2 and 3 RPL).

¹¹³ Gomard/Møller/Talevski/Thønnings, *Kommetar til Retsplejelov*, Bind I, 8. Ed. 2008, Art. 235, note 2, p. 480.

As a matter of principle, the decisive point in time is the bringing of the claim. Again, there is an important exception in connection to foreigners for tag-jurisdictions, where the moment in time of service is decisive.

2.1. Is there a conceptual difference between rules on jurisdiction and rules distributing the jurisdictional power among national judges?

As a starting point, the rules on national jurisdiction do also govern international jurisdiction. However, there are restrictions and some very important additions to this concept.

According to § 246 sect. 1 RPL, if the defendant does not have his *hjemting* (general venue) in Denmark, a court case can be brought before a Danish court if one of the following (national) special venues applies: §§ 237 (place of activity of natural persons), 238 sect. 2 (place of activity of foreign legal entities), 241 (real estate), 242 (place of performance of a contractual obligation), 243 (torts) and 245 (prorogation).

These special venues of Danish law correspond to those of the Brussels I Regulation.¹¹⁴ This serves as a justification for using them as grounds for jurisdiction. These venues are explained in detail under point 3 of this section.

The other (national, general or special) venues **do not apply** in international cases.¹¹⁵ This approach selects and makes very clear which of the national venues apply in international cases.

There are some subsidiary, **additional venues** in **international** cases on **patrimonial** law.

If none of the abovementioned venues in international cases apply, the case can be brought to the court in whose district the person without general venue in Denmark has his address in Denmark at the time of **service** of documents (*oppholdsværnting*, tag-jurisdiction, § 246 sect. 2 RPL).

The other subsidiary, additional venue in patrimonial law is the venue of the **place of assets**. A claim against a person not having his general venue in Denmark can be brought where this person has assets in Denmark at the time of bringing the claim to the court (*godsværnting*, § 246 sect. 3 RPL).

The *oppholdsværnting*, i.e. jurisdiction based on service of documents on a person not permanently resident in the Danish territory, and the venue of assets only apply in international cases. They have no corresponding provisions in the Brussels I Regulation.¹¹⁶

In **international consumer cases**, a particular rule applies which **modifies** the general venue for national consumer cases in case of international relations (§ 246 sect. 1 sent. 2 RPL).

In principle, we would say that there is a **conceptual difference** between national and international jurisdiction, since especially the *oppholdsværnting* and asset-jurisdiction only

¹¹⁴ So expressly Lookofsky, *International privatrett*, 3. Ed., 2004, p. 24.

¹¹⁵ Gomard/Kistrup (*Civilprocessen*, 6. Ed., 2007, p. 138) seem to apply all the general venues on foreigners (not domiciled in Denmark) as well, next to § 246 RPL. But since the general venues overwhelming demand a residence or seat in Denmark, most of them would not apply anyway. The question behind this statement would be if § 246 RPL is of an exclusive nature or not. We would rather see § 246 RPL as an exclusive rule which seems more in line with the reasoning of the legislator (*Betænkningsrapport 1052/1985*, p. 80). However, the question seems of a rather academic nature with little or no practical impact. It does not seem to be discussed in Denmark.

¹¹⁶ Lookofsky, *International privatrett*, 3. Ed., 2004, p. 24.

apply to defendants based outside Denmark (and outside the sphere of applications of the Brussels I Regulation and the Lugano-convention).

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

The grounds of jurisdiction are different in that some of the national venues do not apply in international cases and in that two venues are added for international patrimonial law cases (tag jurisdiction and place of assets: § 246 sect. 2 and 3 RPL).

3. Heads of jurisdiction

In the following, only Danish heads of jurisdiction having special relevance for international jurisdiction in relation to third states (non-Member States to Brussels I and the Lugano-convention) are explained in detail.

In general, it can be said that there seems to be no case law on the particular relation or distinction between national, international and European heads of jurisdiction. In legal literature it seems that the decisions "Group Josi"¹¹⁷ and "Owusu"¹¹⁸ are only cited in a very restrictive and narrow way.¹¹⁹ The requirement of reference to at least one other member state is still quoted as valid in relevant literature.¹²⁰ If a case has no connection to another Member State, Danish courts would probably not apply the European heads of jurisdiction.

3.1. *Forum rei*

a) Danish Ambassador's venue

According to § 236 RPL, a Danish citizen who does not have his residence in Denmark and who is not subject to foreign jurisdiction (ambassadors or employees of international organisations) has his "fictitious" residence (*hjemting*) in Copenhagen. It is not necessary to refer to § 236 RPL in § 246 RPL since the consequence of § 236 RPL is that the Danish citizen abroad has a fictitious residence in Copenhagen. According to Danish legal theory, § 236 RPL should not only be applied to Danish citizens working abroad but also to other citizens working in a Danish representation abroad.¹²¹

b) Venue of commercial activities of natural persons

The first reference mentioned in § 246 is § 237 RPL. This rule provides that cases against natural persons, who do exercise a commercial activity, can be brought before the court of the place from which the activity is exercised. There must be a relation between the claim and the commercial activity, and a regular place from which the activity is organized in a fixed manner (e.g. a form of office or administrative facility). If the activity is exercised from places that change all the time, § 236 RPL would be not applicable. § 237 RPL is comparable to Art. 5 nr. 5 of the Brussels-I-regulation. It expands the idea of Art. 5 nr. 5 to relations between Denmark and third states.¹²²

¹¹⁷ ECJ 13 July 2000. - Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC) - Case C-412/98.

¹¹⁸ ECJ 1 March 2005. - Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others. - Case C-281/02.

¹¹⁹ P. Nielsen in Karnov, Brussels-I-regulation, Art. 2, there at footnote 11 (In the Karnov online edition, April 2013).

¹²⁰ Gomard/Kistrup, Civilprocessen, 6. Ed., 2007, p. 126 (with a reference to elder Swedish literature before Group Josi and Owusu).

¹²¹ Gomard/Kistrup, Civilprocessen, 6. Ed., 2007, p. 109, there in footnote 17.

¹²² Gomard/Kistrup Civilprocessen, 6. Ed., 2007, p. 114.

c) Venue of commercial activities of legal persons

The same reasoning as in § 237 RPL for natural persons is found in § 238 sect. 2 RPL for a legal person's commercial activity from a fixed business facility (branches, agencies).

d) Defendant's abode in Denmark ("tag-jurisdiction")

Danish law contains a particular venue for international cases outside the Brussels-Lugano-regime: the venue of the defendant's abode at the time of service of the court documents (§ 246 sect. 2 RPL) which is normally called tag-jurisdiction. According to the annex I of the Lugano-convention, it is an exorbitant jurisdiction¹²³.

The rule does not apply to legal persons, only to natural persons. The presence of a company's director in Denmark will not determine the venue of the company.¹²⁴ Such a finding of venue only applies for disputes in patrimonial law, not of any other nature (e.g. family law).

The defendant only has to be in Denmark at the time of service of the claim according to the rules on service of the RPL. It is of no relevance if the defendant leaves Denmark after the service.

The law does not demand an abode of certain duration. However, for practical reasons a very short stay will not be of relevance. E.g., if the defendant is only for a short time at the airport to change flights, this will hardly ever be sufficient to organize a service according to the RPL. However, a stay in a hotel will suffice.¹²⁵

3.2. *Forum actoris*

For **international consumer cases**, a particular rule applies which takes into account that these regularly involve long distance relations. In international consumer contracts, the consumer with a general venue in Denmark may bring a **claim in Denmark against a defendant** not having his general venue in Denmark, if, before entering into the contract, there was an initial offer or some advertising in Denmark and the consumer has taken the necessary steps to enter into the contract in Denmark (§ 246 sect. 1 sent. 2 RPL). This active venue shall protect Danish consumers against third state merchants as defendants. The rule corresponds to art. 15 sect. 1 lit c. in connection with art. 16 sect. 1 Brussels I Regulation.

The Danish legislator considers that it would be rather unlikely that a Danish judgment would be enforceable in a third state. However, it nevertheless considers that it is useful for a Danish consumer to be able to sue in Denmark to protect himself from court actions of the foreign entrepreneur in Denmark at a later point in time.¹²⁶

3.3. *Forum rei sitae*

According to art. 241 RPL, disputes relating to rights concerning immovables can be brought in front of the court where the immovable is situated. Art. 241 RPL is a so called supplement venue (and no exclusive jurisdiction). Since art. 22 of the Brussels I Regulation, which also applies for some leases, is also in force in Denmark, the rule in art.

¹²³ According to the EXPLANATORY REPORT by Pocar para 35 et seq. "The system of the Convention is based on the unification of the rules of jurisdiction, rather than the mere exclusion of exorbitant jurisdictions, even though the national rules whose application is excluded are in fact often of this nature. [As a matter of facts] the reference to national law means that where the defendant is domiciled in a State not bound by the Convention [and with the exception of the rules on exclusive jurisdiction and the rules on the prorogation of jurisdiction], the rules of jurisdiction listed in Annex I may be applied even if they constitute exorbitant jurisdiction.

¹²⁴ Gomard/Kistrup Civilprocessen, 6. Ed., 2007, p. 140.

¹²⁵ Gomard/Kistrup Civilprocessen, 6. Ed., 2007, p. 140.

¹²⁶ Gomard/Kistrup Civilprocessen, 6. Ed., 2007, p. 139.

241 RPL is effectively without a sphere of application.¹²⁷ Art. 22 Brussels I provides for exclusive jurisdiction and applies to all sorts of claims in connection with immovable property for all parties, as well as for claimants and defendants from third states.

3.4. Fact-based jurisdictions

§ 242 RPL contains a classical formulation for the venue of performance of contractual relationships. It is copied from Brussels I.¹²⁸

§ 243 RPL is a classical venue of torts. But it can also be used for damages for the breach of contractually secondary obligations.

§ 245 RPL contains the rule that the parties can agree which of several courts of the same instance have jurisdiction (prorogation).

3.5. *Forum patrimonii*

§ 246 sect. 3 RPL contains the rule concerning the venue of assets, which only applies in international cases. Disputes concerning patrimonial law against parties that do not have their general venue in Denmark (or a Brussel-Lugano-state) can, if there is no appropriate venue according to § 246 sect 1 RPL (subsidiarity), be brought before the court at the place where the defendant has, at the moment of bringing the claim, some patrimony, or where the goods that the claim concerns are to be found. If the seizure of goods is deferred by a security payment, the security payment is regarded as patrimony and the relevant venue is at the place where the summons for the seizure had to be brought to court.

The venue of patrimony applies in favour of Danish, but also foreign plaintiffs.

The rules of the RPL about the venue of patrimony do not require any connection between the defendant's abode (or his other patrimony) and the patrimonial relationship which the claim concerns.

In Danish legal writing, one finds the example of an umbrella forgotten in the hotel. Such items of a minor value are not sufficient.¹²⁹ Claims in money and counter claims are sufficient. Since the place of the asset is decisive, it is necessary to decide where assets are located. Claims not represented by documents are at the place of the debtor. Claims represented by documents are to be placed where the document is. Shares registered in the Danish value paper register, are placed there (in Tåstrup).

For this reason, this venue is known as "exorbitant". However, there are cases where this venue seems justified in international cases. In Danish legal writing, there are calls to reduce the scope of this venue along the lines of German case law and to demand instead a link between the case and the court. But for Denmark it is said that such a change would require a change of the Danish law first.¹³⁰ Other authors suggest only reducing the scope in cases of abuse.¹³¹

The venue of patrimony is defended in Denmark by the fact that foreign judgments from a third state are not recognized and executed in Denmark.¹³²

¹²⁷ Gomard/Møller/Talevski/Thønnings, *Kommetar til Retsplejelov*, Bind I, 8. Ed. 2008, § 246, nr. 4, p. 501.

¹²⁸ Lookofsky, *International privatrett*, 3. Ed., 2004, p. 25.

¹²⁹ Gomard/Kistrup *Civilprocessen*, 6. Ed., 2007, p. 143.

¹³⁰ Lookofsky, *International privatrett*, 3. Ed., 2004, p. 27.

¹³¹ Gomard/Kistrup *Civilprocessen*, 6. Ed., 2007, p. 147.

¹³² Lookofsky, *International privatrett*, 3. Ed., 2004, p. 27.

The venue of patrimony does not depend on the question of how the goods arrived in Denmark or for how long they should stay.

If the goods are sold to another person, only for the purpose of avoiding the finding of a venue in Denmark, such sale is valid and there will be no venue of the seller.

§ 246a RPL expressly refers to ships that have been seized.

3.6. Labour law

In Denmark, special courts do exist for labour law cases between labour law organisations and employers (collective disputes). All labour law is rather strongly influenced by public law regimes and public law dispute resolution mechanisms. Individual cases between a single employee and the employer have to be brought before the general courts, but only if the labour organisation the employee is a member of does not support his claim in the respective public procedures or if he is not a member of any labour organisation at all. In a labour law claim before a general court, the court would likely use the rules of the RPL to decide upon its jurisdiction. The public law dispute mechanisms in labour law would probably also use the RPL.¹³³ Since labour law disputes between Danish employees and employers from third states do not occur often, there is rather no clear answer to this question in legal literature.

3.7. Provisional measures

According to § 246a RPL, disputes about the confirmation of the seizure of a ship and about a claim for which a seizure is made can be brought at the court at the place where the seizure is executed or would be executed if it had not been deferred by a security payment (see also the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, 10 May 1952).

A special rule exists in connection with the venue of patrimony. If the seizure of a thing (arrest in goods) is prevented by delivery of a form of security, the security will be considered as goods, which are at the place where the demand for the seizure is confirmed or should be confirmed (§ 246 sect. 3 sent. 2 RPL). It does not matter where the goods are actually located.

The seizure of ships for specific claims is regulated by the Act on the Law of the Sea (Søloven, chapter 4).

The international competence for other provisional measures is treated separately under § 246a RPL.¹³⁴ According to Danish law, provisional measures are seizure (§ 628 RPL), interdiction (*forbud*, § 652 RPL) and the securing of evidence in intellectual property law cases (§ 653 RPL).

According to § 628 RPL, a seizure can only be authorised if it is assumed that a claim exists. It can only be granted for assets in Denmark.¹³⁵

¹³³ Gomard/Møller/Talevski/Thønnings (Kommetar til Retsplejelov, Bind I, 8. Ed. 2008, § 246, nr. 1, p. 501) do list special provisions on International Jurisdiction. There is no special jurisdiction for labour law cases listed. The new law on the labor law environment from 2010 (LBK nr. 1072 of 07 sept 2010) does not seem to have changed the situation (see there § 81). Gomard/Kistrup (Civilprocessen, 6. Ed., 2007, p. 62) mention that most of the so called special courts (a.o. the former labour law court) use the RPL (by special reference or by the nature of the relation).

¹³⁴ Gomard/Møller/Talevski/Thønnings, Kommetar til Retsplejelov, Bind I, 8. Ed. 2008, § 246, nr. 1, p. 501

¹³⁵ U 1987.942 SH.

The international competence is governed by § 631 sect. 2 RPL with reference to § 487 RPL. This is a rule on local jurisdiction. It refers back to some of the venues described above and to the Brussels-Lugano-regime.¹³⁶

3.8. Succession law

According to § 2 sect. 2, 2. Point of the Act on the Separation upon Death of a Person (*Lov om skifte af dødsboer*), if the deceased did not have his general venue in Denmark, the Minister of Justice can refer the estate or a part of it to the Danish court distributing assets (*skifteret*) where the deceased had Danish citizenship or another special connection to Denmark or leaves patrimony that is not subject to a foreign estate. If the deceased was not a Danish citizen, the same rule applies for any patrimony that the deceased left in Denmark and which is not subject to a foreign estate.

Other rules apply for inter-Scandinavian cases.

3.9. Family law

According to § 448c RPL, cases on marriage can be treated in Denmark, if (1) the defendant has his residence in Denmark, or if (2) the plaintiff has his residence in Denmark and has either lived in Denmark in the last two years or has formerly had his residence in Denmark, or if (3) the plaintiff is a Danish citizen and he proves that he can't, for the sake of his citizenship, bring a case to a court in the country where he lives, or if (4) both parties are Danish citizens and the defendant does not object to the claim in Denmark, or if (5) the divorce is demanded because of a separation communicated in Denmark within the previous five years.

Special rules exist for same-sex couples. They are granted a venue for separation in Denmark, if they live in a country which does not allow same sex-marriage.

For marriages concluded in Denmark, claims can be brought in Denmark in respect of their existence or non-existence.

International rules do prevail.¹³⁷

4. Unilateral Coordination of Jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the *forum*:

Danish law does not recognise exclusive jurisdiction. Even the venue for claims concerning the property of immovables is a special, not an exclusive venue.

4.1.2. Absence of Jurisdiction of the *forum*:

As far as we have been able to identify, the Danish judge is always provided with jurisdiction.

4.1.3. Exclusive Jurisdiction of a Foreign State: Are there any cases in which the law of the *forum* excludes the jurisdiction because the relevant connecting factor is located in another State whose Courts have exclusive jurisdiction according to its own law?

As far as we have been able to identify, there are no such cases in Danish law.

¹³⁶ Nielsen, *International privat- og processret*, 1997, S. 259.

¹³⁷ For all see § 448c sect. 1-4 RPL.

4.2. *Lis pendens*

As a point of departure, Danish law does not recognise general rules on international *lis pendens*. But there are special rules on *lis pendens* contained in particular laws (e.g. in connection to the Scandinavian states, for cases of child abduction, in the Act on the CMR).

The key principle is that the fact that a foreign case is pending only triggers the effect of *lis pendens* if the foreign judgment is recognized in Denmark.¹³⁸

5. Rules on recognition and enforcement

Apart from special provisions in the Brussels-Lugano regime and some special provisions amongst the Scandinavian states¹³⁹, any other foreign judgments do not have any effect in Denmark.

According to § 233a RPL, the Minister of Justice would have competence to allow for the recognition and enforcement of foreign judgments or to conclude treaties related to this matter. However, it seems that no such treaties have been concluded (apart from the Brussels and the Nordic system).

In Danish legal literature, it is said that Denmark is one of the few countries of the western world that does not recognize foreign judgments and is therefore seen as hostile to foreign courts.¹⁴⁰

In legal practice, foreign judgments still have evidentiary effect. Foreign divorces are, however, recognized. There are also some cases on filiation where Danish courts have been known to recognize foreign judgments.¹⁴¹

5.1. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

Foreign judgments are recognized in Denmark only on the basis of a conventional recognition and enforcement regime. If the foreign judgment falls outside the scope of an International Convention of which Denmark is part, it will not be recognized. The recognition of a foreign judgment may be requested by the foreign Ministry of Justice and would lead to a special procedure; it seems however that this procedure has never been used. Thus we may conclude that foreign judgments are not recognized according to national law (apart from, of course, the Conventional regimes).

5.2. Bilateral and Multilateral Agreements

The relevant conventions in Denmark are not easily located, given that it does not appear to have a designated publicly accessible Database¹⁴² on the concluded international treaties.¹⁴³

Jurisdiction

Brussels-Lugano-regime.

¹³⁸ Nielsen, *International privat- og processret*, 1997, p. 104, Gomard/Kistrup *Civilprocessen*, 6. Ed., 2007, p. 237 in note 30.

¹³⁹ LBK nr. 39 of 7 june 1978. In Denmark, Act on nordic judgments (Nr. 622, 14 dec 1977). Since all major nordic countries are part of the Brussels-Lugano-regime, it has mostly lost its value.

¹⁴⁰ Lookofsky, *International privatrett*, 3. Ed., 2004, p. 43.

¹⁴¹ Gomard/Kistrup *Civilprocessen*, 6. Ed., 2007, p. 781 et seq.

¹⁴² <http://um.dk/da/politik-og-diplomati/retsorden/traktater/> (April 2013).

¹⁴³ The following information is based on dated literature (a book from 1997, there seems to be no more recent, comprehensive source on the topic) and a research study in the database of the lovtidende (part C) with the keywords "kompetence" (jurisdiction), "anerkendelse" (recognition) and "fuldbyrdelse" (enforcement). The database only contains publications from the year 2008 onwards.

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental responsibility and measures for the protection of children (of 19 October 1996)¹⁴⁴

Amongst the Nordic states:

Convention on inter-Nordic marriage and divorce¹⁴⁵.

Articles 5 to 10 of the Convention contain rules on jurisdiction for inter-Nordic marriages. They seem to be of no further relevance for the questions treated here. The rules and their transcription into Danish law are rather complicated.¹⁴⁶

Convention on inter-Nordic Estate upon death of a person¹⁴⁷

This has not been derogated from under the new Regulation on cross-border succession (see Art. 75 sect. 3). If a person who is citizen of one Nordic state and was living in another Nordic state dies in that latter state, the courts of that latter country shall have jurisdiction to start proceedings, if the local law so provides (Art. 19 of the Convention).

Some authors cite as a further Nordic Convention (which would contain rules on international jurisdiction) the Inter-Nordic Convention on bankruptcy.¹⁴⁸ Others say that it is a so-called simple convention that only contains rules on recognition and enforcement.¹⁴⁹

Rules on International Jurisdiction in Danish law based on Conventions¹⁵⁰:

The CMR convention (in the Danish Act on the CMR, § 39).

Arrest in ships, see § 246a RPL.

Act on the Law of the sea, § 64 sect 2.

Act on Air Traffic, § 117

Different laws on Intellectual Property Law.

Act on Damages caused by Atomic Power.

Recognition and Enforcement

Denmark is subject to the Brussels Regulation in virtue of the Agreement with the EU¹⁵¹ and of the Lugano 2007 Convention. Denmark has ratified Hague Conventions Nr. 9 on enforcement of maintenance obligations towards children, Nr. 18 on recognition in divorce law, Nr. 23 on enforcement of maintenance obligations, Nr. 28 on child abduction, and nr. 34 on jurisdiction, applicable law, recognition enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

¹⁴⁴ Ratified on the 30-VI-2011 and entered into force on 1-X-2011. See BKI nr 8 of 13 March 2012.

¹⁴⁵ BEK nr 121 of 10 April 1954.

¹⁴⁶ Nielsen, International privat- og processrett, 1997, p. 232.

¹⁴⁷ BEK nr 348 of 24 June 1976. For Denmark, Finland, Island, Norway and Sweden.

¹⁴⁸ Gomard/Møller/Talevski/Thønnings, Kommentar til Retsplejelov, Bind I, 8. Ed. 2008, § 246, nr. 1, p. 501.

¹⁴⁹ Nielsen, International privat- og processrett, 1997, p. 290.

¹⁵⁰ List found at Nielsen, International privat- og processrett, 1997, p. 131.

¹⁵¹ Supra, footnote 3.

Denmark has also ratified some Conventions of the Council of Europe and the Berne-Convention on claims in connection with trains¹⁵².

Moreover, as regards Conventions in force amongst the Nordic states, the Nordic Judgment convention¹⁵³ must not be forgotten. This does not prevail over the Lugano Convention as regards the recognition of Norwegian judgments in Denmark and the recognition of Danish judgments in Norway:

- i) Convention on inter-Nordic Estates upon death of a person¹⁵⁴: Art. 28;
- ii) Convention on inter Nordic marriage and divorce¹⁵⁵ Art. 22;
- iii) Convention on inter-Nordic bankruptcy

Rules in Danish law with a background in conventions

Act on the CMR (§ 40)

Act on the Law of the Sea (§ 205)

Act on the Damage caused by Atomic accidents (§ 37)

Act on international investment disputes

There are some laws which would contain a basis for the minister of Justice to allow further recognition and enforcement. However, it seems that such empowerment has not been used. It has already been noted above that Denmark is country particularly hostile towards recognition and enforcement of foreign judgments.

6. Conclusions: a Comparison with other Scandinavian countries

We shall also give a short overview of the heads of jurisdiction in Norway and Sweden.

In **Norwegian** law, the question of international jurisdiction is generally treated in § 4-3 of the *Tvisteloven* (Act on Civil Procedure). According to sect. 1 of this rule, disputes in international cases can only be brought before a Norwegian court if the case has a sufficient relationship with Norway. The question of when such a relationship is sufficient is considered in the particular case. The national rules on local, general and special venues (§ 4-4 and 4-5 *Tvisteloven*) only give more or less strong indications of such connection for international jurisdiction. In addition to these (local) venues, the Norwegian law provides for a **venue of assets**, but solely for international cases (§ 4-3 sect. 2 *Tvisteloven*). Also, the venue of assets is controlled by the rule of "sufficient relation to Norway".

In respect to the Lugano-convention, it is noteworthy that Norway's Highest Court recently decided that, where the relevant case has **no connection to any other Brussel-Lugano-state**, the **Lugano Convention does not apply for plaintiffs from third states** (in the particular case, a plaintiff from Singapore). This is the case even though the defendant has his residence in Norway. Instead of the Lugano Convention, the Norwegian § 4-3 *tvisteloven* (Code of Civil Procedure) has been applied with the specific requirement of a special connection to Norway (i.e. a state interest of Norway in the decision). However, in

¹⁵² Nielsen, International privat- og processrett, 1997, p. 309.

¹⁵³ It has lost most of its meaning because of the European Instruments (Nielsen, International privat- og processrett, 1997, p. 338).

¹⁵⁴ BEK nr 348 of 24 june 1976. For Denmark, Finland, Island, Norway and Sweden.

¹⁵⁵ BEK nr 121 of 10 april 1954.

the same decision, the court held that such special connection should normally be present when the defendant company has its seat in Norway, according to national law.¹⁵⁶

For **Sweden**, there exists no general rule that governs international jurisdiction. However, for a large number of claims, there exist particular rules on international jurisdiction (e.g. in family and succession law but also in patrimonial law).¹⁵⁷ If there is no particular rule (and no international instrument applies), the rules on local jurisdiction are used as a starting point to decide upon international jurisdiction. These rules are found in chapter 10 of the *rättegångsbalken* (Act on Civil Procedure, law 1942, nr. 740).

For some time there was discussion in Sweden concerning whether, in non-regulated cases, the **Brussels I Regulation** could – in cases with third states, for example – be **applied by analogy**. Some case law did even operate in that way. However, the Swedish Highest court denied such analogy and currently takes the regulation and the Lugano-convention only as, in effect, a source of inspiration in such cases.¹⁵⁸ A strict analogy was not found to be convincing because it was considered that it would limit the Swedish international jurisdiction considerably. In particular, it would deprive the Swedish international jurisdiction of the **venue of assets** as foreseen in Swedish national law. Such a limitation was only regarded as reasonable if it is combined with the regime of recognition and enforcement as foreseen in the Regulation, parts which clearly cannot be applied *per analogiam*.¹⁵⁹

In those cases where international jurisdiction is explicitly non-regulated, the starting point is therefore the relevant rule on local jurisdiction. But such application is not a mechanical operation; these rules only form a sort of guideline for the decision. Some rules seem to be more effective than others. E.g., the venue of joint debtors (10-14 Act on Civil Procedure) does not decide on international jurisdiction. This is the same for the rules on consumer disputes (10-8a Act on Civil Procedure).¹⁶⁰

Heavy emphasis in international cases is placed on the Swedish **venue of assets** (10-3 Act on Civil Procedure). Sect. 1 point 1 of this rule stipulates that those not having residence or seat in Sweden shall be sued, if the claim is for a sum of money, at the court in Sweden where some of their patrimony is located. Point 1 can be regarded as a classical rule of a venue of assets.

Interestingly, point 2 of the same rule changes the perspective. If the dispute is not about a sum of money but about a right *in rem* in movable property, the claim has to be brought at the place where the movable is located. Hence, a claim for the payment of the purchase price of the movable located in Sweden would not be sufficient to bring the claim in front of a Swedish court (under point 2).¹⁶¹ The second point of this rule has, it seems, the effect of extending the **lex rei sitae** rule to movables (which would explain why only the first point is rendered inapplicable in annex I of the Brussels I Regulation).

Section 2 of chapter 10 adapts the venue of assets for a particular asset, namely **receivables**. A normal receivable is located at the place of the debtor. A receivable which is documented by a so-called *skuldbrev* (roughly translated as letter of debt) is located at the place where the document is located. A receivable secured by a pawn is located at the place of the pawn.

¹⁵⁶ Norwegian Highest Court, 20.12.2012, Rt. 2012-1951, HR 2012-2393-A. Particularly in nr. 88 of the Norwegian decision.

¹⁵⁷ Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 114 et seq.

¹⁵⁸ NJA 2007, p. 482, 499.

¹⁵⁹ Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 115.

¹⁶⁰ Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 118.

¹⁶¹ Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 121. However, it would be sufficient under point 1, it seems.

The venue of assets is of big importance and has given rise to a considerable number of legal disputes. E.g., it has been decided that, in principle, every asset independent of its actual value is sufficient to determine venue (a common example is an umbrella as an asset in Sweden). However, **paperless shares** in a Swedish *bolag* (i.e. a corporation which holds apartments and leaves the use to the shareholders) shall not be sufficient since such paperless shares did not exist when the venue of the assets was introduced by the Swedish legislator.¹⁶² A bank account with some hundred Swedish crowns is sufficient for a claim in money for millions. This is justified by the fact that in many cases, Sweden does not recognize foreign judgments. It should be possible for the Swedish plaintiff to try to have his Swedish judgment based on the venue of asset recognized abroad.¹⁶³

Since these lines only give a general overview of the situation in Sweden, no further details are reported here.

Comparing the **different approaches of the Scandinavian countries**, it can be said that Sweden follows a different model to that of Denmark and Norway. The Swedish model is clearly closer to the German approach of using rules on local jurisdiction to decide international jurisdiction. This approach seems to us more outdated and rather unclear, creating more uncertainties than the Danish model. The Norwegian model also appears rather abstract and formulates only the highest principle of connection without giving closer indications of which general or special venues to apply.

Altogether, the **Danish model** seems **convincing** and formulating in rather concise wording a precise framework for international jurisdiction. The venue of assets is justifiable in international cases. The tag-jurisdiction would combine the Common law with the Civil law tradition. The Danish rule on international jurisdiction (§ 246 RPL) could, as far as can be identified, constitute a role model also on a European level.

¹⁶² A reasoning understandably criticized by Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 123.

¹⁶³ Bogdan, *Svensk Internationell Privat- och Processrätt*, 7. Ed., 2008, p. 123.

ANNEX II: NATIONAL REPORT FOR FRANCE

(Daria Solenik)

1. Sources

- Code of civil procedure, Articles 42 to 48 extended to international matters (hereinafter “CPC”).
- Civil Code, Articles 14 and 15.
- Labour Code, Article R. 1412-1.
- Jurisprudence.

2. French distribution of jurisdiction

2.1. Is there a conceptual difference between rules on jurisdiction and rules distributing the jurisdictional power among national judges?

In domestic disputes in civil and commercial matters, selection of a competent judge is a two-step procedure. First, the plaintiff must identify the category of courts which are materially qualified to hear the specific dispute he intends to file (material jurisdiction, *competence attribution*). Second, the plaintiff needs to search, within that category of courts, the “proper judge” which is territorially best placed to hear the case (territorial jurisdiction, *compétence territoriale*).

In other words, the plaintiff needs first to identify the jurisdictional order competent for his type of dispute (e.g. courts of commerce for commercial contracts; common courts for divorce), and then to find a territorially competent judge.

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

In cross-border disputes, the plaintiff needs to identify whether, in principle, the French judicial system has the power to allow the dispute to be heard by its national judges. For this purpose, the plaintiff must demonstrate that the dispute has a sufficient proximity with the French legal and judicial order. This proximity usually takes the shape of a territorial link between the parties or the subject of the dispute and the French territory.

Thus, in cross-border matters, determination of the competent judge follows an inverted pattern: first, the plaintiff needs to determine if the French courts are territorially competent, and then, in the affirmative case, he will search for a judge competent for the subject matter.

French law distinguishes between common grounds of jurisdiction and specific grounds of cross-border jurisdiction.

The common grounds of jurisdiction are the criteria of material jurisdiction used to determine the competent court for domestic disputes, according to the subject matter of the case. Hence, Articles 43 to 48 CPC, normally used in domestic matters, have been extended by the courts to international matters. Applied to international disputes, these provisions are used to determine whether or not the French jurisdictional order is competent to judge the case. The common grounds of jurisdiction are construed according to “principal-and-subsidiary” scheme. The principal criteria is based on the *forum rei*: “*The territorially competent court is, unless otherwise provided, that of the place where the defendant lives [...]*”(art. 42 CPC). Projected into the international order, this rule is interpreted as conferring jurisdiction to French courts, whenever the defendant lives in the French territory. The subsidiary criteria (specific or alternative to *forum rei*) are established by Art. 44 to 46, as extended to international litigation.

Specific grounds of jurisdiction have been specifically elaborated for international disputes and determine the power of the French jurisdictional order to hear a cross border case.

3. Heads of jurisdiction

3.1. *Forum rei*

According to art. 46 CPC, “the plaintiff may bring his case, at his choosing, besides the court of the place where the defendant lives, before:

- in contractual matters, the court of the place of the actual delivery of the chattel or the place of performance of the agreed service;
- in tort matters, the court of the place of the event causing liability or the one in whose district the damage was suffered;
- in mixed matters, the court of the place where real property is situated;
- in matters of support or contribution to the expenses of marriage, the court of the place where the creditor lives”.

The general head of jurisdiction is the place of the **defendant’s domicile**. French tribunals are internationally competent to resolve disputes in which the defendant has his domicile or - for legal persons and companies - his **seat** in the French territory (Art. 43 para. 3 CPC). French courts are therefore deprived of international jurisdiction in cases where the defendant has his domicile or his seat abroad.

The **objective reality of the connecting factor** is of particular importance for jurisdiction purposes. Thus, when the seat (head office) of the company has been **fictitiously or fraudulently created** in a foreign country, French courts shall have jurisdiction over the action against such company provided that its real **centre of activity** is situated in France¹⁶⁴.

Other than that, by virtue of the “main station theory” (*“la théorie des gares principales”*),¹⁶⁵ French tribunals shall enjoy jurisdiction over actions brought against **companies having branches in France**¹⁶⁶. It has thus been considered that an Italian plaintiff could file with the French courts an action against a company established abroad, provided that the litigious contract was signed in “an important centre” of the company in Paris, where the latter had “a **sufficiently characterized factual domicile**”¹⁶⁷. However, the international jurisdiction of French courts over disputes involving French branches of foreign companies is limited to **actions exclusively related to the activity of such branches**, and not to the general activity of the foreign company¹⁶⁸.

International jurisdiction is also attributed to French courts whenever the defendant has an **“apparent domicile”** in the French territory: when the conduct of the defendant induced

¹⁶⁴ JCl. Droit international, Fasc. 564-40 ou Sociétés Traité, Fasc. 194-30. - Cass. com., 12 déc. 1972 : Bull. civ. 1972, IV, n° 331. - M.-N. Jobard-Bachelier, L'apparence en droit international privé : LGDJ, 1984, n° 394 s.

¹⁶⁵ JCl. Droit international, Fasc. 564-40 ou Sociétés Traité, Fasc. 194-30. - G. Delaume, Les conflits de juridictions en matière de sociétés : JCP G 1950, I, 849.

¹⁶⁶ Cass. 1re civ., 15 nov. 1983 : JurisData n° 1983-702494 ; JDI 1984, p. 887, note P. Courbe ; Rev. crit. DIP 1985, p. 100, note H. Batiffol.

¹⁶⁷ Cass. 1re civ., 12 mai 1959 : Rev. crit. DIP 1959, p. 714, note Y. Loussouarn ; JDI 1960, p. 164, obs. J.-B. Sialelli ; RTD com. 1960, p. 243, obs. Y. Loussouarn. - V. J.-P. Niboyet, n° 1808 et 1812.

¹⁶⁸ Cass. com., 26 mai 2004 : JurisData n° 2004-023863 ; RD aff. int. 2005, p. 222, obs. A. Mourre et Y. Lahlou.

and maintained the idea that the latter had his domicile or seat in France¹⁶⁹.

Should the defendant have no known domicile in a foreign country but instead, a **place of residence** in France, the latter shall suffice to confer international jurisdiction on French courts¹⁷⁰.

The general head of jurisdiction (defender's place of residence) may be used alternatively with **specific heads of jurisdiction**, all of which qualify as *forum rei sitae* (i.e. the place where the subject matter of the dispute or the controverted object is located).

The choice between alternative heads of jurisdiction is up to the plaintiff.

However, no alternative head of jurisdiction is provided for **payment orders**: according to art. 1404 CCP, actions for an injunction to pay may be brought before French courts "*in whose jurisdiction the prosecuted debtor(s) live(s)*" (the defendant's residence criteria may not be replaced).

3.1.1. Contracts

According to art. 46, para 1 and 2 CCP, in contractual matters, the plaintiff may opt for bringing his case before "the court of the place of the **actual delivery of the chattel** or the **place of performance** of the agreed service". Once "internationalized", these provisions confer jurisdiction to French courts whenever one of the named connecting factors (delivery of chattel or performance of service) is located in the French territory.

If none of the connecting factors is in France, French courts are to decline international jurisdiction. For instance, French tribunals may not retain jurisdiction over a dispute between two foreign companies over a contract fully executed abroad¹⁷¹. No other head of jurisdiction may be used to bring the case before French courts¹⁷².

The *forum rei sitae* rule is naturally applicable in cases where **immovable property** is subject to contract. Thus, French tribunals are internationally competent to hear cases arising out of **rental contracts** over immovable property or a **farming lease**, if the property on lease is located in France (*COJ*, art. R. 221-48. - *CPC*, art. 880).

In matters of **commercial lease**, « international jurisdiction of French courts results from the situation of the immovable property under commercial lease »¹⁷³.

In matters of **maritime transport contracts**, Articles 42 and 46 remain applicable, together with Articles 54 and 73 of the Decree n° 66-1078 of 31 December 1966 as extrapolated into the international context. According to these provisions, claims arising out of contracts of maritime transport of goods may be brought before French tribunals:

¹⁶⁹ Cass. 1re civ., 31 janv. 1968 : Bull. civ. 1968, I, n° 41. - CA Paris, 14 oct. 1958 : Gaz. Pal. 1959, 1, p. 80. - J.-P. Niboyet, n° 1809, cité supra n° 1. - M.-N. JOBARD-BACHELLIER, *L'apparence en droit international privé. Essai sur le rôle des représentations individuelles en droit international privé* : LGDJ, 1984, n° 362 s.

¹⁷⁰ *A contrario*: CA Paris, 18 févr. 1994: JurisData n° 1994-022542 ; D. 1994, somm. p. 351, obs. B. Audit (under art. 43 CCP).

¹⁷¹ Cass. 1re civ., 2 avr. 1996 : JurisData n° 1996-001346 ; Bull. civ. 1996, I, n° 164 ; JCP G 1996, IV, n° 1264. - 7 avr. 1998 : Rev. crit. DIP 1998, p. 459, note H. Muir Watt.

¹⁷² See CA Douai, 5 sept. 1991 : JurisData n° 1992-600114 ; DMF 1992, p. 123, excluding jurisdiction of French courts based, in contractual matters, on *forum arresti* or on *forum patrimonii*.

¹⁷³ Cass. 1re civ., 25 févr. 1997 : JurisData n° 1997-000780 ; Bull. civ. 1997, I, n° 69 ; JCP G 1997, IV, 862 ; D. 1997, inf. rap. p. 90 ; Rev. soc. 1997, p. 602, note BEAUBRUN, "la compétence internationale de la juridiction française (...) résulte, s'agissant d'une action relative à un bail commercial, de la situation de l'immeuble"

- if loading or boarding took place in a French port¹⁷⁴;
- unloading or landing was conducted in a French port¹⁷⁵.

By analogy, the courts tend to consider the above-mentioned connecting factors as the **place of performance of the services**, in the meaning of Art. 46 para. 2 CCP.

3.1.2. Torts and quasi-delicts

In matters of **torts and quasi-delicts**, the rule of Art. 46, para. 1 and 2 CPC are “internationalised” to enable the plaintiff to refer a case, alternatively, “to the courts of the place where the defendant lives” (general rule of jurisdiction), or “in tort matters, the court of the place of the event causing liability or the one in whose district the damage was suffered (special rule of jurisdiction)”¹⁷⁶.

The French case-law evolves in the direction of retaining jurisdiction of French courts, where the defendant is domiciled in France¹⁷⁷. Where the defendant has no fixed or known domicile in any country, the criteria of “residence” in the French territory shall suffice to confer international jurisdiction to French courts¹⁷⁸.

Where the defendant has neither residence nor domicile in France, French courts may still have international jurisdiction over the case, if the tortious act has been **entirely committed in France** (meaning that both the event causing liability and the damage occurred in France). French courts have thus been considered as having international jurisdiction over actions against counterfeit, when fabrication and distribution for sale of forged comics took place in France¹⁷⁹.

French courts still retain international jurisdiction where the tortious act is only **partially committed in France**. By virtue of Art. 46 para. 3, French tribunals are competent to hear a case if either the event causing liability or the damage has occurred in France. So far, French tribunals have not yet had an occasion to rule on jurisdiction in a case where the event causing liability was located in France (probably because in such cases, French tribunals are competent on the basis of the defendant’s residence criteria). On the contrary, jurisprudence is abundant in cases where international jurisdiction of a French court was upheld due to the fact that the alleged damage was suffered in France¹⁸⁰. It was thus ruled that the victim of defamation by a television broadcaster could file an action in France, if the defamatory information diffused in Monte-Carlo could also be viewed in France.¹⁸¹

Jurisprudence, as well as doctrinal analysis, remains divided on the question of whether French courts should have jurisdiction over **torts committed via the Internet** (defamation, unfair competition, false advertising, etc.). Two main positions coexist in the

¹⁷⁴ CA Bordeaux, 27 févr. 1979 : DMF 1980, p. 163.

¹⁷⁵ CA Aix-en-Provence, 15 juin 1972 : D. 1972, p. 756, note P. Rodière ; Rev. crit. DIP 1973, p. 350, note H. Gaudemet-Tallon. - CA Aix-en-Provence, 20 mars 1979 : DMF 1979, p. 725. - T. com. Paris, 30 sept. 1981 : DMF 1982, p. 235.

¹⁷⁶ B. Audit et L. d'Avout, n° 345, cités supra n° 1. - H. Gaudemet-Tallon, n° 38, citée supra n° 31. - CA Toulouse, 20 déc. 1976 : D. 1977, p. 690, note J. Boyer ; Gaz. Pal. 1977, 2, p. 607. - CA Paris, 15 juin 1982 : Gaz. Pal. 1982, 2, somm. p. 378. - CA Orléans, 6 mai 2003 : JurisData n° 2003-244783 ; Rev. crit. DIP 2004, p. 139, note H. Gaudemet-Tallon ; JDI 2004, p. 193, obs. A. Huet. - Comp., CA Paris, 25 avr. 1978 : Gaz. Pal. 1978, 2, p. 448.

¹⁷⁷ V. under ex-art. 59 of the Ancient Code of civil procedure: CA Lyon, 13 déc. 1889 : JDI 1892, p. 479. - CA Rouen, 24 nov. 1897 : JDI 1898, p. 344. - CA Paris, 5 mai 1960 : JCP G 1960, II, 11775, note J.C. ; JDI 1961, p. 450 ; Rev. crit. DIP 1960, p. 603, note E. Mezger.

¹⁷⁸ Cass. 1re civ., 4 janv. 1984 : Bull. civ. 1984, I, n° 4 ; D. 1985, inf. rap. p. 177, obs. B. Audit ; Rev. crit. DIP 1986, p. 123, note P. Courbe.

¹⁷⁹ TGI Paris, 4 juin 1997 : D. 1998, somm. p. 190, obs. C. Colombet.

¹⁸⁰ CA Paris, 19 mars 1984 : JurisData n° 1984-021744 ; Gaz. Pal. 1985, 1, p. 6, note Mauro ; D. 1985, inf. rap. p. 179, obs. B. Audit ; Rev. crit. DIP 1985, p. 141, note H. Gaudemet-Tallon.

¹⁸¹ TGI Paris, 30 juin 1984 : Rev. crit. DIP 1985, p. 141, note H. Gaudemet-Tallon. - TGI Paris, 16 janv. 1985 : D. 1985, flash n° 7.

matter. The first, named "passive site theory", confers jurisdiction to French courts over torts committed via Internet whenever the relevant Internet site is accessible in the French territory. The damage is then deemed to be suffered in France, as long as the information was accessible and accessed to by the victim from the French territory¹⁸². According to the second theory, named "active site theory", the damage is deemed to be suffered in France, if the relevant Internet site specifically targets the users located in the French territory (e.g. by using French language, by proposing services /goods to be delivered in France, by advertising French-registered brands, etc)¹⁸³. In any case, the rule remains the same: in order for the French courts' jurisdiction to be retained, one needs to demonstrate that the damage is suffered in France.

According to Art.114-1 of the Insurance Code, the victim of the tort may seek direct recourse against the tortfeasor's insurance company before the French courts, if the event causing liability occurred in France¹⁸⁴.

For the purposes of Art. 46 al. 3 CCP, the damage is presumed to be suffered in the sole **place of its physical occurrence**, not in the place of the victim's residence¹⁸⁵. If neither the event causing liability, nor the damage itself occurs in France, the French tribunal shall retain no international jurisdiction over the case, even if the plaintiff resides in the French territory¹⁸⁶.

In matters of torts governed by **maritime law** (assault of sea vessels), Art. 1 of the Decree of 19 January 1968 allows the plaintiff to subpoena the defendant alternatively before the court of the defendant's domicile or before the tribunal of the French port in which one of the colliding vessels was first harboured or sequestered¹⁸⁷.

3.1.3. *Forum rei / Forum rei sitae: Successions*

According to Art. 45 CPC, "in matters of succession, until distribution has been completed, the following will be brought before the court of the district where the succession is opened:

¹⁸² C. Chabert, note : JCP G 2007, 10089. - P.-Y. GAUTIER, *Les aspects internationaux de l'Internet*, Travaux comité fr. de DIP 1997-1998, p. 241 s., spéc. p. 246. - M. VIVANT, *Cybermonde. Droit et droits des réseaux* : JCP G 1996, I, 3969, n° 13. - A. HUET, note : JDI 2004, p. 878 s. - TGI Nice, 7 févr. 2006 : PIBD 2006, III, p. 269 ; CCE 2007, chron. 1, par M.-E. ANCEL, p. 22, n° 7, contrefaçon de marque. - CA Paris, 2 déc. 2009 : JCP G 2010, note 216, C. CHABERT ; JCP E 2010, 1261, note A. MENDOZA-CAMINADE, contrefaçon de marque. - TGI Lille, réf., 10 juill. 2001 : PIBD 2002, III, p. 176, concurrence déloyale. - TGI Paris, 3 sept. 2008 : D. 2009, p. 2000, obs. P.T., contrefaçon de droits d'auteur. - Comp. Cass. com., 20 mars 2007 : JurisData n° 2007-038233 ; JCP G 2007, II, 10088, note M.-E. ANCEL ; Rev. crit. DIP 2008, p. 322, note E. TREPPOZ, concurrence déloyale. -V. Cass. 1re civ., 9 déc. 2003 : JCP G 2004, II, 10055, note C. Chabert ; Rev. crit. DIP 2004, p. 632, note O. CACHARD ; JDI 2004, p. 872, note A. HUET, contrefaçon d'une marque.

¹⁸³ M.-E. Ancel, note : JCP G 2007, II, 10088 ; CCE 2007, chron. 1, p. 19 s. et CCE 2011, chron. 1, p. 15. - De HAAS, L'omnipotence du juge français de la propriété intellectuelle face à l'Internet : LPA 13 nov. 2001, p. 4. - Cass. com., 9 mars 2010 : Bull. civ. 2010, IV, n° 46 ; D. 2010, p. 834. - Cass. com., 13 juill. 2010, n° 06-20.230 : JCP G 2010, p. 1675. - Cass. com., 7 déc. 2010 : D. 2011, p. 6. - TGI Paris, 11 oct. 2006, cité par M.-E. Ancel, chron. préc., p. 22, n° 6, contrefaçon de marque. - CA Paris, 9 nov. 2007 : JCP G 2008, II, 10016, note C. Chabert ; D. 2008, p. 8, obs. C. Manara, contrefaçon de droits d'auteur. - CA Paris, 18 juin 2008 : JCP G 2008, II, 10180, note C. Chabert, contrefaçon de droits d'auteur. - Comp. H. Gaudemet-Tallon, obs. D. 2008, p. 735, spéc. p. 736, n° 5.

¹⁸⁴ A. TOUBIANA : Rép. dr. int. Dalloz, 1re éd. 1968-1969, V° *Assurances terrestres*, n° 67 ; CA Paris, 18 oct. 1972 : JDI 1973, p. 371, note F. Deby-Gérard. - M. COZIAN, *L'action directe* : LGDJ, 1969, n° 527. -

¹⁸⁵ TGI Paris, 30 juin 1984, cité supra n° 41. - V. Cass. 1re civ., 16 avr. 1985, motifs : JurisData n° 1985-701312 ; Bull. civ. 1985, I, n° 114 ; D. 1985, inf. rap. p. 496, obs. B. Audit ; Rev. crit. DIP 1987, p. 584, note G. Khairallah. - CA Rouen, 11 sept. 2003 : JurisData n° 2003-228039 ; RD aff. int. 2005, p. 221, obs. A. Mourre et Y. Lahlou.

¹⁸⁶ CA Paris, 22 mars 1924 : Rev. DIP 1924, p. 558 ; JDI 1924, p. 116 ; Gaz. Pal. 1924, 2, p. 148.

¹⁸⁷ CA Aix-en-Provence, 6 avr. 2000 : JDI 2001, p. 1130, note M. LELIEVRE-BOUCHARAT.

- actions among the heirs;
- actions brought by the creditors of the deceased;
- actions relating to the implementation of the dispositions *mortis causa*".

Similar to Articles 42 et 46 CPC, the scope of the above provision has been extended to cover international jurisdiction of French courts¹⁸⁸. As a consequence, French tribunals are internationally competent to settle disputes whenever the last domicile of the deceased is located in France¹⁸⁹.

On the contrary, French tribunals shall have no jurisdiction over disputes concerning a succession opened abroad¹⁹⁰.

By virtue of Article 45 CPC, international jurisdiction and applicable law are submitted to the same criteria, that of the last domicile of the deceased. As a result, the situation of the movable property subject to succession is indifferent for determining international jurisdiction of French courts¹⁹¹.

The concept of "the last domicile of the deceased" is to be qualified and interpreted under French law. In order to be characterised as such, the domicile of the deceased needs to possess all of the following characteristics: the intention of permanent or lasting establishment¹⁹², as well as concentration of financial and economic interests in the country of domicile¹⁹³. In this sense, the international jurisdiction of French courts over the succession is justified by the high probability that the assets subject to succession are concentrated in the French territory (*forum rei sitae*), and if some of them are not, the stability of domicile shall be deemed to have a sufficient power of attraction to vest French courts with jurisdiction over assets located abroad.

Concerning the material span of jurisdiction, French courts of the deceased's domicile are only competent to hear actions explicitly listed in Art. 45 CPC, namely, actions among the heirs, actions brought by the creditors of the deceased and actions relating to the implementation of the dispositions *mortis causa*. For all other possible actions, French courts enjoy international jurisdiction if France is the place of the defendant's residence.

3.2. *Forum patrimonii*

French domestic law does not contain specific heads of jurisdiction based on the criteria of *forum patrimonii*. However, some general jurisdiction rules are used for the very purpose of anticipating enforcement of the decision regarding the disputed property.

3.2.1 Article 14 of the Civil code

According to Art. 14 of the French civil code, "*An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in*

¹⁸⁸ Cass. 1^{re} civ., 17 nov. 1981 : Bull. civ. 1981, I, n° 341 ; JDI 1982, p. 926, note G. Wiederkehr. -- CA Aix-en-Provence, 30 sept. 1999 : JDI 2001, p. 530, note M. Revillard.

¹⁸⁹ Cass. 1^{re} civ., 22 avr. 1981 : JurisData n° 1981-701314 ; Bull. civ. 1981, I, n° 123 ; JCP G 1982, II, 19920, note F. Boulanger ; Rev. crit. DIP 1983, p. 645, note B. Ancel. - CA Aix-en-Provence, 30 sept. 1999, cit. supra.

¹⁹⁰ Cass. 1^{re} civ., 12 déc. 2000 : Rev. crit. DIP 2001, p. 130, note B. Ancel. - CA Aix-en-Provence, 27 mars 1911 : Rev. DIP 1912, p. 403, note Chervet. - Cf. CA Bordeaux, 9 janv. 2006 : JurisData n° 2006-300563 ; JCP G 2006, IV, 2536.

¹⁹¹ Cass. 1^{re} civ., 22 avr. 1981 : JurisData n° 1981-701314 ; Bull. civ. 1981, I, n° 123 ; JCP G 1982, II, 19920, note F. Boulanger ; Rev. crit. DIP 1983, p. 645, note B. Ancel, ruling that "French jurisdiction can judge notwithstanding the situation of assets, provided that the deceased had her last domicile in France".

¹⁹² Cass. 1^{re} civ., 17 juill. 1963 : Bull. civ. 1963, I, n° 403 ; D. 1964, somm. p. 20.

¹⁹³ TGI Seine, 17 févr. 1967 : Gaz. Pal. 1967, 2, p. 293 ; Rép. Commaille 1968, p. 137, note G. Droz.

France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons".

This provision is very often used, as seen in cases where there is a serious probability of enforcement of the future decision in France; namely, where the defendant possesses property in France. In these cases, Art. 14 of the Civil code is deemed to play the role of a *forum patrimonii* or *arresti* head of jurisdiction.

3.2.2 Actions *in personam*

French tribunals are competent to hear personal actions (e.g. **actions in debt**) whenever the defendant is domiciled in France. The international jurisdiction of French courts is thus established by virtue of the sole criteria of the defendant's domicile and shall not depend on the movable or immovable nature of the subject of the debt, neither on its location in France or abroad¹⁹⁴.

French tribunals do not have international jurisdiction if the defendant is domiciled abroad, even though his property is situated in France. This long established rule¹⁹⁵ makes it impossible for French tribunals to assume international jurisdiction as *forum patrimonii*, that is, where the sole motive is that the defendant possesses some property within the territory of the State, notwithstanding the property's connection to the claim or its value.

3.2.3 Actions *in rem*

Res mobilis. – The jurisdictional status of real actions concerning movables is similar to that of actions *in personam* (*supra*). When the claim relates to a movable asset, the defendant's domicile in France shall suffice to confer to the French court international jurisdiction, notwithstanding the location of the asset abroad¹⁹⁶.

Similarly, French tribunals shall not have international jurisdiction, if the defendant is domiciled abroad, even though the contested movable asset is situated in France¹⁹⁷.

Some doctrinal writings suggest that international jurisdiction of French courts could still be founded in a situation involving movable property in France, where the defendant is domiciled abroad. Various arguments are presented to support this thesis. First, the sovereignty of the state would nurture a veritable interest in exercising judicial power over the case, because the subject of it is located on its territory and because the movable is governed by French *lex rei sitae*¹⁹⁸. Second, the courts of the *situs* constitute a "natural judge" for disputes relating to movables located in the state by virtue of the rule "*forum rei sitae*".¹⁹⁹ However, the connection of movables with the State where they are located is too feeble to constitute a connecting factor: their position is unstable and subject to change; moreover, the applicable law could not be a unique indicator in favour of international jurisdiction of the tribunal of the *situs*.

Res immobilis. – International jurisdiction of French courts relating to immovables results from Art. 44 CPC. According to this text, "*in real-estate matters, only the court of the place where the building is located has jurisdiction*". Thus, in matters concerning immovable

¹⁹⁴ T. civ. Strasbourg, 29 oct. 1930, motifs : RJ Alsace-Lorraine 1932, p. 377.

¹⁹⁵ Cass. civ., 10 janv. 1883 : DP 1883, 1, p. 460 ; S. 1884, 1, p. 380, refusing jurisdiction over the claim of a plaintiff domiciled in Italy in payment of a farming lease for a chattel in France.

¹⁹⁶ CA Paris, 22 mars 1924 : Rev. DIP 1924, p. 558 ; JDI 1924, p. 116 ; Gaz. Pal. 1924, 2, p. 148.

¹⁹⁷ CA Paris, 8 juin 1978 : JDI 1979, p. 846, note G. Droz, concerning a claim relating to movable assets located in France and included in a succession filed by executors domiciled in Switzerland. - Cass. ass. plén., 15 avr. 1988 : D. 1988, p. 325, concl. Cabannes, note Maury ; JCP G 1988, II, 21066, rapp. Grégoire, note Barbiéri ; Rev. crit. DIP 1989, p. 100, note G. Droz ; JDI 1989, p. 86, note Ph. Kahn ; RTD civ. 1989, p. 345, obs.

¹⁹⁸ J.-P. Niboyet, n° 1835.

¹⁹⁹ Cf. observation of J.-B. SIALELLI, under TGI Seine, 1er juill. 1964 : JDI 1965, p. 419.

property, international jurisdiction exclusively belongs to the tribunals of the state where the property is located, notwithstanding the defendant's domicile. A contrario, the claims relating to immobile property located abroad are beyond French courts' jurisdiction²⁰⁰.

Mixed actions. - Actions that are qualified as "mixed" are actions that indirectly concern immovable property, e.g. actions in annulment, actions in rescission of sale, action in division of jointly held property, etc. For the purposes of international jurisdiction, the "immovable" element prevails, thereby attaching the action to the courts of the *situs*. Classically, Article 46 para. 4 CPC offers to the plaintiff a double alternative: the latter may choose to file the case with the courts of the country of the defendant's domicile, or those of the country where immovable property is located.

3.3. Labour law

International labour *fora* are provided for by art. R. 1412-1 (former art. R. 517-1) of the Labour Code, whose provisions are "internationalized" by extrapolating the criteria of internal jurisdiction into the international legal order²⁰¹.

According to art. R. 1412-1 (former art. R. 517-1) of the Labour Code, French tribunals hold international jurisdiction in labour law matters, if one of the following elements is located in France:

- the establishment in which the work is habitually done²⁰²;
- the domicile of the employee, working outside of the employer's premises or in his domicile²⁰³;
- in cases where the plaintiff is the employee:
 - o the place where the labour contract was concluded²⁰⁴, or
 - o the place of the employer's seat²⁰⁵.

On the contrary, French tribunals shall have no jurisdiction over cases where none of the aforementioned elements is located in France.²⁰⁶ Residually, French courts may retain jurisdiction if the defendant has his domicile in France.²⁰⁷

²⁰⁰ Th. VIGNAL, *Réflexions sur le rattachement des immeubles en droit international privé* : Travaux comité fr. DIP 2006-2008, p. 15 s., spéc. p. 20

²⁰¹ The French *Cour de cassation* explicitly affirmed that "in French law, international jurisdiction [in labour law matters] is governed by internal rules of territorial competence". - Cass. soc., 2 oct. 2001 : JurisData n° 2001-011143 ; JCP G 2001, IV, n° 2843 ; D. 2001, inf. rap. p. 3171:

²⁰² A Swedish worker engaged in Sweden, but working in France: Cass. soc., 16 févr. 1999 : JurisData n° 1999-000660 ; D. 1999, inf. rap. p. 74.

²⁰³ Cass. soc., 9 avr. 1987 : JurisData n° 1987-000749 ; Bull. civ. 1987, V, n° 221. - Cass. soc., 7 mai 1987 : JurisData n° 1987-000820 ; Bull. civ. 1987, V, n° 287 ; D. 1988, somm. p. 341, obs. B. Audit ; Rev. crit. DIP 1988, p. 78, note H. Gaudemet-Tallon. - Cass. soc., 16 juill. 1987 : Bull. civ. 1987, V, n° 516 ; JCP G 1987, IV, p. 332. - Cass. soc., 16 juill. 1997 : JurisData n° 1997-002264 ; JDI 1998, p. 736, note Moreau, specifying that the rule applies to the employee engaged by a French company, although the salary was paid by an American company belonging to the same group. - Cass. soc., 16 mars 2004 : JurisData n° 2004-022876 ; Bull. civ. 2004, IV, n° 88 ; JCP G 2004, IV, 2018. - Comp., Cass. 1re civ., 16 juin 1987 : Rev. crit. DIP 1988, p. 78, note H. Gaudemet-Tallon ; JDI 1988, p. 1041, note A. Lyon-Caen. - Cass. 1re civ., 8 mars 1988 : JurisData n° 1988-703185 ; JDI 1988, p. 1041, note A. Lyon-Caen.

²⁰⁴ CA Versailles, 19 mars 1986 : D. 1986, inf. rap. p. 348. - Comp., sous l'empire de l'article 80 du décret n° 58-1292 du 22 décembre 1958, Cass. soc., 23 mai 1973, 1re esp. et 8 nov. 1973 : Rev. crit. DIP 1974, p. 354, note P. Lagarde

²⁰⁵ An action of a posted worker may be lodged with the Council of Prud'hommes in Paris, as long as the employer is established in Paris: Cass. soc., 9 oct. 2001 : JurisData n° 2001-011295 ; JCP G 2001, IV, n° 2878.

²⁰⁶ CA Paris, 23 févr. 1966 : JDI 1966, p. 662, obs. J. Ribettes-Thillhet, ruling on a labour contract concluded in France by foreign nationals, but executed abroad.

²⁰⁷ Cass. soc., 11 juin 1969 : JCP G 1969, IV, p. 199 ; JDI 1970, p. 332, obs. crit. Ribettes-Thillhet.

Concerning maritime labour contracts, it has been ruled that French courts are competent, on the basis of R. 1412-1 of the Labour Code (formerly art. R. 517-1), if the employee engaged on board of a foreign vessel is domiciled in France²⁰⁸.

Concerning **employees working on sea vessels** registered with the French international register of navigation, the latter have a particular status determined by art. 30 of the **Law n° 2005-412 of 3 May 2005**²⁰⁹. If the navigating staff are domiciled outside France:

- the action against the employee is brought before the courts of the State of the employees' domicile (defendant's domicile rule)
- the action against the employer is brought before French courts, or before the courts of the State of his domicile, or before the courts of the country where the establishment having concluded the employment contract is or was situated
- the court of the State where the employee resides is competent²¹⁰.

3.4. Provisional measures

French tribunals usually declare themselves competent in matters where jurisdiction is justified by emergency. Thus, the unilateral jurisdiction of French tribunals in relation to taking provisional measures is a matter of **exception**²¹¹.

In order for the exceptional jurisdiction to be realised, one needs to demonstrate the **urgency of the litigious situation** or the **urgency of the measures** required to be taken²¹².

Generally, the urgency is characterized in cases where "the measures are necessary for security of persons or the preservation of their property"²¹³.

In some cases, unilateral jurisdiction of French courts for provisional measures has been admitted on the grounds of art. 3, para. 1 of the Civil code, because the main action was governed by a **mandatory provision of French law** ("*loi de police ou de sûreté*"). This interpretation dates back to the time where disputes between foreigners were considered to be beyond the jurisdiction of French courts²¹⁴. The French *Cour de cassation* then ruled that "legal provisions imposing maintenance obligations are mandatory provisions relating to public policy and security; that it is a fair policy of the country to supervise that maintenance obligations are not infringed by persons vested therewith". The Court thus established a possibility for French courts to order provisional measures for maintenance obligations, notwithstanding the fact that a foreign court was competent to resolve the

²⁰⁸ Cass. soc., 28 juin 2005 : JurisData n° 2005-029193 ; Bull. civ. 2005, V, n° 216 ; Rev. crit. DIP 2006, p. 159, note F. Jault-Seséke ; DMF 2006, p. 35, note P. Chaumette ; JDI 2006, p. 616, note S. Sana-Chaillé de Néré ; D. 2005, inf. rap. p. 2035. - V. aussi CA Aix-en-Provence, 8 févr. 2008 : DMF 2009, p. 228, note C. Babault-Ballufin.

²⁰⁹ Journal Officiel 4 Mai 2005.

²¹⁰ P. Lagarde : Rev. crit. DIP 2005, p. 529.

²¹¹ M. Vasseur, Urgence et droit civil : RTD civ. 1954, p. 405 s., spéc. p. 425. - Ph. Jestaz, L'urgence et les principes classiques du droit civil : LGDJ, 1968,

²¹² Cass. civ., 17 janv. 1950 : D. 1950, p. 263 ; Rev. crit. DIP 1952, p. 108, note Y. Loussouarn. - Cass. 1re civ., 20 mars 1989 : JCP G 1990, IV, p. 193 ; JDI 1989, p. 1045, note B. Oppetit ; Rev. arb. 1989, p. 494, note G. Couchez ; D. 1990, p. 147, note J. Peyrard, ruling that "emergency may justify jurisdiction of French tribunals to provisional or protective measures, especially when the safety of persons or preservation of their property is in danger".

²¹³ Cass. req., 20 juill. 1911 : DP 1912, 1, p. 64 ; S. 1912, 1, p. 132. - Cass. req., 26 déc. 1917 : Rev. DIP 1919, p. 484 ; Gaz. Pal. 1918-1919, p. 72. - V. Cass. req., 27 nov. 1822 : S. 1822-1824, 1, p. 161. - T. civ. Seine, 21 janv. 1880 : JDI 1880, p. 194. - CA Besançon, 30 nov. 1887 : DP 1888, 2, p. 113, note Boeck ; S. 1890, 2, p. 59. - CA Paris, 12 mars 1891 : S. 1892, 2, p. 235. - CA Alger, 1er mars 1897 : DP 1897, 2, p. 478. - Comp. CA Paris, 20 févr. 1964 : JCP G 1964, II, 13848 ; Rev. crit. DIP 1965, p. 119.

²¹⁴ Cass. 1re civ., 6 déc. 2005 : JurisData n° 2005-031146 ; Bull. civ. 2005, I, n° 466 ; JCP G 2006, IV, 1027.

dispute on merits.²¹⁵ The exceptional jurisdiction of French courts to order provisional measures is justified by the fact that, if such measures are not ordered, the ultimate goal of the mandatory provisions of *lex fori* shall not be attained. However, such justification of exceptional jurisdiction of French courts has never been generalised. It is rarely used by the jurisprudence, which displays a clear preference to found such jurisdiction solely on urgent or “emergency” situations.²¹⁶

In order to establish exceptional jurisdiction for provisional measures, two conditions need to be satisfied. Firstly, the “emergency” needs to be clearly demonstrated. In the absence of emergency proven beyond doubt, French tribunals are considered to have no jurisdiction to order provisional measures. The emergency or the existence of danger is a question of fact freely adjudicated on by the judge.²¹⁷ Secondly, the beneficiary or the assets to be protected by the provisional measures need be located in France, at least temporarily, at the moment of the request. In the end, jurisdiction of French courts to mandate provisional measures is justified by the presence in France of the object of the request.²¹⁸ Emergency and the presence of the litigious matter in the French territory are deemed sufficient to justify exceptional jurisdiction of French courts: the latter may order provisional measures even in the absence of any other connection with the French territory or legal order²¹⁹.

4. Unilateral Coordination of Jurisdiction

In France, domestic rules on the coordination of international jurisdiction of French courts are unilateral by nature and structure: the jurisprudence has extended the scope of domestic jurisdiction rules to international private disputes. The unique function of the rules discussed above is to determine whether or not French courts are competent to resolve disputes with international facts.

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the *forum*

French tribunals deny recognition of the legal effect of foreign judgments in matters covered by mandatory rules on the jurisdiction of the forum (so-called exclusive jurisdiction). Exclusive jurisdiction is retained by the forum in matters where it is necessary that the competent judge and applicable law belong to the same legal system (the forum).

Exclusive jurisdiction is unilaterally reserved for French courts in matters concerning exercise of public sovereignty. This is the case for disputes over procedures for obtaining French nationality, annulment or rectification of acts of civil status, annulment of a patent or a brand or a measure of enforcement²²⁰. This jurisdiction excludes any contrary agreement: a clause delegating jurisdiction to a foreign court is null and void, and a foreign judgment rendered in violation of the exclusive jurisdiction of French courts shall not be recognized.

Sometimes, exclusive jurisdiction is justified by the need for efficiency in administration of cross-border justice, namely, to avoid cross-border enforcement of judicial decisions. This explains exclusive jurisdiction of French courts in the area of succession of immobile property²²¹. In general, in matters concerning real estate (immovable property), French

²¹⁵ Cass. req., 26 déc. 1917 : Rev. DIP 1919, p. 484 ; Gaz. Pal. 1918-1919, p. 72.

²¹⁶ Cass. 2e civ., 11 oct. 1995 : Bull. civ. 1995, II, n° 235 ; RTD com. 1996, p. 664, obs. Dubarry et Loquin ; Rev. arb. 1996, p. 228, 3e esp.

²¹⁷ Cass. req., 26 déc. 1917 : Rev. DIP 1919, p. 484 ; Gaz. Pal. 1918-1919, p. 72.

²¹⁸ TGI Seine, 29 avr. 1964 : JDI 1965, p. 134, obs. J.-B. Sialelli ; Gaz. Pal. 1964, 2, p. 169.

²¹⁹ Cass. 1re civ., 6 mars 1990 : Rev. arb. 1990, p. 633, note H. Gaudemet-Tallon. - Comp. Cass. com., 29 juin 1999 : D. 1999, p. 649, note Najjar ; JCP G 2000, II, 10228, note Vuitton.

²²⁰ M.-L. Niboyet, G. de Geouffre de La Pradelle, *Droit international privé*, LGDJ, 2011, n°401.

²²¹ Cass. 1re civ. 1983, 14 June 1983, Rev. crit. DIP 1984.316, note B. Ancel.

courts enjoy exclusive jurisdiction, whenever such property, subject to a dispute, is located in the French territory²²². This is the direct effect of Art. 44 CPC as applied to cross-border issues: “*In real-estate matters, only the court of the place where the building is located has jurisdiction*”. In matters of succession, and with the criteria of the last domicile of the deceased being applicable solely to succession of mobile property (Art. 45 CPC), French tribunals have developed extensive jurisprudence invariably submitting actions arising out of succession of immovable assets to the exclusive jurisdiction of French courts²²³. In cases where the succession was opened abroad (i.e. the last domicile of the deceased is located abroad), but the immovable property subject to succession is located in France, French courts must retain jurisdiction to the detriment of the last domicile of the deceased. If the succession concerns multiple lumps of immovable property, some of which are located in France, and others abroad, French courts retain exclusive jurisdiction over the property situated in the French territory, immovables based abroad being beyond any jurisdiction of French courts.²²⁴ However, the jurisdiction over such property may “rebound” upon a French court if the conflict-of-law rules of the relevant foreign State submit such property to French law as *lex rei sitae*. Applying this principle, the French *Cour de cassation* overturned a Court of appeal decision for not having taken into account property located in Italy to calculate the disposable part of a succession, whereas Italian conflict of law rules submitted the matter to French law (*renvoi* to the law of the country of the last domicile of the deceased).²²⁵ In addition to correlating applicable law and jurisdiction in matters of succession of immovable property,²²⁶ this latter technique allows proceedings to be placed before the courts of the country where enforcement will be or is likely to be sought. It is much appreciated by litigants, as in the end it helps avoid cross-border enforcement of court decisions in matters of succession.²²⁷

Contractual matters, although ordinarily open to contractual choice of jurisdiction, still allow an exceptional exclusive jurisdiction of French courts in some disputes arising from maritime contracts. Hence, the Decree n° 68-65 of 19 January 1968 relating to mutual assistance at sea, declares null and void any choice of jurisdiction to the benefit of a foreign court, whenever both the assisting vessel and the assisted vessel are of French nationality, provided that the assistance took place in French territorial waters (art. 1).

French tribunals enjoy exclusive jurisdiction when they are designated as such by the parties in a jurisdiction clause or agreement.²²⁸ In this case, exclusive jurisdiction is deemed to guarantee legal certainty and predictability of the competent court. When established to the benefit of French courts, a choice of jurisdiction clause has a double effect: on the one hand, it confers exclusive jurisdiction to the forum; on the other hand, it excludes jurisdiction of any foreign tribunal, even if competent according to national or foreign rules. Consequently, a foreign judgment pronounced in violation of the agreement of the parties to confer jurisdiction to French courts shall be refused recognition and enforcement in the French territory. On the contrary, when established to the benefit of foreign courts, a choice of jurisdiction clause excludes jurisdiction of French courts: the

²²² B. Ancel, Y. Lequette, *Les grands arrêts de la jurisprudence française*, Dalloz, 2006, p. 657, n° 10.

²²³ For actions in liquidation of successions (les demandes en liquidation et partage) : CA Colmar, 12 août 1817 : S. 1817, 2, p. 316. - Cass. civ., 14 mars 1837 : S. 1837, 1, p. 195. - Cass. civ., 22 mars 1865 : S. 1865, 1, p. 175 ; DP 1865, 1, p. 127. - CA Aix-en-Provence, 27 mars 1911 : Rev. DIP 1912, p. 403, note Chervet. - V. également, Cass. req., 30 mars 1914 : JDI 1914, p. 951, rapp. Feuilloley. - Cass. civ., 13 avr. 1932, motifs : S. 1932, 1, p. 361 ; Rev. DIP 1932, p. 549, concl. Matter. - T. civ. Seine, 30 juill. 1941 : Gaz. Pal. 1941, 2, p. 326. - F. Boulanger, *Les successions internationales* : Economica, 1981, p. 23 s. ; *Le droit international des successions* : Economica, 2004, n° 11 s

²²⁴ Cass. civ., 24 nov. 1953 : Rev. crit. DIP 1955, p. 698, note E. Mezger.

²²⁵ Cass. 1re civ., 21 mars 2000 : JurisData n° 2000-001120 ; JDI 2001, p. 505, note M. Revillard ; JCP G 2000, II, 10443, note Th. Vignal ; Rev. crit. DIP 2000, p. 399, note B. Ancel ; D. 2000, p. 539, note F. Boulanger ; Defrénois 2000, art. 37240, p. 1157, note M. Revillard ; Gaz. Pal. 2000, 2, p. 1467, note Drapier.

²²⁶ M.-L. Niboyet, G. de Geouffre de La Pradelle, *op.cit.*, *supra* (note 57), n° 408.

²²⁷ P. Lagarde, *Successions*, in *Rép.dr. int.*, Dalloz, 1^{re} éd., 1968, n°190 ; M. Goré, in *Rev.crit. DIP* 1992.306.

²²⁸ Safe the parties' explicit agreement to forfeit the jurisdiction clause.

latter shall be obliged, if seized, to decline jurisdiction to the benefit of a foreign court.²²⁹

On the contrary, the mandatory character of a given provision in the domestic legal order does not necessarily imply exclusive jurisdiction in the international order. The *Simitch* ruling of the *Cour de cassation* thus stated that, although mandatory in domestic matters, Art. 1070 CPC in matters of divorce did not entail exclusive jurisdiction of French courts²³⁰.

The rule contained in Art 15 of the Civil code has been for a long time considered as conferring exclusive jurisdiction (more specifically, a “privilege of jurisdiction”) to French defendants in disputes over “obligations contracted by them in a foreign country, even with an alien”. This interpretation allowed French nationals to contest recognition or enforcement of judgments pronounced against them abroad, even where no proof was brought that they had renounced the jurisdictional privilege.²³¹ However, this head of exclusive jurisdiction has been abandoned by the *Prieur* ruling of the *Cour de cassation*²³². According to it, “Article 15 solely provides for an option of jurisdiction, inapt to exclude the indirect competence of a foreign tribunal, whenever the dispute has manifest ties with the State whose courts are hearing the case and the choice of jurisdiction is not fraudulent”.

4.1.2. Absence of Jurisdiction of the forum

The exercise of jurisdiction by French courts is unconditionally precluded - whether or not there is a foreign court competent to proceed in the matter - when the **relevant connecting factor** justifying international jurisdiction is not realized in the French territory. In matters where the law provides for alternative jurisdiction (art. 46 CPC) - which are contracts, torts, mixed matters and matters of support or contribution to the expenses of marriage - the term “relevant connecting factor” includes the defendant’s domicile (art. 42 CPC) remaining applicable in the alternative if the specific heads of jurisdiction are not realized in France. If the defendant’s domicile is located in France, French courts shall retain competence, notwithstanding the fact that another pertinent connecting factor is located abroad. In general, French courts are not obliged to exercise any preliminary verification of the jurisdiction of a foreign country: the jurisdiction of the forum is determined unilaterally, notwithstanding potential concurrent jurisdiction of a foreign country. This situation may clearly generate a situation of *lis pendens*, where courts of many countries may be simultaneously seized of the same case.

In the cases below, French legal system may prevent a judge from hearing a case.

In matters of non-contractual liability (Art. 46 al. 3 CCP), if neither the event causing liability, nor the damage itself occurs in France, the French tribunal shall retain no international jurisdiction over the case, even if the plaintiff dwells in the French territory²³³. However, if none of the specific connecting factors have taken place in France, but the defendant is domiciled there, French courts retain competence on the general basis of art. 42 CPC (defendant’s domicile).²³⁴ If the defendant has no known domicile in a foreign country, but has a place of residence in France, this shall suffice to confer international jurisdiction to French courts.²³⁵

²²⁹ Cass., 1^{re} civ., 9 oct. 1990 : Rev. crit. DIP 1991.135, note H. Gaudemet-Tallon.

²³⁰ Cass. 1^{re} civ., 6 February 1985 : Rev. DIP 1985.369. - Recently confirmed : Cass. 1^{re} civ., 20 Feb. 2007, n° 05-14.082.

²³¹ Cass. 1^{re} civ., 30 mars 2004 : Rev. crit. DIP 2005.89, note SINOPOLI.

²³² Cass. 1^{re} civ., 23 mai 2006, D. 2006.1846, obs. B. AUDIT ; Petites affiches 2006, n°190, note P. COURBE; JDI 2006.1846, note C. CHALAS.

²³³ CA Paris, 22 mars 1924 : Rev. crit. DIP 1924, p. 558 ; JDI 1924, p. 116 ; Gaz. Pal. 1924, 2, p. 148.

²³⁴ CA Paris, 5 mai 1960 : JCP G 1960, II, 11775, note J.C. ; JDI 1961, p. 450 ; Rev. crit. DIP 1960, p. 603, note E. Mezger.

²³⁵ Cass. 1^{re} civ., 4 janv. 1984 : Bull. civ. 1984, I, n° 4 ; D. 1985, inf. rap. p. 177, obs. B. Audit; Rev. crit. DIP 1986, p. 123, note P. Courbe.

In contractual matters, if neither the actual delivery of the chattel nor the place of performance of the agreed service (connecting factors provided for by Art. 46, para 1 and 2 CCP) takes place in France, the French court must decline international jurisdiction, save in cases where the defendant is domiciled in France; the general head of jurisdiction (defendant's domicile, art. 42 CPC) remains applicable in the alternative in contractual matters. Hence, French tribunals may not retain jurisdiction over a dispute between two foreign non-resident companies over a contract fully executed abroad.²³⁶

In labour law contracts, French tribunals shall have no jurisdiction over cases where none of the following elements is located in France (art. R. 1412-1 of the Labour Code):

- the establishment in which the work is habitually done;
- the domicile of the employee, working outside of the employer's premises or in his domicile;
- in cases where the plaintiff is the employee:
 - the place where the labour contract was concluded, or
 - the place of the employer's seat²³⁷.

With jurisdiction not being exclusive in labour law matters, the location of any of the above connecting factors abroad shall not forbid the exercise by French courts of jurisdiction based on another factor located in France. In non-exclusive matters, international jurisdiction of French courts is determined unilaterally, notwithstanding the potential jurisdiction of foreign courts. Moreover, the jurisdiction of French courts is reinforced every time the ordinary rules of competence confer jurisdiction on French tribunals: in such cases, the jurisprudence tends to invalidate choice of jurisdiction clauses to the benefit of foreign tribunals (in the name of protection of workers as a weaker party of the contract).²³⁸ In such cases, French tribunal will not enquire into whether or not the foreign jurisdiction – chosen by the parties – considers itself to have exclusive jurisdiction. However, it has been established by jurisprudence that French courts may decline jurisdiction to the benefit of a foreign court in case of related actions, "under the sole condition" that the foreign court is equally competent and *simultaneously seized* with the related case, and that the cases reveal a link between them that could potentially lead to contrary decisions.²³⁹

In matters of succession (Art. 45 CPC), French tribunals shall have no jurisdiction over disputes concerning a succession opened abroad.²⁴⁰ This is the only case where the absence of French courts' jurisdiction is objective and irretrievable: even if the deceased was *in fine* domiciled in France, French tribunals must refuse to exercise jurisdiction over immovables located abroad.

In matters involving **payment orders**, in the absence of any alternative heads of jurisdiction, French courts are not competent to admit actions, if the debtor has no domicile in France. No alternative head of jurisdiction is provided for **payment orders**: according to

²³⁶ Cass. 1^{re} civ., 2 avr. 1996 : JurisData n° 1996-001346 ; Bull. civ. 1996, I, n° 164 ; JCP G 1996, IV, n° 1264. - 7 avr. 1998 : Rev. crit. DIP 1998, p. 459, note H. Muir Watt.

²³⁷ CA Paris, 23 févr. 1966 : JDI 1966, p. 662, obs. J. Ribettes-Thillhet, ruling on a labour contract concluded in France by foreign nationals, but executed abroad.

²³⁸ Cass. Soc., 19 oct. 21967 : JCP G1967.II. 15293, note G. Lyon-Caen.

²³⁹ Cass., 1^{re} civ., 7 mars 200 : Rev. crit. DIP 2000.458, note

²⁴⁰ Cass. 1^{re} civ., 12 déc. 2000 : Rev. crit. DIP 2001, p. 130, note B. Ancel. - CA Aix-en-Provence, 27 mars 1911 : Rev. DIP 1912, p. 403, note Chervet. - Cf. CA Bordeaux, 9 janv. 2006 : JurisData n° 2006-300563; JCP G 2006, IV, 2536.

art. 1404 CPC, actions for injunctions to pay may be brought before French courts "*in whose jurisdiction the prosecuted debtor(s) live(s)*" (the defendant's residence criterion may not be replaced).

As to provisional matters, French tribunals may not retain international jurisdiction, on the one hand, in the absence of a clearly demonstrated or manifest emergency situation or requested measure, and on the other hand, when the assets to be preserved or the persons to be protected are not found in France.

4.1.3. Exclusive Jurisdiction of a Foreign State

In areas of exercise of public service (acts of civil status, granting patents) or enforcement of judgments, the jurisdiction of French courts is deemed exclusive. Reciprocally, French courts are to decline jurisdiction over measures that are to be taken under jurisdiction of a foreign State²⁴¹. French tribunals shall enquire whether the connecting factor conferring exclusive jurisdiction is to be found in France. If it is not, exclusive jurisdiction of the State where the measure is to be taken is presumed, and the French court must decline jurisdiction. In the area of enforcement measures, the jurisdiction of the *forum arresti* is based on the consideration that the measures will necessitate intervention of public authorities of the State on whose territory the measure is carried out. It is thus impossible to disregard the sovereign powers and interests of the State where the enforcement takes place, as its authorities are solely competent to carry out such measures.²⁴² Thus, French tribunals may neither accept actions in release of enforcement measures pronounced abroad,²⁴³ nor actions in damages suffered in connection with such measures,²⁴⁴ notwithstanding the plaintiff's French nationality or their domicile in France. Similarly, French tribunals are not competent (as they do not have the jurisdictional powers) to annul or to rectify civil records established by foreign authorities abroad or by diplomatic or consular authorities in France.²⁴⁵ French tribunals must, in principle, decline jurisdiction for demands in declaration of birth of a foreign citizen occurred abroad.²⁴⁶

In matters of succession, French courts are to decline jurisdiction when the immovable property, subject to succession, is situated in the territory of a foreign State, even though the last domicile of the deceased is situated in France.²⁴⁷ In the latter case, French tribunals may still recover international jurisdiction by *renvoi* of the private international rules of the foreign state to French law.²⁴⁸ The jurisdiction exception seen in the situation of immovables is justified by the principle of efficiency of cross-border justice, which tends to privilege jurisdiction of the State where enforcement of the future decision will be sought or is likely to be sought. An exception is made for cases where succession is entirely liquidated in France, and the judge takes into consideration the mere existence of the immovable property abroad to determine the disposable portion of succession.²⁴⁹

If jurisdiction is conferred to the court by a choice of jurisdiction clause, it excludes the jurisdiction of French courts. The latter shall be obliged, if seized, to decline jurisdiction to the benefit of a foreign court.²⁵⁰ However, it may be the case that a choice of a foreign

²⁴¹ Cass. civ. 12 mai 1932, S. 1932, 1, p. 137, rapp. Casteil, note J.-P. NIBOYET, concerning an action in annulment of a sequestration ordered abroad.

²⁴² G. Cuniberti, « *Le principe de territorialité des voies d'exécution* », JDI 2008.963.

²⁴³ E.g. TGI Seine, 5 févr. 1962 : JDI 1963.144.

²⁴⁴ E.g. Cass. 1^{re} civ., 14 avr. 2010 : Bull. civ. 2010, I, n° 91.

²⁴⁵ E.g. Tr.cor Seine, 26 nov. 1913 : JDI 1914.552, note Perreau.

²⁴⁶ TGI Paris, 1^{er} oct. 1976 : Rev. crit. DIP 1977.535, note A. Huet.

²⁴⁷ Cass. 1^{re} civ., 5 juil. 1933, Rev. crit. DIP 1934, note J.-P. Niboyet, et 24 nov. 1953 Rev. crit. DIP 1955. 698, note Mezger.

²⁴⁸ On admissibility of renvoi : Cass. 1^{re} civ., 21 mars 2000, *Ballestrero*, Rev. crit. DIP 2000. 399, note B. Ancel ; D., 2000.539, note Boulanger ; JDI 2001.505, note Revillard.

²⁴⁹ Cass. 1^{re} civ., 21 mars 2000, *Ballestrero*, cit. supra, note 69.

²⁵⁰ Cass., 1^{re} civ., 9 oct. 1990 : Rev. crit. DIP 1991.135, note H. Gaudemet-Tallon.

jurisdiction does not render French courts incompetent. This can be where the defendant appears before a French court, as summoned by the plaintiff, and does not contest the French court's jurisdiction (the tacit prorogation of jurisdiction thus neutralises the effects of the previous choice of jurisdiction).²⁵¹ Such is also the case where the foreign jurisdiction designated by the parties declines its competence *ratione materiae* and where no proof is brought that a foreign court, competent *ratione materiae*, was seized by the plaintiff.²⁵²

4.2. *Lis pendens*

Proceedings pending abroad may be relevant for the dismissal of a claim, provided that the conditions of Art. 100 CPC are satisfied. According to this text, "If the same dispute is pending before two distinct courts of the same hierarchy that have jurisdiction, the court to which the matter is brought must decline jurisdiction in favour of the other court if one of the parties requires it. Want of that, it may do it *sua sponte*". The provisions of Art. 100 CPC, normally applicable for domestic distribution of jurisdiction, has been extended to international disputes²⁵³. Since the precedent established by the *Cour de cassation* in 1974, the exception of *lis alibi pendens* is admitted before French courts.

To be sustainable, the plea of *lis pendens* must indicate the identity of the dispute simultaneously pending before two concurrently competent jurisdictions. One must demonstrate a triple identity of the pending matter, confirming the identity of the parties, the identity of the subject and that of the cause of the cross-border dispute. The triple identity is established according to the relevant procedural concepts of *lex fori*. The jurisdiction of the foreign court is to be verified to confirm that the exception of *lis pendens* is substantially well-founded.

The plea of *lis pendens* is evaluated by the judge with reference to the efficiency of the future judgment in foreign jurisdictions. Recognition and enforceability of the judgment is assessed with respect to the indirect jurisdiction of the foreign judge and the conditions in which the case was filed with him. Most commonly, the plea of *lis pendens* is countered by the argument relating to exclusive jurisdiction of French courts over the dispute.

If the conditions of art. 100 CPC are satisfied and the case is brought before the French court subsequently, the latter court is not bound to decline jurisdiction. In an international context, French law vests the judges with a discretionary power to refuse the exception of *lis pendens*, if the conditions under which the case was brought before the first judge seem suspiciously hurried. The exception may also be refused if the judge considers that the case will be more appropriately judged in France, considering that the enforcement will be sought in that State.

If a plea of *lis pendens* is filed, the judge may stay the proceedings, awaiting information on the state of proceedings abroad.²⁵⁴ Occasional jurisprudence has ruled against the optional character of *lis pendens* and obliged the judge to apply *ex officio* the procedural consequences thereof.²⁵⁵ However, such cases are isolated and have never further received confirmation in later rulings of the *Cour de cassation*.

²⁵¹ H. Gaudemet-Tallon, *Compétence civile et commerciale*, Rép. Dr. Int, Dalloz, n°103.

²⁵² Cass. 1^{re} civ., 30 sept. 2009, n° 08-17.587 : JCP G 2009.346, note E. CORNU ; Rev. crit. DIP 2010.133, 1^{re} esp., note H. Gaudemet-Tallon.

²⁵³ D. HOLLEAUX, « *La litispendance internationale* », TCFDIP 1971-1973, Dalloz, p. 211.

²⁵⁴ H. GAUDEMET-TALLON, Rev. crit. DIP, 2006, p. 877.

²⁵⁵ Cass. 1^{re} civ. 17 juin 1997, Rev. crit. DIP 1998.454, note B. ANCEL.

5. Bilateral and Multilateral Agreements

5.1. Bilateral agreements (in French)

1. *Convention entre le gouvernement de la République française et le gouvernement espagnol sur la reconnaissance et l'exécution des décisions judiciaires et arbitrales et des actes authentiques en matière civile et commerciale, signée le 28/05/1969, TRA19690069, TRA19690069, EN VIGUEUR*
2. *Convention entre le gouvernement de la République française et le gouvernement de la république socialiste fédérative de Yougoslavie relative à la reconnaissance et l'exécution des décisions judiciaires en matière civile et commerciale, signée le 18/05/1971, TRA19710057, EN VIGUEUR*
3. *Convention entre la République française et la République tunisienne relative à l'entraide judiciaire en matière civile et commerciale et à la reconnaissance et à l'exécution des décisions judiciaires, ensemble un protocole additionnel, signée le 28/06/1972, TRA19720059, EN VIGUEUR*
4. *Accord par échange de notes interprétatif des articles 2 et 17 de la convention entre la France et l'Espagne sur la reconnaissance et l'exécution des décisions judiciaires et arbitrales et des actes authentiques en matière civile et commerciale signé à Paris le 28 mai 1969, signée le 25/02/1974, TRA19740079, EN VIGUEUR*
5. *Convention entre la République française et la république d'Autriche sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière de faillite, signée le 27/02/1979, TRA19790077, EN VIGUEUR*
6. *Convention entre la République française et la République populaire hongroise relative à l'entraide judiciaire en matière civile et familiale, à la reconnaissance et à l'exécution des décisions ainsi qu'à l'entraide judiciaire en matière pénale et à l'extradition, signée le 31/07/1980, TRA19800150, EN VIGUEUR*
7. *Convention entre le gouvernement de la République française et le gouvernement de la République socialiste tchécoslovaque relative à l'entraide judiciaire, à la reconnaissance et à l'exécution des décisions en matière civile, familiale et commerciale, signée le 10/05/1984, TRA19840268, EN VIGUEUR*
8. *Convention relative à l'entraide judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale entre la République française et l'État des Émirats arabes unis, signée le 09/09/1991, TRA19910178, EN VIGUEUR*
9. *Convention relative à l'entraide judiciaire, la reconnaissance et l'exécution des décisions en matière civile entre le gouvernement de la République française et le gouvernement de Mongolie, signée le 27/02/1992, TRA19920040, EN VIGUEUR, rectifiée*

5.2. Multilateral agreements (in French)

1. *Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, faite à Bruxelles le 27 septembre 1968*
2. *Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale (ensemble trois protocoles et trois déclarations), faite à Lugano le 16 septembre 1988*

ANNEX III: NATIONAL REPORT FOR GERMANY WITH REFERENCES TO AUSTRIA

(Andreas Fötschl)

1. Sources

The most important national heads of jurisdictions are found in the German Code of Civil Procedure (§§ 12 to 40 ZPO²⁵⁶). In addition to these rules there is a large number of heads of jurisdictions in the ZPO and in other statutes governing specific topics.

An important characteristic of the German system seems to be that there are no general rules governing international jurisdiction. The ZPO does not mention expressly the term international jurisdiction. The above mentioned rules on national jurisdiction are also applied in the context of questions of international jurisdiction (the so called “**double function**” of the rules on national jurisdiction).

For family law, however, since 2008 there are special provisions on international jurisdiction (§§ 98 bis 106 FamFG²⁵⁷, Act on the Procedure in Family Law) in addition to the general “double function” rules.

A similar technique is also used in **Austria**. In Austria however, this technique is explicitly mentioned in the law (§ 27a Jurisdiktionsnorm, Act on Jurisdiction of the Courts).²⁵⁸

2. German distribution of jurisdiction

2.1. Is there a conceptual difference between rules on jurisdiction and rules distributing the jurisdictional power among national judges?

The rules on local jurisdiction (§§ 12 ZPO *et seq.*) have what is known as a double function. This means that essentially every head of jurisdiction under national law may be the basis for international jurisdiction as well. The double function can be traced back to the adoption of the ZPO. The German Federal Court (BGH) stated that the double function is not regulated explicitly and directly, but only indirectly by a tacit reference to the rules of venue in §§ 12 ZPO *et seq.*²⁵⁹ As a result, according to these rules, whenever there is local jurisdiction, there is also international jurisdiction.

Other highest courts (e.g. Federal Labour Law Court, Bundesarbeitsgericht, BAG²⁶⁰) share this view of the double nature of jurisdiction as do virtually all legal commentators.

The general basis for this connection between local and international jurisdiction is that foreigners should be treated in the same manner as German citizens. There should be no

²⁵⁶ As promulgated on 5 December 2005 (BGBl. I S. 3202). Some of the changes effected by the law of 5.12.2012 (BGBl. I S. 2418) will become effective only as of 1.1.2014 and the provisions of that law are therefore not taken into consideration in the text.

²⁵⁷ Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17. Dezember 2008 (BGBl. I S. 2586, 2587), zuletzt durch Artikel 6 des Gesetzes vom 5. Dezember 2012 (BGBl. I S. 2418) geändert).

²⁵⁸ See Rechberger/Simotta, Zivilprozessrecht, 8. Ed., 2010, nr. 85. If no national head of jurisdiction is applicable, there is one special international jurisdiction which is called “Ordination” accorded to the Highest Court (*Oberster Gerichtshof*). Such “Ordination” takes place if the plaintiff is an Austrian citizen or has his or its residence or seat in Austria (§ 28 sect. 1 Z 2 Jurisdiktionsnorm, JN). One legal commentator states that this would not be in conformity with European Law (Rechberger/Simotta, loc. Cit., Rdnr. 89, dort in Fn 31). However, the rule only applies if and insofar as European Law does not prevail (§ 28 sect. 3 JN). It seems that this rule is only effective as against third-State defendants. Its function is similar to the Swiss “Heimatzuständigkeit” or the German “Notzuständigkeit”.

²⁵⁹ Entscheidung des Großen Zivilsenates des BGH (14.06.1965), BGHZ 44, 46.

²⁶⁰ IPRspr. 1977 Nr. 46.

discrimination on the basis of citizenship or a foreign residence or domicile. Only in exceptional cases do the heads of jurisdiction in the ZPO refer to citizenship. Also as a defendant, a German citizen can only be sued in a German court if there is a venue according to the §§ 12 ZPO *et seq.*

In the field of family law, since 2008 this double nature has been regulated expressly in § 105 FamFG²⁶¹. The double function steps next to the rules on international jurisdiction. Whenever a ground of jurisdiction is given according to the rules on national local jurisdiction, the judge will also assume his international jurisdiction. The double function also applies to prorogation. For disputes on status (marriage, divorce, etc.) the international jurisdiction of German courts is mostly based on the German citizenship of one of the relevant parties or their place of abode in Germany, whilst the local jurisdiction is regulated separately and does not necessarily run along the lines of international jurisdiction. In other words, the FamFG knows special heads for international jurisdiction. In addition, it operates also with the double function, when there is no special head of jurisdiction in the FamFG.

Back to the general principles of the double function, it is said that the local jurisdiction only indicates the international jurisdiction.²⁶² With other words, there is no strict regime. In a specific case there can be deviations from this double functionality. For example, where jurisdiction is based on location of assets in Germany, the rule may need to be modified where a defendant has little or no other connection to Germany.²⁶³

The distribution of cases to different types of courts (*sachliche Zuständigkeit*) depends on the nature of the particular case and on the value of the dispute. As much as we can see for Germany, there are no references to internationality whatsoever. Therefore we would not elaborate in detail on this topic.

The ZPO knows general, special and exclusive venues. At the so called general venue all sorts of claims can be brought against a defendant. The general venue always exists for all cases (except if there is an exclusive venue). The general venue is governed by §§ 12 to 19 ZPO exclusively. These venues refer to residence or abode.

Next to the general venue, there is, in the ZPO and in many particular statutes, a vast number of special venues. The problem is here that all the national venues are also relevant on an international level. The special venues do provide jurisdiction only in connection with particular claims. They apply next to the general venues. Since the number of these venues is very big, their practical relevance differs a lot: here, we only give an overview and later on we concentrate on the special venues in the ZPO (§§ 20 to 34 ZPO). Even in German commentaries, only the most important ones are mentioned.²⁶⁴

Special venues in the ZPO (outside §§ 20 to 34):

- Main intervention (Hauptintervention) (§§ 64 ZPO *et seqs.*),
- Interim court rulings (Zwischenfeststellungs-Inzidentklagen und -widerklagen) (§ 256 Abs. 2 ZPO),
- securing evidence (Beweissicherung) (§ 486 ZPO),

²⁶¹ Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17. Dezember 2008 (BGBl. I S. 2586, 2587), zuletzt durch Artikel 6 des Gesetzes vom 5. Dezember 2012 (BGBl. I S. 2418) geändert).

²⁶² See Geimer, IZPR, 6. Auflage, 2009, Rdnr. 946 -972c.

²⁶³ See discussion under « Patrimony » *infra*.

²⁶⁴ Patzina, MÜKO-ZPO, 4. Aufl. 2013, § 12 Rdnr. 30.

- invalidity and restitution (Nichtigkeits- und Restitutionsklagen) (§ 584 ZPO),
- bill of exchange and cheques (Wechsel- und Scheckprozess) (§ 603 ZPO),
- payment procedure for smaller claims (Mahnverfahren) (§ 689 Abs. 2 ZPO),
- enforcement (Zwangsvollstreckung) (e.g. in §§ 731, 764, 767, 771, 802 ZPO),
- arrest and provisional measures (e.g. §§ 919, 937, 942, 943 ZPO) (will be addressed later in detail),
- Court measures in arbitration (§§ 1045 ff. ZPO).

Outside the ZPO:

- § 26 Fernunterrichts-Gesetz (FernUSG, Act on long distance learning, later in connection with the consumers venues),
- § 215 Versicherungsvertrags-Gesetz, Insurance Contract Act (see later on consumers),
- § 14 Gesetz über den unlauteren Wettbewerb (UWG, Unfair Competition Act, see later on torts),
- §§ 246 Abs. 3, 249, 275 Aktiengesetz (AktG, Law on stock corporations),
- § 6 Binnenschiffahrts-Verfahrensgesetz (BinSchVerfG, Act on Shipping on inland waters),
- § 14 Haftpflichtgesetz für Schienenverkehr (HaftpflG, train traffic act, see later on torts),
- § 27 Gebrauchsmuster-Gesetz, § 140, 141²⁶⁵ MarkenG (both in intellectual property),
- §§ 87, 109 Genossenschafts-Gesetz (Act on cooperatives),
- §§ 61 ff. GmbHG (Act on limited companies),
- §§ 488, 508 Handelsgesetzbuch (HGB, Commercial Code) (for shipping contracts),
- §§ 179, 180 InsO (Act on Insolvency),
- § 20 Straßenverkehrs-Gesetz (StVG, Act on road traffic, see later on torts).

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

The point of departure is the above mentioned effect of indication. There is no double function; insofar the law refers to criteria that do not give any indication for the local jurisdiction, e.g. citizenship. Such rules only govern international jurisdiction (e.g. the

²⁶⁵ Ansprüche, welche die im MarkenG geregelten Rechtsverhältnisse betreffen und auf Vorschriften des Gesetzes gegen den unlauteren Wettbewerb gegründet werden, brauchen nicht im Gerichtsstand des § 14 des Gesetzes gegen den unlauteren Wettbewerb geltend gemacht zu werden.

general venue for German diplomats, § 15 ZPO, and the special venue for German deceased, § 27 sect. 2 ZPO).

For some particular fields, such as family law, there is international jurisdiction even if there is no local jurisdiction (e.g. a demand for modification of a German judgment concerning alimony).

In addition, a so called forum of necessity, which is not regulated explicitly in the law, is also discussed. Legal writers recognize such a forum. Its practical relevance seems doubtful. However, in such a case, there would also be international jurisdiction, although there would be no explicit local jurisdiction, what could be seen as a deviation of the principle of double functionality.

An important difference exists for the venue of patrimony (§ 23 ZPO). In international cases the German courts demand that the case has a sufficient connection to Germany.²⁶⁶ So, even though the local jurisdiction might be granted according to the law, there might be no international jurisdiction.

The cases on supplement local jurisdiction provide an interesting variation of the notion of double function. If it is clear that there is international jurisdiction according to international treaties or an EU-regulation, there must also be a local jurisdiction (supplement jurisdiction, e.g. in connection with the CMR) even if such local jurisdiction would not ordinarily exist under German law.

Another important deviation is that exclusivity on the local level does not necessarily mean exclusivity on the international level (e.g. the exclusive venue in case of damage to the environment by factories, § 32a ZPO, is not exclusive on the international level).²⁶⁷

3. Heads of jurisdiction

3.1. *Forum rei*

Defendants' General Venues for all Sorts of Claims

According to § 13 ZPO, **the general venue** of a person is determined by his place of residence.

§ 15 ZPO (General venue of **German citizens living abroad**²⁶⁸) contains a particular rule for German diplomats abroad: German citizens entitled to the privilege of extraterritoriality as well as German civil servants working abroad will retain the venue of their last place of residence in Germany. Should they not have had such a place of residence, their venue shall be the local court (Amtsgericht, AG) of Schöneberg in Berlin. The present rule shall not apply to honorary consuls.

This rule should avoid negative conflicts of competence. It seems unclear if § 15 ZPO would apply next to the Brussels-Lugano-regime if the diplomat has his residence in a Member State.

§ 16 ZPO (General venue of persons **without a place of residence**): The general venue of a person who has no place of residence shall be determined by that person's place of abode in Germany and, where no such place of abode is known, by that person's last place

²⁶⁶ BGH vom 2.7.1991, BGHZ 115, 90.

²⁶⁷ For all see Geimer, IZPR, 6. Auflage, 2009, Rdnr. 946 -972c.

²⁶⁸ The term used in the official English translation of the ZPO is "Germans entitled to the privilege of extraterritoriality".

of residence (tag-jurisdiction). § 16 ZPO is the so called vagabond's forum. It applies next to the Brussels-Lugano-regime.

§ 17 ZPO (General venue of **legal persons**): (1) The general venue of the municipalities, corporate bodies, and of those companies, co-operatives or other associations as well as of those foundations, institutions, and available assets that may be sued as such is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre. (2) Mining companies have their general venue with the court having jurisdiction over the location of the mine; public authorities – provided they can be sued as such – have their general venue with the court of their official seat. (3) It is admissible to determine a venue, in derogation from what is determined by the stipulations of the present subsection, by statute or by other special provision.

§ 18 ZPO (General venue of the **government treasury**): The general venue of the treasury of the government is determined by the official seat of the public authority authorised to represent the government treasury in the legal dispute.

§ 19a ZPO (General venue of the **insolvency administrator**): The general venue of an insolvency administrator for actions concerning the insolvency estate is determined by the seat of the insolvency court.

Defendants' additional Venues for Specific Claims

§ 20 ZPO (Specific jurisdiction of the place of **abode**): Where persons have their place of abode at a location under circumstances that, by their nature, indicate that their abode will be of a longer term, in particular because such persons are household help, workers, assistants in commercial enterprises, university students, pupils, or apprentices, the court of their place of abode shall have jurisdiction for all actions that may be brought against these persons for claims under property law.

Within the Brussels-Lugano-regime the rule may not be applied. But if there is a residence outside the Brussels-Lugano-regime, and the elements of § 20 ZPO are fulfilled, the rule may be applied and provide for an international jurisdiction.²⁶⁹

§ 21 ZPO (Specific jurisdiction of a **place of business**): (1) Should someone have a place of business serving the operation of a factory, a trade enterprise, or any other commercial establishment, and from which transactions are directly concluded, all actions that relate to the operation of the place of business may be brought against that person at the court of the location at which the place of business is situated. (2) The jurisdiction of the place of business also applies to actions brought against persons acting as owners, beneficiaries, or lessees in managing a property, on which residential and service buildings have been constructed, to the extent such complaints concern the legal relationships relating to the property's management.

§ 22 ZPO (Specific jurisdiction of a **membership**²⁷⁰): The court with which municipalities, corporate bodies, societies, co-operatives, or other associations have their general venue shall have jurisdiction for those actions that are brought by them or by the insolvency administrator against the members of such membership as such, or that are brought by the members against one another in their capacity as such.

§ 27 ZPO (Specific jurisdiction of an **inheritance**): (1) Complaints brought in order to have the court determine succession, or to assert claims of the heir against a possessor of an

²⁶⁹ Heinrich in Musielak, ZPO, 9. Auflage, 2012, § 20 Rdnr. 11.

²⁷⁰ This refers to a specific type of legal entity.

inheritance, claims under testamentary gifts or under other testamentary trusts, claims to the compulsory portion of the inheritance, or complaints brought regarding the distribution of the inheritance may be brought with the court at which the testator had his general venue at the time of his death. (2) If the testator is a **German citizen** who had no general venue in Germany at the time of his death, the complaints designated in subsection (1) may be brought with the court in the jurisdiction of which the testator had his **last place of residence** in Germany; where he did not have such a place of residence, the rule of section 15 (1) second sentence shall apply mutatis mutandis.

For the new Succession-regulation of the EU (nr. 650/2012²⁷¹) it is subject to discussion in Germany whether the German rules on (national and international) jurisdiction continue to apply concurrently with the new European rules in cases with third States rather than being superseded by the European regulation.²⁷²

§ 28 ZPO (Extended jurisdiction of an **inheritance**): In the jurisdiction where an inheritance is situated, complaints may also be filed for other liabilities of the estate, provided that the estate is still situated, either as a whole or in part, in the court's jurisdiction, or provided that the existing plurality of heirs is liable as joint and several debtors.

3.2. *Forum actoris*

According to the German doctrine, a *forum actoris* needs special justification. This is in principle the case for weaker groups in society, e. g. consumers or insured parties.

The Consumer's Forum

§ 29c ZPO (Specific jurisdiction for **doorstep sales**) stipulates: For complaints regarding doorstep sales (section 312 of the Civil Code (*Bürgerliches Gesetzbuch, BGB*)), that court in the jurisdiction of which the **consumer has his place of residence** at the time he is bringing proceedings shall be competent; where the consumer has no such place of residence, his habitual place of abode shall be relevant. For complaints brought **against the consumer**, the above court shall have **exclusive** jurisdiction. (2) Section 33 (2) shall not apply to any countercharges brought by the respective other party to the agreement. (3) An agreement will be deemed admissibly made, in derogation from subsection (1), in those cases in which, following the conclusion of the contract, the consumer relocates his place of residence or habitual place of abode to a location outside the territorial scope of this Act, or in which the consumer's place of residence or habitual place of abode is not known at the time proceedings are brought in the courts.

Art. 26 Abs. 1 *Fernunterrichts-Gesetz (FernUSG)* for long distance learning contracts provides for a similar rule on exclusive jurisdiction.

Both rules have an exclusive character also on the international level. This means that Germany would not recognize a judgment made on such matters in another state.

Art. 215 VVG for insurance contracts (not only for consumers) is also interesting in this field. In respect of actions brought on the basis of the contract of insurance or the mediation of a contract of insurance, that local court in whose **district the policyholder**

²⁷¹ Although the regulation is too recent for there to be significant discussion in the literature, there was extensive discussion on this point concerning the draft regulation.

²⁷² Majer, Die Geltung der EU-Erbrechtsverordnung für reine Drittstaatsverhältnisse, ZEV 2011, 455: Ergibt sich aber keine Zuständigkeit eines Gerichts eines EU-Mitgliedsstaates nach den Art. 4 - 6, richtet sich die Zuständigkeit nach nationalem Recht. Es finden dann die nationalen Kollisionsnormen Anwendung. Im o. g. Beispiel eines reinen Drittstaatsverhältnisses (Russe mit letztem Wohnsitz in der Schweiz) können die (deutschen) Erben nach Maßgabe der §§ 12 ff. ZPO in Deutschland Klage erheben. Das anwendbare Recht bestimmt sich nach den Art. 25 und Artikel 26 EGBGB.

has his place of residence at the time of the filing of the action shall also have jurisdiction, failing that, the rule of his habitual place of residence applies. In respect of **actions brought against the policyholder**, only this court shall have jurisdiction. Section 33 (2) of the Code of Civil Procedure shall not apply to cross-actions brought by the other party. An agreement deviating from the above said shall be permitted in the event that the policyholder moves his domicile or habitual place of residence outside the scope of this Act after signing the contract, or his domicile or habitual place of residence is unknown at such time as the action is filed.

Special Venue for Rescue Providers in Salvage

§ 30 ZPO (Jurisdiction for claims arising from search and **rescue operations**): For complaints filed regarding claims arising from search and rescue operations as provided for in the Eighth Chapter of the Fifth Book of the Commercial Code (*Handelsgesetzbuch, HGB*) against a person who has no venue in Germany, that court shall be competent in which the plaintiff has his general venue in Germany.

The *forum actoris* in family law (§§ 98 sect. 1 and 103 sect. 1 FamFG) is treated under a separate heading later.

3.3. Fact-based venues

Place of Performance

§ 29 ZPO (Specific jurisdiction of the place of **performance**): (1) For any disputes arising from a contractual relationship and disputes regarding its existence, the court of that location at which the obligation that is to be performed is at issue shall have jurisdiction. (2) An agreement as to the place of performance shall establish a court as the forum only insofar as the parties to the agreement are merchants, legal persons under public law, or special assets (*Sondervermögen*) under public law.

Place of Asset Management

§ 31 ZPO (Specific jurisdiction for **asset management**): For complaints brought under an asset management relationship by the principal against the administrator, or by the administrator against the principal, the court in the jurisdiction of which the assets are managed shall have jurisdiction.

Torts

§ 32 ZPO (jurisdiction for **tort**): For complaints arising from tort, the court in the jurisdiction of which the tortious act was committed shall have jurisdiction.

For the violations of personality rights in the internet, the rule has been restricted for international cases. In general, according to § 32 ZPO for claims in torts, the court of the place where the act has been committed would be competent. Such place is the place of action and the place where the damage occurred. There is a competence at both places, at the disposal of the plaintiff. For violation of personality rights on the internet the German BGH demands a clear relation to Germany. The mere access to the information on Internet seems to be insufficient. In this sense, the Internet version of the New York Times was not sufficient for the application of § 32 ZPO.²⁷³

²⁷³ BGH, 2. 3. 2010, NJW 2010, 1752.

Car and Train Accidents

For claims for damage caused by car accidents, there is a particular venue, *i.e.* the place where the accident/injury occurred (§ 14 Strassenverkehrsgesetz, StVG).

The same rule applies to claims for damage caused by **trains** (§ 14 Haftpflichtgesetz, HaftpflG).

Capital Market Disclosures

§ 32b ZPO (**Exclusive** jurisdiction for false or misleading public **capital market disclosures**, and exclusive jurisdiction in the event that such disclosures have not been made): (1) For complaints concerning: 1. The compensation of damages caused by false or misleading public capital market disclosures, or caused by the failure to make such disclosures, or 2. A claim to performance under a contract based on an offer pursuant to the Securities Purchase and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) is being asserted, that court shall have exclusive jurisdiction which is located at the **registered seat** of the issuer concerned, of the person offering other capital investments, or of the targeted company. **This shall not apply where the said registered seat is situated abroad.**²⁷⁴ (2) The Land governments are authorised to assign by statutory instrument the complaints set out in subsection (1) to a regional court (*Landgericht, LG*) for the jurisdictions of several regional courts, provided this is expedient for promoting the proceedings *ratione materiae* or for accelerating the termination of the proceedings. The Land governments may confer this authorisation upon the Land departments of justice.

It is unclear whether the rule applies where there are no other EU Member State parties. The overwhelming opinion in Germany would rather say that the Brussels-Lugano regime prevails even in such a case.²⁷⁵

Some legal authors state that § 32b ZPO only provides for the local exclusive jurisdiction, not for the international exclusive jurisdiction. The element of exclusivity would not be transferred to the international level in order not to force claimants from third states to bring their claim in Germany.²⁷⁶ However, exactly this was presumably the motivation of the German legislator (protection of the German issuer from foreign plaintiffs).

Unfair Competition

A particular rule on international jurisdiction is to be found in the Act on Unfair competition (§ 14 UWG).²⁷⁷ For court actions brought by virtue of that Act, jurisdiction shall lie with the court in whose districts the **defendant** has his or its commercial place of business or his independent professional place of business, or in the absence thereof, his or its place of residence. The defendant's domestic place of abode shall be the decisive point of reference in a case where the defendant also does not have a place of residence.

For international cases there is a particularity. Next to the defendant's forum, for court actions brought by virtue of the Act on Unfair competition, jurisdiction shall lie solely with the court in whose district the **act was committed**. This sentence shall apply to court actions brought by those entitled to assert a cessation and desistance claim (pursuant to Section 8 subsection (3), numbers 2 to 4 UWG), only if the defendant has **neither a domestic commercial**, or independent professional, place of business nor a place of residence.

²⁷⁴ A new version of the law formulates the other way round: the seat must be in Germany.

²⁷⁵ Rauscher/Mankowski, *Europäisches Zivilprozessrecht*, Art. 5 Brüssel I-VO Rdnr. 11 ff.

²⁷⁶ Heinrich in Musielak, ZPO, 9. Auflage, 2012, § 32b, Rdnr. 7.

²⁷⁷ Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette [BGBl. Part I p. 254).

3.4. *Forum connex*

§ 33 ZPO (Specific jurisdiction for **countercharges**): (1) Countercharges may be brought with the court with which the complaint has been filed if there is a connection between the counterclaim and the claim being asserted in the action, or between the counterclaim and the means of defence raised against the claim. (2) This shall not apply if, due to a counterclaim having been brought, it is not admissible to agree on the jurisdiction of the court for a complaint pursuant to section 40 (2).

§ 34 ZPO (Specific jurisdiction of the main proceedings): The court of the main proceedings shall have jurisdiction for complaints brought for **fees and expenditures** by attorneys of record, persons providing assistance, authorised recipients, and court-appointed enforcement officers.

3.5. *Forum prorogationis*

§ 38 ZPO (Admissible agreement as to the **choice** of venue): (1) A court of first instance that as such is not competent will become the forum by express or tacit agreement of the parties should the parties to the agreement be merchants, legal persons under public law, or special assets (*Sondervermögen*) under public law.

(2) The competence of a court of first instance may be agreed, furthermore, wherever at least one of the parties to the agreement **has no general venue in Germany**. Such agreement must be concluded in writing or, should it have been concluded orally, must be confirmed in writing. If one of the parties has its general venue in Germany, a court may be selected in Germany only if that party has its general venue in that court's jurisdiction, or if a specific jurisdiction is given.

(3) In all other regards, a choice-of-court agreement shall be admissible only where it was concluded, expressly and in writing: 1. **After the dispute has arisen**, or 2. For the event that, following the conclusion of the agreement, the party to whom claim is to be laid relocated his place of residence or habitual place of abode to a location outside the territorial scope of this Code, or for the event that the party's place of residence or habitual place of abode is not known at the time the proceedings are brought in the courts.

§ 39 ZPO (Competence of a court as a result of a party having **participated** in court proceedings without objecting to the court's lack of jurisdiction): Furthermore, the competence of a court of first instance is established by the fact that the defendant makes an appearance in oral argument on the merits of the case and **fails to object** to the court's lack of jurisdiction. This shall not apply where the notification stipulated by section 504 ZPO²⁷⁸ was not given.

§ 40 ZPO (Invalid and inadmissible choice of court agreement): (1) The choice-of-court agreement shall have no legal effect if it does not refer to a certain legal relationship and to the legal disputes arising therefrom. (2) A choice-of-court agreement shall be inadmissible where: 1. The legal dispute concerns non-pecuniary claims that are assigned to the local courts (*Amtsgerichte*, AG) without consideration of the value of the subject matter being litigated, or 2. An exclusive jurisdiction has been established for the complaint. In these cases, the competence of a court will not be established by a party making an appearance in oral argument on the merits of the case without asserting the court's lack of jurisdiction.

²⁷⁸ §504 ZPO provides as follows: « Should the local court (Amtsgericht) lack jurisdiction, this being local jurisdiction or competence *ratione materiae*, it shall indicate this fact to the defendant prior to holding the hearing on the merits of the case, and shall likewise draw the defendant's attention to the consequences of entering an appearance on the merits of the case without filing a corresponding objection. »

3.6. *Forum rei sitae*

§ 24 ZPO (**Exclusive** jurisdiction as to the subject matter, so called *forum rei sitae*): (1) For complaints by which ownership, an encumbrance “*in rem*”, or the freedom from such an encumbrance is being asserted, and for complaints concerning the settlement of boundary disputes, or the partition or possession of **immovable property**, that court shall have exclusive competence in the jurisdiction of which the object or property is situated. (2) For complaints concerning an easement, a realty charge, or a right of pre-emption, the location of the servient tenement or encumbered property shall be relevant.

From § 24 ZPO it does not follow that the German courts would not be competent for disputes concerning foreign real estate because the rule only refers to German real estate.

§ 25 ZPO (Jurisdiction as to the subject matter, *forum rei sitae*, in light of the matter’s **connection** with the various facts and their overall context): Should the jurisdiction of a court be governed by the subject matter of the dispute, the creditor’s complaint for performance (*Schuldklage*) may be brought together with any complaint concerning a mortgage, charge on land, or annuity charge on land; the complaint for exemption from personal liability may be brought together with the complaint for transfer or cancellation of a mortgage, charge on land, or annuity charge on land; the complaint for overdue performance may be brought together with the complaint for recognition of a realty charge; in all cases, such consolidated actions must be brought against one and the same defendant.

§ 26 ZPO (Jurisdiction as to the subject matter, *forum rei sitae*, for complaints brought **against a person**): Where the jurisdiction of a court is governed by the subject matter of the dispute, complaints brought against a person may be filed against the owner or possessor of an immovable property, as may be complaints for damages caused to real estate, or actions brought concerning compensation for the expropriation of a plot of real estate.

§ 29a ZPO (**Exclusive** jurisdiction of spaces governed by a **tenancy or lease** agreement): (1) For disputes concerning claims under tenancy or lease relationships regarding spaces, or disputes regarding the existence of such relationships, the court in the jurisdiction of which the spaces are situated shall have exclusive competence. (2) Subsection (1) shall not apply to residential spaces of the type provided for by section 549 (2) numbers 1 to 3 of the Civil Code (Bürgerliches Gesetzbuch, BGB).

§ 32a ZPO (**Exclusive** jurisdiction for effects on the **environment**): For complaints brought against the operator of a facility listed in Annex 1 of the Act on Liability for Environmental Damage (*Umwelthaftungsgesetz*), by which a claim to compensation is asserted for damages caused by effects on the environment, the court in the jurisdiction of which the facility’s effects on the environment originated shall have exclusive competence. This shall not apply where the facility is situated abroad.

It is disputed if the rule is also of an exclusive nature on the international level.

3.7. *Forum patrimonii*

§ 23 ZPO (Specific jurisdiction of **assets** and of an object): For complaints under proprietary rights brought against a person who has no place of residence in Germany, that court shall be competent in the jurisdiction of which assets belonging to that person are located, or in the jurisdiction of which the object being laid claim to under the action is located. Where claims are concerned, the debtor’s place of residence and, in cases in which an object is liable for the claims as collateral, the place at which the object is located shall be deemed to be the location at which the assets are located.

3.8. Family Law

As already mentioned in the introduction, for family law disputes German law stipulates particular rules on international jurisdiction. The theory of double functionality does not apply.

According to § 98 FamFG (marriage cases, connection of divorce and consequential cases), German courts are internationally competent, if

1. one spouse is a German citizen or was at the time of marriage;
2. both spouses have their abode in Germany;
3. one spouse has no citizenship and has his place of abode in Germany;
4. one spouse has his place of abode in Germany, except if the German judgment would not be recognized by the countries involved in the case.

§ 99 FamFG governs parent and child cases (Kindschaftssachen).

§ 100 FamFG contains a venue for cases on parentage (Abstammungssachen).

§ 101 FamFG contains a venue for cases on adoption (Adoptionssachen).

§ 102 FamFG contains a rule on international jurisdiction for disputes about statutory pensions' equalization (**Versorgungsausgleichssachen**).

§ 103 FamFG contains a rule on registered partnerships (Lebenspartnerschaftssachen).

§ 104 FamFG contains a venue for disputes on tutelage for adults (Betreuungs- und Unterbringungssachen; Pflegschaft für Erwachsene).

§ 105 FamFG contains a general rule and refers back to the technique of double functionality.

According to § 106 FamFG none of these jurisdictions is of exclusive character.

The rule also facilitates the recognition of foreign judgments (§ 109 Abs 1 Nr 1 FamFG).

3.9. Labour law

There are no particular heads of jurisdiction for labour law.²⁷⁹ The theory of double functionality applies also in labour law.²⁸⁰

3.10. The so called *forum necessitatis*

The so called *forum necessitatis* is discussed in Germany. It is widely accepted by legal writers. In practice the relevance is almost none since § 23 ZPO (patrimony venue) covers most of the relevant cases. If the defendant has no patrimony in Germany, there will be in most cases no need for legal protection in front of German courts.²⁸¹

²⁷⁹ Geimer, IZPR, 6. Auflage, 2009, Rdnr. 1187.

²⁸⁰ Geimer, IZPR, 6. Auflage, 2009, Rdnr. 952.

²⁸¹ Geimer, IZPR, 6. Auflage 2009, Rdnr. 1036 et seq.

4. Unilateral coordination of jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the forum

For the local jurisdiction, § 12 ZPO states that exclusive jurisdiction excludes every other forum (also by prorogation). But this rule only addresses directly the local and not the international exclusiveness. It is disputed how far exclusivity can be claimed on the international level.

Things are relatively simple in Family law, where § 106 FamFG (FamFG) provides that none of the local jurisdiction claims exclusivity on the international level. This rule makes recognition of foreign judgments much easier.

The ZPO knows the following venues which are locally exclusive:

Venue for claims *in rem* (property law) for immovables (*dinglicher Gerichtsstand*, § 24 ZPO),

Venue for claims on lease and leasehold (*Klagen bei Miet- und Pachtsachen*, § 29a ZPO),

Venue for claims for damages caused by influence on the environment (*klagen bei Umwelteinwirkung*, § 32a ZPO), and

Venue for claims for damages caused by false or misleading capital market disclosure (*Klagen bei falschen oder irreführenden Kapitalmarktinformationen*, § 32b ZPO).

The ZPO also knows so called half-sided exclusive venues (e.g. in consumer law cases, § 29c ZPO).

It has to be examined and is rather disputed which of these exclusive local jurisdictions also are exclusive on an international level.

Concerning claims *in rem* for immovables (§ 24 ZPO) and claims in connection with a lease or leasehold for an immovable (§ 29a ZPO), legal practice and the overwhelming majority of legal writers claim exclusivity also on the international level.²⁸² It is said that the German state can't tolerate that foreign judges decide about German land.

However, the vice-versa conclusion is not drawn. The German courts do exercise jurisdiction on contracts for lease of a real estate abroad (not covered by Art. 22 Brussels I Regulation). The argument seems to be that § 24 ZPO restricts exclusivity to German real estate, and does not mention foreign immovables.²⁸³

The same is true in cases of lease and leasehold of immovables. Exclusivity is claimed for German immovable, but is not awarded to foreign real estate.²⁸⁴ That there is no barrier effect for the German courts seems rather undisputed in Germany.²⁸⁵

²⁸² BGH 28.09.1994, NJW 1995, 58. Geimer IZPR, 6. Auflage 2009 Rdnr. 1433 et seq. (with further references).

²⁸³ Already the Reichsgericht in RGZ 32, 414 (416) and the BGH, 25 sept 1997, NJW 1998, 1321: Spanish immovable before application of the Brussels-regime.

²⁸⁴ Landesgericht (LG) Bonn, 4 oct 1973, NJW 1974, 427. Immovable in former Yugoslavia, claimant and defendant in Germany.

²⁸⁵ Heinrich in Musielak-ZPO, § 29a nr. 16. See also Geimer in NJW 1974, 2189 (confirming the above mentioned judgment of the LG Bonn and refusing explicitly Droz (Compétence judiciaire et effets des jugements dans le Marché Commun, Paris 1972, S. 102 no. 151).

The venue for doorstep contracts with consumers (§ 29c ZPO) is only exclusive in one sense, which means that it is only exclusive for claims against the consumer with residence or place of abode in Germany. If the consumer has no residence or place of abode in Germany, the exclusivity according to the ZPO does not have any barrier effects (*Sperrwirkung*) for international jurisdiction of the German courts (based on other venues).²⁸⁶ This corresponds to the solution explained above for immovables.

This would probably have the effect that Germany would not recognize judgments on doorstep contracts against a German consumer, whilst a German company could bring a claim against a foreign consumer in Germany, if there is another venue in Germany (e.g. prorogation or venue of performance).

For damage caused by influences to the environment by production facilities (§ 32a ZPO), some time ago it was discussed if the exclusiveness is granted also to such facilities abroad. Nowadays it is said that the problem has been solved by the fact that Germany is surrounded by member states since the eastern expansion of the EU.²⁸⁷ In such cases the Brussels-Lugano-regime would prevail and the venues of the ZPO would not apply. It is more or less practically impossible that there could be such damage in Germany caused by a production facility in a third, non EU, State because environmental influences do not regularly reach so far.

Of more interest is the same question for the venue in case of damage caused by false or misleading information on the capital markets (§ 32b ZPO). According to one legal writer, the German legislator wanted that this rule is not only exclusive on the national, but also on the international level.²⁸⁸ If the issuer has its seat in Germany, he may only be sued in Germany. The legislator justified this solution with the threads for the German stock exchange market.

However, the overwhelming majority of legal writers in Germany seems not to follow the opinion that § 32b ZPO is also exclusive on an international level. The opinions are split. It is said that it would be desirable to have this question solved but that it is open for the time being. It would be rather frequent that German (listed?) companies are quoted in third States, e.g. the New York Stock Exchange. If it would be assumed that § 32b ZPO is exclusive also on an international level, the victim in such a state would be forced to sue in Germany. A judgment abroad would not be recognized in Germany (§ 328 sect. 1 nr. 1 ZPO). The slightly overwhelming view is that § 32b ZPO is only exclusive on the national level, not on the international level.²⁸⁹ In 2009, the Federal Ministry of justice emitted a final report on the evaluation of the Act on Exemplary Proceedings on the Capital Market and concluded that § 32b ZPO would not be exclusive on the international level.²⁹⁰

Other authors would simply say § 32b ZPO only applies if the issuer has its seat in Germany.²⁹¹ If the defendant has its seat abroad, § 32b ZPO would not be applicable. It does not have barrier effects for claims in Germany against such defendants.

In German literature, exclusivity is also discussed for rights in intellectual property as well as for claims for liability of an authority. The result seems rather open.²⁹²

²⁸⁶ In this sense Toussaint in Vorwerk/Wolf-ZPO, Beck-OK-ZPO, 8. Ed. 2013, § 29c, nr. 14. Also Geimer (IZVR, 6. Ed. 2009, nr. 875) gives indications in that direction. However, the questions does not seem to be decided in a court case.

²⁸⁷ Heinrich in Musielak-ZPO, 9. Ed. 2012, § 29a, nr. 10.

²⁸⁸ Geimer, IZPR, 6. Auflage 2009, Rdnr. 874. Allerdings lässt sich die Internet-Quelle bei Geimer (Media-Seite des BMJ) heute (März 2013) nicht mehr nachvollziehen.

²⁸⁹ Heinrich in Musielak-ZPO, 12. Auflage, 2012, § 32b ZPO Rdnr. 7.

²⁹⁰ Halfmeier/Rott/Feess, 14.10.2009, abrufbar unter:

http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht_KapMuG_Frankfurt%20School_2009.pdf?__blob=publicationFile (Stand März 2013).

²⁹¹ E.g. Toussaint in Vorwerk/Wolf-ZPO, Beck-OK-ZPO, 8. Ed. 2013, § 32b, nr. 11.

There is one powerful voice that claims that all problems could be solved if one would abolish exclusive jurisdictions altogether.²⁹³ The protection of state interests would not really demand that jurisdiction is e.g. exclusive for immovable in Germany. This voice claims that exclusivity is not possible because a foreign judge would never be bound by a German rule claiming exclusivity.²⁹⁴

4.1.2. Absence of Jurisdiction of the forum

There are no such negative cases explicitly mentioned in the law.

Especially the forum of patrimony (§ 23 CCP) covers probably all cases with a practical need for a forum in Germany. In connection with the forum of patrimony, the German BGH decided that such cases have to have a sufficient link to Germany. However, such link is normally existent if the plaintiff has his residence in Germany. If the plaintiff comes from a third State, it could be imagined that the link is not sufficient and for such cases there would be an absence of jurisdiction.

Next to this, the German doctrine acknowledges a *forum necessitatis*, if no court would treat the case and there would be a danger of a denial of justice (see already above).

In legal doctrine it is discussed which generally known foreign jurisdictions do exist which are not to be found in German law. No general forum exists in German law for joint litigants (differing from art. 6 Brussels I Regulation). However, there are such fora in special legislation (e.g., in the Commercial Code, Air Traffic Code, FamFG). There is no general venue for connected claims. No venue exists for claims in warranty, no *forum obligationis* (venue at the place where an obligation is entered into), no place of marriage forum, no place of service forum (tag jurisdiction), no venue of reciprocity, no forum *arresti* (attachement-procedures), no venue of citizenship (neither actively nor passively), no forum legis.²⁹⁵

4.1.3. Exclusive Jurisdiction of a Foreign State

As already shown under heading 4.1.1., there are no such cases in Germany. The German courts do assume their international jurisdiction, even though there might be a foreign exclusive jurisdiction.

4.2. *Lis pendens*

The relevant rule of the German Code of Civil Procedure (CCP) is § 261 sect. 3 nr. 1 on pending suits. Once a dispute is pending, this will have the following effects: For as long as the dispute is pending, none of the parties may bring the dispute before another court or tribunal.

This rule in the German CCP is made for purely national cases, but according to German jurisprudence also applies in international cases (universal ideal of substitutability of all courts, so called *Fungibilität*).²⁹⁶ The overwhelming legal doctrine in Germany is in line with this view of jurisprudence.²⁹⁷ However, the rule applies in international cases only with some modifications (application *per analogiam*).

²⁹² Geimer, IZVR, 6. Auflage 2009, Rdnr. 875 et seqs.

²⁹³ Geimer, IZVR, 6. Auflage 2009, Rdnr. 879 - 942.

²⁹⁴ Geimer, IZVR, 6. Auflage 2009, Rdnr. 878 et seqs.

²⁹⁵ Geimer, IZVR, 6. Auflage 2009, Rdnr. 1578 et seqs.

²⁹⁶ Example given, BGH, 10.10.1985, NJW 1986, 2195.

²⁹⁷ See the overview of Geimer, IZVR, 6. Auflage 2009, Rdnr. 2688 et seqs. (there seems to be only one author, Mr. Schütze, who has another opinion).

The *lis pendens* rule applies in international cases only if there is a **positive prognosis of recognition**. This criterion contains a big number of problems and open questions, especially in connection with the objection of *ordre public*.²⁹⁸

If the prognosis is positive, the claim has to be rejected entirely. It should not be sufficient to suspend the German procedure (§ 148 CCP).

It is open for discussion what happens if the prognosis is unclear. It is argued that the proceedings should at least be suspended pending the outcome of the trial abroad. The German BGH limits this possibility to exceptional cases.²⁹⁹ Legal authors seem to be more favorable, arguing that suspension of the litigation in Germany should be possible to prevent lacks of legal protection for the plaintiff. Next to this there is clearly no possibility for suspension, for example if it is doubtful that the subject of the case is identical.

The barrier of a case pending does not apply if the legal protection would be influenced negatively in a way that is not tolerable. If in another country the duration of proceedings is extremely long or unsure or subject to bribes, this would be a threat for the claimant coming to Germany and the German proceedings would not be stopped or interrupted. According to the jurisprudence of the BGH, good faith is also relevant in this aspect in procedural law.³⁰⁰ Legal authors contest this view of the BGH.

In the field of maritime law, the German Commercial Code contains a special provision on *lis pendens* in international cases in claims for damages (§ 738a sect. 1 German CC).³⁰¹

5. Rules on recognition and enforcement

The relevant rules of national German law are the following:

§ 328 ZPO: Recognition of foreign judgments

(1) Recognition of a judgment handed down by a foreign court shall be **ruled out** if:

1. The courts of the State to which the foreign court belongs do not have jurisdiction according to **German law**; (so called *Spiegelbildlichkeitsprinzip*, principle of mirroring-effects)
2. The defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself;
3. The judgment is **incompatible** with a **judgment** delivered in Germany, or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have become pending earlier in Germany;
4. The recognition of the judgment would lead to a result that is obviously **incompatible** with essential **principles of German law**, and in particular if the recognition is not compatible with fundamental rights;
5. **Reciprocity** has not been granted.

²⁹⁸ Geimer, IZVR, 6. Auflage 2009, Rdnr. 2727 et seqs.

²⁹⁹ BGH, 10.10.1985, NJW 1986, 2195, 2196.

³⁰⁰ BGH, 26.01.1983, NJW 1983, 1269 (divorce in Italy).

³⁰¹ A global reference to all these questions can be made to Geimer, IZVR, 6. Auflage 2009, Rdnr. 2685 and Becker-Eberhard in MÜKO-ZPO, § 262 Rdnr. 73 et seqs.

(2) The rule set out in number 5 does not contravene the judgment's being recognised if the judgment concerns a **non-pecuniary claim** and if, according to the laws of Germany, **no place of jurisdiction** was established in Germany.

§ 722 ZPO governs the Enforceability of foreign judgments

(1) Compulsory enforcement may be pursued under the judgment of a foreign court if such compulsory enforcement is ruled admissible by a judgment for enforcement.

(2) Shall be competent to enter the judgment for enforcement that local court (*Amtsgericht*, AG) or regional court (*Landgericht*, LG) with which the debtor has his general venue, or, where there is no such general venue, that local court or regional court where assets are located as provided under section 23 (venue based on assets).

In Family-law cases, the relevant rules are arts. 107-109 FamFG (FamFG).

5.1. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

According to § 328 sect. 1 Nr. 1 ZPO, in order for a foreign judgment to be recognized, the foreign court must have jurisdiction according to the German rules on jurisdiction (principle of mirroring-effects, indirect competences). German courts will not recognize a foreign judgment if German law would provide for exclusive German jurisdiction over the dispute in question (e.g. §§ 24, 29a, 32b ZPO).³⁰²

It is disputed in Germany whether, in the case of non-European judgments, under this test of mirroring competencies only the German rules of jurisdiction should be taken into account or if the jurisdictional rules of the Brussels I Regulation should be considered as well. The courts and much of the doctrine in Germany do not take into consideration the European rules on international competences.³⁰³ At least one author, however, states that at least the exclusive jurisdiction of Art. 22 Brussels I Regulation (*rei sitae* rule) and Art. 23 (prorogation) should be taken into consideration with respect to third country judgments according to § 328 ZPO, although this is not the current state of the law.³⁰⁴

According to the bilateral Treaties with Israel and Tunisia, a decision is not recognized if the state of recognition claims exclusive jurisdiction (see below).

5.2. Bilateral and Multilateral Agreements

5.2.1. In the field of jurisdiction:

- **Multilateral treaties (apart from EU-Instruments):**

Transport Law

COTIF 1999 (Trains, BGBl. 2002 II 2140, 2142):

Art. 52 CIV (transport of persons): damage to persons, exclusive int. jurisdiction: place of the accident; apart from this: place of the seat of the railway company

Art. 56 CIM (transport of goods): place of the seat of the railway company

³⁰² Gottwald in MüKo-ZPO, 4. Auflage 2013, § 328, Rdnr. 87.

³⁰³ BGH 03.12.1992, NJW 1993, 1073. OLG Düsseldorf, 7.12.2007, IPRax 2009, 517 (Erfüllungsgerichtsstand nach Brüssel-I-VO nicht anerkannt, im Verhältnis zu Argentinien).

³⁰⁴ Stadler in Musielak-ZPO, 9. Auflage 2012, § 328 Rdnr. 10. With reference to Kern, ZZP 120 (2007), 31.

Art. 31 sect. 1 CMR (road carriage, BGBl. 1961 II 1119): choice between venues depending on the defendant or place of handover (at take-over or delivery) of the goods;

Art. 28 Warsaw convention (RGBl. 1933 II 1040, BGBl. 1958 II 312), Art. 33 Montreal convention (BGBl. 2004 II 458);

Art. 34 sect. 2 Revidierte Rheinshiffahrtsakte (BGBl. 1969 II 597): (functional) competences of the Rheinschiffahrts-court;

Art. 25 II of the Moselschiffahrts-convention (BGBl. 1956 II 1837);

Collision of ships: Art. 1 and 2 of the convention of 10.5.1952 (BGBl 1972 II 653, 663): defendants residence, place of arrest or, if accident in a port, place of accident;

Arrest on ships: Art. 7 of the convention of 10.5.1952 (BGBl 1972 II 653): international jurisdiction for cases of arrest (only);

Art. 20 of the Roman treaty of 7.10.1952: damages to buildings and landscape by foreign aircrafts (no longer in force in Germany);

For atomic vessels Art. X sect. 4 of the Brussels convention of 25.5.1962 (BGBl. 1975 II 957, 997): exclusive international jurisdiction of place of permit or place of damage;

Damage by ship's oil pollution: Art. IX, sect 1 of the convention of 29.11.1969 (BGBl. 1975 II 305) (cancelled); Convention of 27.11.1992 (BGBl. 1996 II 670); Art. 9 and 10 convention of 23.3.2001 (BGBl. 2006 II 578): not in force yet.

For atomic accidents: Art 13 of the Paris convention of 29.7.1960 (BGBl. 1975 II 959): exclusive international jurisdiction for the state of the permit

Family Law

Hague Conventions: MSA, KSü, HErwSü.

- Bilateral treaties:

Rules on international jurisdiction in bilateral treaties are not frequent.³⁰⁵

Turkey: §§ 2, 8, 15 of the German-Turkish Treaty on successions (RGBl. 1930 II 758).

Some of the successors of the **Former Soviet Union:** Art. 26 of the German-USSR Consular-Treaty on successions (BGBl. 1959 II 233)

Norway: Art. 20 sect 2 of the German-Norwegian Treaty of 17 June 1977 (excluding exorbitant jurisdictions) (BGBl. 1981 II 341)

Austria: Art. 4 sect. 3 of the German-Austrian Treaty of 19 December 1967 on the effects of the Airport Salzburg (exclusive international jurisdictions of German courts) (BGBl. 1974 II 13)

Netherlands: Art. 32, 39 sect. 2 of the German-Dutch Treaty on the cooperation in the water mouth of the river Ems (8 april 1960, BGBl. 1963 II 458, 1078).

³⁰⁵ So Roth in Stein/Jonas-ZPO, 22. Ed. 2002, Before § 12 nr. 31. See also Linke/Hau, IZVR, 5. Ed. 2011, nr. 152.

5.2.2. In the field of recognition (and enforcement)

- **Multilateral Treaties (apart from EU-Instruments)**

Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (BGBl. 1961 II S. 1006) with executive legislation of 18. 7. 1961 (BGBl. I S. 1033). Effectively in force only for relations between Germany, on one side, and Liechtenstein and Surinam.

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (BGBl. 1986 II S. 826). Effective for the following states: Australia (1. 2. 2002), Denmark, United Kingdom, Norway, Switzerland, Turkey.

New Yorker UN-convention for the enforcement of maintenance claims in another state of 20. 6. 1956 (BGBl. 1959 II S. 150) with legislation of consent of 26. 2. 1959 (BGBl. 1959 II S. 149) in the version of 4. 3. 1971 (BGBl. 1971 II S. 105).

Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (ABl EU 2011 Nr. L 192/51). At the moment (May 2013) the convention is in force in Norway, Bosnia Herzegovina and Albania. It has been ratified, but not entered into force in the EU. After its entry into force, the convention replaces the Hague Conventions of 1973 and 1958 (Art. 48). It replaces the New Yorker UN-convention of 1956 (Art. 49). In Germany, the execution of these international rules is governed by the Foreign Maintenance obligation Act, Auslandsunterhaltsgesetz, AUG, draft of the Federal Government of 23. 5. 2012).

Convention of 1 March 1954 on civil procedure (BGBl. 1958 II S. 576) with the German executive provisions of 18 December 1958 (BGBl. 1958 I S. 939). Only for procedural costs.

Hague convention on Civil Procedure of 17. 7. 1905 (RGrBl. 1909, S. 409) with executive legislation of 5 April 1909 (RGrBl. 430). On procedural costs. Effective for Iceland.

The CMR of 19. may 1956 (BGBl. 1961 II S. 1120), Art. 31 sect 3.

The COTIF (train traffic) of 9. 5. 1980 (BGBl. 1985 II S. 130), Art. 18 § 1, appendix A, CIV, and appendix B, CIM.

Convention on the delictual liability in case of atomic accidents 29. 7. 1960 (BGBl. 1976 II S. 308), Art. 13 (d).

Revidierte Rheinschiffahrtsakte of 17. 10. 1868, Art. 40, idF vom 20. 11. 1963 (BGBl. 1966 II S. 560), special rules for ships on the Rhein.

Moselschiffahrtsabkommen vom 27. 10. 1956 (BGBl. II S. 1838), Art. 34 Abs. 3. Special rules for ships on the Mosel.

- **Bilateral Treaties**

The bilateral treaties with Member States of the EU and EEA are overwhelmingly replaced by the Brussels-Lugano regime. However, they do at the moment still have effects for cases on succession. This will be changed from 17.8.2015 when the new EU-succession regulations will be applicable (Reg.Nr. 650/2012) (ABl EU Nr. L 201/107). The same is true for matrimonial property regimes.

Treaty between Germany and Belgium of 30. 6. 1958 (BGBl. 1959 II S. 766) executive order of 26. 6. 1959 (BGBl. I S. 425). It still applies for matrimonial property, succession, and for older cases in marriage cases and general civil and commercial matters.

Treaty between Germany and Greece of 4. 11. 1961 (BGBl. 1963 II S. 110) executive order of 5. 2. 1963 (BGBl. I S. 129). In general matters only for cases before 1. 4. 1989, in marriage and family cases for cases before 1. 3. 2001.

Treaty between Germany and the United Kingdom, Great Britannia and Northern Ireland of 14. 7. 1960 (BGBl. 1961 II S. 302) executive Order of 28. 3. 1961 (BGBl. I S. 301). Today only relevant for cases on succession.

Treaty between Germany and Italy of 9. 3. 1936 (RGBl. 1937 II S. 145) executive order of 18. 5. 1937 (RGBl. 1937 II S. 143) in the version of 12. 9. 1950 (BGBl. I S. 455, 533). Only for cases before the Brussels-regime.

Treaty between Germany and the Kingdom of the Netherlands of 30. 8. 1962 (BGBl. 1965 II S. 27) executive Order of (BGBl. I S. 17). Only for cases before the Brussels-regime.

Treaty between Germany and the Republic of Austria of 6. 6. 1959 (BGBl. 1960 II S. 1246). Applies to old cases and child custody and succession.

Treaty between Germany and Spain of 14. 11. 1983 (BGBl. 1987 II S. 35) For child custody and succession.

Treaty between Germany and Switzerland of 2. 11. 1929 (RGBl. 1930 II S. 1066) executive order of 23. 8. 1930 (RGBl. 1930 II S. 1209). Only effective for questions on status and succession.

Treaty between Germany and Norway of 17. 6. 1977 (BGBl. 1981 II S. 342) exekutive order of 10. 6. 1981 (BGBl. I S. 514), replaced by the Act of 30. 5. 1988 (BGBl. I S. 662). Only for old cases and for succession.

Treaty between Germany and the Turkish Republic, appendix to Art. 20 of the consular treaty of 28. 5. 1929, RGBl. 1930 II S. 748; BGBl. 1952 II S. 608. For succession.

Israel

Treaty between Germany and Isreal of 20. 7. 1977 (BGBl. 1980 II S. 925, 1531) in the version of 3. 12. 2009 (BGBl. I S. 3830).

The treaty is similar to the rules on recognition in the Brussels-regime.³⁰⁶

Tunisia

Treaty between Germany and Tunisia of 19. 7. 1966 (BGBl. 1969 II S. 889) with executive legislation of 29. 4. 1969 (BGBl. I S. 333).³⁰⁷

³⁰⁶ Next to the text of the Treaty, the following informations are found in the aricle: Siehr, Die Anerkennung und Vollstreckung israelischer Zivilentscheidungen in der Bundesrepublik Deutschland, RabelsZ 50(1986), 586.

³⁰⁷ Gottwald in MÜKO-ZPO, 3. Ed. 2008, Part 3, German-Tunesian Treaty.

ANNEX IV: NATIONAL REPORT FOR ITALY

(Raffaella Di Iorio)

1. Sources

For International Cases :

Law no. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law (hereinafter PIL).

International treaties.

For Internal Cases:

Italian Code of Civil Procedure adopted by way of Royal Decree of 28 October 1940, no. 1443 (hereinafter CCP).

2. Italian distribution of jurisdiction

The rules applicable to select the competent civil judge are set by the Italian Code of Civil Procedure (CCP). These rules are called rules on “competence”. The criteria to identify the competent civil judge can be grouped into three categories: subject-matter competence, value competence and territorial (venue) competence.

Subject-matter competence and value competence (Articles 7-17 CCP) allow one to determine what kind of court in the judicial hierarchy is competent (“vertical distribution of cases”): the Tribunal or the *Giudice di Pace* (literally, Justice of the Peace). Only in rare cases does the Court of Appeal have competence at first instance level (e.g., recognition of foreign judgments or foreign arbitral awards).

Pursuant to the above mentioned rules, *Giudice di Pace* is competent for actions concerning real estate valued at EUR 5000.00 or less and for actions for compensation of damages caused by car, boat and airplane accidents, provided that the value of these actions does not exceed the amount of EUR 20,000.00. *Giudice di Pace* is also competent for all the disputes concerning the matters listed in Article 7 CCP, irrespective of the value of the actions. The Tribunal is competent for all the actions which do not fall under the venue of a different judge. The Tribunal is the exclusive venue over actions concerning excise taxes and fees, status and legal capacity of individuals, actions concerning honor rights, forgery claims, execution actions and, in general, any other action of undeterminable value (Art. 9 CCP).

The rules of subject matter and value competence may not be changed by agreement of the parties (Art. 6 CCP).

Rules on territorial competence (Articles 18-30 CCP) determine the particular court of all those on the same hierarchical level in which the action may be heard (horizontal distribution of cases). According to Art. 18 CCP (General forum of individuals), the proper venue is the place where the defendant has his residence or domicile and, if these are unknown, his temporary accommodation (*dimora*). If the defendant has neither a residence, nor a domicile in Italy, or if his temporary accommodation is unknown, then the criterion of the residence of the plaintiff applies (Art. 18 CCP). According to Art. 19 CCP (General forum of legal entities and nonregistered associations), when a legal entity is sued, the proper venue is the place of its head office, or of a branch or the place where it has a representative pursuant to art. 77 CCP. Companies that are not legal entities, nonregistered associations and committees are supposed to have their head office where they carry out their business continuously.

These general rules are followed by a set of **special rules** for cases involving rights deriving from obligations (Art. 20 CCP), rights *in rem* and possessory actions (Art. 21 CCP), hereditary actions (Art. 22 CCP), disputes between associates and joint owners (Art. 23 CCP), actions concerning the management of a guardianship or property management (Art. 24 CCP), execution procedure (Art. 26 CCP) and challenging the execution procedure (Art. 27 CCP). Special fora are also provided for actions involving administrative agency (Art. 25 CCP) and judges (Art. 30-bis CCP). These special criteria sometimes provide merely an additional and sometimes an exclusive forum.

Territorial competence may usually be modified by agreement (Articles 28 and 29 CCP). Territorial competence may also be created by a choice of domicile clause (Art. 30 CCP) or by the defendant's failure to take timely exception to territorial competence of the court (Art. 38 CCP). Territorial competence may not be modified by agreement in most of the cases in which the *pubblico ministero* (Public prosecutor) is a necessary party, in possessory cases, cases involving provisional remedies, proceedings in closed chambers and other cases expressly provided for by law.

Further rules provide for the variations to venue for reasons linked with the relation between different actions (Articles 31-36 CCP).

2.1. Is there a conceptual difference between rules on jurisdiction and rules distributing the jurisdictional power among national judges?

In the Italian legal system there is a fundamental difference between rules on jurisdiction and rules on "competence".

The concept of jurisdiction, which is not expressly defined, describes the general power granted by the law to the courts belonging to the ordinary judicial order³⁰⁸ and the limits of the general power of adjudication of the civil courts.

The competence can be defined as a fragment of jurisdiction³⁰⁹. It denotes the *quantum* of power that the legislator has conferred to a specific court to hear a specific dispute. The notion of competence includes all matters of distribution of the disputes among the Italian courts concerning subject-matter, value and venue issues.

The issue of whether specific litigation should be launched before an Italian court is an issue of jurisdiction, which can be solved by applying the relevant legal provisions (v. infra). On the contrary, identifying the proper court within the Italian jurisdiction (i.e., the Justice of the Peace or the Tribunale; the Tribunale of Milan or the Tribunale of Rome) is a question of competence, which can be decided on the basis of the above mentioned rules set in the CCP.

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

As discussed above, there is a distinction between rules on jurisdiction and rules on competence.

³⁰⁸ According to Article 102 of the Constitution, jurisdiction to adjudicate is conferred to "ordinary magistrates" established by law. Ordinary courts are opposed to special courts, such as the administrative ones. According to Article 1 CCP "unless where otherwise provided by special applicable provisions, civil jurisdiction is exercised by ordinary judges, pursuant to the provision of this code". See M.A. Lupoi, Italy, Civil Procedure – Suppl. 62 (Novembre 2011), in International Encyclopedia for Civil Procedure, Wolters Kluwer, 2011, 79, <http://www.kluwerlawonline.com/toc.php?area=&mode=bypub&level=6&values=Looseleafs~IEL+Civil+Procedure~National+Monographs~Italy>

³⁰⁹ Chiovenda, *Principii di diritto processuale civile*, Napoli, 1980, 368.

Italian law provides general rules to determine when a person may be a defendant before the Italian courts³¹⁰. They specify when and under which conditions a person may be sued before an Italian court, but they do not indicate the particular court before which the action has to be brought. These are the rules on Jurisdiction which are set in the Law no. 218 of 31 May 1995 on Private International Law. This Act applies when EU Regulations and/or international Treaties are not applicable.

Rules on jurisdiction establish whether a case may be heard by the Italian ordinary courts, while rules on competence establish - once jurisdiction is found to be present - which specific Italian court has the power to adjudicate.

In spite of these fundamental conceptual differences, the content and the result of both set of rules are often comparable. So, for instance, the general clauses in PIL and CCP both refer to the domicile or the residence of the defendant. Furthermore, as will be discussed below, heads of venue competence may constitute heads of jurisdiction, according to Article 3 (2) PIL.

3. Heads of jurisdiction

The “**scope of jurisdiction**” is defined by **Article 3 PIL**.

“1. Italian jurisdiction exists where the defendant is domiciled or resident in Italy or has a representative in Italy who is authorized to appear before the court pursuant to Article 77 of the Italian code of civil procedure and in other cases provided for by the law.

2. Jurisdiction also exists on the basis of the criteria set out in Sections 2, 3, and 4 of Title II of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the relevant protocol, signed in Brussels on 27 September 1968, implemented by Law No. 804 of 21 June 1971 as subsequently amended, in force in Italy, even where the defendant is not domiciled in the territory of a Contracting State, where the matter falls within the scope of application of the Convention. In respect of other matters, jurisdiction exists also on the basis of the criteria set out for jurisdiction limited territorially”.

Article 3 grants general jurisdiction to the Italian courts, whatever the subject-matter of the dispute, when the **defendant** is either **domiciled or resident**³¹¹ in Italy.

The heads of special jurisdiction are identified through their relation to other provisions, contained in the same PIL or in different Acts.

Regarding the *renvoi* to the Brussels Convention, commentators agree that such reference should now be extended to the provisions of the Regulation which took the place of the former³¹².

Insofar as the *renvoi* to the rules on territorial competence is concerned (Articles 18-30 bis ICCP), it has been said that it can easily lead to the exercise of exorbitant and improper *fora*³¹³.

³¹⁰ Starace, voce Giurisdizione (limiti della) (dir. internaz.), in Enc. dir., XIX, 1970, par. 1.

³¹¹ According to Article 43 of the Italian Civil Code (ICC), a person's residence is the place where he or she habitually lives, while his or her domicile is the place where he or she has concentrated his or her interests and business.

³¹² See G. Conetti, S. Tonolo, F. Vismara, Commento alla riforma del diritto internazionale privato italiano, Giappichelli Editore, Torino, 2009, p. 14-15.

³¹³ M.A., Lupoi, Italy, cit., par. 139.

The list of the heads of jurisdictions provided for by the Law No. 218 of 1995 follows. It is in any event worth remembering that other heads of jurisdiction may apply according to Article 3 (2).

3.1. *Forum rei*

Article 3(1)

Heads of general jurisdiction are the **domicile or the residence of defendant**; Italian jurisdiction also exists if the defendant has a representative who is authorized to appear before the court pursuant to Article 77 CCP.

3.2. Choice of parties

Article 4 (1)

Italian jurisdiction exists:

- if the parties have accepted it by agreement and such acceptance is evidenced in writing (express acceptance); or
- if the defendant appears in the proceedings without objecting to the lack of jurisdiction in his first defence (tacit acceptance)

3.3. Preliminary questions

Article 6

No limits to jurisdiction exist for preliminary matters (i.e., issues that must be solved before and in order to adjudicate the merits of a claim) as long as they can be incidentally decided by the court, with no *res judicata* effects.

3.4. Non-contentious jurisdiction

Article 9

In matters of non-contentious jurisdiction, jurisdiction exists:

- in those cases specifically contemplated by the PIL
- in those cases where jurisdiction is limited territorially to an Italian judge
- where the measure requested concerns
 - o an Italian citizen; or
 - o a person resident in Italy; or
 - o situations or relationships governed by Italian law

3.5. Provisional measures

Article 10

Concerning preventative measures, Italian jurisdiction exists where:

- the relevant measure is to be implemented in Italy; or
- the Italian judge has jurisdiction over the merits.

No extraterritorial provisional remedy can therefore be granted if Italian courts do not have jurisdiction on the merits.

3.6. Status, family and succession matters

Article 22 (2)

As concerns **absence and presumption of death**, Italian courts have jurisdiction if:

- a) the national law of the interested person was Italian law;
- b) the last residence of the person was in Italy;
- c) the court's decision can have juridical effects in Italy.

Article 32

In **matrimonial disputes** (nullity, annulment, legal separation, dissolution of marriage), apart from the cases under Article 3, Italian jurisdiction also applies when one of the spouses is an Italian citizen or the marriage was celebrated in Italy.

Article 37

Italian jurisdiction in matters of **filiation** applies not only in the cases provided in Articles 3 and 9, but also when either a parent or the child is an Italian national or resides in Italy.

Article 40

Italian judges have jurisdiction in matter of **adoption**, when:

- a) the adoptive parents or either of them or the child to be adopted are Italian nationals or foreigners resident in Italy;
- b) the child to be adopted is a minor in a state of abandonment in Italy.

In disputes concerning **personal or economic relations between the adopted and the adopters and their relatives**, Italian judges have jurisdiction as *per* Article 3 and also when the adoption was effected under the Italian law.

Article 44

Italian jurisdiction in matters of **protection of adults** apply in the cases provided for Articles 3 and 9 and also whenever it is necessary to promptly and provisionally safeguard the person or his or her assets in Italy.

Article 50

Italian jurisdiction in matters of **succession** applies:

- a) if the deceased was an Italian citizen at the time of death;
- b) if the succession was opened in Italy;
- c) if the most economically consistent part of the hereditary assets is located in Italy;
- d) if the defendant is either domiciled or resident in Italy or has accepted Italian jurisdiction, unless the claim relates to immovable assets abroad;
- e) if the claim refers to assets in Italy.

4. Unilateral coordination of jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the forum:

No rule attributes exclusive jurisdiction to Italian courts. As long as the foreign judgment complies with the requirements set by Articles 64-66 PIL it should be recognized.

Particularly, according to Article 64 lit. a) PIL, a foreign judgment is recognized in Italy when “the judge who pronounced it could take cognizance of the case in accordance with the principles of the Italian system on jurisdictional competence³¹⁴”.

4.1.2. Absence of Jurisdiction of the forum:

Article 5

Italian jurisdiction does not exist with regard to **actions *in rem* relating to real estate assets located outside Italy**.

This provision is strengthened by Article 11, according to which, in the case referred to in Article 5 or whenever Italian jurisdiction is excluded pursuant to an international rule, the judge may declare the lack of jurisdiction *ex officio*, at whatever stage of the proceedings.

Pursuant to Article 4 (2)(3) Italian jurisdiction may be derogated from by agreement in favour of a foreign judge or a foreign arbitration panel if the derogation is evidenced in writing and the case concerns transferable rights. Nevertheless, the exclusion shall be unenforceable if the relevant judge or arbitrators decline jurisdiction or cannot otherwise entertain the suit.

So, in this case, the exercise of the Italian jurisdiction is precluded, but not unconditionally.

4.1.3. Exclusive Jurisdiction of a Foreign State:

No rule expressly excludes Italian jurisdiction because of the exclusive jurisdiction of the courts of another State.

This seems in any event to be the *rationale* of Article 5, which excludes Italian jurisdiction because the relevant connecting factor is located in another State (regardless of whether it has exclusive jurisdiction or not).

5. *Lis pendens*

Article 7

1. Where, during proceedings, an objection is raised in relation to the prior existence of a question pending between the same parties, having the same object and being based on the same grounds, before a foreign judge, the Italian judge shall stay the proceedings if he thinks that the foreign judgment may produce effects within the Italian system. If the foreign judge declines jurisdiction or if the foreign judgment is not recognized by the Italian legal system, the proceeding started in Italy shall continue, subject to their resumption at the request of the relevant party.

³¹⁴ According to the Corte di cassazione, 28.5.2004, n. 10378, *GC Mass.*, 2004, 5, “these are the same principles according to which the Italian judge exercises jurisdiction over the foreigner”.

2. The law of the State in which the proceedings take place shall determine the existence of a suit pending before a foreign judge.
3. In the event of a prior suit pending abroad, the Italian judge may stay the proceedings if he thinks that the foreign judgment may have an effect on the Italian legal system.

6. Rules on recognition and enforcement

6.1. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

No rule excludes the recognition of a foreign judgment because of the exclusive jurisdiction of the Italian courts (See par. 4.1.1.).

6.2. Bilateral and Multilateral Agreements

Convention on judicial assistance and on recognition and enforcement of judgments in civil matters between Italian Republic and Argentine Republic (Rome 9.12.1987)

Convention between Italy and the Swiss Confederation on the recognition and enforcement of judgments in civil matters (Rome 3.1.1933).

Treaty on judicial assistance, on recognition and on enforcement of judgments in civil matters between Italian Republic and Federative Republic of Brazil (Rome 17.10.1989).

Agreement on judicial cooperation, on recognition and enforcement of judgments in civil matters between the Government of Italian Republic and the Government of the State of Kuwait (Kuwait City 11.12.2002).

Convention on judicial assistance reciprocity, on enforcement of judgments and on extradition between Italy and Morocco (Rome 12.2.1971)

Convention between Italian Republic and Republic of Tunisia on judicial assistance in civil, commercial and criminal matters, on recognition and enforcements of judgments and of arbitral and extradition decisions (Rome 15.11.1967).

Agreement between the Government of Italian Republic and the Government of Moldova for judicial assistance and for recognition and enforcement of judgments in civil matters, with annexes (Rome 7.12.2006).

Convention between the Italian Republic and the Arab Republic of Egypt on recognition and enforcement of judgments in civil and commercial matters and on the status of persons (Cairo 3.12.1977).

Convention between the Italian Republic and the Lebanese Republic on mutual judicial assistance in civil, commercial and criminal matters, on enforcement of judgments and on arbitral decisions and on extradition (Beirut 10.7.1970).

Convention between the Italian Republic and the Union of Soviet Socialist Republics on judicial assistance in civil matters (Rome 25.1.1979).

Note Exchange between Italy and Japan for mutual judicial assistance in civil and criminal matters (5.10.1937)

Treaty between the Italian Republic and the People's Republic of China for judicial assistance in civil matters, with annexes (Beijing 20.5.1991).

Convention in civil and commercial judicial assistance matters between the government of

the Italian Republic and the government of the People's Democratic Republic of Algeria (Algiers 22.7.2003).

Convention on judicial protection and mutual assistance of judicial authority in civil matters and criminal matters, and enforcement of judicial decisions conclude between Italy the Republic of Turkey (Rome 10.8.1926).

Convention of Friendship and Good Neighbourhood between Italy and San Marino (Rome 31.3.1999).

6.3. Multilateral Conventions

Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (The Hague).

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (The Hague).

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, (Luxembourg, 20.05.1980).

Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, (The Hague).

ANNEX V: NATIONAL REPORT FOR JAPAN (SUMMARY)

(Yuko Nishitani)

1. Unilateral coordination of jurisdiction

1.1. Rules on Exclusive Jurisdiction

1.1.1 Exclusive Jurisdiction of the *forum*:

Pursuant to Article 118 No. 1 of the Japanese Code of Civil Procedure (*hereinafter* "CCP"), the recognition of foreign judgments presupposes that the foreign court has international jurisdiction to adjudicate. This indirect jurisdiction is decided according to the same criteria as the direct jurisdiction (so-called "*Spiegelbildprinzip*")³¹⁵. Hence, the rules on exclusive jurisdiction with regard to the direct jurisdiction (Article 3-5 CCP)³¹⁶ have reflexive effects and control also the indirect jurisdiction of the foreign rendering state. In cases where Japanese courts have exclusive jurisdiction under Article 3-5 CCP, foreign judgments cannot be recognized³¹⁷.

According to Article 3-5 CCP, exclusive jurisdiction is granted for the following disputes: (1) Disputes over the validity of the constitution or dissolution of a company or other entity, the nullity of the decisions of its organs, as well as liability and discharge of its officers (Paragraph 1); (2) disputes over a registration to be made in Japan (Paragraph 2); (3) disputes over the existence or validity of intellectual property rights registered in Japan that come into existence through registration, such as patents and trademarks (Paragraph 3)³¹⁸.

In contrast to Article 22 No. 1 of the Brussels I Regulation, Japanese rules do not confer exclusive jurisdiction to the *situs* of immovables, even if the dispute concerns rights *in rem* (Article 3-3 No. 1 and 11).

1.1.2. Absence of Jurisdiction of the Forum:

Japanese courts do not have international jurisdiction in cases where foreign courts are supposed to have exclusive jurisdiction pursuant to the reflexive effects of Article 3-5 CCP (*see supra* 4.1.1.). In these cases, the jurisdiction of Japanese courts is declined henceforth without examining whether or not the foreign court in question actually has and exercises

³¹⁵ Yasunori Honma/Shun-ichiro Nakano/Hajime Sakai, *Kokusai Minji Tetsuzuki-hô*, 2nd ed. (2012), p. 185; Yuko Nishitani, *Internationales Privat- und Zivilverfahrensrecht*, in: *Handbuch Japanisches Handels- und Wirtschaftsrecht*, hrsg. von Harald Baum and Moritz Bälz, Köln 2011, para. 174 ff.

³¹⁶ For English translation of Japanese rules on international jurisdiction, *see Masato Dogauchi*, Act for Partial Revision of Code of Civil Procedure and Civil Provisional Remedies Act, in: *Japanese Yearbook of International Law* 54 (2011), pp. 723-732; Yasuhiro Okuda, New Provisions on International Jurisdiction of Japanese Courts, in: *Yearbook of Private International Law* 13 (2011), pp. 369-380; for German translation, *see Yuko Nishitani*, Neue Regelungen über die internationale Zuständigkeit in Zivil- und Handelssachen in Japan, in: *IPRax* 2013 (*forthcoming*) and *ZJapanR/J. Jap. L.* 33 (2012), pp. 205-214.

³¹⁷ *See Yuko Nishitani*, International Jurisdiction of Japanese Courts in Comparative Perspective (*hereinafter* 'International Jurisdiction'), in: *Netherlands International Law Review* (*forthcoming* 2013).

³¹⁸ Article 3-5 CCP [Exclusive Jurisdiction] provides for as follows :

"(1) Actions provided for in Part VII, Chapter II (excluding those provided for in Sections 4 and 6 of the same Chapter) of Companies Act, in Chapter VI, Section 2 of Act on General Incorporated Associations and General Incorporated Foundations (Act No. 48 of 2006) or any other similar actions in relation to association or foundation incorporated under other laws and regulations of Japan shall be exclusively subject to the jurisdiction of the courts of Japan.

(2) Actions relating to a registration shall be exclusively subject to the jurisdiction of the courts of Japan, if the place where the registration should be made is located in Japan.

(3) Actions relating to the existence or non-existence or the validity of intellectual property rights (meaning "intellectual property rights" provided for in Article 2, Paragraph (2) of Intellectual Property Basic Act (Act No. 122 of 2002)) which become effective by registration for their establishment shall be exclusively subject to the jurisdiction of the courts of Japan, if the registration is done in Japan."

exclusive jurisdiction according to the law of that state.

1.1.3. Exclusive Jurisdiction of a Foreign State:

There is no explicit rule in Japanese private international law according to which jurisdiction is excluded because the relevant connecting factor is located in another State whose Courts have exclusive jurisdiction. However, Article 3-9 CCP allows the judge to dismiss the claim under special circumstances if exercising jurisdiction in Japan would undermine equity between the parties or disturb the realization of a proper and prompt trial³¹⁹. In examining these factors, the judge may take into consideration that courts of a foreign state have exclusive jurisdiction according to its own law.

1.2. *Lis pendens*

In the 2011 reform of the CCP, Japanese legislators discussed extensively whether and to what extent *lis alibi pendens* exception should apply, though no explicit rule has been adopted. International parallel litigations could, however, be regulated by self-restricting the exercise of jurisdiction of Japanese courts pursuant to Article 3-9 CCP (see *supra* 4.1.3.), along the lines of the US *forum non conveniens* doctrine³²⁰.

³¹⁹ Article 3-9 CCP [Dismissal of Action on Account of Special Circumstances] provides for as follows:

"Even where the courts of Japan have jurisdiction over an action (excluding cases where the action is filed on the ground of choice of court agreement designating the courts of Japan exclusively), the court may dismiss the whole or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting defense, the location of the evidence and any other circumstances."

³²⁰ *Nishitani*, International Jurisdiction, op.cit.

ANNEX VI: NATIONAL REPORT FOR POLAND

(Josef Skala)

1. Sources

Act of 23 April 1964 Civil Code (Dziennik Ustaw 1964, No. 16, item 93)

Act of 17 November 1964 Code of Civil Procedure (Dzennik Ustaw, No. 43, item 296)

Act of 4 February 2011 Private International Law (Dziennik Ustaw 2011, No. 80, item 432).

2. Polish distribution of jurisdiction

In Poland, civil cases are heard by the ordinary courts and the Supreme Court unless they come under the jurisdiction of the specialized courts.

SUPREME COURT

The Supreme Court is the cassation court. It is located in Warsaw. The court handles cassations, i.e. appeals from sentences or decisions of courts of second instance. The Supreme Court does not consider the facts of such cases, but examines whether the decisions of civil and military courts are compliant with the law. Cassation appeals cannot be filed in all cases. Cassations must be filed by a barrister or a counselor at law.

COMMON COURTS

Common courts are the **courts of appeals, regional and district courts**. They handle the following cases: civil, family, minors, labour, social security, commercial, bankruptcy and criminal, including misconduct, and penitentiary; they also keep land registers and records.

Common courts consist of **two instances**.

Courts of 1st instance:

district court (including Municipal court)

regional court

Courts of 2nd instance:

regional court

court of appeals

Regional courts are the courts of first instance only in certain case categories (see below). They are also the appellate courts (courts of second instance) for decisions of district courts.

Courts of 2nd instance (appellate) handle the appealed cases and can:

Uphold the appealed decision –the appealed decision remains in force;

Amend the appealed decision –a new decision is issued in the case;

Revoke the decision and remand the case to re-examination by the court of first instance – meaning that the case will be examined again.

Most often, the competent court for civil cases is the court of proper venue serving the address of the defendant, and -in criminal and misconduct cases - court of proper venue for the place of prohibited act (crime or misconduct).

In order to begin the proceedings it is necessary to submit at court (at the day-book office), or send by register mail, a written statement with enclosures (copies of documents, supportive evidence). Depending on the nature of the case, it will be handled by the district or regional court in the first instance.

The rules governing the jurisdiction of courts are set out in Articles 16-18 and 27-37 of the Code of Civil Procedure.

DISTRICT COURT

There are 315 district courts in Poland. They are located in larger cities. In the case of main cities, a regional court can be established for one or several districts of the city – e.g. in Krakow, Łódz, Warsaw and Wrocław. **District courts are the judicial units closest to the citizens. They handle all cases**, except cases reserved for the regional court. In most district courts there are municipal divisions (also known as municipal courts). There are approx. 380 municipal divisions countrywide. They handle minor civil and criminal cases, including misconduct.

In the district courts, civil cases are heard by the following Divisions:

Civil Division;

Family and Minors Division (family tribunals) – matters relating to family and guardianship law and concerning the leading astray of children and criminal offences committed by minors, treatment for alcoholics and drug addicts and other matters which fall under the jurisdiction of the guardianship courts under separate legislation;

Labour and Social Insurance Division (employment tribunals) – cases involving labour or social insurance law;

Business Division (business tribunals) for cases pertaining to economic and civil law, such as disputes between companies operating in a given field, disputes within companies, actions for damages against members of the board of managing directors for making false statements to the State Court Register and actions against companies for causing environmental damage;

Land Registry Division – for land register records and other civil proceedings involving the land register;

Municipal Division (municipal tribunals) for cases heard in simplified proceedings or concerning escrow deposits and forfeiture of property.

At Warsaw District Court, the following Divisions **also** operate:

Protection of Competition and Consumers Tribunal, which is mandated to hear cases involving anti-trust rules and energy regulation;

Community Trade Marks and Design Rights Tribunal, which hears cases involving infringement of trademarks, threats to infringe designs or statements to the effect that designs and trademarks have not been infringed, annulment of a Community design right, revocation or annulment of a trade mark and the consequences of infringing trademarks.

As a general rule, the district courts have jurisdiction in respect of civil cases and issue judgments in first instance.

REGIONAL COURT

There are 45 regional courts in Poland. They are located in all major cities. Regional courts handle appeals (from decisions of district courts, thus they function as courts of 2nd instance (appellate)). They also handle certain serious cases (e.g. high claim value, serious crimes, etc.) and then function as courts of 1st instance.

First-instance regional courts have jurisdiction in respect of the cases referred to in Article 17 of the Code of Civil Procedure, i.e. concerning:

- non-material rights (such as divorce) and related claims other than the following: establishment or contestation of a child's parentage, renunciation of parenthood or dissolution of adoption;
- protection of copyright and related rights and rights concerning inventions, utility models, designs, trademarks, geographical indications and topographies of integrated circuits, protection of other rights involving intangible goods;
- claims under the Press Act;
- property rights where the value of the disputed item is more than PLN 75 000, and PLN 100 000 in business proceedings, except in cases concerning: alimony, ownership disputes, liquidation of matrimonial property between spouses, alignment of the contents of the land register with the law as it stands;
- the issue of a ruling replacing a resolution on the division of a cooperative;
- the annulment, declaration of invalidity or establishment of the null and void status of resolutions issued by legal persons or by organizations which are not legal persons but which have been granted legal personality by law;
- the prevention of, and measures to eradicate, unfair competition.

The following areas **also fall within** the remit of the **regional courts**:

- cases involving legal incapacity;
- dispute resolution in cases involving the operation of nationalized companies: between a company's board and the director, between a company's internal bodies and the founding authorities and between a company's internal bodies and the monitoring body;
- cases involving the recognition and confirmation of the enforceability of judgments handed down by foreign courts (Articles 1148 and 1151 of the Code of Civil Procedure).

In **cases involving property rights**, the petitioner is required to indicate the value of the object of the dispute in the petition, unless the object of the dispute is a given sum of money.

In **cases involving financial claims**, even those declared as an alternative to another claim, the amount indicated constitutes the value of the object of the dispute.

In **other cases involving property** the petitioner is required to indicate the amount of the object of the dispute in the petition pursuant to Articles 20-24 of the Code of Civil Procedure.

COURT OF APPEALS

There are 11 courts of appeals in Poland. They are located in major cities: Białystok, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Rzeszów, Warszawa, Wrocław and Szczecin.

A court of appeals functions as the court of 2nd instance – i.e. it tries appeals from decisions of the regional court.

ADMINISTRATIVE COURTS

Supervise public administration in order to safeguard its compliance with law.

Administrative courts are courts of two instances. The first instance: 14 Voivodship (provincial) Administrative Courts (WSA); second instance: the Supreme Administrative Court (NSA), located in Warsaw.

MILITARY COURTS

Military courts include provincial courts and garrison courts. They handle cases involving crimes committed by soldiers and military employees

3. Heads of jurisdiction

Territorial jurisdiction

There is **no legal definition** of domestic jurisdiction in the CPC. According to legal writings ("doctrine"), domestic jurisdiction exists if the two following conditions are fulfilled simultaneously:

- 1) **Positive condition** – there exists a relevant connection of the case with Poland justifying the existence of jurisdiction and, as a consequence, the competence to hear the case;
- 2) **Negative condition** – there is no specific rule expressly excluding domestic jurisdiction and there is no restriction on Polish courts administering justice which has its source in international law and which would concern judicial immunity.

The Polish Code of Civil Procedure refers to **four types of court jurisdiction**:

- **general** (Articles 27-30 of the Code of Civil Procedure),
- **concurrent** (Articles 31-37 of the Code of Civil Procedure),
- **exclusive** (Articles 38-42 of the Code of Civil Procedure)
- **special** (Articles 43-46 of the Code of Civil Procedure).

3.1. The basic rule of territorial jurisdiction - General territorial jurisdiction

Proceedings should be instituted with the court of first instance with jurisdiction over the **defendant's domicile**.

Under Article 25 of the Civil Code, **a natural person's domicile** is the place in which he/she normally resides.

If the defendant is not domiciled in Poland, general jurisdiction is determined according to where (s)he actually lives, and where this is not known or is not in Poland, proceedings should be instituted at the defendant's last domicile in Poland. Proceedings against the Treasury should be instituted in the court with jurisdiction over the place in which the establishment concerned by the dispute is located. In cases where the Treasury is represented by the Office of the State Attorney of the Treasury (*Prokuratoria Generalna Skarbu Państwa*), proceedings should be instituted in the court with jurisdiction over the place where the branch responsible for the establishment concerned by the claim is located.

Proceedings against other legal or non-legal persons should be instituted in the court with jurisdiction over the place where they have their office (Article 30 of the Code of Civil Procedure).

3.2. Concurrent territorial jurisdiction – Exceptions to the basic rule

Concurrent territorial jurisdiction means that in some cases petitioners can choose the court in which they institute proceedings. In those instances, the petitioner can institute proceedings in the court with general jurisdiction or in one of the other courts indicated in Articles 32-37 of the Code of Civil Procedure.

Provision is made for concurrent territorial jurisdiction in the following cases:

- maintenance claims, establishment of paternity and related claims – proceedings can be instituted before the court with jurisdiction over the domicile of the claimant; property claims connected to the defendant's business activities – proceedings can be instituted before the court with jurisdiction over the place in which the defendant's establishment or business is located, if the claim is connected to the activities carried out by that establishment or business. However, this does not apply to cases in which, under the law, the Treasury is represented by the Office of the State Attorney of the Treasury (*Prokuratoria Generalna Skarbu Państwa*); actions to establish the existence of a contract or to have it performed, annulled or declared null and void and actions for damages for non-performance or improper performance of a contract – proceedings can be instituted with the court with jurisdiction over the place of performance of the disputed contract; in the event of any doubts arising, documentary evidence should be provided of the place of performance of the contract;
- claims arising out of a tort/delict proceedings can be instituted with the court with jurisdiction over the place where the harmful event occurred;
- claims for payment of fees can be instituted with the court with jurisdiction over the place where the legal representative handled the case in question;
- claims relating to the rental or lease of real estate proceedings can be instituted with the court with jurisdiction over the place where the real estate is located;
- actions against the issuer of a bill or cheque proceedings can be instituted with the court with jurisdiction over the place of payment. Several issuers of a bill or cheque can be arraigned jointly before the court with jurisdiction over the place of payment or before the court with general jurisdiction for the drawee or the issue of promissory notes or cheques;
- actions to conclude, establish the contents of or amend a contract, heard in separate proceedings in cases involving business law – proceedings can be instituted with the court with jurisdiction over the place of performance of the contract (Article 479, in conjunction with Article 34 of the Code of Civil Procedure);

- actions pertaining to labour law proceedings can be instituted with the court with jurisdiction over the place where the work is, has been or is to be carried out, or before the court with jurisdiction over the place where the workplace in question is located (Article 461(1) of the Code of Civil Procedure).

3.3. Exclusive jurisdiction

Exclusive jurisdiction means that the case must be heard by the court indicated in the Code.

Provision is made for exclusive jurisdiction in cases involving:

- ownership or other rights *in rem* to real estate or possession of real estate proceedings must be instituted with the court with jurisdiction over the place where the real estate is located; if an easement is the subject of the dispute, jurisdiction is determined according to the place where the encumbered property is located; inheritance or conservation by virtue of a letter, instruction or other form of will – proceedings must be instituted with the court with jurisdiction over the testator's last domicile and, where it is not possible to determine their domicile in Poland, before the court with jurisdiction over the place in which the inheritance, or part thereof, is located;
- by virtue of membership of a cooperative, company or association proceedings must be instituted with the court with jurisdiction over the place where the body's registered office is located;
- by virtue of marriage – proceedings must be instituted with the court with jurisdiction over the place in which the couple's last joint domicile is located if one or both of them is still permanently resident there. Where that is not the case, the court with jurisdiction over the domicile of the defendant has exclusive jurisdiction; where that is not applicable either, the court with jurisdiction over the domicile of the petitioner has exclusive jurisdiction;
- by virtue of a parental relationship or relationship between an adoptor and adoptee proceedings must be instituted with the court with jurisdiction over the domicile of the petitioner, in so far as there is no basis on which to institute proceedings under the rules governing general jurisdiction.

3.4. Special jurisdiction

Special jurisdiction means that, in the cases indicated in the special rules, there may be a different definition of court jurisdiction:

1. The petitioner has been authorised to choose the court.

If there are grounds for one court to have jurisdiction or if proceedings are instituted against several persons in respect of whom different courts have jurisdiction under the rules governing general jurisdiction. The same applies to cases where real estate whose location determines jurisdiction is situated in several judicial districts;
2. Both parties have been authorised to choose the court further to an agreement or joint application.
3. The parties may agree in writing to submit an existing dispute which has arisen from a given legal relationship or potential future disputes to a court of first instance which does not have local jurisdiction under the law. This court will then have exclusive jurisdiction, unless the parties decide otherwise. The parties may

also, by written agreement, restrict the right of the petitioner to choose between courts with jurisdiction in respect of such disputes.

However, the parties may not change exclusive jurisdiction.

Agreements on court jurisdiction must be in writing and may form part of a legal agreement (prorogation clause) or be drawn up as a separate agreement.

In cases involving labour and social insurance law, the court with jurisdiction may remit the case for hearing by another, equivalent court competent in respect of cases involving labour and insurance law further to a joint application from the parties, in so far as this is deemed expedient.

4. The court with jurisdiction is designated by the higher court or the Supreme Court.

If the court with jurisdiction is precluded from hearing the case or taking other action, the higher court designates another court. Another court is designated only where the court with jurisdiction is precluded from hearing the case e.g. because a judge has been barred or on grounds of *force majeure*.

The Supreme Court is required to designate the court before which proceedings should be instituted if, within the meaning of the Code of Civil Procedure, it is not possible to establish local jurisdiction with reference to the facts of the case (Article 45 of the Code of Civil Procedure).

4. Unilateral coordination of jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the Forum

Subject to the applicable provisions of international agreements (Code of Civil Procedure Art 1096), Polish courts have an **exclusive jurisdiction** in matters related to immovables situated in Poland (Code of Civil Procedure Art 1102[1]) and have **no jurisdiction** as to matters related to immovables situated outside Poland (Code of Civil Procedure Art 1102[2]). Marriage matters are within Polish **jurisdiction as to Polish citizens or persons residing in Poland** (Code of Civil Procedure Art 1100). **The same applies to relations between parents and children** and in matters of adoption (Code of Civil Procedure Art 1101).

Other disputes that are within Polish jurisdiction:

- 1) if the defendant sojourns, resides or has his place of business in Poland at the time he is served with the writ of summons,
- 2) if the defendant has property or other property rights in Poland,
- 3) if the dispute deals with a subject of dispute in Poland, a succession opened in Poland or an obligation which originated or has to be performed in Poland (Code of Civil Procedure Art 1103).

Parties may submit their present or future disputes to Polish courts (Art 1104).

According to Article 7 of the PIL foreign law shall not apply where application thereof would have effects contradictory to fundamental principles of legal order of the Republic of Poland.

Article 1110 CCP concerns **non-litigious proceedings** other than legal capacity matters, matters relating to acknowledgement of a person as deceased, care and guardianship matters, inheritance matters. According to this Article, such other cases also belong to domestic jurisdiction so long as just one participant in the proceedings is a Polish citizen or has his place of residence or registered office in Poland.

4.1.2. Absence of Jurisdiction of the Forum

Polish courts have **no jurisdiction** as to matters related to immovables situated outside Poland (Code of Civil Procedure Art 1102[2]). Marriage matters are within Polish **jurisdiction only** as to Polish citizens or persons residing in Poland (Code of Civil Procedure Art 1100). **The same applies to relations between parents and children** and in matter of adoption (Code of Civil Procedure Art 1101). According to Article 1101 § 2 CCP, if both parties reside in Poland, domestic jurisdiction is exclusive except when neither of the parties has Polish citizenship.

According to Article 64 of the PIL concerning testament or other disposition in case of death, **testators may subject the inheritance case** to their national law, the law of the place of their residence or the law of the place of their ordinary stay upon performance of such act or upon their death. If no law in respect of the inheritance case is chosen, **the national law of the deceased**, whether testate or intestate, binding upon his or her death shall apply. The validity of a testament or other dispositions in case of death shall be **decided by the testator's national law** upon performance of such acts. The law governing the form of the testament and its revocation shall be determined by the **Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions**, done at The Hague on 5 October 1961 (Dziennik Ustaw 1969 No. 34, item 284).

4.2. *Lis pendens*

According to Art 1098 of The Polish Code of Civil Procedure, a set of pending proceedings abroad has **no influence** on the proceedings before Polish courts **if the jurisdiction is given** to them by Polish law.

5. Rules on recognition and enforcement

5.1. Recognition of Foreign Judgment and Arbitral Awards

Recognition in Poland of foreign judgment in civil matters which are within the jurisdiction of Polish courts is subject to reciprocity, except for matters which, according to Polish law, are within the exclusive jurisdiction of the state where the judgment was made. In all cases, recognition may be extended only if

- 1) the judgment is non-appealable in the state where it was made
- 2) according to Polish law or an international agreement the matter is not within the exclusive jurisdiction of Polish courts or of third States courts,
- 3) the party was not deprived of the possibility of defense and, in case of lack of capacity to act before courts, of due representation,
- 4) the matter was not already decided by a Polish court or started before a Polish court previous to the date when the foreign judgment became final and non-appealable,
- 5) the judgment is not against the fundamental principles of legal order of the Polish Republic and

- 6) in cases where Polish law was applicable according to the conflict rules, it was actually applied, except when the foreign law applied does not differ essentially from Polish law (Code of Civil Procedure Art 1146).

5.2. Enforcement

Enforcement means in Polish law the implementation, by the competent authorities, of the coercive measures provided for in law with a view to obtaining the discharge of an obligation vis-à-vis a creditor on the basis of an enforcement order.

Enforcement proceedings are a set of measures taken in connection with enforcement following the lodging of an enforcement application.

Bodies involved in enforcement proceedings:

- **legal bodies** involved in "declaration of enforceability" proceedings in respect of an enforcement order: the presiding judges, district court, regional court and court of appeal;
- **enforcement agencies** involved in enforcement proceedings proper: district court, bailiff.

Parties to proceedings:

- "declaration of enforceability" proceedings;
- enforcement proceedings proper: once proceedings have been instituted, the parties indicated in the enforcement order as the **creditor and debtor**; until such time as proceedings are instituted, these are potential parties.

Enforcement measures designed to encourage debtors to take action:

- **coercive measures** (fine imposed by a court in lieu of a custodial sentence in the event of non-payment, obligation imposed on a debtor to cover a creditor's potential losses, instructions issued to a bailiff by a court to remove a debtor's opposition to a creditor's application, performance of activities by a creditor at a debtor's expense, opening of an apartment, search of a debtor's possessions and clothing, fine imposed by a bailiff of PLN 500 for an unfounded refusal, on the part of a person responsible, to provide explanations and for failure, on the part of a debtor, to comply with their obligation to notify a change of address);
- **seizure** (of moveable property or real estate);
- **sale by public auction** of seized real estate or moveable property;
- **sale of seized moveable** property by direct agreement;
- **placing in receivership** of a business or farm – confiscation of debtor's moveable property by a bailiff;
- **vacation of premises**;
- **removal of custody** fights over a person subject to parental authority.

5.3. Procedure

An enforcement order featuring a declaration of enforceability serves as the basis for enforcement.

The following constitute enforcement orders:

- **a *res judicata* judgment** or a *non-res judicata* judgment subject to immediate enforcement (and immediately enforceable);
- **a settlement reached in court;**
- **an award by a board of arbitration;**
- **a settlement reached in the board of arbitration;**
- other judgments, settlements and instruments which by law are implemented by way of judicial enforcement;
- **a notarial deed** in which a debtor accepts enforcement (comprising an obligation to repay a sum of money or quantifiable fungibles, or an obligation to deliver individually designated items) if the deadline for repayment, settlement or delivery is indicated in the deed;
- a notarial deed in which a debtor accepts enforcement and which comprises an obligation to repay the sum of money specified in the deed or indicated by way of an index clause;
- **judgments by the courts of EU Member States**, settlements concluded in or confirmed by those courts and official documents drawn up in EU Member States and certified in those States as European enforcement orders.

Only judgments which feature a declaration of enforceability or are immediately enforceable (by virtue of immediate enforceability conferred automatically or further to an application) may constitute enforcement orders. Judgments handed down by boards of arbitration must first be declared enforceable by a domestic court, and only then may a declaration of enforceability be issued; the mere fact of declaring a judgment enforceable is not, of itself, sufficient for the purpose of instituting enforcement proceedings. A notarial deed constitutes an enforcement order if it meets the conditions laid down by the Code of Civil Procedure and the Notaries Act.

Other enforcement orders:

- extract from a notice of claims in insolvency proceedings;
- extract from a notice of claims with extract from a *res judicata* decision confirming an agreement in insolvency proceedings;
- *res judicata* bank settlement;
- settlement concluded before a surveyor;
- settlement concluded by a board of arbitration responsible for trades unions;
- draft terms of division for an amount obtained from enforcement of real estate;

bank enforcement order as provided for by the Banking Act, but only after a court has issued a declaration of enforceability;

- judgments handed down by foreign courts and settlements concluded before those courts after being declared enforceable by a Polish court;
- draft terms of division of the limitation of liability for maritime claims fund;
- rulings of the Assets Committee and settlements concluded before it in settlement proceedings (governed by the Relations between the State and the Catholic Church in Poland Act).

Enforcement is instituted:

- automatically - on a request from a court of first instance in cases which may be instituted automatically (by virtue of the Code of Civil Procedure);
- further to a creditor's application lodged with the district court with jurisdiction or with the bailiff attached to that court, depending on who is competent to proceed with enforcement;
- on the request of an authorised body (a court or public prosecutor in cases involving enforcement of fines, financial penalties, court fees and costs of proceedings owed to the Treasury).

Enforcement applications must be lodged in writing or entered to the record orally; the instructions of the enforcement agency must be made in writing. The enforcement order should be attached to the application or request.

Creditors' applications do not need to be lodged via the intermediary of a representative or of another body.

Bailiffs' enforcement costs, expenditure incurred in the course of enforcement and enforcement fees are governed by the Court Bailiffs and Enforcement Act of 20 August 1997.

Rules governing fees:

- enforcement of payments: 15% of the amount of the enforced claim;
- securing of claims: 5% of the amount of the claim after it has been secured;
- seizure of property: fixed fee equivalent to 50% of expected average remuneration;
- transfer of ownership of real estate, designation of a manager on a company's board, vacation of premises (objects and persons): fee equivalent to 40% of expected average remuneration;
- inventory or other list of assets: fixed fee equivalent to 10% of expected average remuneration for every hour or part thereof;
- transfer of ownership to creditors in other cases: fixed fee of 25%; where enforcement is carried out pursuant to further violations of ownership, the fee is increased by 100% each time;
- sealing or removing stamps without drawing up an inventory at the same time: fixed fee equivalent to 4% of expected average remuneration;

- activities involving the police: fixed fee of 25%;
- helping to remove a debtor's opposition and issuing an order to imprison a debtor: fee of 25%, implementation of the custody order is contingent on the creditor paying the fee.

Application by the creditor with enforcement order attached. The contents of the application are important (the obligation in question and the way in which enforcement is carried out should be indicated, i.e. the property rights on the basis of which enforcement of payments is to be carried out; in the case of enforcement involving real estate, the land register and the name of the court in which it is located should be indicated; in the case of enforcement involving moveable assets, there is no need to provide further details of the assets involved because in principle enforcement concerns all moveable assets owned by the debtor).

Enforcement may be carried out in respect of:

- moveable assets;
- earned income;
- bank accounts;
- real estate;
- seagoing vessels;
- other claims and property rights.

Enforcement may not be carried out in respect of:

- household equipment, linen, bedding, everyday clothing, work clothes;
- one month's food and fuel supplies for the debtor and their family;
- one cow, two goats or three sheep;
- the requisite tools to engage in paid employment and the raw materials necessary for one week's production, excepting motor vehicles;
- any monies not subject to enforcement (i.e. other than the part of remuneration collected on a regular basis as specified in the Labour Code); if the debtor is not in permanent employment, such monies as are necessary to keep the debtor and their family for two weeks;
- educational materials, personal papers, awards, religious items and everyday items which could be sold only at a significant loss and which are of substantial value to the debtor;
- certain items owned by farmers (indicated in separate legislation);
- amounts and benefits in kind designated to cover business and travel expenses;
- amounts allotted by the Treasury for special objectives (grants, aid), unless the claim was generated by virtue of realising those objectives or as a result of an obligation to pay maintenance;
- non-transferable rights;

- claims by debtors against State organisational bodies for supplies, work or services before completion thereof;
- personal insurance payments and non-life insurance compensation.

Effects of enforcement measures

Unless specified otherwise, under an enforcement order the whole of the relevant claim can be enforced from all parts of the debtor's property. Debtors are entitled to manage their assets unless, as a spouse, they are deprived by the court of the right to manage joint assets. However, when enforcement proceedings involving moveable assets are instituted, the bailiff takes over the said assets and writes an attachment report. Disposal of real estate after attachment does not affect the further course of proceedings, whereas enforcement proceedings involving attached moveable assets may also be instituted against purchasers. However, where there are good grounds for doing so, a bailiff may, at any stage of proceedings, place attached moveable assets under the supervision of a third party, who may be a creditor. In the case of enforcement involving real estate, the bailiff first instructs the debtor to repay their debt within two weeks, failing which he will prepare a description and valuation of the property. Disposal of real estate after attachment does not affect the further course of proceedings. Purchasers may take part in proceedings as debtors. **However, legal action taken by a debtor (who runs a business or farm) after enforcement has been instituted by the receivers is null and void.**

Where debtors are bound by an obligation not to take a certain course of action or not to obstruct action taken by a creditor and they have failed to comply with that obligation, the court imposes a fine on them further to an application from the creditor; debtors who fail to pay the fine are liable to imprisonment. Accordingly, in such cases debtors who fail to settle a fine constituting a coercive measure may be deprived of their liberty.

A bank which fails to comply with the rules governing banks' obligations in terms of attachment of bank accounts, including savings accounts, is liable for the resulting losses incurred by the creditors in question. The civil and criminal liability of banks is governed by the Banking Act. Persons who make false statements or who conceal correct data when providing information to the authorities responsible for banks and banks' customers are liable under criminal law (fine and up to three years' imprisonment), as are persons required to maintain banking secrecy who disclose or misuse information constituting a bank secret (fine of up to PLN 1 million and up to three years' imprisonment).

The Act does not specify any time limit for lodging enforcement applications; however, checks must be made to ensure that the procedural conditions for enforcement proceedings are met (admissibility of court proceedings, national jurisdiction, ability to sue, fitness to stand trial). If these conditions are not met, enforcement is annulled.

Judicial remedies in enforcement proceedings:

- complaint lodged with a district court against action taken by a bailiff (time limit: one week from the date of the action);
- appeal against a court decision to reject a complaint;
- complaint to a district court against a bailiff's decision to impose a fine;
- appeal against a court decision not to annul the aforementioned decision;
- appeal against a court decision in the event of duplication of administrative and court enforcement;

- appeal against a court decision regarding the issue of a declaration of enforceability;
- appeal against a court decision regarding the suspension or annulment of proceedings;
- appeal against a court decision concerning the limitation of enforcement;
- court action against a judgment rendered without the debtor being heard;
- appeal against a court decision concerning the repayment of expenditure incurred by and remuneration of a party responsible for supervising enforcement proceedings involving moveable assets;
- appeal against a court decision concerning the release of monies seized within the framework of enforcement involving moveable assets;
- appeal against a court decision concerning a description and valuation of property within the framework of enforcement involving real estate;
- verbal complaint lodged with a supervising judge against action taken by a bailiff in the course of a sale by auction;
- appeal against a court pricing decision;
- objections to the draft terms of division for the amount obtained from enforcement (within two weeks of the date on which notice was given to the enforcement agency which drafted them);
- appeal against a court decision concerning the resolution of objections to the draft terms of division;
- appeal against a court decision concerning the performance of activities by a creditor at a debtor's expense and appeal against a court decision to order a debtor to perform certain activities, to threaten the debtor with a fine or imprisonment and to cover a creditor's losses;
- objection to a court decision concerning the exemption of property from enforcement with the involvement of the Treasury and businesses.

5.4. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

See above.

5.5. Bilateral and Multilateral Agreements

Under Polish law, foreign judgments are recognized on the basis of the **reciprocity rule**. To secure the mutual recognition of judgments, **Poland usually includes the reciprocity rule in international conventions or recognizes foreign judgments on the grounds of international practice**.

5.5.1. Bilateral conventions

- Mongolia–Poland. Agreement of 19 October 1998 on judicial assistance and legal relations in civil matters, family matters, employees' matters and criminal matters, signed in Warsaw.

- Romania–Poland. Agreement of 15 May 1999 on judicial assistance and legal relations in civil matters, signed in Bucharest.
- Russia–Poland. Agreement of 16 September 1996 on judicial assistance and legal relations in civil and criminal matters, signed in Warsaw.
- Estonia–Poland. Agreement of 27 November 1998 on judicial assistance and legal relations in civil matters, employees’ matters and criminal matters, signed in Tallinn.
- Cyprus–Poland. Agreement of 14 November 1996 on judicial cooperation in civil and criminal matters, signed in Nicosia.
- Belarus–Poland. Agreement of 26 October 1994 on judicial assistance and legal relations in civil matters, family matters, employees’ matters and criminal matters, signed in Minsk.
- Latvia–Poland. Agreement of 23 February 1994 on judicial assistance and legal relations in civil matters, family matters, employees’ matters and criminal matters, signed in Riga.
- Ukraine–Poland. Agreement of 24 May 1993 on judicial assistance and legal relations in civil and criminal matters, signed in Kiev.
- Lithuania–Poland. Agreement of 26 January 1993 on judicial assistance and legal relations in civil matters, family matters, employees’ matters and criminal matters, signed in Warsaw.
- Egypt–Poland. Agreement of 17 May 1992 on judicial assistance in civil and commercial matters, signed in Cairo.
- Germany–Poland. Treaty of 14 December 1992 on further facilitation of legal relations on the basis of the Hague Convention dated 1 March 1954 concerning civil proceedings, signed in Warsaw.
- Italy–Poland. Agreement of 28 April 1989 on judicial assistance and on recognition and enforcement of judgments in civil matters, signed in Warsaw.
- Turkey–Poland. Agreement of 12 April 1988 on judicial assistance in civil and commercial matters, signed in Warsaw.
- Belgium–Poland. Agreement of 17 December 1986 on legal information, signed in Brussels.
- Iraq–Poland. Agreement of 29 October 1988 on judicial assistance in civil and criminal matters, signed in Baghdad.
- Czechoslovakia–Poland. Agreement of 21 December 1987 on judicial assistance and legal relations in civil matters, signed in Warsaw.
- China–Poland. Agreement of 5 June 1987 on judicial assistance in civil and criminal matters, signed in Warsaw.
- North Korea–Poland. Agreement of 28 September 1986 on judicial assistance in civil matters, family matters and criminal matters, signed in Pyongyang.
- Libya–Poland. Agreement of 2nd December 1985 on judicial assistance in civil matters, commercial matters, family matters and criminal matters, signed in Tripoli.

- Tunisia–Poland. Agreement of 22 March 1985 on judicial assistance in civil and criminal matters, signed in Warsaw.
- Syria–Poland. Agreement of 16 February 1985 on judicial assistance in civil and criminal matters, signed in Damascus.
- Cuba–Poland. Agreement of 18 November 1982 on judicial assistance in civil matters, family matters and criminal matters, signed in Havana.
- Morocco–Poland. Agreement of 21 May 1979 on judicial assistance in civil and criminal matters, signed in Warsaw.
- Algeria–Poland. Agreement of 9 November 1976 on judicial assistance in civil and criminal matters, signed in Algiers.
- Greece–Poland. Agreement of 24 October 1979 on judicial assistance in civil and criminal matters, signed in Athens.
- Finland–Poland. Agreement of 27 May 1980 on judicial protection and judicial assistance in civil matters, family matters and criminal matters, signed in Helsinki.
- Austria–Poland. Agreement of 11 December 1963 on mutual relations in civil matters and on documents, signed in Vienna.
- Mongolia–Poland. Agreement of 14 September 1971 on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Warsaw;
- France–Poland. Treaty of 5 April 1967 on facilitating the use of the Hague Convention on civil proceedings of 1 March 1954, signed in Warsaw.
- Bulgaria–Poland. Agreement of 4 December 1961 on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Warsaw.
- Romania–Poland. Agreement of 25 January 1962 on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Bucharest.
- Hungary–Poland. Agreement of 6 March 1959 on judicial assistance and legal relations in civil matters, family matters and criminal matters, signed in Budapest.
- Great Britain and Northern Ireland – Poland. Extension to Scotland of the convention between the President of the Polish Republic and His Royal Highness regarding the United Kingdom of Great Britain and Northern Ireland on proceedings in civil and commercial matters, signed in Warsaw on 26 August 1931.
- Great Britain and Northern Ireland – Poland. Convention of 26 August 1931 on proceedings in civil and commercial matters, signed in Warsaw.
- Holland–Poland. Treaty of 12 April 1930 on judicial proceedings, arbitration and conciliation, signed in Hague.
- Norway–Poland. Treaty of 9 December 1929 on conciliation, arbitration and judicial proceedings, signed in Oslo.
- Spain–Poland. Treaty of 3 December 1928 on conciliation, judicial proceedings and arbitration signed in Madrid.

- Yugoslavia–Poland. Agreement of 6 February 1960 on legal relations in civil and criminal matters, signed in Warsaw.

5.5.2. Multilateral conventions

- Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed in The Hague.
- Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, signed in The Hague.
- Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano (at the moment only in relationship with EEA countries and Denmark).
- Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations, signed in Hague.
- European Convention of 27 January 1977 on transferring applications for legal assistance, signed in Strasbourg.
- European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, signed in Luxembourg.
- Convention of 25 October 1980 on international access to justice, signed in The Hague.
- International convention of 10 May 1952 for the unification of certain rules relating to civil jurisdiction in matters of collision, signed in Brussels.
- European Convention of 7 June 1968 on information on foreign law, signed in London.
- Convention of 1 March 1954 on civil procedure, signed in The Hague.
- Convention of 20 June 1956 on the recovery abroad of maintenance, signed in New York.
- Convention of 17 July 1905 relating to civil procedure; signed in The Hague.
- Convention of 20 June 1956 on the recovery of maintenance abroad, signed in New York.

ANNEX VII: NATIONAL REPORT FOR THE UK

(Martin Sychold)

1. Sources

- Judicature Act 1873
- Civil Procedure Rules 1999.

2. Structure: content of the rules on civil adjudication in national courts

The legal concept of venue was abolished in the domestic legal order of England and Wales by the Judicature Act 1873, as the culmination of a process in which the various courts that co-existed within the country were either abolished or integrated into a single court hierarchy. At the core of that hierarchy sits the High Court of Justice of England and Wales, which inherently possesses unlimited, original subject-matter jurisdiction in the national sense. Some of that original jurisdiction has been effectively delegated to inferior courts, but that is a question of administrative efficiency, in the same way as the distribution of business amongst the various divisions and sub-divisions of the High Court of Justice. No inferior court has any kind of exclusive jurisdiction, upon which it could insist to the exclusion of the High Court. Although it is said in common parlance that certain cases “fall within the jurisdiction” of inferior courts (for example that claims for sums not exceeding £5,000 may be decided in the Small Claims Court or that claims for more than £50,000 in respect of personal injuries must be commenced in a County Court), that is in fact a reference to the administratively determined categories of claims which may be filed in the registries of individual courts. The proceedings on those claims can later be transferred by the judges of a lower court to the High Court, or by the judges of the High Court to a lower court, as a function of the difficulty of the issues to be decided, the costs of the litigation and general administrative convenience. This has become particularly clear since the Civil Procedure Rules 1999 changed the philosophy of civil litigation in England and Wales, requiring every case to be attributed at an early “allocation hearing” to “the small claims track”, “the fact track” or “the multi-track” and to be referred to a court as a function of that allocation. In summary, a plaintiff in England and Wales does not select a competent judge.

2.1. Is there a conceptual difference between rules on jurisdiction and rules distributing the jurisdictional power among national judges?

There is a fundamental conceptual difference between the rules of English private international law concerning international jurisdiction and the rules distributing cases among national judges (refer above, point II).

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

Yes (refer above, point II).

3. Heads of jurisdiction

Formally (or “legally” in that sense) the courts of England and Wales have jurisdiction over any case in which a writ initiating process has been validly served and do not have jurisdiction over any other cases. This means that the question of jurisdiction is discussed in England and Wales in terms of “service of initiating process”. In other words, the scope of judicial jurisdiction depends on the categories of cases in which a writ is permitted to be served. This implies, it has been observed, that the question of the extent of the

international jurisdiction of English courts is fundamentally a procedural issue, rather than a matter of substantive (private international) law. By way of exception, there are a few substantive *restrictions* on jurisdiction (to be mentioned under point IV. below), but they conceptually come into play only once jurisdiction has been established by procedural means.

At the highest level, there are four categories of cases (A to D, below) in which a writ initiating process is permitted to be served on a defendant.

A - Service within the territorial jurisdiction of the courts

A plaintiff has a right to initiate proceedings by serving a writ on a defendant who is present within the territorial limits of the court's jurisdiction. Physical presence alone suffices as a basis of jurisdiction; there is no need to even mention any other kind of connection of England and Wales to the defendant (such as residence, domicile, nationality ...) or to the litigation (such as presence of property in dispute, or place of employment, ...). The justification for this principle is that he who has been served with the King's writ and finds himself within the King's realm is subject to the jurisdiction of the King's courts. A defendant may object that he has been brought within the realm against his will, by force or fraud; that is not an exception to the principle of jurisdiction however, but rather a separate principle that the courts may refuse to deal with proceedings brought in "abuse of the court's process".

Originally, "service" required the writ to be personally handed to the defendant. That principle was later amended to permit postal service or "substituted service" (i.e. the court may be persuaded to replace personal service with service on a third person somehow connected with the defendant, or with service by advertisement). Those alternative procedures nevertheless rest upon the prerequisite of the defendant's presence within the territorial jurisdiction. In the case of postal service, the plaintiff or his solicitor must attest to the court that the letter (in the defendant's post box) will come to the defendant's knowledge within seven days. In the case of substituted service, the court will permit this only if it is convinced by the plaintiff that the steps envisaged will bring the writ to the attention of the defendant within the jurisdiction. Substituted service outside the territory of England and Wales is not permissible.

Special arrangements and substantial jurisprudence exist in respect of personal service on legal persons. The special arrangements apply to companies which have registered offices or agents for service as foreseen by companies legislation; such a company can be served by leaving a writ at, or posting it to, its registered address. The jurisprudence concerns foreign juridical persons (normally companies) which have not registered an address anywhere in the United Kingdom; such a company can be served by leaving the writ at the company's "place of business" within England or Wales, i.e. a place (if any) at or from which the company is carrying on its business at the time at which the writ is served.

B - Submission to jurisdiction

Jurisdiction on the basis of submission is normally relevant only to foreign defendants. Judicial jurisdiction may be established by submission on the part of an individual who would otherwise not enter onto the territory of England and Wales, or on the part of a company which has no place of business within that territory. The justification for this principle is that he who submits to the King's writ is thereafter subject to the jurisdiction of the King's courts. This view explains the rule that a foreign defendant who takes any step in English proceedings, without first expressly protesting the assumption of jurisdiction over him, is considered to have submitted. Only voluntary submission has this effect (see the first paragraph under category A, above).

C - Service out of the jurisdiction

By way of exception, a plaintiff may be permitted to initiate proceedings by serving a writ abroad on a defendant who is not present within the territorial limits of the court's jurisdiction. If permission is granted, the existence of the writ is notified to the relevant authorities of the relevant foreign State for service according to the procedures in force in that State, as foreseen by international conventions. This establishes the jurisdiction of the courts of England and Wales to decide the case, regardless of whether the defendant submits to the jurisdiction and regardless of whether any resulting judicial order or judgment could be enforced against the defendant abroad. This category of initiating process, which was introduced by legislation to co-exist with categories A and B, is limited to certain kinds of cases and is limited by the discretionary power of the judges. Each limitation should be explained separately

Types of cases in which service out of the jurisdiction is possible

An applicant for leave to serve a writ out of the jurisdiction must establish that his claim falls under one (or more) of the following descriptions:

- relief is being sought against a person who is either domiciled or ordinarily resident in England and Wales (that person will normally be the defendant to the action which the writ is intended to initiate, but this is not necessarily always the case);
- an injunction is being sought against the defendant to the intended action, ordering him to do, or to refrain from doing, something in England or Wales;
- the writ has already been properly served on a person present within the territory of England and Wales and the person to be served out of the jurisdiction would be a necessary or proper party to the intended action;
- it is sought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain some other type of relief in respect of a breach of a contract, which contract either:
 - o was made in England or Wales, or
 - o was made by or through an agent trading or residing in England or Wales, or
 - o is expressly or impliedly governed by English law (i.e. according to English private international law, English law is "the proper law of the contract"), or
 - o contains a choice of England and Wales as the forum for litigation of the claim, or
 - o contains an obligation to be performed in England or Wales, but only in so far as relief is sought in respect of the breach of such an obligation;
- the claim is founded on a tort committed in England or Wales;
- land situated in England or Wales is the whole subject-matter of the intended action;
- it is sought to construe, rectify, set aside or enforce an act, deed, will, contract or other obligation or liability affecting land situated in England or Wales;
- the subject-matter of the intended action is movable property, which is situated in England or Wales and has been mortgaged, and the claim is either by the mortgagee for sale of the property, foreclosure of the mortgage, or delivery of possession of the property, or by the mortgagor for redemption of the mortgage or for re-conveyance

- or re-delivery of possession of the property (i.e. it is a proprietary, rather than a personal claim);
- the claim would be settled as part of the administration, under the supervision of the courts of England and Wales, of the estate of a person who died domiciled in England or Wales (this includes cases of intestate succession and cases in which a valid testamentary instrument does not name executors or names executors who refuse to act as such);
- the claim would be settled as part of a contentious probate action in the courts of England and Wales (this always involves testamentary succession);
- it is sought to obtain the proper execution, as to property situated in England or Wales, of a trust established by a written instrument governed by English law and the person to be served out of the jurisdiction is a trustee of that trust;
- the revenue authorities of the United Kingdom seek to recover amounts due as taxes or duties.

Grant of permission to serve out of the jurisdiction

Once an applicant has shown that his claim qualifies for service out of the jurisdiction, he must proceed to convince the court (in the first instance, a Master of the High Court of Justice of England and Wales) that it would be appropriate for the court to grant leave to serve out of the jurisdiction in that particular case, or in technical terms, that the Court is the *forum conveniens* (i.e. that the litigation could properly continue in the courts of England and Wales, rather than in the courts of a foreign country). All of the circumstances of the individual case must be taken into account by the court in arriving at a decision on this aspect; no previous case will have been exactly identical to the present case, so it is in principle always impossible to know in advance whether leave will be granted or not.

In practice, English (first instance and appellate) judges have taken a clearly discernible approach to the exercise of their discretionary powers to grant leave to serve out of the jurisdiction in respect of certain descriptions of claims. Thus, they have almost always granted leave in respect of contracts containing a choice of an English forum, on the basis of the principle that *pacta sunt servanda*; it seems that leave is granted in these cases *unless* there appears to be a good reason for *refusing* leave. On the contrary, they have been extremely reluctant to grant leave to serve "necessary or proper parties" to litigation commenced in England and Wales, on the basis that a territorial connection between the claim and the party to be served abroad is normally completely absent in these cases. In respect of the most commonly invoked descriptions, namely those concerning torts and the remaining descriptions concerning contracts, the repeatedly stated principle is that the applicant for leave has "a heavy burden to discharge". All kinds of circumstances may be considered relevant. Those which are certainly relevant (and may or may not be attributed sufficient weight as to justify the grant of leave) include:

- after a summary exposition, it appears that the applicant has "a good arguable case" on the merits of his substantive claim;
- the applicant would not be able to count on a fair trial in the only alternative forum for the litigation (i.e. in the only foreign courts which would otherwise take jurisdiction);
- the only alternative forum for the litigation would apply material norms which an English judge believes to be "contrary to the general understanding of commercial men";

- trial of the claim in one of the alternative fora would permit the simultaneous resolution of related claims, while trial in another of the alternative fora would encourage a multiplicity of parallel proceedings;
- trial in the alternative forum would involve substantially more expense and inconvenience than would a trial in England and Wales.

In most cases, the last circumstance is effectively the only one of relevance, or at least by far the most important one. The onus is then upon the applicant to convince the judge that a trial of his claim in England and Wales would confer upon him a "legitimate advantage", namely a benefit for himself as plaintiff which is not offset by a burden for the party to be served as defendant. The applicant must, in other words, show that a trial in the English courts could take place with relatively little cost and difficulty to both parties, seen together. The place of residence of any essential witnesses would obviously be of relevance in this sense, as would the identification of the *lex causae* in the substantive claim, given that English courts require foreign law to be proven by (expensive) expert witnesses. Not of relevance are factors such as the expiration of a limitation period that would be applied in one of the alternative *fora*, but not in another, as this would constitute a disadvantage to one party in exactly the same measure as it would constitute an advantage to the other.

Conceptual difficulties seem to have arisen in respect of cases in which service out of the jurisdiction is permitted by subject-matter-specific legislation. Originally, no distinction was made between the need to obtain leave in these cases and the need to obtain leave in cases governed by the common law. Subsequently, it was considered that leave would almost always be granted in these cases. Most recently, it was decided that these cases should no longer be mentioned in the rules governing service of writs initiating process, on the (intellectually dishonest, even if factually correct) basis that these cases rarely arise in practice. Most examples of such legislation involve the transposition into domestic law of provisions of international conventions (usually concerning liability: for maritime oil pollution, radiation from nuclear installations, losses suffered by passengers or freight in aircraft ...) which have been ratified by the United Kingdom. Particularly interesting is the Protection of Trading Interests Act 1980, which effectively permits British enterprises ordered by foreign courts (i.e. U.S. courts) to pay punitive damages to a plaintiff, to recover an equivalent amount from the plaintiff by order of a British court.

D - Claims *in rem*

All of the categories and sub-categories of permitted service which have so far been discussed involve claims *in personam* (i.e. claims that the defendant is obliged by law to do or refrain from doing something and that the plaintiff is entitled by law to insist upon that action or omission). English law distinguishes such claims from claims *in rem*, which formally involve the establishment of the legal status of a particular thing in a manner binding upon everyone. English law permits claims *in rem* to be brought only against a ship, or an aircraft, or something within such a vessel (e.g. cargo, or fuel). The writ is served by physical attachment of the writ to some part of the superstructure of the vessel. The vessel must be located within the territory (including the territorial waters) of England and Wales at the moment of service of the writ. Once the jurisdiction of the English courts has been established in this manner, they have the power to order, *inter alia*, the arrest of the vessel. This category of service and thus of jurisdiction was originally justified by the importance of ships for the defence of the realm; all ships located within English territorial waters were potentially at the King's disposal and therefore subject to the jurisdiction of his courts.

4. Unilateral coordination of jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive jurisdiction of the *forum*

Under the Domicile and Matrimonial Proceedings Act 1973, the courts of England and Wales have mandatory jurisdiction to issue decrees of divorce, legal separation and nullity of marriage in the circumstances specified by that legislation.

4.1.2. Absence of Jurisdiction of the *forum*

Cases concerning foreign land (i.e. immovables situated outside of the territorial limits of England and Wales) are traditionally considered to be the most important category of cases falling outside the jurisdiction of the courts of England and Wales. This exclusion from jurisdiction derived from the relevant principles of public international law. Although commentators usually state that the exclusion is subject to limitations, those limitations are really so wide in scope and of such practical importance that it is probably more realistic to formulate the position in the opposite way: English courts basically have jurisdiction over cases concerning foreign immovables, but there are some limitations on that subject-matter jurisdiction. Thus, English courts are competent to decide claims invoking alleged personal rights and obligations in respect of foreign immovables. Such rights and obligations are frequently created by contracts and by fiduciary relationships. English courts are not competent to decide claims invoking alleged property rights and obligations in respect of foreign immovables. Such rights and obligations can normally be created only by the property laws of the *situs* of an immovable. Although this has been described as intellectually dishonest, English courts do not hesitate to personally order litigants, in cases before the English courts, to transfer their rights to foreign immovable property or to exercise such rights in conformity with the English courts' judgments. They adopt this approach on the basis of the fundamental principle of English law that "Equity acts *in personam*", theoretically in the sense that the norms of Equity affect the conscience of individuals and practically in the sense that an English court normally takes jurisdiction over the person of the defendant, rather than (only) his property. As the norms of Equity are developed by jurisprudence over the course of time, the incidence of fiduciary relationships increases enormously. Claims in respect of the administration of deceased estates, matrimonial property rights, investment services or fraudulent schemes, as well as traditional trust arrangements, are nowadays all considered to involve fiduciary duties and therefore potentially personal, fiduciary obligations, irrespective of whether movable or immovable property may be involved. In summary, it is fair to say that, in the increasingly rare cases in which a plaintiff is not able to raise any equitable claims, a defendant may insist upon the dismissal of an action involving common law claims to foreign immovable property.

Many of the statutes which were enacted for the purpose of transposition into domestic law of provisions of international conventions (compare above, the last paragraph under point III. Cb.) expressly exclude from the jurisdiction of the English courts all other cases than those for which the English courts have jurisdiction according to the treaty arrangements. All of the statutes containing such norms fall within this subject-matter context (i.e. implementation of international conventions). They take a normative approach which differs fundamentally from that of English private international law in general.

Although it does not concern any particular subject matter, we should mention here, for the sake of completeness, that several classes of potential defendants enjoy "immunity from the jurisdiction" of the courts of England and Wales. This means that proper service of an initiating writ on such a person does not create judicial jurisdiction over that person, unless the person voluntarily submits to the jurisdiction. The relevant categories are:

- Diplomatic and Consular Agents and their families;
- International Organisations identified by executive orders;
- Foreign States and their emanations, subject to numerous exceptions.

The last category was already clearly established during the Middle Ages and justified by the maxim that *par in parem non habet imperium*; one sovereign cannot have jurisdiction over another, for they are by definition equal. That rule was subsequently restricted in scope by legislation in respect of foreign States and extended in principle by legislation in respect of diplomats and international organisations.

4.1.3. Exclusive Jurisdiction of a Foreign State

As far as I have been able to determine, the fact that the courts of a relevant foreign territory have exclusive jurisdiction over a case according to their own domestic legal order has no influence on the decision of an English as to whether or not to allow a claim to proceed before it. Different is the position in regard of the fact that the courts of a relevant foreign territory would have no jurisdiction over a case according to their own domestic legal order; that would be taken into account in determining whether England and Wales is *forum conveniens* for particular litigation (refer above, point III.Cb).

4.2. *Lis pendens*

The concept of *lis alibi pendens* has not taken an important place in English private international law. It is subsumed within the concept of *forum (non) conveniens*. Thus, if a claimant in England or Wales requires leave to serve an initiating writ out of the jurisdiction (refer above, point III.C.) and it is made known to the judge at that stage that proceedings in respect of the same claim are pending between the same parties before a foreign court, then the judge would take that aspect into account when deciding whether England and Wales is a *forum conveniens*. That aspect will not be decisive. It would obviously add weight to the view that (additional) proceedings before the English court would be inordinately expensive and generate complexity, in that the parallel proceedings might lead to the issuance of conflicting judgments, but those considerations could be outweighed by others, for example if third parties to the foreign proceedings were to take part in the English proceedings with the result that all related claims and issues could be resolved in the one set of English proceedings. Once any proceedings involving a foreign element have been initiated in England and Wales, either "as of right" or on the basis of a grant of judicial leave to serve out of the jurisdiction, it is open to the defendant to argue that *forum non conveniens* and ask the court to stay the proceedings in England and Wales. It may be only at this point that the fact of *lis alibi pendens* will come to the attention of the English court. A judge will then reconsider the issue of the appropriateness of the English courts as a forum for the litigation, putting into the balance the existence of the foreign proceedings along with any other relevant circumstances to which the parties may draw his attention. There was at one time authoritative jurisprudence to the effect that parallel English proceedings should normally be stayed unless the judge concludes that England and Wales constitutes the "natural forum" for the litigation. That was subsequently replaced by authoritative judicial statements to the opposite effect: parallel English proceedings should normally be allowed to proceed unless the judge concludes that the relevant foreign territory constitutes the "natural forum" for the litigation. More recently, it was decided to eschew any kind of presumption in this respect and to simply weigh up all of the circumstances relevant to each particular case. The date on which foreign proceedings were commenced and in particular whether they were commenced (long or shortly) before or after the commencement of the English proceedings is considered an irrelevant circumstance, being the result of accidents of timing. On the contrary, considerable weight may be attributed to the manner in which the foreign proceedings are being conducted, for example in an expeditious and efficient manner in order to obtain a judgment, or for example in the most limited manner possible in order to preserve a party's claims if ever the English proceedings are stayed.

5. Rules on recognition and enforcement

5.1. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

There are a substantial number and (at the same time) several different *types* of restrictions on the recognition and/or enforcement of foreign judgments by the courts of England and Wales. Hardly any of the restrictions are (or can be) justified by the exclusive/mandatory jurisdiction of the English courts over the claims decided by the judgments presented for recognition. Instead, English private international law developed more or less objective standards by which foreign judgments can be appraised, regardless of whether English courts would have had exclusive jurisdiction or any jurisdiction at all over the cases which gave rise to those judgments.

First and probably foremost, recognition will not be accorded to a foreign judgment *in personam* against a defendant over whom the foreign court did not have personal jurisdiction. The concept of “personal jurisdiction” is similar, but not identical, to that used to determine the jurisdiction of English courts over claims *in personam* (refer above, points III.A. to III.C). Thus, the applicant for recognition and/or enforcement must show that the defendant, if a natural person, was resident or at least present within the territorial jurisdiction of the foreign court, or if a juridical person, maintained a place of business within the territorial jurisdiction of the foreign court on the date of the commencement of the proceedings which resulted in the judgment, or in either case, voluntarily submitted to the jurisdiction of the foreign court. Under the last option, the jurisprudence has developed a number of conceptual sub-divisions with the result that defendants are sometimes considered not to have submitted to foreign courts in circumstances in which they would, *mutatis mutandis*, certainly be considered to have submitted to English courts. More blatantly, service of initiating process outside of the (foreign) jurisdiction is considered to be clearly insufficient to establish personal jurisdiction of the foreign court over the defendant. This double standard is sought to be justified by pointing out that many foreign legal systems do not confer discretionary judicial powers to grant or refuse leave to commence proceedings (compare above, point III.Cb.) and do not offer a defence of *forum non conveniens*. The refusal of recognition extends however, to common law jurisdictions which have adopted all of the English procedures and legal concepts, with the result that the plaintiff in the foreign proceedings did obtain leave to serve out of the jurisdiction and the defendant did have the opportunity to convince the foreign court that *forum non conveniens*.

Equally important as a matter of principle, though less frequently invoked in practice, is that recognition will not be accorded to a foreign judgment *in rem* unless it was issued by a court of the *situs* or the *loci situs* of the *res* on the date of the commencement of the proceedings which resulted in the judgment. In other words, English private international law considers that only a foreign court of the *situs* has jurisdiction *in rem*. This means that English courts will not give effect to foreign judgments which personally oblige the defendant to effect a transfer of land in England and Wales to the person considered by the foreign court to be entitled to that land, although the English courts frequently issue such judgments in respect of foreign land (refer above, the first paragraph under point IV.4.1.2). On the other hand, English private international law recognises that many foreign legal orders deal with many more subjects by means of proceedings *in rem* than does the legal order of England and Wales (compare above, point III.D.). Foreign judgments concerning both immovable and movable property of all kinds may be recognised, as can judgments establishing the status of persons (including whether or not natural persons are married, or dead, and whether or not juridical persons have particular capacities). English courts nevertheless reserve to themselves the power to decide whether a foreign judgment is really *in rem* (in that it concerns the status of the *res*), or actually *in personam* (in that it determines whether one person has justified claims against another person). It seems that the formulation of the foreign judgment is considered to be less important in this respect

than the nature of the judicial proceedings which led to the judgment: proceedings concerning rights and obligations enforceable against anyone in the world will result in judgments *in rem*; proceedings concerning the rights and obligations of the parties towards each other will result in judgments *in personam*. The distinction is of practical importance especially when foreign judgments allocate title to moveable property: a judgment which declares a movable to be the property of the plaintiff so as to satisfy his claim against the defendant (for example under a contract), is considered to be a judgment *in personam*; a judgment which declares a movable to be the property of the plaintiff so as to satisfy his claim against that movable (for example a claim to enforce a security lien created by operation of law), is considered to be a judgment *in rem*. The recognition of foreign judgments decreeing divorces, legal separations or nullity of marriage has been placed on a statutory footing, independently of European Law (refer below, point V.5.2), so that such judgments must conform to the criteria set out in Part II of the Family Law Act 1986 so as to be capable of recognition. The criteria are nationality, habitual residence, domicile as defined by English private international law and domicile as defined by the legal system which produced the foreign judgment; specifically, a relevant foreign judgment is capable of recognition in England and Wales if either spouse was domiciled or habitually resident within or a national of the State of the court which issued the judgment, on the date of the commencement of the proceedings which resulted in the judgment (or alternatively on the date of the death of that spouse, if the judgment declares the marriage to have been a nullity).

The applicant for recognition and/or enforcement of a foreign judgment must convince the English court that the foreign court had personal jurisdiction or jurisdiction *in rem*, depending on the nature of the judgment. This is necessary in order to establish that the foreign judgment is of a kind which is capable of being recognised and/or enforced in England and Wales. A **second**, indispensable characteristic of a recognisable foreign judgment is that of "finality". The applicant must accordingly show, in addition to the foreign court's jurisdiction, that the judgment presented for recognition is a "final judgment" within the relevant foreign legal order. Here again, English courts nevertheless reserve to themselves the power to decide whether a foreign judgment is really final, regardless of what it says on its face. There are two aspects to English private international law's conception of finality. On the one hand, the judgment must transform into *res judicata* the issues which it decides. A foreign judgment will therefore not be considered in England and Wales to be final if the decided issues can be reopened in other judicial proceedings within the foreign legal system (reopened by anyone if it is a judgment *in rem*, or reopened by any of the parties to the original proceedings if it is a judgment *in personam*). On the other hand, the judgment must have definitely terminated the proceedings on the issues which it decided, at least in the court which issued the proceedings. The fact that appellate or judicial review proceedings may be or have actually been initiated in a separate court of appeal or court of cassation does not prevent a foreign judgment from attaining the status of finality (although the English court may use its equitable powers to stay enforcement of the judgment if enforcement under the foreign legal order is also stayed pending determination of the appeal or review). This latter aspect of the concept of finality has long caused difficulty with the recognition and enforcement of foreign spousal or child maintenance orders, in that such orders are normally open to variation from time to time, if the circumstances of the parties vary. In common law principle, foreign maintenance orders can be enforced only in arrear, to the extent that arrears are payable under the foreign legal order, which does not permit variation of maintenance sums that have fallen into arrears.

Thirdly and again importantly, the applicant for recognition and enforcement of a foreign judgment *in personam* must show that it orders the payment of a fixed sum of money, either stated in the judgment or capable of objective calculation on the basis of elements stated in the judgment. Orders in foreign judgments requiring specific performance of legal duties, or prohibiting specified activities, are incapable of recognition and enforcement in England and Wales as a matter of common law principle, as are foreign judgments which

determine only the existence of liability and leave its quantification to be determined subsequently. Foreign judgments *in rem* are not required to display this characteristic so as to be capable of recognition in England and Wales. They are, by their nature, normally not capable of direct enforcement, but there have been cases in which English courts have entertained applications for the judicial sale of movables which had been determined by foreign judgments *in rem* to belong, at least in part, to the applicants for enforcement, before the movables came onto the territory of England and Wales. Such judgments are not required to fix a sum of money.

Fourth in the list of restrictions is the group of defences which can be raised by the respondent to an application for the enforcement of a foreign judgment in England and Wales, once the applicant has established that the judgment is basically capable of being recognised. An argument that the foreign court lacked jurisdiction, under the relevant rules of the foreign legal system, to entertain the proceedings and issue the judgment, falls within this list of restrictions. Although the argument implies that the judgment presented for recognition is a nullity (i.e. in law not a judgment at all) and therefore incapable of being recognised in England and Wales, applicants for enforcement are not asked to establish the foreign domestic law jurisdiction of the foreign court. If the issue is raised at all, it is raised by respondents. Noteworthy is the principle that the nullity of the foreign judgment under the foreign legal system, for any reason other than a total lack of jurisdiction on the part of the court which issued the judgment, has no relevance in recognition proceedings before an English court. Vitiating circumstances other than a lack of subject-matter and personal jurisdiction are treated in the same manner as a procedural defects leading up to the foreign judgment or legal errors in the foreign judgment: the respondent should raise them in appellate or review proceedings under the foreign legal system, not in the recognition proceedings before English courts. Several additional defences have been clearly established as belonging to the list of restrictions:

a. Res judicata

The principles of estoppel *per rem judicatam* can be relied upon by a defendant in English civil proceedings which threaten a re-litigation of matters that were previously settled by a valid, final judgment. There are two variations of the defence: "cause of action estoppel" prevents new legal proceedings on a claim which was the subject of previous proceedings between the same parties and decided by judgment; "issue estoppel" prevents reconsideration in pending proceedings of a particular issue which was decided by a judgment resulting from previous proceedings involving (but not necessarily limited to) the same parties, even though the previous proceedings arose out of a claim which is different to the claim underlying the pending proceedings. Those principles apply regardless of whether the previous proceedings took place in England and Wales, or abroad. Indeed, a defendant to English proceedings may apply for recognition of an existing foreign judgment in order to estop the plaintiff from proceeding at all, or from contesting a particular issue. On the other hand, but equally consistently with those principles, a respondent to an application for recognition of a foreign judgment may produce a copy of a previous (English or foreign) judgment in order to prevent recognition entirely, if the previous judgment resulted from proceedings between the same parties on the same claim as that decided by the foreign judgment now presented for recognition, or in order to prevent recognition in respect of a particular issue if the two judgments resolved different claims. It appears that these principles will be applied regardless of whether the concept of estoppel *per rem judicatam* or an equivalent thereof is known to the *lex fori* of the court which issued the subsequent judgment.

b. Foreign revenue or penal laws

Similarly indigenous is the policy of English private international law to refuse to

directly or indirectly enforce foreign laws aimed at raising revenue for a foreign government or having penal effect. Recognition of foreign judgments applying such laws would be an obvious example of indirect enforcement and is therefore refused. Where a foreign judgment imposes a penalty and also affords a civil remedy, the principle of severance may be applied to permit recognition and enforcement of the non-penal element.

c. Protection of Trading Interests Act 1980

Foreign laws permitting some civil claimants to recover multiple damages, or other forms of punitive damages, constitute an example of foreign laws considered by English private international law as having penal effect. The Protection of Trading Interests Act 1980 *inter alia* confirms that foreign judgments awarding multiple damages and foreign judgments awarding punitive damages in respect of unfair competition cannot be enforced by the courts of England and Wales.

d. English public policy

The respondent to an application for recognition may ask the court to refuse it on the basis that the foreign judgment is incompatible with English public policy. Individual judges of the English courts have a discretionary power to accept such a request, but are required to exercise the power in accordance with principle, rather than arbitrarily. It therefore seems that a perceived affront to the public policy of the forum must fall into at least one of three sub-categories, if it is to justify a refusal of recognition.

- i. The foreign judgment offends the conceptions of morality (usually sexual) which prevail in England and Wales at the date the application for recognition is heard.
- ii. Recognition of the foreign judgment could well prejudice the interests of the United Kingdom in the international arena. This restriction is justified by reference to the principle that the King's courts will not assist litigants in injuring the King's interests. That justification is difficult to reconcile with the modern conception of the judiciary as a State organ independent of both the legislature and the executive.
- iii. The foreign judgment contradicts what are viewed in England and Wales as being fundamental standards of human rights and personal freedoms. This restriction could theoretically have effect in respect of a foreign judgment according a remedy which is unknown to the domestic law of England and Wales, but such orders would in any case not be enforced due to the principles that execution procedure is governed by the *lex fori* and that foreign judgments *in personam* are capable of recognition only in so far as they award fixed sums of damages (refer above, to the third element / fifth paragraph under the present point V.5.1). The restriction is applied in practice to refuse recognition of some foreign judgments which give effect to incidents of a status established by foreign law; the English courts must recognise the status of a *res* as determined by a court of the *situs* at the date of commencement of the proceedings leading to the foreign judgment (refer above, to the first element / third paragraph under the present point V.5.1), but may refuse to recognise any of the legal incidents of that status as a matter of public policy. Historically, the English courts have not hesitated to give effect in this context to the social standards then prevailing in England and Wales: they refused recognition of civil incapacities imposed by foreign law on persons who had entered into religious orders, at a time when avowed Roman Catholics living in England and Wales ("popish recusants") were

subjected to drastic curtailment of civil capacity and personal freedom. More recently, they have refused recognition of civil incapacities imposed by foreign law on the basis of prodigality, apparently because this status is unknown to English domestic law. Foreign marriage annulments, dissolutions and separations were similarly refused recognition if decreed on grounds unknown to English domestic law. The powers of the English courts in that last respect were subsequently put onto a statutory footing (by the Recognition of Divorces and Legal Separations Act 1971 and later sec. 51 of the Family Law Act 1986), but the relevant provisions use the term “public policy” and it seems that their enactment has had no impact on the substantive approach taken by English and Welsh judges.

e. Principles of natural justice

Originally no more than one among many manifestations of English public policy, the concept of natural justice has developed into a category of its own since the 1970s. In the context of recognition and enforcement of foreign judgments, it was long thought that only those principles of natural justice which require a realistic attempt to notify the defendant of the commencement of proceedings, as well as *audi alterem partem* during the proceedings, would be taken into account. The English courts have since emphasised however, that any aspect of natural justice may justify refusal of recognition of a foreign judgment. Recognition of a Texan judgment was thus refused on the basis that the judge had quantified the amount of damages arbitrarily, rather than by application of the law to the evidence.

f. Fraud

5.2. Bilateral and Multilateral Agreements

The United Kingdom has generally shown itself to be reluctant to enter into international conventions or treaties on the subjects of jurisdiction and recognition of foreign judgments. It has preferred to deal with those subjects, like many others in the field of trans-boundary legal cooperation, by means of schemes of reciprocity. Such schemes foresee that each of the participating countries will pass basically identical legislation permitting the internationally agreed actions and imposing the internationally agreed restrictions. Each of those enactments provides that it shall apply only in respect of those foreign States and Territories which are subsequently designated by executive order. The government of each participating country then designates all of the other participating countries. On the subjects of jurisdiction and recognition of foreign judgments, the scheme of reciprocity was originally limited (like most such schemes) to States, Dominions and Dependant Territories belonging to the British Commonwealth and was given force in England and Wales by the Administration of Justice Act 1920. It was later decided to extend the scheme to non-Commonwealth jurisdictions and the Foreign Judgments (Reciprocal Enforcement) Act 1933 was passed in England and Wales in order to provide clearer rules and gradually replace the arrangements of 1920. Reciprocity arrangements were concluded inter alia with five European Union Member States and they were designated for the purposes of the legislation of 1933, before the Brussels Convention came into force for the United Kingdom.

The Recognition of Divorces and Legal Separations Act 1971 was supposed to give effect to the 1968 Hague Convention on the Recognition of Divorces and Legal Separations (Hague Conference Convention No. 18). Nevertheless, the Act applied (and its successor provision in the Family Law Act 1986 still applies) to all foreign divorce and separation decrees, regardless of whether they were issued by courts of States Parties to the Convention. It therefore cannot be said that this Convention provides the basis for the recognition of judgments of the courts of any particular foreign country.

ANNEX VIII: NATIONAL REPORT FOR SWITZERLAND

(Lukas Heckendorn Urscheler)

1. Sources

Article 30 (2) Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101)²
Unless otherwise provided by law, anyone against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.”

For International Cases :

Act of 18 December 1987 on Private International Law (Loi fédérale du 18 décembre 1987 sur le droit international privé), SR 291.

For Internal Matters:

Swiss Code of Civil Procedure Ordinance of 19 December 2008 (Code de procédure civile du 19 décembre 2008), SR 272.

2. Swiss distribution of jurisdiction

The distribution of jurisdictional power among national judges is made according to a multitude of criteria. The jurisdiction *rationae materiae* (including existence of a Commercial Court, Art. 6 SPCC) is governed by cantonal law except for federal legislation providing for the contrary (e.g. in federal administrative matters; Art. 4 SCCP). The different cantonal instances will not be discussed more in detail. Very often, criminal and civil matters are dealt with by different instances, and specific procedures apply depending on the value of the dispute and / or the subject matter (peace justice, employment law, lease matters, insolvency issues).

In addition to those substantive criteria (*ratione materiae* and according to the value of the dispute), territorial criteria apply. For civil and commercial matters, the Swiss Code of Civil Procedure of 2008 establishes in its first and the second Chapter in the second Title of the first Part the national rules on the competent judge *ratione loci*. Until the entry into force of the Swiss code of Civil Procedure on 1 January 2011, the competence was established according to the Federal Act on Jurisdiction of 2000 (Loi fédérale sur les fors en matière civile du 24 mars 2000) and, before that federal Act, according to cantonal legislation and to some extent by case law of the Federal Supreme Court (Tribunal fédéral). In addition, and of mainly historical importance for jurisdiction in federal cases, the Constitution provides for a guarantee of the jurisdiction of the judge at the place where the defendant is established; while that guarantee today allows for legislation to provide for exceptions, it was previously formulated in a stricter way – what was especially difficult in negotiations of international agreements relating to jurisdiction such as the Lugano Convention.

The rules on jurisdiction *ratione loci* of the Swiss Code of Civil Procedure (SCCP) are structured as follows. Section 1 contains the general provisions, especially taking up the general rule already contained in the constitution according to which the court at the **domicile** (according to the definition of the Swiss civil code) or at the **seat of the defendant** has in principle jurisdiction (Art. 10 SCCP). In the absence of domicile, the habitual residence is the connecting factor (Art. 11 SCCP). Other general provisions include rules on actions against several defendants, the possibility of choice of court agreements (except if a specific provision provides otherwise, Art. 17 SCCP) as well as the tacit acceptance of jurisdiction by pleading on the merits (Art. 18 SCCP).

The general rules of section 1 are then followed by a set of **specific rules for several subject matters** such as personal status (violation of personality rights, actions relating to

the change of the name and some actions according to the data protection legislation), family law, law of successions, actions *in rem* (*droits réels*: possession and property), contractual claims, tort claims, commercial law and insolvency and bankruptcy issues (sections 2 to 9 of Chapter 2 / Titel 1). Some of those rules on jurisdictions are mandatory (e.g. in family matters: Art. 23 – 27 SPCC: court at the domicile of one of the parties in all family matters (marriage, family-relation, alimonies), others are partly mandatory in the sense that the weaker party (e.g. consumers, employees) cannot validly renounce the jurisdiction of the court provided by law before court proceedings are started (Art. 32-35 SCCP: contracts concluded with consumers, rent, employment contracts).

2.1. Is there a conceptual difference between rules on Jurisdiction and rules distributing the Jurisdictional power among National judges?

There is a fundamental **formal difference** between rules on the competent judge *ratione loci* in domestic matters and the rules on international jurisdiction, as the former are regulated according to the SPCC while the latter are governed (generally exclusively) by international conventions and the Swiss Act on private International Law of 18 December 1987 (PIL).³²¹ In other terms, in international cases, the SPCC does not apply and in national cases, PIL does not apply.

Conceptually, there is a fundamental difference stemming from the fact that PIL only establishes jurisdiction of Swiss courts and therefore generally refers to “the Swiss courts” (e.g. Art. 2, Art. 3, Art. 33, Art. 43 PIL) while SCCP refers directly to the head of jurisdiction, i.e. the attributing criteria. In other words, the legislator in international matters only confers jurisdiction on its own courts and doing so does in principle not care about what other states do.³²² In doing so, it generally takes a relatively broad approach. This underlying conceptual difference can be seen most clearly from the **exceptional provision** of Art. 3 PIL according to which a Swiss judge has jurisdiction if proceedings abroad are impossible or cannot reasonably be required (*unzumutbar*) and the case has sufficient connection with Switzerland. Similar provisions exist in the field of family law, where the nationality (place of origin) can be a subsidiary ground of jurisdiction (Art. 47, 60, 66, 76, 80 PIL) or where jurisdiction is necessary for the protection of a weak person (children, adults; Art. 85 PIL) or to avoid that no authority deals with the matter (succession: Art. 87 and 88 PIL). In the domestic context, there are no equivalent provisions, as the rules are about distributing competencies within the territory rather than establishing the jurisdiction of the Swiss courts. Also the formulation of the heads of jurisdiction might in some instances be influenced by that difference (compare e.g. Art. 43 PIL and Art. 23 SCCP), though a detailed analysis goes beyond the scope of this paper.

Finally, the concepts of **exclusive and mandatory jurisdiction** can be seen as a consequence of the difference: in the international context, the legislator refers to “exclusive” jurisdiction in certain cases, and might thereby imply the non-recognition of decisions that were made elsewhere³²³ (though there generally is a provision on recognition). In fact, exclusive jurisdiction implies that only the courts of a given state have jurisdiction, according to several authors, the term also often implies that parties cannot agree on a different place.³²⁴ In that latter regard, the concept of exclusive jurisdiction is

³²¹ Art. 2 SPCC; Art. 1 (1) PIL.

³²² See A.K. Schnyder / M. Liatowitsch, Internationales Privat- und Zivilverfahrensrecht, 2. Auflage, Zürich 2006, N 272; G. Walter, cit., p. 89 seq.; .

³²³ J. Kren Kostkiewicz, Grundriss des Schweizerischen Internationalen Privatrechts, Bern 2012, N 86; A. Bucher & A. Bonomi, Droit international privé, 2ième édition Bâle 2004, N 87; CR-LDIP Bucher, N 4 ad Art. 2 – 12; see also G. Walter, Internationales Zivilprozessrecht der Schweiz, 4. Auflage, Bern 2007, p. 93.

³²⁴ K. Spühler / A. Dolge / M. Gehrig, Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts, 9. Auflage, Bern 2010, § 15 N 15; A. Dolge & D. Infanger, Schlichtungsverfahren nach Schweizerischer Zivilprozessordnung, p. 23; Kren Kostkiewicz, cit., N 83; Bucher & Bonomi, cit., N 86; CR-LDIP A. Bucher, N 2 ad Art. 97 with critical remarks, proposing that the Parties should nevertheless have the possibility to agree on other Courts within Switzerland.

complemented by the concept of mandatory jurisdiction that applies both in international and national cases: the mandatory element implies (only) that parties cannot agree otherwise.³²⁵ Thus, the concept of exclusive jurisdiction is only used in the international context.³²⁶

In spite of these fundamental conceptual differences, the content and the result of both sets of rules are often comparable. The **structure** of the SPCC is to some extent similar to the structure of the Act on Private International Law (PIL): also PIL starts with a general part and then contains specific provisions in a chapter on natural persons, matrimonial issues, child matters, protection of adults, succession matters, actions *in rem*, securities, intellectual property rights, law of obligations, trust, commercial law, and insolvencies (chapter 2 – 11), each chapter dealing with jurisdiction, choice of law and recognition and enforcement. Thus, while the headings are slightly different in PIL and SPCC, they reflect very similar categories.

Also from a material point of view, the rules on jurisdiction according to SPCC and the PIL lead to the **same result**; the legislator even tends to harmonize the norms (by modifying PIL in order to bring it into line with the more recent SCCP and international agreements) to minimize differences between international and domestic cases.³²⁷ Some differences remain, however (e.g. the definition of domicile).

There might be several **explanations** for the similarity between domestic and international rules on jurisdiction. First of all, the fact that Switzerland is a Confederation with rules on jurisdiction being of the competency of the federal units might have led to an internationally influenced perspective on jurisdiction. Second, the structure of the Swiss Act on Private International Law and the experiences with its application probably had an impact on the SCCP. Finally, the constitutional guarantee of the competent judge at the domicile of the defendant influenced both international and domestic rules on jurisdiction and has therefore been the guiding principle for the legislator and the judge, paving the way to the “rule and exception” approach in both the national and the international arena.

2.2. Are the grounds of jurisdiction different from the criteria for selecting the competent judge within the State?

As already indicated above, the grounds of jurisdiction are formally different but might lead to the same result in many cases. In fact, PIL is structured in a similar way as SCCP. In addition, the heads of jurisdiction are often similar: the general clauses in PIL and SCCP both refer to the domicile of the defendant (though the two concepts are not identical), in many other cases the domicile (or habitual residence) of either party may be a ground of jurisdiction (e.g. Art. 20 and 23 – 27 SCCP; Art. 43 and 46 PIL), in real estate cases the place where the real property is located is ground for jurisdiction, etc. A detailed comparison of the grounds of jurisdiction according to SCCP and the heads of jurisdiction according to PIL goes beyond the scope of this analysis.

3. Heads of jurisdiction

As indicated above, the heads of jurisdiction in international matters are mentioned in the first part of each chapter of PIL specifically for a given subject matter. The same head of jurisdiction might therefore apply in several subject matters, and several heads of jurisdiction might exist within the same matter. In Swiss academic writing, some authors do, however, present the heads of jurisdictions individually, though they do not follow the

³²⁵ Art. 9 SCCP; Kren Kostkiewicz, *Grundriss des Schweizerischen Internationalen Privatrechts*, Bern 2012, N 91.

³²⁶ K. Spühler / A. Dolge / M. Gehrig, *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts*, 9. Auflage, Bern 2010, § 15 N 15.

³²⁷ See R. Gassmann, *Schweizerische Zivilprozessordnung, Stämpfli Handkommentar*, Bern 2010, N 13 ad Art. 2.

same approach or do not carry out their approach consistently.³²⁸ To avoid a countless reproduction of provisions, the following developments will mainly just refer to the relevant provisions that are available online (in French, Italian, German)³²⁹; only some provisions will be quoted.

3.1. Domicile and Habitual Residence

3.1.1. *Forum rei*

Given the big number of specific provisions in PIL, the general head of jurisdiction (*forum rei* - domicile of the defendant, art. 2 PIL) does not really apply independently.³³⁰ Nevertheless, as it is a fundamental principle, the general provision will be quoted here.

Art 2 PIL

"The Swiss judicial or administrative authorities at the defendant's domicile have jurisdiction unless specific provisions of this Act provide otherwise."

Domicile is understood as the state where a person **resides with the intent of establishing permanent residence**, while habitual residence is the state where a person lives during a certain period of time, even if of limited duration (Art. 20 PIL).

Many other provision in the specific part establish jurisdiction also at the defendant's domicile, for example for divorce (Art. 59(a) PIL), for disputes concerning the child-parent relationship (Art. 79 PIL), for the restitution of cultural goods (Art. 98a PIL), in matters concerning securities (Art. 108b PIL), for intellectual property matters – jointly with habitual residence (Art. 109 (1) and (2) PIL, in contractual disputes (Art. 112 (1) PIL), in consumer contracts (Art. 114 (1) (b) PIL, in employment contracts (Art. 115 (1) PIL), for suits based on unjustified enrichment (Art. 127 PIL), in matters of tort (Art. 129 PIL) and nuclear torts (Art. 130 (2) (b)), for a direct claim against the insurance (Art. 131 PIL), in trust matters (Art. 149b (2) (a), in disputes relating to company law (Art. 151 (2) and Art. 152 PIL). Most often, domicile of the defendant is not the only possible place for filing a suit.

3.1.2. Domicile or habitual residence of the plaintiff

The **domicile of the plaintiff** (*Wohnsitz / domicile*) is a ground for jurisdiction in four cases. This rather exceptional jurisdiction is established in cases where the legislator deemed it necessary in order to protect a weaker party such as consumers (Art. 114 (1) PIL, where the consumer can choose to file at his own domicile or habitual residence or at the domicile or habitual residence of the supplier) or employees (Art. 115 PIL, where the employee can file a case at his own domicile or habitual residence (115 (2) PIL) in addition the "general venue" of the domicile of the defendant and the place where the work is carried out (115 (1) PIL).

The domicile of the plaintiff is also one head of jurisdiction in **divorce** cases (besides the domicile of the defendant). However, the legislator, being aware of the unusual character of the venue, imposed some additional requirements: the plaintiff has to be a Swiss national or has to have resided in Switzerland for at least one year. This venue aims at protecting the family interests of people with a supposedly significant link to Switzerland.

³²⁸ Walter, Internationales Zivilprozessrecht, zit., p. 113 seq ; Spühler/Dolge/Gehri, op. cit., p. 42 seq.

³²⁹ See for the French version: <http://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>, for the German version: <http://www.admin.ch/opc/de/classified-compilation/19870312/index.html>, for the Italian version: <http://www.admin.ch/opc/it/classified-compilation/19870312/index.html>.

³³⁰ Bucher & Bonomi, cit., N 81.

In **non-contentious matters**, the domicile or habitual residence (*gewöhnlicher Aufenthalt / residence habituelle*) of the person concerned (often identical to the person requesting an action to be taken) is the relevant criterion for deciding on the competency of the authority or the court to take the respective measure. For adoptions, the authorities at the domicile of the adopting person(s) are competent (Art. 75 PIL), though challenges against adoptions can also be heard at other courts (habitual residence of the child, subsidiary also the place of origin of parent). In most cases, the domicile of the requesting party is one of several possible grounds of jurisdiction: the domicile of the parents is one head of jurisdiction for the recognition of a child (next to the place of birth or the habitual resident of the child; Art. 71 PIL), the last known domicile of the disappeared is a head of jurisdiction for declarations of disappearance of missing persons (Art. 41 (1) PIL, next to jurisdiction in case of a legitimate interest – Art. 41 (2) PIL, see below, 3.7.), and the domicile of the person requesting a change of name is head of jurisdiction for such a requests (Art. 38 PIL, next to the place of origin of Swiss citizens). The domicile of any of the requesting parties (i.e. the future spouses) is also the head of jurisdiction for celebration of marriage (in addition to the Swiss nationality of one of the spouses, Art. 43 PIL, see 3.4.1.). Note that in case of marriage, and as an exception to the general rule, PIL only establishes international jurisdiction but not the competent authority.³³¹

3.1.3. Domicile of any of the parties

In several **family related issues** such as claims related to marriage (Art. 46 PIL) or the establishment or denial of a formal child – parent relationship (Art. 66 PIL), the domicile (or habitual residence) of any of the parties is a head of jurisdiction. This aims, as with divorce claims (3.1.2.) the best possible protection of the family life.

3.1.4. Habitual Residence of the child

The habitual residence of the child is one of the heads of jurisdiction for actions for the establishment or denial of a formal child- parent relationship (Art. 66 PIL, see also 3.1.3.) and for actions relating to that relationship such as actions relating to child support (Art. 79 PIL, together with the domicile or habitual residence of the respondent parent).

3.1.5. Last Domicile of Deceased

The last domicile of the deceased is the head of jurisdiction for succession cases (Art. 86 PIL). This jurisdiction is however not unlimited: in case the state where the real property is located claims exclusive jurisdiction, the Swiss authorities will not have jurisdiction to deal with that property. Several other grounds for jurisdiction exist in succession cases such as the place of origin of the deceased (Art. 87 PIL) or the place where goods are located (Art. 88 PIL), in both cases on the condition that foreign authorities do not deal with the (part of) the estate.

3.2. Seat and Place of Business

The **seat of a company** is the main venue for claims related to **company law** (Art. 151 (1) PIL), though the general rule (domicile of the defendant) also applies for actions directed against the shareholders or members of the company, or persons liable under company law (Art. 151 (2) PIL, see above, 3.1.1.). Similar provisions exist for trusts, where the seat of a trust is a head of jurisdiction for claims relating to trusts in the absence of a choice of law clause, besides the domicile of the defendant and the place of establishment (Art. 149 b (2) PIL).

³³¹ CF-LDIP Bucher, N 2 ad Art. 43.

Besides the statutory seat, several provisions establish jurisdiction in Switzerland for claims against foreign companies, i.e. against companies that do not have its seat in Switzerland. The significant link to Switzerland that allows for Swiss jurisdiction can be twofold: either the factual place of administration, or the place of business.

The **factual seat** of the company, i.e. the place where the company is managed in fact, is a head of jurisdiction for claims against foreign companies and for liability claims against persons managing foreign companies (Art. 152 PIL). For liability claims against persons managing foreign company, Art. 159 PIL establishes the application of Swiss law.

The **place of business** of a company (*établissement / Geschäftsniederlassung*) is defined as the state where an individual person has its center of professional or commercial activities (Art. 20 (1) (c) PIL) or the place where the registered office or any of the branches of a company or a trust are located (Art. 21 (4) PIL). The place of business is a head of jurisdiction for several other actions:

- 1) "actions regarding securities held with an intermediary arising out of the operations of such place of business" (Art. 108b (2) PIL)³³²,
- 2) actions pertaining to the violation of intellectual property rights in relation with the operation of the place of business (Art. 109 (2) PIL), for actions relating to the validity or registration in Switzerland of intellectual property rights, the commercial office of the representative recorded in the register is one of several possible heads of jurisdiction,
- 3) in contractual matters if the action relates to an obligation arising out of the operation of the place of business (112 (2) PIL) – in addition to other contractual fora (place of performance, Art. 113 PIL),
- 4) actions in tort or unjust enrichment (127 and 129 PIL; in tort next to other fora)

3.3. Nationality and origin

For several family related actions, Swiss private international law provides for jurisdiction based on nationality alone, generally as an additional head of jurisdiction. This can be explained by the interest of the national state to offer its protection to its nationals even if they are living abroad and to have clarity on family related issues. For this reason, the head of jurisdiction is often only subsidiary, i.e. it only applies in case if there is a valid reason preventing (one of) the parties to file the case abroad.

Nationality can be a head of jurisdiction for the celebration of marriage (Art. 43 PIL). Art. 43 PIL is the only provision on jurisdiction referring to nationality, as this provision, as an exception to the general rule (2.1.), does not establish national jurisdiction, i.e. what authority is competent. In other situations, PIL designates the territorially competent authority within Switzerland. For doing so, it refers to the Swiss concept of "**place of origin**". In fact, every Swiss citizen is a citizen of a specific municipality (city, village), and the municipalities are competent for the procedure on citizenship (though federal conditions apply).

For actions related to the effects of marriage (Art. 47 PIL) or actions for divorce (Art. 60 PIL), a subsidiary head of jurisdiction at the place of origin of one of the spouses exist in case they are domiciled in Switzerland and the action cannot reasonably be brought at the domicile of either spouse. Also for actions for a declaration establishing or denying a parent-child relationship, the place of origin of one of the parents is subsidiary head of jurisdiction for cases in which actions cannot reasonably be brought at either parent's

³³² Translation according to CR-LDIP Guillaume, 108b.

domicile nor the child's habitual residence (Art. 67 PIL). Similarly, Swiss authorities at the place of origin of the deceased have jurisdiction if the foreign authorities do not deal with the estate (Art. 87 (1) PIL).

For actions relating to the relationship between parents and children, the place of origin of the responding parent or the child might also be a head of jurisdiction if they have neither domicile or habitual residence in Switzerland (Art. 80 PIL).

3.4. *Forum rei sitae*

The location of assets is the exclusive head of jurisdictions for real property claims relating to immovable (Art. 97 PIL, see below, 4.1.1.), and an alternative head of jurisdiction (besides the domicile of the defendant) for real property claims relating to movables (Art. 98 PIL) and for actions for recovery of cultural goods according to the legislation relating to cultural goods (Art. 98 a PIL).

In succession cases, the location of assets is a subsidiary ground of jurisdiction in case foreign authorities do not deal with the part of the estate located in Switzerland (Art. 88 PIL) or for provisional measures (Art. 89 PIL). Similar to nationality (3.3.), the provision aims at making sure that estates situated in Switzerland are dealt with, being aware that other legal systems might have substantially different rules on jurisdiction in succession matters. While the legislator follows the general principle being the jurisdiction at the domicile of the deceased, the possibility that other states do not operate with the same principle are also taken into account.

The situation of assets can also be ground of jurisdiction for provisional measures relating to those assets (Art. 10 (b) PIL) and for measures aiming to **protect Swiss assets** of foreign companies (Art. 153 PIL).

3.5. *Specific fora in contract, tort, securities*

Several provisions provide for specific fora depending on the legal basis of the dispute. In contractual matters, it is the **place of performance** (Art. 113 PIL, with specific provisions relating to employment contracts in Art. 115 PIL) that is an additional head of jurisdiction.

In tort, the places where the **act or the result occurred** are additional heads of jurisdiction (129 and 131 PIL), or, in case of nuclear accidents, the place where the event occurred (130 PIL³³³). The place of occurrence of the result is also a head of jurisdiction for actions relating to violation of intellectual property rights (Art. 109 (2) PIL).

Finally, for liability of public issue of equity and other securities, the place of issue is considered head of jurisdiction (Art. 151 (3) PIL). The same is true in matters of trust (Art. 149b (4)).

The place where a register is kept can give jurisdiction on matters regarding partnership (dissolution of partnership, Art. 65b PIL) but also on intellectual property issues (Art. 109 PIL).

3.6. *Forum necessitatis*

Several provisions of PIL provide for jurisdiction even in the absence of a specific link to Switzerland. The first example is the general rule of Art. 3 PIL, according to which the authorities at the place "with which the case has a sufficient connection" will have jurisdiction even when the act does not provide for jurisdiction. The provision only applies if

³³³ For a diverging opinion see CR-LDIP Bonomi, N 6 ad Art. 130.

it is impossible to proceed or if proceedings abroad or if proceeding abroad cannot be reasonably required (see above, 2.1.).

Another provision providing for jurisdiction even in the absence of a connecting factor is Art. 41 (2) PIL relating to the declaration of disappearance. For such a declaration, jurisdiction exists already if “a legitimate interest” justifies proceeding in Switzerland. Commentaries mention cases of dissolution of marriage and parent-child relationships issues or succession cases, where there is an interest in having certainty on the death of a person.³³⁴

Finally, Art. 85 (3) PIL on the protection of minors and adults provides for jurisdiction on the sole ground that the protection of a person or his/her property requires. (protection of adults and children), and this in addition to other grounds for jurisdiction in this area.

3.7. Other

The **choice of the parties** is a general head of jurisdiction that applies for matters involving an economic interest (Art. 5 PIL). Status issues are therefore excluded.³³⁵ Choice of court clauses are equally not possible if exclusive jurisdiction rules are concerned (see below, 4.). Proceeding on the merits is considered as choice of court and therefore also establishes jurisdiction in matters involving an economic interest.

In some instances, jurisdiction is linked to **jurisdiction on a related claim**, e.g. jurisdiction for the counter claim depending on jurisdiction for the claim (Art. 8 PIL), jurisdiction for provisional measures exists (also) if jurisdiction for the principle action is given (Art. 10 PIL), and jurisdiction for civil claims in criminal proceedings can be brought in the competent criminal court, as far as it is admissible to pursue those claims in criminal proceedings (Art. 8c PIL).

Finally, PIL also provides for **jurisdiction to perfect an attachment** (validation de sequester / Arrestprosequierung) at the forum of the attachment even if no other forum exists. This head of jurisdiction is considered **exorbitant** and therefore not allowed by the Lugano Convention.³³⁶

4. Unilateral coordination of jurisdiction

4.1. Rules on Exclusive Jurisdiction

4.1.1. Exclusive Jurisdiction of the *forum*

As already mentioned previously (2.1), the Swiss Act on Private International Law sometimes explicitly states that the jurisdiction is exclusive, but the terminology and its significance is not entirely coherent. I will therefore first analyse where the term “exclusive jurisdiction” within is used and what are the consequences. In addition, scholarly writers sometimes also qualify other instances as examples of exclusive jurisdiction.

Swiss PIL only knows very **few instances of exclusive jurisdiction**. The legislator uses the term “exclusive jurisdiction” of the forum on the one hand in the context of choice of court agreements (Art. 5 (1) PIL), and, on the other hand, in the context of jurisdiction relating to **immovables** (Art. 97 PIL). In the context of Art. 97 PIL, exclusive jurisdiction prevents recognition of foreign judgments dealing with real property rights concerning real property located in Switzerland in all cases (and this is uncontroversial in spite of the fact

³³⁴ CR-LDIP A. Bucher, N 2 ad Art. 41.

³³⁵ CR LDIP A. Bucher, N 7 ad Art. 5.

³³⁶ CR LDIP A Bucher, N 7 ad Art. 4.

that Art. 108 PIL does not explicitly state so).³³⁷ In addition, according to several authors as well as the preparatory material, the term exclusive jurisdiction prevents Swiss courts from dealing with real property rights concerning an immovable abroad, even if the defendant is domiciled in Switzerland or the parties would agree otherwise.³³⁸

As for **choice of court agreements**, jurisdiction clauses validly agreed upon by the parties are presumed to be exclusive (Art. 5 (1) PIL). Unless the choice of court agreement is formulated differently, this deprives a Swiss court of the possibility to assume jurisdiction it might otherwise have on the basis of an ordinary head of jurisdiction³³⁹ - unless the defendant proceeds on the merits³⁴⁰ (and thereby implicitly agrees to changing the choice of court agreement³⁴¹). In addition, according to the case law of the Swiss Supreme Court, in case of a choice of court clause in favour of a foreign court, the Swiss court has to suspend proceedings until the position of the foreign court is known³⁴². In addition, and more importantly to the present context, according to several writers, it also prevents the recognition of a foreign decision in a case where the parties had previously and validly agreed the jurisdiction of Swiss courts and have not changed that agreement explicitly or by tacitly proceeding on the merits.³⁴³

Finally, the recent provisions on trust law (Art. 149b PIL) provide for a presumption of the exclusive nature of a choice of court clause in the document establishing a trust. Similar considerations as in the context of choice of court agreements apply.

According to some academic writers, other provisions provide for exclusive jurisdiction of the forum in spite of the fact that the legislator does not explicitly state so. In fact, scholarly writers and courts agree that in matters of **validity or registration of intellectual property rights**, the jurisdiction at the place where the authority keeping the register has its office is exclusive.³⁴⁴ Interestingly, as Swiss courts are also competent to deal

One author mentions Art. 6 PIL (implied consent)³⁴⁵ as another case of exclusive jurisdiction – probably based on analogy with Art. 5 PIL and in order to avoid internationally conflicting decisions where the mechanisms of *lis pendens* and *res iudicata* fail.

4.1.2. Absence of Jurisdiction of the *forum*:

As a general rule and quite normally, the absence of an applicable head of jurisdiction precludes the exercise of jurisdiction. In addition, as previously mentioned (4.1.1.), the existence of a **valid choice of court clause** in favour of a foreign court might preclude the national courts from hearing a case – most often, courts will suspend proceedings until it is known whether the foreign court accepts the prorogation.³⁴⁶ Choice of court clauses are only possible in matters involving an economic interest (Art. 5 (1) PIL). In addition, they

³³⁷ Kren Kostkiewicz, cit., N 1815 ; Walter, cit., p. 93 (with the following explanation: „Das Gesetz verlangt ein gewisses Mass an Selbstachtung!“).

³³⁸ BSK-IPRG P. Fisch, N 3 ad Art. 97; B. Berger, Berner Kommentar, Schweizerische Zivilprozessordnung, Band I, Art. 1 – 149 ZPO, Bern 2012, N 19 ad Art. 9; A. K. Schnyder & M. Liatowitsch, op. Cit., N 1052; CR-LDIP L. Gaillard, N 2 ad Art. 97, who advocates the possibility of the parties agreeing on another court in Switzerland; unclear: ZK-IPRG P. Volken, N 17 ad Art. 2.

³³⁹ ATF 119 II 177, c. 3d and 3e; BSK-IPRG P. Grolimund, N 43 ad Art. 5; CR-LDIP A. Bucher, N 31 ad Art. 5.

³⁴⁰ ATF 127 III 118, c. 3b.

³⁴¹ F. Knoepfler et al., Droit international privé Suisse, 3ième edition, Bern 2004, N 614d.

³⁴² ATF 127 III 118, c. 3b.

³⁴³ CR-LDIP Bucher, N 22 ad Art. 26 et N 44 ad Art. 5; ZK-Volken, N 83 and N 91 ad Art. 5 LDIP (whose developments under Art. 26 do however not deal with the issue).

³⁴⁴ CR-LDIP Ducor, N 22 ad Art. 109, with further references; Kren Kostkiewicz, N 90 (referring to Art. 111 PIL); see also BSK-IPRG Jegher, N 44 ad Art. 109 (though the content of the provision has changed).

³⁴⁵ Kren Kostkiewicz, cit., N 90.

³⁴⁶ ATF 127 III 118.

cannot deprive a party in an abusive manner from the protection granted by a forum provided by Swiss law (Art. 5 (2) PIL). This second protection is an application of the more general principle in Swiss law (Art. 2 Civil Code) that abuse of a right will not be protected, and it will only be applied in severe cases – there seems little case law on the issue and doctrinal writers mention especially the cases where protection of weaker parties according to specific rules has failed (e.g. employment contracts).³⁴⁷ Similarly, the existence of a valid arbitration agreement might preclude jurisdiction (Art. 7 PIL).

More generally, Swiss law does not know the doctrine of *forum non conveniens*.³⁴⁸

4.1.3. Exclusive Jurisdiction of a Foreign State:

The legislator refers to exclusive jurisdiction of foreign courts in relation to succession to immovables (Art. 86 (2) PIL). In that context, Swiss courts would generally have jurisdiction to deal with the entire estate in case the deceased had her last domicile in Switzerland. However, if and as far as foreign courts where immovable are located have exclusive jurisdiction in relation to those immovables, Swiss courts lose their jurisdiction.

4.2. *Lis pendens*

Proceedings pending abroad usually lead to the stay of proceedings. Only once a foreign decision is made, and only if that foreign decision is capable of being recognized in Switzerland, the Swiss proceedings will be terminated.

Art. 9 PIL

“(1) When an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland.

(2) In order to determine when an action has been initiated in Switzerland, the conclusive date is that of the first act that is necessary to initiate the proceeding. A notice to appear for conciliation is sufficient.

(3) The Swiss court shall terminate its proceeding as soon as it is presented with a foreign decision capable of being recognized in Switzerland.”³⁴⁹

5. Rules on recognition and enforcement

5.1. Are there cases where a foreign judgment is not recognised because the national jurisdiction is mandatory in certain subjects?

See above, 4.1.1. as well as 4.1.2. More generally, a foreign judgment is only recognized, amongst other conditions, if the foreign court had indirect jurisdiction according to the rules of PIL. The rules on indirect jurisdiction are often similar than the rules on (direct) jurisdiction, but in several cases they are narrower.³⁵⁰ Nevertheless, except for the provisions quoted above (4.1.1.), the fact that a foreign court does not have indirect jurisdiction is not necessarily grounded on the fact that the domestic court does have it – it might equally be that the connecting factor exists in relation to another (third) state.

³⁴⁷ CR-LDIP Bucher, N 28 s ad Art. 5.

³⁴⁸ CR-LDIP Bucher, N 32 seq ad Art. 2-12 ; Spühler/Dolge/Gehri, § 15 N 21; Walter, cit., 105 seq, especially 107.

³⁴⁹ Quoted according to CR-LDIP Bucher.

³⁵⁰ Walter, cit., p. 392 seq.

5.2. Bilateral and Multilateral Agreements

5.2.1. Bilateral Agreements

The following bilateral agreements provide for Jurisdiction / Recognition of foreign judgments:³⁵¹

Belgium (SR 0.276.191.721), Germany (SR 0.276.191.361) Italy (SR 0.276.194.541) Greece (SR 0.142.113.721), Liechtenstein (SR 0.276.195.141), Austria (SR 0.276.191.632), Sweden (SR 0.276.197.141), Slovakia (SR 0.276.197.411), Spain (SR 0.276.193.321), Czech Republic (SR 0.276.197.411).

5.2.2. Multilateral Agreements

The most important multilateral agreement is the Lugano Convention (Convention of October 30, 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters). In addition, Switzerland is party to a many multilateral agreements and generally takes a relatively active role in promoting agreements especially within the framework of The Hague Conference.

The following list provides an overview of the main multilateral agreements relating to jurisdiction and/or recognition and enforcement in force in Switzerland:

- Convention on the international protection of adults, 13 January 2000 (SR 0.211.232.1)
- Convention on Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 19 October 1996 (SR 0.211.231.011)
- Convention on the recognition and enforcement of decisions relating to maintenance obligations, 2 October 1973 (SR 0.211.213.02)
- Convention on the recognition of divorces and legal separations, 1 June 1970 (SR 0.211.212.3)
- Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, 15 April 1958 (SR 0.211.221.432)
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, 20 Mai 1980 (SR 0.211.230.01)

Other agreements also contain provisions on jurisdiction, especially multilateral convention in the sector of transportation such as the Convention on the International Rail Traffic (COTIF), SR 0.742.403.1.

³⁵¹ According to Kren Kostkiewicz, § 1, N 133.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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