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The External Dimension of International Family Law

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Working paper

Family law is not — to say the least — at the heart of the European Union (EU). The EU does not have any competence in family law, which remains in the hands of the Member States. Therefore, if EU law modifies family law, and it does so, it is only indirectly.

Immigration law, firstly, has an impact on family law. The EU is now an area providing freedom of movement to all its citizens. Citizens have an unconditional right to move from one country to another, including with their families. Based on this principle, secondary law and case law have built a great number of solutions in order to promote the freedom of movement, such as the recognition of ‘family status’ and access to social benefits. Those rules frequently concern nationals of third countries who have a family link with a European citizen or a long-term residence in the EU. Therefore, freedom of movement of EU citizens has an important impact both on family law and on immigration rules toward third countries nationals.

The second margin is private international law. According to article 81 TFUE, the EU has the competence to adopt rules on private international law. On the basis of this competence, the EU has adopted, over the last 15 years, many Regulations in the area of private international law in general, and, more particularly in family matters. In doing so, the fundamental goal of the EU was to build a legal regime, which allows for a close cooperation between Member States, closer than between Member States and third States.

Third States, however, cannot be entirely disregarded.¹ Families can, and often do have connections with third countries, either by nationality or domicile and are therefore subject to EU law. The EU's attempts to tackle those issues are twofold, and raise separate questions that are addressed in this paper. First, the EU took competence to enter into international conventions with third countries, the so-called 'external competence'. As discussed in the first part of this paper, the exercise of this competence, raises difficulties in family law. Second, EU instruments on private international family law, although primarily designed for EU judges and EU citizens, have an impact on third countries nationals. As detailed in the second part of this paper, the exact scope of this impact remains uncertain.

I. The EU's External Competence in the Field of Family Law

Treaty making power

The first question is nothing more than the private international aspect of the traditional treaty making power question: who has the power to negotiate, sign and finally ratify an international convention? Of course, this question is not specific to family law. However, experience shows that as far as private international law is concerned, most of the issues were raised in a family law context.

As a general rule, set up in the famous *ERTA* case², the EU's external competence depends on the exercise of its internal competence. This rule has been applied to private international law by the Court of justice in its equally famous 1/94 opinion about the Lugano Convention.³ In this opinion, the Court stated that the external competence in private international law should be given to the EU and not to the Member States because the EU exercised its internal competence in the field by adopting, among others, the Brussels 1 Regulation.

¹ See already: A. Malatesta, S. Bariatti, F. Pocar (eds.), *The external dimension of EC private international law in Family and Successions Matters*, Studi e pubblicazioni delle rivista di diritto internazionale privato et processuale, vol. 71, CEDAM, 2008. See also, in the present volume: Stephanie Francq, "The External Dimension of the Rome I and Rome II Regulations: A Policy of Neutrality, Contrasting the Balanced Unilateralism of EU Substantive Law", *supra*, chap. 4 and Angela Ward & N Jääskinen, "The External Reach of EU Private Law in the Light of *L'Oreal v eBay* and *Google and Google Spain*", *infra*, chap. 6.

² ECJ, 31 March 1971, 22/70, *Commission v. Council*.

³ Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. For a thorough analysis, see F. Pocar (ed.), *The external competence of the EU and Private International Law*, Studi e pubblicazioni delle rivista di diritto internazionale privato et processuale, vol. 67, CEDAM, 2007.

This issue has raised some new difficulties concerning the legal relations between Member States, the EU, and third States.

A good illustration of those difficulties can be seen in the EU's participation in the Hague Conference on private international law.⁴ Those who follow the work of the Conference might remember the effect the entry into force of the Amsterdam treaty had on the negotiations of the worldwide convention on jurisdiction, then discussed in The Hague.⁵ Indeed, the Commission took over those negotiations in spite of objections — and even some bitterness — expressed by Member States delegations. The Commission did so because, it considered that under Article 65 EC (now 81 TFEU), the EU had sole competence in private international law matters.

This shift of power resulted in a modification of the very statute of the Conference, adopted in 2005 and entered into force in 2007: article 3 of the statute now allows that a 'Regional Economic Integration Organisation' may become a member of the Conference. Although drafted in general terms, this provision was clearly designed to allow for the EU's accession to the Conference.⁶ Indeed, the EU became a member of the Conference on 3 April 2007.⁷ Since, the EU has ratified the 2007 texts on Maintenance and signed the 2005 Convention on choice of forum.⁸ Therefore, it is now clear that Member States have competence to sign/ratify conventions adopted before 2007, whereas the EU has competence for those adopted thereafter.

However, this solution is not as simple as it seems, and raises some further problems which are diplomatic and/or political, as much as legal, particularly in family matters.

⁴ W. Warlet, 'La participation de l'Union européenne à la conférence de La Haye', in : M. Benlolo-Carabot, U. Candas et E. Cujo (eds.), *Union Européenne et droit international, mélanges en l'honneur de P. Daillier*, CEDIN – Pedone, 2012, p. 785.

⁵ These negotiation eventually failed due to lacking consensus among the negotiating States ; the work of the Conference, nevertheless, led to the adoption of the 2005 choice of forum Convention.

⁶ Statute, art. 3 (available on www.hcch.net)

'(1) The Member States of the Conference may, at a meeting concerning general affairs and policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned.

(2) To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.'

⁷ Council Decision 2006/719/EC of 5 October 2006 *on the accession of the Community to the Hague Conference on Private International Law*, OJL 297, 26.10.2006, p. 1–14.

⁸ For details, see Hague Conference on Private International Law, *Choice of Forum Convention*, http://www.hcch.net/index_en.php?act=states.details&sid=220 .

The following sections will discuss three of them briefly.

Forcing ratification: The 1996 Child Convention of 1996

Between 1999 (entry into force of the Amsterdam treaty) and 2007 (modification of the Hague Conference status and accession of the EU to the Conference), the situation regarding Hague Conventions was ambiguous. On the one hand, the ratification of pre-2007 conventions was in the hands of the individual Member States, as discussed above. On the other hand, ratification of those conventions also required at least pan-European co-ordination, since EU had gain competence over private international law issues.

A good example of how this ambiguous situation affected the ratification process of The Hague conventions can be seen in what happened regarding the 1996 Child Protection Convention. This convention had been negotiated and signed at a time when the EU had no competence on private international law yet. At the same time, the political decision was taken in EU to address questions of international jurisdiction in family matters in a convention, the Brussels 2 1998 Convention⁹, which was transformed into a Regulation before even entering into force.¹⁰ As both texts (the 1996 Hague Convention and the then Brussels 2 Convention) concerned international child protection, the simultaneousness of the negotiations of those conventions led to some diplomatic turmoil in The Hague. The members of the Hague Conference felt that EU Member States did not negotiate in good faith because the EU negotiations were secret, whereas the Hague discussions were transparent and public. Indeed, the critics from the Hague were largely justified : as the EU did not have any internal competence at the time, as far as international convention are concerned, the 100 years old Hague experience gave the organisation a strong legitimacy to lead and international discussion on the topic.

Anyway, both texts were eventually adopted and the question of ratification arose. According to the Statute of the Hague Conference and EU law at the time it was clear that the competence to ratify the Child Protection Convention laid in the hands of the Member States. However, this competence started to shift shortly thereafter: in 1999, competence in private international law issues was transferred to the EU, and in 2000, the EU exercised this

⁹ *Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Protocol on its interpretation by the Court of Justice*, OJ C 221 of 16.07.1998.

¹⁰ Council Regulation (EC) No 1347/2000 of 29 May 2000 *on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children*, OJ L 160 of 30.06.2000 (Brussels 2 Reg.), now replaced by the so-called Brussels 2 bis Reg., n° 2201/2003, OJ L 338 of 23.12. 2003.

competence by adopting the Regulation Brussels 2. Even though the European Court of Justice had not yet rendered its Lugano opinion, discussed above, it could already be argued at that time that, since internal competence had been exercised, external competence should follow.

Such was indeed the view of the European Council. It adopted a specific decision, the title of which is telling: ‘Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention’. ¹¹

Recital 4 of this decision states as follows:

‘The Community has exclusive competence for the relevant provisions of the Convention insofar as those articles affect Community rules adopted in this area. The Member States should retain their competence in the areas covered by the Convention which do not affect Community law.’

However, the legal situation was less clear than this strong wording might suggest. Indeed, only the Member States could become a party to the 1996 Convention (as stated in recital 5 of the above-mentioned decision by the EU Council). Accordingly, the decision concerning ratification ultimately also lay in the hands of the Member States.. While the political need for a unified European action had thus become obvious, the legal basis for such an common action was far less clear.

It took some political pressure towards the Member States to obtain ratification from all from them. In particular, political difficulties concerning the status of Gibraltar polluted the whole discussion. Because of the territorial dispute between UK and Spain relating to the status of Gibraltar, both countries were unable to agree upon the applicability of the 1996 children Convention to Gibraltar. The situation, appeared completely blocked, and led to an unusually firm letter from the Secretary General of the Hague Conference to the President of the Council of the European Union of 25 October 2005.¹² In the letter, the Secretary General urged all the Member States to find an agreement so as not to jeopardize the entry into force of the 1996 Convention. Eventually, both the UK and Spain ratified the 1996 Convention, albeit with some reservations. Other Member States also took time to ratify the 1996

¹¹ Council Decision 2003/93/EC of 19 December 2002 *authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children*, OJ L 48, 21.02.2003.

¹² Hague Conference on Private International Law, *Letter from the Secretary General of the Hague Conference to the President of the Council of the European Union*: http://www.hcch.net/upload/tb_e.pdf

Convention. It entered into force as late as September 2014 in Belgium. Italy has still not ratified.¹³

The course of event shows that the ratification issue was not as obvious as stated by the European Council in its above-cited 2002 decision. Theoretically, the EU could take legal action against the last reluctant Member State (Italy), but in practice has not done so. This shows that there is still some remaining uncertainty about the exact scope of the external competence of the EU in this field. Politics, here, is difficult to distinguish from law.

Expanding the external competence: The 2007 Maintenance Convention

Maintenance is an area of law where lack of international texts is not to be feared. The Hague Conference adopted three sets of conventions, all of which are still in force today: (i) two conventions on maintenance obligations toward children (1956 and 1958); (ii) two conventions on maintenance in general, applicable law and recognition and enforcement (1973); and (iii) two conventions on recovery and applicable law, the second one being called the Hague Protocol (2007).¹⁴ Meanwhile, the EU decided to take its own legal path and adopted a specific text, the Maintenance 4/2009 Regulation.¹⁵

Such an abundance of texts necessarily creates the risk of overlaps and other difficulties relating to the coordination of those instruments.¹⁶ Those problems are addressed in the instruments themselves, which contain various provisions on the relations between those legal instruments. The discussion here will focus more specifically on the relationship between the EU Regulation 4/2009 and the 2007 Hague Protocol on the law applicable to maintenance.

¹³ Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=70

¹⁴ This last text is called *Protocol of 23 November 2007 on the law applicable to Maintenance obligations*. Use of the term ‘protocol’ rather than the usual ‘convention’ is due to political and practical reasons, and has no impact on its legal nature.

¹⁵ Council Regulation No 4/2009 of 18 December 2008 *on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, OJ L 7, 10.01.2009, p. 1.

¹⁶ For a general survey, see P. Beaumont, B. Hess, L. Walker and S. Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide*, Studies in Private International Law, Hart Publishing, Oxford, 2014.

The first project for a the Regulation by the Commission, in 2005, contained several detailed provisions on the law applicable to maintenance obligation.¹⁷ However, in 2007, when the Hague Protocol on applicable law was adopted, the Commission decided to modify the structure of the draft Regulation: while the draft Regulation still contained rules on jurisdiction, recognition and enforcement provisions on the applicable law were deleted. Instead, the Regulation refers to the Hague Protocol in its very original Article 15, which states:

‘The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that instrument.’

This solution is striking, since it incorporates into European legislation a text that has been adopted at international level, outside the EU’s legislative procedures.¹⁸ This novel solution is, however, not without difficulties. The most important one, in practice, concerns the entry into force of both instruments.

The Hague instruments, like any other international treaties or conventions, have their own procedure for entry into force. For instance, Article 25 of the Hague Protocol states that ‘[t]he Protocol shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 23’. For that reason, the Protocol entered into force in August 2013, three month after Serbia ratified the text, following the EU ratification in 2010.

On the other hand, EU instruments also regulate their entry into force. Article 76 of the 4/2009 Regulation states that: ‘this Regulation shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community.’

Accordingly, whether or not the EU Regulation would enter into force depended, in part, on the Hague Protocol, i.e., an international treaty, the entry into force of which did not depend on EU procedures.

¹⁷ Proposal for a *Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, of 15. 12. 2005, COM/2005/0649 final, article 12 and seq.

¹⁸ More generally on this issue, see. J. Scott, “Extraterritoriality and Territorial Extension in EU Law”, *AJCL* Vol. 62, n° 1, 2014. See also, in the present volume : Stephanie Francq: “The External Dimension of the Rome I and Rome II Regulations: A Policy of Neutrality, Contrasting the Balanced Unilateralism of EU Substantive Law”, *infra*, chap. 4.

This is the reason why the Regulation contains a further provision in the Preamble which provides for the possibility that the Regulation enters into force before the Hague Protocol, or at least for the possibility that the Hague Protocol enters into force in some Member States only. As stated in recital 20 of the text:

‘It should be provided in this Regulation that, for Member States bound by the 2007 Hague Protocol, the rules on conflict of laws in respect of maintenance obligations will be those set out in that Protocol. To that end, a provision referring to the said Protocol should be inserted. The 2007 Hague Protocol will be concluded by the Community in time to enable this Regulation to apply. To take account of a scenario in which the 2007 Hague Protocol does not apply to all the Member States a distinction for the purposes of recognition, enforceability and enforcement of decisions needs to be made in this Regulation between the Member States bound by the 2007 Hague Protocol and those not bound by it’.¹⁹

To take into account this possibility, the recognition and enforcement section distinguishes between decisions rendered in a Member State which is bound by the 2007 Hague Protocol (art. 17 and seq.), on the one hand, and decisions rendered in a Member State which is not bound by the 2007 Hague Protocol (art. 23 and seq.), on the other hand.

This cautious approach proved necessary since, as has just been seen, the Regulation entered into force on 2011 and the Protocol only in 2013. Therefore, there should have been a two years gap, during which the European instrument was in force, but not the Protocol, leaving the resolution of choice of law issues to each Member States.

Such a solution was indeed complex, and European institutions decided it could be avoided. They decided to adopt an original and more radical approach. This approach is probably the best, in terms of efficiency, uniformity, and simplicity. It is, however, questionable from a legal point of view. The solution is twofold.

First, the Council, as has been seen, decided to ratify the Hague Protocol in 2010.²⁰ The competence to do so, however, was not obvious. The *ERTA* doctrine laid down by the ECJ links external competence to the actual exercise of internal competence. Therefore, the EU

¹⁹ Another difficulty needs to be mentioned: the peculiar situation of Denmark and UK regarding texts in matters of Freedom, security and justice (see Recital 47 and 48 of the 4/2009 Regulation and the declaration by the EU with the ratification decision of the Hague Protocol). This question will not be addressed here.

²⁰ Council Decision 2011/220 of 31 March 2011 *on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, OJ L 93, 07.04.2011, p. 9

must have adopted a text dealing with the same questions as the international instrument at stake. This is the reason why, in recital 4 of its 2010 decision, the Council states that :

‘Matters governed by the Convention are also dealt with in Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The Union should decide, in this particular case, to sign the Convention alone and to exercise competence over all the matters governed by it.’

But this assertion could be challenged since, precisely, *there is no choice of law rule in the Regulation*. Instead, as discussed above, Article 15 merely refers to the Hague Protocol in this context. Accordingly, the Hague Protocol and the Regulation have a different scope. The use of the word ‘matter’ in the decision is misleading because both texts concern broadly speaking the same ‘matter’, i.e. maintenance. However, the rules are completely different, since the Hague Protocol deals with choice of law issues, while European Regulation with the other private international law issues. Therefore, the rationale behind the *ERTA* doctrine — that is the risk of jeopardizing a European policy if external competence was exercised by Member States — is not respected. Since there is no autonomous choice of law rule in the Regulation, there is no risk of discrepancy if Member States decide or not to ratify the Hague Protocol.

However, Article 15, which, once again, only provides that the EU will follow the rules of an international instrument, was deemed to be sufficient to exercise external competence. Since there is no substantive rule in Article 15, this solution appears to be nothing else than a self-given exclusive external competence²¹ or, as an author elegantly put it ‘a competence by parthenogenesis’.²²

Secondly, to avoid the time-lap problem, EU made a declaration when it ratified the Protocol.²³ This declaration states that:

‘The European Community declares that it will apply the rules of the Protocol provisionally from 18 June 2011, the date of application of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and

²¹ C. Kohler, « Le nouveau régime transfrontalier des obligations alimentaires en Europe : interrogations sur le règlement (CE) 4/2009 du Conseil », *Annuaire de droit européen 2008*, vol. VI, Bruylant, 2011, p. 1175, at 1183.

²² C. Kohler and W. Pintens, « Entwicklungen im europäischen Familien- und Erbrecht 2008-2009 », *FamRZ*. 2009, 1529 at 1531.

²³ Hague Conference on Private International Law, *Maintenance Protocol - Declarations and Notifications*, http://www.hcch.net/index_en.php?act=status.comment&csid=1065&disp=type

cooperation in matters relating to maintenance obligations, if the Protocol has not entered into force on that date in accordance with Article 25(1) thereof.’

This declaration creates somewhat of a strange legal creature, i.e. a set of European choice of law rules, adopted by reference to an international instrument, which is not in force, but nevertheless applicable in Europe. Such a solution is beyond legal analysis...

Of course, legal criticisms have to be weighed with the obvious political will of both Member States and European institutions. Moreover, the solution that has been followed was probably the most reasonable and simplistic one, since it allowed for a global and simultaneous entry into force of the Hague Protocol in all the Member States. The downside of such a course of action is that the legality of the Regulation could be challenged before the ECJ. A legal action, however, is doubtful for such a narrow and technical question. The aim of this analysis is therefore not to express some kind of legal bitterness or regret; only to confirm the impression that the question of the scope and the exercise of external competence are more political than legal in nature.

Authorizing the accession of third States: The 1980 Convention

Another question concerns the exact scope of the EU’s external competence. The question has been raised before the ECJ in relation to the accession of Russia to the 1980 Hague Child Abduction Convention.

It is usual practice of the Hague Conference to distinguish between two groups of State : those which were a party to the Conference when the convention was adopted, and those which were not, and became a member of the Conference only thereafter. The states in the first group participated in the negotiations and thus ratification is sufficient for a convention to enter in force. In other words, no specific agreement or consent from the other States is required. To the contrary, if a State of the second group wishes to accede to a convention every other State, member of Conference that is already party to said convention must give its consent to this accession. For the 1980 Child Abduction Convention, the model is followed in Articles 37 and 38, which respectively state that:

‘The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session’,

and that :

‘The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession’.

Russia is a member of the Hague Conference since 2001. It wished to accede to the 1980 Convention in 2011. Therefore, Russia’s accession needs to be accepted by the other Conference member States, already party to the 1980 Convention. Inside the EU, some Member States granted their consent. Between those Member States and Russia, the 1980 Convention is now in force.²⁴ However, other Member States, including Germany, Italy, Poland and the UK, have not accepted Russia’s accession yet and the Convention therefore is not in force in relation to those Member States

Such a situation is not satisfying, particularly in a case where, as in child abduction matters, the Union is now governed by a completely unified set of rules since the adoption of the Brussels 2 bis regulation.²⁵ As a matter of policy, a unified solution with third States would be preferable.

However, such a unified solution requires an external competence of the EU. Once again, the existence and the scope of this external competence are questionable. The external competence exists today: Article 81 TFUE gives internal competence to the EU and such internal competence has been exercised by the adoption of the Brussels 2 bis Regulation, which organises a particular legal regime for intra-EU child abduction. However, the Hague Child Abduction Convention was adopted in 1980 and entered into force in 1983 in some Member States, long before the EU’s internal (and thus external) competences existed. Accordingly, regarding the accession of third States, it is unclear who, the EU or the Member States, must provide their consent to the accession. The background for this issue is again political and is related to the reluctance of certain Member States to accept Russia as part of the legal cooperation on child abduction under the Convention. Had they all accepted, it is more than likely that no one would have raised the issue.

This divergence among Member States, and the need for a unified answer led the Commission to put the following question to the Court:

²⁴ See the exact present state of the convention at: Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24

²⁵ Council 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*, OJ L 338 , 23. 12. 2003, p. 1.

‘Does the exclusive competence of the [European] Union encompass the acceptance of the accession of a non-Union country to the Convention on the civil aspects of international child abduction [concluded in the Hague on] 25 October 1980 [(‘the 1980 Hague Convention’ or ‘the Convention’)]?’²⁶

The answer of the Court, given in Grand Chamber, has been delivered on the 14th of October 2014. As suggested by the opinion of Advocate General Jääskinen, the Court gives a positive answer to the question, and states that external exclusive competence does indeed encompass the acceptance of the accession of a third State to the 1980 Convention.

The Court’s opinion, is not a surprise, but its exact outcome is still uncertain. It will more than likely have an important impact on the conventional relations between EU, Member States and third States, not only in relation to accession questions. The opinion of the Court will also influence the possibility for Member States to make declarations and reservations to conventions to which they are already a party to. More generally, the specific nature of the question asked is the possibility of a kind of retroactive application of the external competence. EU Regulations in private international family law all contain provisions dealing with the applicability of previously adopted conventions. The general principle is that prior conventions remain unaffected by the new rules. After the opinion of the Court, granting for an absolute and general external competence to the EU, this solution has now to be revised or, at least, nuanced. Given the dense multi- and bilateral network of conventions in force between Member States and third States, the opinion of the Court could have a significant legal and political impact.

The major lesson to be learned from the study of the emergence of an EU external competence in matters of private international family law is therefore as follows: The existence, the scope, and the exercise of this external competence is a political question, as much as it is a legal one. It leads to an uncommon, flexible approach, which leaves room for political compromises and therefore for what lawyers hate most: uncertainty.

II. EU family law instruments and third State : the example of jurisdiction

EU or extra EU private international law

²⁶ Opinion Avis 1/13, *OJ C* 226, 03. 08. 2013, p. 2.

Since 2000, EU has slowly built a common private international law. More than 15 Regulations are now in force in various fields of law, opening for a discussion about a possible general codification of European private international law.²⁷ The specific nature of EU private international law has been under intense doctrinal scrutiny for the past decades. One of the questions regularly raised is the comparison between private international law inside the EU and private international law regarding relations with third countries. It is still quite unclear whether distinct private international law rules are needed. Should it be thought so, it would be necessary to draw a clear-cut line between rules applicable inside the EU and rules applicable outside the EU.²⁸

Such a distinction is fairly easy to make when it comes to procedural cooperation. In these situations, are involved an ‘outgoing’ State and an ‘incoming’ State. Both of them need to be Member State for the rules of cooperation to be applicable. That solution is followed in various topics: e.g. proof collecting²⁹, service of documents³⁰ or recognition and enforcement of judgments.³¹ In all these cases, cooperation under the concerned Regulation provision is possible if and only if it involves two member States. Third States, therefore, are not involved by the cooperation. The most striking example is to be found in articles 10 and 11 of the Brussels 2 bis Regulation. These articles deal with the child abduction issue, and lay down rules of cooperation that are specific to Member States, but take place inside the functioning of the 1980 Hague Child Abduction Convention. EU Member States have organised a closer cooperation between them, but try to coordinate this cooperation with the one set up with third States.

As far as choice of law is concerned, the difficulty is different, but also fairly simple to tackle. The fundamental option that has been taken by all the Regulations is to treat equally situations involving Member States only or Member States and third States. The choice of law rules are so-called ‘universal’, by which the law applicable is the law designated by the connecting factor, without making any distinction depending on whether this connecting factor is inside

²⁷ See : Communication from the Commission, ‘The EU Justice agenda for 2020 – Strengthening trust, mobility and growth within the EU’, COM 2014/0144 Final, par. 4-2.

²⁸ See A. Nuyts and N. Watté (eds), *International civil litigation in Europe and relations with third States*, Bruylant, Bruxelles, 2005.

²⁹ Reg. 12096/2001, art. 1

³⁰ Reg. 1393/2007, article 1

³¹ Reg. Brussels 1: 44/2001 and 1215/2012, art. 33 and 36; Reg. Brussels 2: 2201/2003, art. 21; Reg. EET 805/2004, art. 1...

or outside of the EU. The model for such a rule is to be found in article 2 of the Rome I Regulation on contracts³² which states:

‘Any law specified by this Regulation shall be applied whether or not it is the law of a Member State’.

The same model is followed in all the other Regulations dealing with choice of law: Rome II³³, or, in family matters, maintenance³⁴, divorce³⁵ or successions.³⁶

But it is much more complicated when it comes to international jurisdiction. In all the previous examples, the question always involved two legal systems, which needed to be coordinated. On the contrary, when it comes to jurisdiction, only one legal system is involved: the system of the judge seized. Cases can have various connections to various States, within or outside the EU. Would, for example a sales contract between a German domiciled and an Argentinian domiciled, with a delivery of goods in Canada be considered to be a contract “inside the EU” ? Would it be different if goods were to be delivered in Italy ?

Per se, international jurisdiction issue concerns only the tribunal of one State, and it is therefore extremely difficult to make a clear distinction between a legal regime that would concern Member States only and another that would concern relations between Member States and third States. The distinction between ‘intra-EU’ and ‘Extra EU’ situations is almost impossible to make.³⁷

As a policy issue, it can be accepted that there is and should be a closer cooperation between Member States that between Member States and third States. The fundamental European principle of mutual trust, and the grid of European Judicial Network allows for close cooperation between authorities, for the sake of the European Citizens. But the question remains to determine how to implement this policy in jurisdiction matters³⁸, taking into

³² Reg. 593/2008.

³³ Reg. 846/2007, article 3

³⁴ Reg. 4/2009, which, as has been seen, refers to the Hague Protocol of 2007, in which article 2 gives universal effect to the choice of law rule.

³⁵ Reg. 1259/2010 (Rome 3 Regulation), art. 4

³⁶ Reg. 650/2012, art. 20

³⁷ In general, see Etienne Pataut, « Qu’est-ce qu’un litige intracommunautaire ? », *Justice et droits fondamentaux, Mélanges J. Normand*, Litec, 2003, p. 365. See also, in the present volume : Angela Ward & N. Jääskinen: “The External Reach of EU Private Law in the Light of *L’Oreal v eBay* and *Google and Google Spain*”, *infra*, chap. 6, at IV.

³⁸ Andrea Bonomi, ‘The opportunity and the modalities of the introduction of Erga Omnes EC rules on jurisdiction’, in A. Malatesta, S. Bariatti, F. Pocar (ed.), *The external dimension of EC private international law in Family and Successions Matters*, Studi e pubblicazioni delle rivista di diritto internazionale privato et processuale, vol. 71, CEDAM, 2008, p. 149.

consideration that the decision taken will have an important impact on recognition and enforcement of foreign judgments.³⁹

Here again, the question is much more political than purely technical. From the family law perspective, it will be submitted that if indeed there is a distinction between different private law relationships, this distinction should not lie upon the jurisdiction rule itself, and that the real difficulty concerns exorbitant grounds of jurisdiction.

As far as jurisdiction is concerned, several models exist, all of them being tested in various European Union instruments.

The original model was set up in the 1968 Brussels Convention, and unchanged in the provisions of its follower, the Brussels 1 Regulation. Following article 2 and 4 of the text, the very applicability of the rules of jurisdiction, subject to a few exceptions, was based on the fact that the defendant was domiciled in a Member State. Therefore, a distinction was drawn between litigation which involved a defendant domiciled in a third State, for which jurisdiction had to be decided upon by national rules and litigation which involved a defendant domiciled in a member State, for which jurisdiction had to be decided upon by European rules.

This solution, however was partly abandoned during the recast of the Brussels 1 Regulation.⁴⁰ Moreover, it has never been followed in family matters, for which existing texts hesitate between semi-universal, or universal rules. This latter model seems preferable, although it leaves open the difficult and political question of the existence of exorbitant grounds of jurisdiction.

Semi universal rules : The Brussels 2 bis approach

The Brussels 2 bis approach is very different from Brussels 1, as the applicability of the jurisdiction rules are not limited by any connecting factor drawing a specific territorial scope of application. Therefore, once the jurisdiction connecting factor is located in a Member State, then the courts of that Member State have jurisdiction, regardless of the other connecting factors. Therefore, in divorce cases, if art. 3 of the Regulation gives jurisdiction to the courts

³⁹ See part. Marc Fallon and Thalia 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*, 2012/2013, vol. 14, p. 1.

⁴⁰ Partly only, unfortunately, and despite the proposal of the Commission, which suggested the deletion of the rule. See part. the critics in European Commission, *Report on the application of Council Regulation n° 44/2001*, COM (2009) 174 final of 21.4.2009, par. 3-2 and the proposal of a new article 4 in European Commission, *Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2010) 748 final of 14.12. 2010.

of a Member State (because of habitual residence, for example), these courts have jurisdiction, regardless of all the other connecting factors. Member State national rules are not applicable at all.

Such a solution was new and could appear somewhat puzzling for judges. This might explain why, for example, the French Cour de cassation affirmed the jurisdiction of the French court pursuant to article 14 of the French civil code and not to the Brussels 2 Regulation in a case where the members of the family had French and/or Moroccan nationality, where the wife and children were living in France but where the husband was living in Morocco, and where jurisdiction of the French court was challenged in favour of jurisdiction of Moroccan courts, by virtue of a bilateral convention.⁴¹ It is very likely that the ‘franco-moroccan’ nature of the relationship hid the fact that an EU piece of legislation was actually applicable. Applicable it was, nevertheless, and if indeed the French courts had jurisdiction, it was thanks to article 3 of the original Brussels 2 Regulation (Reg. 1347/2000) and not to article 14 of the French civil code.

On the contrary, the correct interpretation has been given by the ECJ in one of the first decision interpreting the original Brussels 2 Regulation.⁴² In that situation, which was close to the one decided upon by French courts, a Swedish national domiciled in France wanted to obtain divorce from her Cuban husband, who had returned to Cuba. She seized the Swedish Courts, arguing they had jurisdiction, based on her nationality. The argument, however, was dismissed by the ECJ. As the Court perfectly clearly said (n°28):

‘where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a National of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under art. 3 of the Regulation’.

This solution is far better than the one in Brussels 1. In jurisdiction matters, the question is not to determine whether one or more EU countries are concerned with the legal relationship challenged before the court. The only question is to select an appropriate connecting factor and, if this connecting factor aims at a particular country, give jurisdiction to the courts of that country. The fact that jurisdiction rules are being harmonised at EU level does not make any difference. It does not imply that the legal relationship concerned needs to be connected to

⁴¹ Civ. 1, 28 mars 2006, *JCP*. 2006. II. 10133, note A. Devers. The bilateral convention was in fact not applicable to the case.

⁴² ECJ, 29 nov. 2007, C-68/07, *Sundelind Lopez*. The Brussels 2 bis Regulation has kept the same provisions.

two or more Member States. As far as jurisdiction is concerned, there is no theoretical difference between national rule of jurisdiction and unified rules of jurisdiction, and for third countries, there is no difference between national or European jurisdiction rules. The structure of the rule is the same and the application is the same.

Therefore, adding, as in Brussels 1, a distinction between ‘intra EU’ cases and ‘Extra EU’ cases in order to determine the very applicability of European or national jurisdiction rules seems to be of great complexity for no satisfying theoretical or practical reason.

Brussels 2 Regulation, however, does not radically exclude all national rules. For divorce cases, article 6 and 7 organise a regime where national rules of jurisdiction can be used only when no connecting factor used by the regular jurisdiction rule is located in a Member State ; but in any case these national grounds of jurisdiction cannot be used against a defendant habitually resident in the EU, domiciled in the Common law sense in the United Kingdom or Ireland, or national of a Member State. Lastly, EU nationals habitually resident of another Member State can avail themselves of the national rules of jurisdiction of that State against a defendant who is neither habitually resident in the EU, nor EU national, nor domiciled in the Common law sense in the UK or in Ireland.⁴³

Things are simpler when it comes to parental responsibility, since article 14 simply states that ‘where no court of a Member State has jurisdiction pursuant to article 8 to 13, jurisdiction shall be determined in each Member State by the laws of that State’.

Even though the formulation, at least in divorce cases, might seem complicated, the aim is very simple and the text is able to draw a clear line between national and European rules of jurisdiction. The latter are applicable when the former are not, *i.e* when no connecting factor links the case and the courts of a particular Member State. Therefore, as in Brussels 1, national law on international jurisdiction has not completely disappeared, although, as it will be shown, its role is completely different.

Universal Rules : The Maintenance and Succession Regulations approach

The Maintenance Regulation (4/2009) and the Successions Regulation (650/2012) have adopted another model, simpler and, it is argued, better.⁴⁴

Article 3, 4 and 5 of the maintenance Regulation give the main connecting factors for a court of a Member State to have jurisdiction. Mostly, are involved habitual residence, choice of

⁴³ A. Borrás, ‘Art. 6 and 7’ in U. Magnus and P. Mankowski (eds.), *Brussels II bis Regulation*, Sellier, 2012.

⁴⁴ For a close analysis, see also A. Bonomi, *op. cit.*, at 153.

court by the parties, mere appearance of the defendant. Another possibility is to give jurisdiction to the courts of the Member State which has jurisdiction in a connected family matter.

If no Member State court has jurisdiction in that situation, then art. 6 opens for a subsidiary jurisdiction based on the common nationality of the parties. Lastly, if no Member State has jurisdiction pursuant to all these rules, art. 7 opens for a *forum necessitatis*, based on the fact that a proceeding cannot be reasonably brought before the courts of a third State.

As one can see, there is no room at all for national rules of jurisdiction.

Although the rules are different, the same model have been adopted in the Succession Regulation. Chapter II (art. 4 and *seq.*) organises a complete and closed jurisdiction system. Basically, the competent courts are those of the habitual residence of the deceased (art. 4). In addition, it is possible to have jurisdiction based on choice of forum, choice of law, or mere appearance (art. 5, 6 and 9). If none of these conditions are met, then a court of a Member State can have specific jurisdiction over goods of the deceased that are located in the forum or general jurisdiction if, in addition, the deceased is either a national of that State or had its former habitual residence in that State (art. 10). Lastly, if no Member State has jurisdiction pursuant to all these rules, art. 11 also opens for a *forum necessitatis*, based, once again, on the fact that a proceeding cannot be reasonably brought before the courts of a third State.

Once again, national rules of jurisdiction are completely left aside.

Exorbitant rules of jurisdiction

In the Brussels 1 text, two separate bodies of international rules of jurisdiction are still necessary, since when the defendant is domiciled outside the EU, the basic rules of jurisdiction do not apply, even when the connecting factor (*e.g.*, the place of the tort) is located in a Member State. Therefore, the use of national rules of jurisdiction is inevitable and not limited to exorbitant grounds of jurisdiction. In Brussels 2 bis, on the contrary, there is no need for national rules of jurisdiction. The provisions of the Regulation completely supersede national rules, and are potentially applicable to every situation.

Therefore, article 6 and 7 of Brussels 2 bis completely differ from article 4 of Brussels 1: where article 4 is a technical necessity, article 6 and 7 are a fundamental policy choice. Article 4 is a technical necessity, since one needs to know what happens when the defendant is domiciled outside the EU; in addition, it leaves room for exorbitant grounds of jurisdiction.

On the contrary, the only objective of article 6 and 7 is to allow the use of exorbitant grounds of jurisdiction.

Exorbitant grounds of jurisdiction are difficult to define. As a broad definition, exorbitant jurisdiction can be defined as rules of jurisdiction based on criteria that cannot be considered as a reasonable link between the dispute and the forum. Of course, as it is extremely difficult to precisely define what a “reasonable link” is, the distinction between ‘exorbitant’ and ‘non exorbitant’ ground of jurisdiction is largely a matter of policy. The choice in Brussels 2 bis, is to base divorce jurisdiction on habitual residence and nationality of both spouses. It could be argued, and indeed is very often, that the habitual residence accepted in Brussels 2 bis is too large. However, taken the text as it is, it results clearly from the provisions of the family matters regulations that every rule that has not been accepted as a basis for jurisdiction is to be considered as exorbitant. The hierarchical relationship between European rules of jurisdiction and national rules of jurisdiction makes that very clear.

Brussels 2 bis, Maintenance and Succession Regulations accept that, in some cases, Courts of a Member State can be given jurisdiction in a situation where none of the connecting factors of the ordinary rules are located within the EU. In other words, it is only when the jurisdiction rules in the Regulations do not point any judge in the EU that national rules can be used. National rules of international jurisdiction are secondary, inferior rules. Moreover, the exceptional nature of these situations is stressed by the fact, in Brussels 2, EU nationals, the EU residents and the UK or Ireland domiciled are immune from these forum and, in the two other Regulations the rules are of subsidiary nature.

Therefore, as one can see, two very different questions are here at stake. The first one is to determine whether there should be room for national rules of jurisdiction *in general*, based on the fact that the litigation is located in the EU. The second one is to determine whether one needs *exorbitant grounds* of jurisdiction, and if so, if those exorbitant grounds of jurisdiction should be governed by national or European rules.

It is argued that the family law model is far better for answering the first question. Once again, in our view, there is no theoretical nor practical convincing argument in favour of keeping two sets of rules for international jurisdiction. Once the political decision of adopting European rules, these rules should completely replace their national counterparts.

Do we need exorbitant rules of jurisdiction ?

It is far from obvious that exorbitant rules of jurisdiction are needed and there are today strong arguments against such rules.⁴⁵ These arguments seem particularly strong in family matters, where the international harmony of solution is of the utmost importance. Exorbitant grounds of jurisdiction jeopardize recognition abroad and, therefore, should be used only when strong policy arguments favour the attraction of a specific litigation before the courts of a particular Member State.

Moreover, it is to be regretted that national law could not be completely left aside. If ever it appeared really impossible to completely refuse exorbitant jurisdiction in family matters in Europe, then why could such a choice not be done at European level? If complete unification of ordinary rules of jurisdiction is possible, then it could also be possible, or at least thoroughly discussed, to unify exorbitant grounds of jurisdiction. Therefore, the solution eventually adopted in Brussels 2 bis, even if it is better than the one adopted in Brussels 1, can be criticised. It seems rather unpredictable and, since every Member State is free to keep any rule it considers useful for whatever reasons, it does not reflect a policy that would be endorsed by the whole EU. Since the 'europeanisation' of jurisdiction has been decided, the same should follow with the exorbitant rules.

This analysis is obviously shared by the Commission. A few years ago, a modification of the Brussels 2 text was proposed.⁴⁶ In that proposal, the Commission suggested to adopt two uniform exorbitant rules: one based on the nationality of one of the spouses, the other based on the fact that the spouses had a common habitual residence on the territory of a Member State for three years. Indeed, those rules could be contested, for the need of exorbitant rule can be challenged. But at least, predictability would be enhanced by unification. This solution has eventually not been yet accepted by Member States for divorce⁴⁷, but, as we have seen, it has for successions and maintenance.

The Brussels 2 bis rules, also leads to a strange solution, because of the choice that has been made to protect from national rules an important class of defendants, those who are integrated in the EU, either by habitual residence, domicile (UK or Ireland) or nationality. Therefore, this rule organises an open discrimination towards national from third countries living abroad.

⁴⁵ See in particular (in the Brussels 1 context) D. Fernandez Arroyo, « Exorbitant and exclusive grounds of jurisdiction in European private international law : will they ever survive ? », *Festschrift für E. Jayme*, Sellier, 2004, p. 169.

⁴⁶ European Commission, *Proposal for a Council Regulation amending Regulation (EC) n° 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters*, COM (2006) 399 Final, of 17 July 2006, proposal for a new article 7, p. 14.

⁴⁷ As it has not been accepted for the Brussels 1 recast, where the Commission also suggested a uniform set of exorbitant rules, including a *forum necessitatis*, which has been rejected by Member States.

Such a policy choice in favour of an open discrimination can be challenged. The reasons for such discrimination do not clearly appear, especially in family matters. Once again, international harmony is of great importance in family matters, and therefore the possibility of international recognition should always be taken into account. Outside article 3, 4 and 5, and because of this protection of EU nationals and EU residents, Member States courts will only hear cases with almost no connection at all with their territory, seriously challenging the chances of international recognition of their decision. It is to be regretted that such an important choice is not more justified, for cases where it does not seem that the competence of a Member State court is really justified.

It seems that the *forum necessitatis* which has been adopted in both the Succession and Maintenance Regulations is to be preferred. It allows for exceptional extension of jurisdiction of the courts of a member State, when the foreign forum with the closest connection is unavailable, or when it would be too much of a burden for the plaintiff. Although the rule leaves room for uncertainty, it is a better approach to the exceptional nature of the intervention of the Member State court.

Therefore, as one can see, it is argued that, when it comes to jurisdiction, there is no really convincing reason to make unclear distinction between European and non-European litigation. The question is not to determine whether there are connections with third States, but only to determine whether the connecting factor adopted by a jurisdiction rule is located in Europe or abroad. When it comes to jurisdiction, the whole European territory should be considered as a single legal order. Certainty and simplicity would certainly gain a lot if the Successions or Maintenance model was followed.