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Exclusive and Discretionary Heads of Jurisdiction for Third States and Lugano States: the Way Forward*

1. Jurisdictional Rules and Third States in the Recast

The Swiss Institute of Comparative Law was conducting research on behalf of the European Parliament,[1] particularly in relation to the possible evolution of European cases connected with third States and with a view to preparing a draft Recast, when the EU Regulation n° 1215/2012, was approved in December 2012.[2] Despite the approval of the Recast, the IURI Committee of the EU Parliament made it clear that the SICL study should continue, as it eventually did, since the Recast did not exclude future modifications.

Explicitly, the European legislator considers the Brussels system – if I may call it so[3] – as an on-going legislative process, subject to continuous adjustments and editing. Truly, in the Recast, the existing "changes in the revised Brussels I Regulation" as relate to the "extension of the spatial scope to third States defendants" are not paramount; rather it is possible to acknowledge, with Professor von Hein, that the recast was quite deceiving for those who had foreseen significant changes in this respect. The study, whose content is synthesised in the following pages, seeks to prepare a theoretical framework for future jurisdictional rules with regard to third States.

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1 Study PE 493.024 financed by the European Parliament. The first four parts of the study, as well as an addendum suggesting changes in the text of the recast, are reproduced in the Yearbook of Private International Law, Volume 15 (2013/2014), at 211–253. The study, including: the executive summary, the introduction and the national reports, is available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-URI_ET(2014)493024_EN.pdf.

2 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 20.12.2012 n° L 351/1.

3 By the expression Brussels system I refer here to: the 1968 Brussels Convention, the Brussels I Regulation and the Recast.

2. The Introduction of a European Arena between the National and International Ones

In this context, the expression "extension to third States" as used in the original title of this contribution could have been tricky, if not misleading, and has therefore been amended in the present written contribution. It must be clear that the EU has no power to extend its rules to third States.

What the EU may do, and has the power to do, is to establish unilateral jurisdictional rules for the purpose of attempting to co-ordinate – in a unilateral manner – the European private international law system(s) with that of third States.[4] This may be done through the unilateral adoption by the EU of jurisdictional rules specifically addressed to disputes involving third States.

Why "unilaterally"? Because the situation of EU cases is structurally different from that of non-EU cases.

Take the example of a dispute connected with Germany and Italy: the jurisdictional rule is provided by the Brussels Regulation applicable in both countries; the rules of recognition and enforcement are also found therein. The EU has the power to establish the rule and to control its implementation, both by Germany and Italy.

When the international element of a dispute points to a third State for example, a dispute connected with Germany and China, the control and power of the EU lies only within the borders of Germany.

In the first hypothetical case, the EU has the power to decide *which* of the two jurisdictions has jurisdictional power (and even exclusive jurisdictional power). In the second, the EU has the power to decide *if* the German jurisdiction may or may not hear the case, and *if* the German Jurisdiction may or may not recognise and enforce the Chinese judgement.

Obviously, that the EU may not say *which* jurisdiction between China and Germany has jurisdiction. The issue of *which* jurisdiction – between Germany and China – could only be decided by an international covenant in force between the EU (or Germany) and China, prescribing specific heads of jurisdiction to the judges of each country (*brevitatis causa*).[5]

There is also another possibility to explore. The EU may, in the future, establish a set of unilateral criteria imposing particular rules of jurisdiction on Germany; i.e. clarifying *if* German judges may or may not – or even: must or must not – hear a case connected with China.

In this second hypothesis, however, these criteria (uniform for European countries) may potentially be in conflict with the corresponding unilateral criteria of China. In this case, it is clear that *positive* as well as *negative* conflicts of jurisdiction cannot be prevented as it would be the case if an international covenant between EU and China were in force. However, the adoption of EU unilateral criteria would at least have the beneficial effect of designing the boundaries of European jurisdiction: European judges would adopt the same attitude with regard to accepting or refusing to hear the case connected with China.

4 See L. MARI and I. PRETELLI, The Brussels I Regulation (Recast) and Extra EU Disputes – *Excerpta* of the Study PE 493.024 of the Swiss Institute of Comparative Law, at 213– 215, n. A, 1. B, 1.

5 *Ibi*, p. 222 et seq., especially at 224, n. A.

3. EU vs. Non-EU Private International Law Cases

It is important to stress that the domicile of the defendant is not the sole factor that allows characterisation of a case as an EU case subject to the application of the Recast instead of National PIL rules (that still govern Non-EU cases). According to the Brussels I Regulation, the link between an EU Member State and a third State is not merely measured by the existence of the domicile of the defendant in a third State. When we consider an EU-case, it might be that, despite the domicile of the defendant being in a third State, the case is connected to EU countries due to an EU exclusive jurisdiction rule.

4. The Four Notions of Exclusive Jurisdiction in Private International Law

4.1. The Three Notions of Exclusive Jurisdiction in National PIL Systems

The concept of exclusive jurisdiction in the Brussels regime does not correspond to the concept of exclusive jurisdiction at the national level.[6]

At the national level, "exclusive jurisdiction" covers three main conceptual scenarios.

First, it embraces those cases where a State is in the position of being the sole State able to enforce a judicial decision. In the case of *stricto sensu* "exclusive jurisdiction", a State is in the position to refuse to give effect to any other State's evaluation of the same case. In this respect, exclusive jurisdiction entails the refusal to give effect to a foreign judgment. The State bars the entrance to a foreign judgment that has settled an international dispute whenever it claims to have exclusive jurisdiction over that dispute. Art. 97 of the Swiss PIL Statute illustrates paradigmatically "exclusive jurisdiction in the true sense": "The courts at the place where real property is located in Switzerland have exclusive jurisdiction to entertain actions relating to real property rights".[7]

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 dispute with another State is so strong that its decision risks being useless. A State "withdraws" its judicial jurisdiction and obliges its judges to decline jurisdiction to avoid the risk of exercising it futilely. The Italian PIL Statute has a clear-cut rule of exclusive foreign jurisdiction in its art. 5: "(Actions concerning rights *in rem* in immovable situated abroad) 1. Italian courts shall have no jurisdiction over actions concerning rights *in rem* in immovable situated abroad".[8]

6 See extensively, L. MARI and I. PRETELLI (note 4), especially at 216–219.

7 Translation from A. BUCHER, Commentaire. romand, Basel 2011, at 835. The same translation is available on line at http://www.andreasbucherlaw.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf.

8 Italian Statute on Private International Law of 31 May 1995, No 218 (as originally adopted, unofficial English translation provided by the University of Ferrara at http://www.unife.it/giurisprudenza/giurisprudenza/studiare/private-international-law/materiale-didattico/archivio/italian-statute-on-private-international-law-of-31-may-1995-no-218-as-originally-adopted-unofficial-english-translation/view.

The third category of rules is that of a "verified exclusive foreign jurisdiction"; this 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 particular dispute. An example of "verified exclusive foreign jurisdiction" is provided by art. 86-2 of the Swiss PIL Statute: "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".[9] In other words, the Swiss judge will not exercise jurisdiction – despite the existence in Switzerland of a ground of jurisdiction (the last domicile of the deceased) – whenever he verifies that the legal order where the deceased' real property is located claims "exclusive jurisdiction in the true sense".

These rules are a corollary of the principle of effectiveness:[10] the collaboration of the legal order capable of giving effect to a judicial decision is unavoidable: considering its point of view is likewise unavoidable in order to prevent a waste of judicial resources.

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

4.2. The Notion of Exclusive Jurisdiction in the Brussels System

These three categories of exclusive jurisdiction rules, unilaterally and autonomously foreseen by national legal orders, cannot be assimilated with the European category of exclusive jurisdiction. The European category is different: it adds to the aforementioned three concepts a fourth meaning of "exclusive" jurisdiction.

In the Brussels system, the rules attributing exclusive jurisdiction are addressed to *all the judges of 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.

9 A. BUCHER (note 7).

10 The principle of effectiveness expresses in Private International Law the link between the jurisdictional and the legislative power and the power of enforcement. It prescribes to give jurisdiction to the strongest legal order, the one in the position to give effect to its own evaluations. See, in legal theory, J. AUSTIN, *The Province of Jurisprudence determined*, London, John Murray, 1832, at 7-8. In Private International Law the principle was theorized by F. KAHN, *Gesetzkollisionen, Ein Beitrag zur Lehre des internationalen Privatrechts*, in: *Jehrings Jahrbücher*, vol. 30, 1891, reprinted by O. Lenel and H. Lewald, *Abhandlungen zum internationalen Privatrecht*, München und Leipzig, 1928, at 31-46, referring to it as *Näherberechtigung* and followed by M. WOLFF and W. WENGLER. The principle of effectiveness, deprived from the reference to the power of coercion, gave birth to the "*principe de proximité*".

In so doing, the EU considers itself a single territorial jurisdictional unit.

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.[11] 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 dispute and simultaneously denies, due to the absence of international competence, any possibility whatsoever of recognising any foreign judgment that purports to settle it.[12]

This internal distribution of jurisdictional power has not been accompanied by a uniform regulation setting the limits of EU Member States' jurisdictional power in respect of disputes falling outside the scope of such internal distribution.

5. Distribution of Competence vs. Delimitation of Jurisdictional Power

In light of this theoretical framework, 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 option is that of creating grounds for jurisdiction on an *ad hoc* basis for defendants who are not domiciled in a Member State.[13] This latter approach has the advantage of keeping and showing the conceptual difference between the issue of distributing cases among the judges belonging to the same territorial unit – the EU's area of freedom justice and security – and the

separate issue of deciding, unilaterally, which connecting factors are considered relevant for the EU in order to found the jurisdiction of European judges.

Under the second approach, the existing dividing line between EU disputes and non-EU disputes needs to be kept and maintained.

Specific criteria for non-EU cases need to be set, so 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 (for example, where its *forum* is not appropriate, economical or convenient due to concerns of legislative policy).

For non-EU cases, such specific set of jurisdiction criteria may well include exclusive criteria of jurisdiction, within one or more of the three meanings explained above (at 4.1.), whereas for Lugano cases, the existing parallel criteria of exclusive jurisdiction (in the sense explained at 4.2., although *mutatis mutandis*) may be left

unaltered.

11 See L. MARI and I. PRETELLI (note 4), at 217, n. C1.

12 *Ibidem*.

13 See L. MARI and I. PRETELLI (note 4), at 243 *et seq*., especially at 245 - B2.

Moreover, 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 to the issue of choice-of-forum and *lis pendens*,[14] as well as to 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.

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.

6. The Parallelism between the Brussels and Lugano Systems:[15] still under Construction?

When considering the "external relations" of the EU, we find ourselves faced with two different categories of third States: *i)* the Lugano States, *i.e.* third States with regard to the EU regulations but nevertheless belonging to a *lato sensu* "European system of judicial cooperation" and sharing – up to now and still – a same logic of solutions; and *ii)* all the other States, with whom only a limited number of Hague Conventions on civil procedure have been ratified and provide an interstate coordination.

In this respect, one issue concerns the parallelism between the Brussels and Lugano systems as regards to third States belonging to the second group. A first foreseeable scenario will occur if the EU were to start regulating unilaterally the jurisdiction of European judges in cases that are extra-European and extra-Lugano. In this case the EU will have uniform jurisdictional rules of Member States even in respect of third (extra-Lugano) States.[16] In addition, the EU may decide – again unilaterally – to adopt uniform rules on recognition and enforcement of judgments coming from third States.

Both scenarios affect the parallelism between the Brussels and the Lugano systems since it is unlikely that Lugano States would be interested in aligning their policies in those matters with those of the EU *a posteriori*. It would therefore be judicious to evaluate the possibility of choosing a specific set of criteria jointly, or in parallel debates, in the framework of the "Lugano space". The possibility of discussing an agreement between the EU and the Lugano States in a "Lugano arena" as regards to indirect criteria of jurisdiction with the aim of easing the recognition of extra-Brussels-and-Lugano judgments in Europe is a matter that is very worthy of further exploration.

The alternative is that each entity, being the EU on one side and each of the Lugano States on the other, will continue to regulate jurisdiction towards third States (extra-EU and extra-Lugano) as well as recognition of extra-EU and extra-Lugano judgments according to their respective particular needs, interests and relations.

14 Supra J. VON HEIN, at 4.4. and 4.5.

15 By the expression Lugano system, I refer here to the two Lugano Conventions: the 1998 Lugano Convention and the 2007 Lugano Convention.