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Recent Developments in European Private International Law under Case Law of the Court of Justice

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Abstract

Within the context of the subject of the Private International Law Section, the contribution identifies selected recent judgments of the Court of Justice of the European Union, which indicate further developments in this area of law. The contribution will focus on the provisions for determining international jurisdiction as well as the recognition and enforcement of foreign decisions.

Keywords

European Union; Private International Law; Court of Justice; Case-law; Judgment; Regulation; Jurisdiction; Recognition and Enforcement; Civil and Commercial Matters; Arbitral Proceedings.

1 Introduction

It is fundamental fact that the Treaty establishing the European Economic Community ("TEEC"), which introduced the internal market and the free movement of goods, persons, services, capital, also known as the "four freedoms", envisaged simultaneously by its Art. 220 the free movement of judicial and arbitration decisions (judgments and arbitral awards), its recognition and enforcement anywhere in the European Economic Community ("EEC"), as "fifth freedom". This free movement of enforcement orders has gradually emerged as a key element in strengthening cross-border law enforcement and a prerequisite for the effective application of the fundamental four freedoms at all.

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As European Commission has already in 1959 pointed out, *a true internal market between the Member States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments*.[1]

Nevertheless, it took nearly six years for the expert commission[2] to submit for approval **Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention")**, within the meaning of Art. 220 TEEC, which entered into force on 1 February 1973. Thus was laid the foundation of a uniquely European body of procedural law.[3]

The subsequent logical and second legislative step was the adoption of the **Convention of 19 June 1980 on the law applicable to contractual obligations ("Rome Convention")**, which came into force on 1. 4. 1991. The Convention does not set out its legal basis and in its short preamble refers just to "*the efforts to continue in the field of private international law to work on the harmonization of the law which has begun within the Community, in particular as regards jurisdiction and the enforcement of judgments*".

The Brussels Convention becomes source of Community law since the Member States concluded the **Protocol on the interpretation of the Brussels Convention by the Court of Justice of the European**

1 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968, p. 38 ("Jenard Report"). It takes the form of a commentary on the Convention (see information of the Council published on the first page of the Report).

2 The committee of experts was established in 1960. Preliminary draft od the Convention was adopted in December 1964. The draft Convention was finally adopted by the experts on 15 July 1966. The Convention was signed in Brussels on 27 September 1968.

3 Reuland, R. The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention. *Michigan Journal of International Law*. 1993, Vol. 14, No. 4, p. 560.

Communities.[4] Under Art. 2 of the Protocol, supreme courts[5] as well as other courts when they are sitting in an appellate capacity may request the European Court of Justice ("Court of Justice") to give preliminary rulings on questions of interpretation of the Convention.

The Court of Justice, as an exclusive judicial institution of the European Communities, assumes its jurisdiction and applies the Brussels Convention according to the interpretative methods of Community law, thus making Brussels Convention 'communitarian', irrespective of the legal basis of Art. 220 TEEC, which did not accord such a character to international treaties arising therefrom.

As has already been stated by the Court on the first occasion of the interpretation of the Brussels Convention, it frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member state to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member states or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought. Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Brussels Convention to ensure that it is fully effective having regard to the objectives of Art. 220 of the TEEC. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Brussels Convention does not prejudge the question of the substantive rule applicable to the particular case.[6]

According to many evaluations, the Protocol was a singular event in the continuing history of legal, social, and political integration in Europe. The Court of Justice was the first international court to be afforded jurisdiction over a private international law convention. Therefore, the Court has been given

4 This Protocol was signed in Luxembourg on 3 June 1971 and entered into force with the Convention on the same day (1 February 1973).

5 Regardless of their civil, commercial or administrative jurisdiction (i.e. in France both Cour de Cassation and Conseil d`État or in Portugal Supremo Tribunal de Justiça and Supremo Tribunal Administrativo, were entitled to submit preliminary ruling).

6 Judgment of the Court of Justice of Justice of 6 October 1976, Case 12/76, para. 10 and 11.

an opportunity of solving, in a unitary European perspective, the problems of interpretation arising from the Brussels Convention. The Court of Justice has certainly availed itself of this opportunity and has, on several occasions, interpreted disputed Brussels Convention terms by adopting a Community definition instead of a definition favored by a particular Member State.[7]

The first preliminary rulings were initiated in 1975 and 1976 by courts from almost all the Member States at that time.[8]

Incidentally, from the very first moments of the application of the Brussels Convention, it was clear that the questions referred would be divided into two basic groups:

1. questions concerning the interpretation of alternative jurisdiction under Art. 5 of the Convention[9], in particular expressions "*obligation*", "*the place of performance of the obligation*" and "*the place where the harmful event occurred*" and
2. all (and "significant") others.

More than 100 judgments of the Court of Justice were delivered under Brussels Convention and the Court's case-law contributed significantly to the updating and modernization of the Brussels Convention without necessity to amend it including and (fundamentally) uniform application across EEC.

Any State which becomes a member of the EEC was required to accede the Brussels Convention. But it has not always been a clear task. It is fact, when the United Kingdom, Ireland, and Denmark became members of the European Community ("EC") in 1973, negotiations resulting even in a 1978 Convention of accession[10] which also modified and amended the Brussels

7 Reuland, R. The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention. *Michigan Journal of International Law*. 1993, Vol. 14, No. 4, p. 566.

8 See cases before Court of Justice: Judgment of the Court of Justice of 6 October 1976, Case 12/76; Judgment of the Court of Justice of Justice of 6 October 1976, Case 14/76; Judgment of the Court of Justice of Justice of 30 November 1976, Case 21/76; Judgment of the Court of Justice of Justice of 14 October 1976, Case 29/76.

9 See also Art. 5 Brussels I Regulation and Art. 7 Brussels I bis Regulation.

10 The fact that the accession of Ireland and the United Kingdom to the Brussels Convention was not merely a technical question underlines the fact that, in the first question referred to the Court of Justice (Case 12/76), both States were active and submitted observations even though they were not a party to the Brussels Convention at that time. See Judgment of the Court of Justice of 6 October 1976, Case 12/76, para. 5–8.

Convention on several provisions in order to accommodate the interests of the new Member States, but without altering the fundamental principles of the original document.

It was not until the **Treaty of Amsterdam**[11] that the private international law was unambiguously included in Community law. Private international law, in EC law terminology known as "*judicial cooperation in civil matters*", was excluded from the third pillar of the European Union ("EU") and attached as the new provisions to TEC (legal base was adopted in Art. 65 TEC).

Only within a year after the entry into force of the Treaty of Amsterdam, the first three key regulations are adopted:

1. Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("the Brussels II Regulation"), very early replaced by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis Regulation"), which will soon be replaced (from 1 August 2022) by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ("Brussels II Regulation Recast"),
2. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("Insolvency Regulation"), later replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Insolvency Regulation Recast") and
3. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), which has replaced the Brussels Convention apart from Denmark. Brussels I Regulation was replaced from 10 January 2015 by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and

11 Signed on 2 October 1997 and valid from 1 May 1999.

enforcement of judgments in civil and commercial matters ("Brussels I bis Regulation").

It must be noted, that in so far as Brussels I bis Regulation repeals and replaces Brussels I Regulation which has itself replaced the Brussels Convention, as amended by successive conventions on the accession of new Member States to that convention, **the Court's interpretation** of the provisions of the latter legal instruments also **applies** to Brussels I bis Regulation whenever those provisions may be regarded as 'equivalent'.[12] This means that a substantial part of the case-law of the Court of Justice since 1976 has remained valid, but also the urgent need to use so-called **correlation tables**, which have special role in its application in this respect.[13]

It should be also pointed out, that the new legal basis contained in Art. 65 TEC as amended by the Amsterdam Treaty was extended to the adoption of legislative acts also in the **new area of EU private international law**, i.e.:

a) system for cross border service of judicial and extrajudicial documents,
b) cooperation in the taking of evidence,
c) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws,
d) eliminating obstacles to the good functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The above-mentioned areas have been regulated in particular by new acts:

1. Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, later replaced by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000,

12 Judgment of the Court of Justice (Eighth Chamber) of 31 May 2018, Case C-306/17.
13 See e.g. correlation table as Annex III of Brussels I bis Regulation.

2. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,
3. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation") and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"),
4. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure ("European Payment Order Regulation") and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure ("Small Claims Procedure Regulation").

The Treaty of Amsterdam also retained a **restriction for the courts of first instance** to initiate preliminary ruling on the interpretation of regulations adopted in the field EU private international law, in a specific provision of Art. 68 TEC, which was a *lex specialis* to Art. 234 TEC as the "basic" preliminary procedure provision. According to the Court of Justice settled case law at that time, the question referred for a preliminary ruling by courts, decision of which is open to appeal, is not admissible.[14] The reference for a preliminary ruling can only be initiated by a court whose decision can no longer be challenged by an appeal, and that is generally the supreme court.[15]

The adoption of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims ("European Enforcement Order Regulation") was an important step in the field of recognition and enforcement of judicial and extrajudicial decisions and was a *lex specialis*[16] to the Brussels I Regulation.

Other *lex specialis* regulations are adopted for **specific legal institutes** and include a new approach consisting in regulating all issues (jurisdiction,

14 See Order of the Court of Justice (Fourth Chamber) of 10 June 2004, Case C-555/03.
15 Judgment of the Court of Justice of 4 June 2002, Case C-99/00.
16 More precisely, the lex alternative, since the application of the Brussels I Regulation was not excluded.

applicable law, recognition and enforcement and cooperation of the courts/central authorities of the Member States) by one single act.[17]

2 Court of Justice role after Lisbon Treaty

Restriction which has existed from adoption of the Protocol (1971), and upheld by Amsterdam Treaty, had its advantages and disadvantages, but in fact it seemed to have forced the first instance courts to properly deal with the Court's previous case-law and to assess its possible development.

With effect from 1 December 2009 the **Treaty of Lisbon**[18] removes those restrictions on the jurisdiction of the Court of Justice of the European Union ("CJEU")[19] to give preliminary rulings in area of EU private international law for first instance courts.[20] But even before from 1 December 2009 CJEU has accepted preliminary ruling asked by first instance court (e.g. Polish court has delivered its question on 23 July 2009) with reasoning, that "*the objective pursued by Article 267 TFEU of establishing effective cooperation between the Court of Justice and the national courts and the principle of procedural economy are arguments in favour of regarding references for a preliminary ruling as admissible where they were lodged by lower courts during the transitional period that elapsed shortly before the entry into force of the Treaty of Lisbon and have not been examined by the Court until after its entry into force. Rejection on the ground of inadmissibility would, in those circumstances, only lead the referring court, which would in the meantime*

17 See 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 ("Maintenance Regulation") or Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ("Succession Regulation").

18 Signed on 13 December 2007.

19 See also Biondi, A., Eeckhout, P., Ripley, S. *EU Law after Lisbon*. Oxford: Oxford University Press, 2012, 456 p.

20 The Treaty of Lisbon also repealed former Art. 35 Treaty on European Union ("TEU") concerning police and judicial cooperation in criminal matters, therefore the jurisdiction of the Court of Justice to give preliminary rulings is no longer subject to a declaration by which each Member State recognises the jurisdiction of the Court of Justice and specifies the national courts that may request a preliminary ruling. Since that article has been repealed, those restrictions have disappeared and the Court of Justice has acquired full jurisdiction in that area. However, transitional provisions (Protocol No 36, Art. 10) provide that such jurisdiction will not apply fully until five years after the entry into force of the Treaty.

have acquired the right to make a reference, to refer the same question for a preliminary ruling once more, resulting in excessive procedural formalities and unnecessary lengthening of the duration of the main proceedings. Therefore, it must be held that since 1 December 2009 the Court has had jurisdiction to hear and determine a reference for a preliminary ruling from a court against whose decisions there is a judicial remedy under national law even where the reference was lodged prior to that date."[21]

Treaty of Lisbon has not only **cancelled the restriction** on access to preliminary ruling proceedings for first instance judicial proceedings, but in EU private international law area also:

1. expressly formulates, at the provision of the supreme legal force, the **principle of mutual recognition** of judicial and extrajudicial decisions (Art. 81 para. 1 Treaty on the Functioning of the European Union ("TFEU")),
2. weakens the context of the measures taken under EU judicial cooperation in civil matters in relation to the functioning of the internal market, and
3. extends the scope of possible measures to include alternative methods of dispute resolution and support for the training of judges and judicial staff in the field of EU private international law (which, in fact, has been in progress from the Amsterdam Treaty).

However, a clear **step back** introduced by Lisbon Treaty is enactment of special legislative procedure for family law measures having cross-border implications, i.e. unanimity of the Council legislative acts in consultation with the European Parliament.

3 Key recent Court of Justice case-law

Development of the EU private international law area has brought strengthening of the competences of the courts of the Member States, including their judicial activities, which shall be obligatory executed by judges (courts).

As the EU legislator has already explained, mutual trust in the administration of justice in the EU justifies the principle, that judgments given in a Member State should be recognised in all Member States, without the need for any

21 Judgment of the Court of Justice (First Chamber) of 17 January 2011, Case C-283/09.

special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.[22] New **Brussels I bis Regulation** therefore **cancelled** the need for an **exequatur** and provides a simplified procedure based on the principle, that a decision issued in a Member State should be treated as if it had been issued in the Member State addressed.[23]

At the same time, Art. 42 para. 1 of Brussels I bis Regulation states: "*For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with* (and only):

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest."

Whereas, in the system established by Brussels I Regulation, production of the certificate was not required, it became **obligatory** with the entry into force of Brussels I bis Regulation.

By extracting from the judgment whose enforcement is sought the key information and making that information easily understandable for the authorities and any interested party – thanks to the standard form that must be employed, set out in Annex I to Brussels I bis Regulation – the Art. 53 Certificate contributes to the rapid and efficient enforcement of judgments delivered abroad.[24]

What is the nature of the activity carried out by the court, when issuing certificate under Brussels I bis Regulation? There is doubt, whether, in the context of a procedure for the issue of a certificate under Art. 53 of Brussels I bis Regulation, a court is acting in the exercise of a judicial

22 Recital 26 Brussels I bis Regulation.
23 Ibid., Art. 39.
24 See Judgment of the Court of Justice (First Chamber) of 6 September 2012, Case C-619/10, para. 41.

function for the purposes of Art. 267 TFEU. Subsequently, as certificate forms the basis for implementation of the principle of direct enforcement of judgments delivered in the Member States, **shall be issued automatically, quasi-automaticity** or **could by further reviewed**?

These questions have been raised recently within two cases:

1. *Gradbeništvo Korana*, C-579/17 and
2. *Maria Fiermonte*, C-347/18.

It should by noticed, that the system established by Brussels I bis Regulation is based on the **abolition of exequatur**, which implies that no control is exercised by the competent court of the requested Member State, since only the person against whom enforcement is brought can oppose the recognition or enforcement of the judgment affecting him.

CJEU has ruled out, that it is apparent from the combined provisions of Art. 37 and 42 of that regulation that, for the purposes of the recognition and enforcement in a Member State of a judgment delivered in another Member State, the applicant must produce solely a copy of the judgment concerned accompanied by the certificate issued, in accordance with Art. 53 of that regulation, by the court of origin. That certificate is to be served on the person against whom enforcement is sought prior to any enforcement measure, in accordance with Art. 43 para. 1 of that regulation.[25]

That certificate constitutes the basis for the implementation of the principle of direct enforcement of judgments delivered abroad. Once the Art. 53 Certificate is provided to the competent enforcement authority, it will, in practice, acquire a life of its own. All the information necessary for the enforcement of the related judgment should in principle be found, in a 'user-friendly' fashion, in the certificate. It is thus fair to assume that, unless expressly questioned, the enforcement authorities are unlikely to double-check the accuracy of that information by examining the text of the judgment in question, which will often be drafted in a language they are unable to read. Therefore, in practice, the Art. 53 Certificate is likely to form the basis for execution of the judgment.[26]

25 Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 36.

26 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 95.

As the Court stated with regard to the certificate provided for in Art. 9 of European Enforcement Order Regulation, in the judgment of 16 June 2016, Pebros Servizi, C-511/14, the **certification of a court decision** is a **judicial act**. Consequently, the procedure for the issue of a certificate under Art. 53 of Brussels I bis Regulation is judicial in nature, with the result that a national court ruling in the context of such proceedings is entitled to refer questions to the Court for a preliminary ruling.[27]

The authorities in the Member State addressed are, under the new system, to enforce the judgment solely on the basis of the information contained in the judgment and in the Art. 53 Certificate. That is why that certificate – as the Court stated – forms the basis for the implementation of the principle of direct enforcement of judgments delivered abroad.[28] Put simply, without that certificate, the judgment is not capable of circulating freely within the European judicial area.[29]

Principally role of the authority responsible for extracting the information from the body of the judgment whose enforcement is sought and introducing that information into the specific form might often be rather mechanical. However, that may not always be the case and filling in the form in Annex I to Brussels I bis Regulation requires rather detailed information and may require some **interpretation of the final judgment** rendered.

Nevertheless, the certificate issued pursuant to Art. 53 and 42 para. 1 of Brussels I bis Regulation, and according to general scheme of the Regulation, is not automatic, but rather "**quasi-automatic**" (or almost automatic[30]). The court of origin is prior to its edition, obliged to verify that the conditions for the application of that provision are satisfied:

1. Brussels I bis Regulation is applicable *ratione temporis* and *ratione materiae* to the case at hand,
2. decision whose enforcement is sought has been issued by it,

27 Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 31.

28 Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 37.

29 See Opinion of Advocate General Bot, Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 44.

30 See expressly Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 38.

3. the applicant is an '*interested party*' within the meaning of Art. 53.[31]

Incidentally, the examination of a cross-border element by court is not essential at all, it may not exist at the time of certificate issue.

Finally, however, it can be concluded that Art. 53 of Brussels I bis Regulation must be interpreted as **precluding the court of the Member State of origin**, which has been requested to issue the certificate referred to in that article concerning a judgment which has acquired the force of res judicata (also issued against a consumer), **from examining of its own motion**, whether that judgment was given in compliance with the rules on jurisdiction laid down by that regulation.[32]

The court of origin cannot go further in its examination of the matter, extending its review to aspects of the dispute which fall outside the boundaries of Art. 53 of Brussels I bis Regulation. More particularly, the court of origin may **not reevaluate the substantive and jurisdictional issues** that have been settled in the judgment the enforcement of which is sought. A different interpretation of the provision would 'short-circuit' the system established by Brussels I bis Regulation, introducing an additional layer of judicial review even where national law does not provide (or no longer provides) an appeal procedure against the judgment in question. That approach would thus risk encroaching upon the principle of *res judicata*.[33]

Another good example of the necessary clarification of the importance of the provisions of EU law can be set by the interpretation of the CJEU in determining conditions of **implied prorogation of jurisdiction**. There is jurisdiction in favour of a court that would not otherwise have jurisdiction under the Brussels I bis Regulation if the plaintiff brings the matter before it and the defendant enters an appearance without contesting its jurisdiction.

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31 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 57.

32 Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 39. As regards the right to an effective remedy referred to in Art. 47 of the Charter, that right has not been infringed given that Art. 45 of Brussels I bis Regulation enables the defendant to rely, in particular, on a potential breach of the rules on jurisdiction provided for in Chapter II, Section 4 of that regulation in respect of consumer contracts.

33 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 58 and 59.

Art. 18 of the Brussels Convention, as it continuous within Art. 24 Brussels I Regulation and actually by **Art. 26 Brussels I bis Regulation** governs jurisdiction implied from submission. As Mr. *Jenard* has stated, it will be necessary to refer to the rules of procedure in force in the State of the court seised of the proceedings in order to determine the point in time up to which the defendant will be allowed to raise this plea, and to determine the legal meaning of the term "appearance".[34]

The first sentence of Art. 26 para. 1 of Brussels I bis Regulation provides for a rule of jurisdiction based on the **entering of an appearance by the defendant** in respect of all disputes where the jurisdiction of the court seised is not derived from other provisions of that regulation. That provision applies also in cases where the court has been seised in breach of the provisions of that regulation and implies that the entering of an appearance by the defendant may be considered to be a tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction.[35]

CJEU has recently stated (**C-464/18, Ryanair DAC**), that since an absence of (any) observations cannot constitute the entering of an appearance within the meaning of Art. 26 of Brussels I bis Regulation and, therefore, cannot be considered as **tacit acceptance**, by the defendant, of the jurisdiction of the court seised, such a provision concerning the implied prorogation of jurisdiction cannot be applied in circumstances such as those in question in the main proceedings. Precisely, Art. 26 para. 1 of Brussels I bis Regulation must be interpreted as not applying in a case, where the defendant has not submitted observations or entered an appearance.[36]

In the **area of family law** and the application of these basic regulations, treaties or conventions:

1. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded in The Hague on 23 November 2007 (the 2007 Hague Convention),

34 Jenard Report, p. 38.

35 Judgment of the Court of Justice (Fourth Chamber) of 20 May 2010, Case C-111/09, para. 21.

36 Judgment of the Court of Justice (Sixth Chamber) of 11 April 2019, Case C-464/18, para. 40 and 41.

2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis Regulation") and
3. 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 ("Maintenance Regulation"),

several cases have been decided recently by the Court of Justice, and these two below mentioned cases are genuine resource how to establish jurisdiction in joint proceedings, where decision on divorce/separation, parental responsibility and maintenance is concurrently requested within one single proceeding:

a) *A v B*, C-184/14 and
b) *R v P*, C-468/18.

In **C-184/14** referring court[37] seeked to ascertain whether Art. 3 (c) and (d) of **Maintenance Regulation** must be interpreted as meaning that, where a court of a Member State is seised of proceedings involving the separation between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that child, a **maintenance** request pertaining to that same child **may be ruled** on both

- by the court that has jurisdiction to entertain the proceedings involving the separation, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Art. 3(c) of that regulation,
- and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Art. 3(d) of that regulation,
- or whether a decision on such a matter must necessarily be taken by the latter court.

37 Corte suprema di cassazione (Italy).

It should be observed that such a matter arises if an application relating to maintenance in respect of a minor child is deemed ancillary both to "proceedings concerning the status of a person" and to "proceedings concerning parental responsibility", within the meaning of those provisions, and not only to one of those sets of proceedings. Therefore, the scope of the concept of '**ancillary matter**' contained in Art. 3 (c) and (d) **Maintenance Regulation** was clearly delineated, as the scope of this concept cannot, however, be left to the discretion of the courts of each Member State according to their national law.

In other words, a question can also be asked, if the connecting factor provided for in Art. 3 (d) of that regulation can relate only to maintenance obligations with regard to minor children, which are cleared linked to parental responsibility, whereas the connecting factor provided for in Art. 3 (c) of that regulation can relate only to maintenance obligations between spouses and not also to those concerning minor children.

As Advocate General *Bot* has pointed out, the best interests of the child must be the guiding consideration in the application and interpretation of EU legislation. In this regard, the words of the Committee on the Rights of the Child attached to the office of the UN High Commissioner for Human Rights (OHCHR) are particularly relevant. That committee points out that (the best interests of the child) constitute a standard, an objective, an approach, a guiding notion, that must clarify, inhabit and permeate all the internal norms, policies and decisions, as well as the budgets relating to children.[38]

Subsequently, CJEU has stated, that, from the wording, the objectives pursued and the context of Art. 3 (c) and (d) of Maintenance Regulation, that, where two courts are seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Art. 3 (d)

38 See Opinion of Advocate General Bot, Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, para. 35.

of that regulation, and to the proceedings concerning the status of a person, within the meaning of Art. 3(c) of that regulation. They may be regarded as ancillary only to the proceedings in matters of parental responsibility.[39]

In **C468/18** the proceedings seeking to obtain the dissolution of the marital link, in this instance the divorce, and to organise the consequences for the child of the married couple were brought before the court with jurisdiction to adjudicate on the separation, owing to the common nationality of the spouses, although the place of habitual residence of one of them, at least, and of the child, was fixed in a different Member State. In such a case, the applicant's choice to seise a single court for all the applications is generally guided by the wish to take **advantage of the concentration of the proceedings**.

Art. 5 of Maintenance Regulation provides, moreover, for the court of a Member State before which the defendant enters an appearance to have jurisdiction, unless the purpose of the defendant entering an appearance was to contest that jurisdiction. As is apparent from the words 'apart from jurisdiction derived from other provisions of this Regulation', that article provides for a head of jurisdiction applicable by default where, inter alia, the criteria under Art. 3 of that regulation are not applicable. Thus, the court for the place where the defendant is habitually resident, seised by the maintenance creditor, has jurisdiction to rule on the application relating to maintenance obligations for the child under Art. 3 (a) of Maintenance Regulation. It **also has jurisdiction under Art. 5** of that regulation as the court before which the defendant entered an appearance without raising a plea alleging lack of jurisdiction.

However, it does not follow from the previous judgment in C-184/14, that where a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child and has designated another court as having jurisdiction to rule on that action, only that latter court has jurisdiction, in all cases, to rule on any application in relation to maintenance obligations with respect to that child.[40]

39 Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, para. 47.

40 It is important to note in this connection that, in the Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, the Court interpreted only points (c) and (d) of Art. 3 of Maintenance Regulation and not the other criteria for jurisdiction provided for in Art. 3 or Art. 5 thereof.

Consequently, the answer to the questions referred is that Art. 3 (a) and (d) and Art. 5 of Maintenance Regulation must be interpreted as meaning that where there is an action before a court of a Member State which includes three claims concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child where it is also the court for the place where the defendant is habitually resident or the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court.[41]

4 Conclusion

Finally, I would like to draw attention to one of the Court's most cited judgment in 2018, which does not, at first or second sight, directly concern the field of judicial cooperation in civil matters, but it certainly has a broad consequences for it.

The *Achmea Case*[42] with regard compatibility of investor-State dispute settlement mechanism established by an intra-EU bilateral investment treaty ("BIT")[43] with Art. 18 para. 1, 267 and 344 TFEU, seeks to clarify the **jurisdiction of the courts** of the Member States (not only in relation to arbitration tribunals), as well as the principle of **mutual trust** between judicial systems, in particular with regard to the status of private law entities originating in Western EU countries and trading with Central and Eastern EU Member States, which acceded to the Union after 2004.

Principally the legal order and the judicial system of the Union are based on the fundamental premises that **each Member State** shares with all the other Member States, and recognises that they share with it, a set of common

41 Judgment of the Court of Justice (Third Chamber) of 5 September 2019, Case C468/18, para. 52.

42 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16.

43 Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic.

values on which the EU is founded, which implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[44]

Pursuant to the **principle of sincere cooperation**, set out in the first subparagraph of **Art. 4 para. 3 TEU**, the Member States are to ensure, in their respective territories, the application of and respect for EU law. Furthermore, pursuant to the second subparagraph of Art. 4 para. 3 TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties (TEU and TFEU) or resulting from the acts of the institutions of the Union.[45] In order to ensure the preservation of the specific characteristics and the autonomy of the EU legal order, the Treaties established a **judicial system intended to ensure coherence and unity** in the interpretation of EU law, which entrusts the national courts and the Court of Justice with the task of ensuring the full application of EU law in all Member States and the judicial protection of the rights which individuals derive from EU law.[46]

It is in the context of Achmea proceedings was important argument raised[47] – risk that decisions will be made by the arbitral tribunals that might be incompatible with EU law and also with the principle of mutual trust. As GA Wathelet correctly pointed out, that argument applies not only to **international investment arbitration** but also to **international commercial arbitration**, since the latter may also lead to awards that are incompatible with EU law and be based on an alleged lack of trust in the courts and tribunals of the Member States. In spite of those risks, the Court has never disputed its validity, although arbitration of questions of EU competition law between individuals is not unknown. If international arbitration between individuals therefore does not undermine the allocation of powers fixed by the TEU and TFEU and, accordingly, the autonomy of the EU legal

44 See Opinion of the Court of Justice (Full Court) of 18 December 2014, Case Opinion 2/13, para. 168.

45 Opinions of the Court of Justice (Full Court) of 8 March 2011, Case Opinion 1/09, para. 68 and of 18 December 2014, Case Opinion 2/13, para. 173.

46 Judgment of the Court of Justice (Grand Chamber) of 13 March 2007, Case C-432/05, para. 38.

47 By number of Governments and the Commission.

system, even where the State is a party to the arbitral proceedings,[48] the same must apply in the case of international arbitration between investors and States, all the more so because the inevitable presence of the State implies greater transparency and the possibility remains that the State will be required to fulfil its obligations under EU law by means of an action for failure to fulfil obligations on the basis of Art. 258 and 259 TFEU. If the Commission's logic were followed, any arbitration would be liable to undermine the allocation of powers fixed by the TEU and TFEU and, accordingly, the autonomy of the EU legal system.[49]

Why would arbitral proceedings breach the principle of mutual trust?

Those proceedings took place only with the **consent of the parties**, or Member States concerned (also Achmea in this case freely expressed choice to use the facility which the Member States offered it).

Nevertheless, the Court of Justice has ruled completely the opposite and, in my view, not quite convincingly. According to Court statement, "*arbitration proceedings such as those referred to in Article 8 of the BIT* ***are different*** *from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19 (1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT*." And having regard to all the characteristics of the arbitral tribunal mentioned in Art. 8 of the BIT, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[50]

48 Judgment of the Court of Justice (Grand Chamber) of 13 May 2015, Case C-536/13.

49 See Opinion of Advocate General Wathelet, Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 257–260.

50 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 55 and 56.

But were the parties to arbitration really in doubt as to whether the other party would comply with EU law and the fundamental rights which it recognises?

My answer is no. Like all the ISDS[51] mechanisms contained in the BITs, Art. 8 of the BIT concerned creates a forum in which the investor may bring an action against the State in order to rely on the rights conferred on him, in public international law, by the BIT, a possibility that would not be open to him without that article. Consequently, far from expressing lack of trust in the other Member State's legal system, recourse to international arbitration is the only means of giving full practical effect to the BITs by creating a specialised forum where investors may rely on the rights conferred on them by the BITs. Therefore, I do not consider that Art. 8 of the BIT is inconsistent with the principle of mutual trust.[52]

Over and above, the risk of irreconcilable decisions possibly rendered by a national court and an arbitral tribunal is the problem more potential than real, as the chances of it occurring are rather minimal.[53]

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51 Investor-State dispute settlement.

52 The same conclusion see by Opinion of Advocate General Wathelet, Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 265–267.

53 Lazic, V., Stuij, S. (eds.). *Short Studies in Private International Law. Changes and Challenges of the Renewed Procedural Scheme.* Hague: T. M. C. ASSER PRESS and Springer, 2017, p. 242.